WISCONSIN DEPARTMENT OF REGULATION & LICENSING

Wisconsin Department of Regulation & Licensing
Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Regulation & Licensing website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Regulation and Licensing from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Regulation and Licensing data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name* as it appears on the order.
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Regulation and Licensing is shown on the Department's Web Site under "License Lookup." The status of an appeal may be found on court access websites at: http://ccap.courts.state.wi.us/InternetCourtAccess and http://www.courts.state.wi.us/wscca .
- Records not open to public inspection by statute are not contained on this website.

By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.

Correcting information on the DRL website: An individual who believes that information on the website is inaccurate may contact the webmaster at web@drl.state.wi.gov

STATE OF WISCONSIN

BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF

DISCIPLINARY PROCEEDINGS

AGAINST

RICHARD GOLDE, D.C.,	FINAL DECISION AND ORDER **FOLLOWING REMAND**
RESPONDENT	LS9810302CHI

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Richard Golde, D.C.

2403 London Road

Eau Claire, WI 54701

Department of Regulation & Licensing

Division of Enforcement

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708

State of Wisconsin Chiropractic Examining Board

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708

A Class 2 hearing was held in the above-captioned matter on February 8, 9 and 10, 2000, at 1400 East Washington Avenue, Madison, Wisconsin. Respondent Richard Golde appeared personally and by Attorney John B. Wolfe. The Division of Enforcement appeared by Attorney Arthur Thexton.

The Administrative Law Judge filed a Proposed Decision on June 8, 2000. The Chiropractic Examining Board considered the ALJ's Proposed Decision and issued its Final Decision including an Explanation of Variance on September 7, 2000. The respondent appealed the matter to Circuit Court, and on August 6, 2001 the matter was remanded to the Chiropractic Examining Board with the following order:

The Board shall:

> **a. CONSULT with Administrative Law Judge Wayne R. Austin regarding his findings as to Petitioner's credibility on the issues of**
>
> > **1. Billing Fraud (cf. Conclusion of Law 3, Final Decision and Order dated September 7, 2000); and**
> >
> > **2. Billing Multiple Parties (cf. Conclusions of Law 10, 14, 16 and 18, Final Decision and**

Order dated September 7, 2000).

b. CONSIDER Judge Austin's findings as to Petitioner's credibility on these issues, and, based on those findings, either

1. ADOPT those findings; or,

2. Specifically EXPLAIN its basis for varying from those findings.

c. RECONSIDER its determination as to the appropriate disciplinary action, if any, in light of the above-ordered actions.

This Final Decision Following Remand specifically addresses the issue of the petitioner's credibility, with additions to the previous Final Decision appearing in bold typeface.

Based upon the entire record in this case, the Chiropractic Examining Board issues as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Richard H. Golde, D.C., respondent herein, 2403 London Road, Eau Claire, WI 54701, is licensed to practice chiropractic by license # 1568, granted on July 30, 1980. Dr. Golde practices chiropractic at Golde Chiropractic Center, at the London Road Address.

2. Respondent was a member of the Wisconsin Chiropractic Association (WCA) through calendar year 1991 and 1992, and from January 1, 1993 until March 31, 1993. At that point, respondent's membership lapsed for failure to pay dues. At no time after March 31, 1993, has respondent been a member of WCA.

3. Respondent placed advertisements in the yellow pages of the Ameritech telephone directory for Altoona/Chippewa Falls/ Eau Claire area in the 1993-94 edition, issued September, 1993; in the 1994-95 edition, issued September, 1994; and in the 1995-96 edition, issued September, 1995. Each of those advertisements falsely indicated that respondent was a member of the Wisconsin Chiropractic Association.

4. Respondent was a member of the American Chiropractic Association (ACA) from April 1, 1993 through September 30, 1993. At no time after September 30, 1993, has respondent been a member of ACA.

5. The advertisements respondent placed in the yellow pages of the Ameritech telephone directory for Altoona/Chippewa Falls/ Eau Claire area in the 1993-94 edition, in the 1994-95 edition, and in the 1995-96 edition, falsely indicated that respondent was a member of the American Chiropractic Association.

6. Respondent entered into a social and sexual relationship with Ms. Schmidt in 1980. Approximately six months later they began living together as domestic partners. Respondent thereafter hired Ms. Schmidt to work in his chiropractic office, where she was employed between March, 1981, and December 29, 1993. Their sexual relationship included occasional sexual intercourse in the office.

7. Respondent treated Ms. Schmidt as a chiropractic patient between January, 1981, and June 14, 1981; and between April 4, 1985, and April 28, 1986. Services provided in 1985 and 1986 were for injuries suffered by Ms. Schmidt in an automobile accident occurring on April 4, 1985.

8. On October 22, 1985, respondent prepared a four page document which purported to be a chiropractic evaluation of Ms. Schmidt. The purpose of this document was to be used in settling an auto accident claim, which occurred on April 4, 1985. There are no contemporaneous clinical notes in respondent's records for Ms. Schmidt which support the evaluation. The report says nothing about the fact that the patient was respondent's domestic partner, and appears to be written by a practitioner who has only a professional relationship with the patient, although it does disclose that the patient is an employee of the office.

9. On December 29, 1993, in respondent's chiropractic office, while Ms. Schmidt was still employed by him, respondent struck Ms. Schmidt in the face with his fist multiple times, causing multiple injuries to her facial area. Respondent was convicted of battery on his plea of no contest on February 10, 1994, and placed on probation for 18 months. Conditions of probation included that he have no contact with Ms. Schmidt, and that he participate a program of education for persons involved in domestic violence. Respondent did not report the fact of the conviction to the Chiropractic Examining Board.

10. Respondent met Ms. Smith in April, 1994. Between that date and approximately November, 1995, respondent and Ms. Smith had a sexual relationship, and they cohabited at various times during that period. Respondent provided chiropractic services to Ms. Smith between July 13, 1994, and September 27, 1995.

11. Between May, 1994, and November, 1995, respondent regularly physically and psychologically abused Ms. Smith. Physical abuse included slapping her, spitting on her, choking her, kicking her, gagging her by sticking his fingers down her throat and, on at least one occasion, slamming her head against a wall until she was rendered

unconscious. Psychological abuse included regularly berating her for consuming a medication prescribed for anxiety, insulting her appearance, and insulting her intelligence.

12. Respondent did, from October 29, 1990, to April 7, 1992, treat patient Jayson Scholtz and simultaneously bill three third party payors, General Casualty, State Farm, and Wausau Insurance, for the same services, without informing any of them that the others were being billed or might provide coverage. Respondent received payments from both General Casualty and Wausau Insurance, in an aggregate amount exceeding the amounts billed for the services to the patient. Respondent kept the excess money received from the insurance companies in the amount of at least $579.20, without their knowledge or consent. Some monies received from insurance companies for payment on this patient's account were transferred by respondent to apply to amounts due on the patient's father's account, without consent of the payer.

13. Respondent did, on and between September 24, 1993 and May 24, 1995, forgive the patient co-pay for patient Teresa Scholtz, without reducing his own claim to Travelers Insurance Company, the third party payor which paid for the services rendered to the patient during this period, by an equal proportion.

14. Respondent treated patient Krista Haase between December 12, 1993, and June 21, 1995, and simultaneously billed third party payors Wisconsin Medical Assistance program, American Family Insurance, and/or Midwest Security Insurance, for the same services and without informing any of them that the others were being billed.

15. Respondent failed to keep contemporaneous clinical notes for patient Krista Haase while treating her. When the patient's records were requested pursuant to the patient's authorization, respondent wrote several years' worth of chart notes on a single occasion, representing them as having been made contemporaneously with the services provided.

16. Respondent treated Carol Burlum from September 8, 1992, until September 18, 1995. During the period from January 3, 1994, until October 25, 1994, Ms. Burlum received both Medicare and Medicaid benefits, and respondent was therefore required to "accept assignment," whereby whatever benefit Medicare paid was required to be accepted by him as payment in full, without any patient co-pay. Notwithstanding that requirement, respondent accepted co-payments from Ms. Burlum throughout the period in which she was on both Medicare and Medicaid.

17. Respondent failed to keep contemporaneous clinical notes for Carol Burlum while treating her as described in the previous paragraph. Respondent wrote what purport to be such notes on a later occasion, dating them in a manner as to represent that they were made contemporaneously with the services provided.

18. Respondent treated Annette Hayden between July 1, 1991 and August 10, 1994. During this period, he billed three third party payors, Allstate Insurance, Integrity Insurance, and a law firm, for the same services rendered to the patient, all without informing any of them that the others were being billed.

19. Respondent treated patient Annette Hayden from May 15, 1991, to January, 1995, and failed to keep contemporaneous clinical notes. All entries in the clinical notes, except the last, were written on a single occasion, although dated to appear as if they were created on the date of each treatment.

20. Respondent billed third party payors Allstate Insurance, Wausau Insurance, Secura Insurance, and a law firm for the same services rendered to patient Laverne Hayden from January 5, 1994 to August 23, 1994, without informing any of them that the others were being billed or might provide coverage.

21. On October 26, 1994, an attorney for LaVerne Hayden requested Mr. Hayden's treatment records from respondent pursuant to sec. 146.83, Stats. The records were not provided for approximately four months.

22. Respondent treated patient Laverne Hayden from May 15, 1991, to January, 1995, and failed to keep contemporaneous clinical notes. All entries in the clinical notes, except the last, were written on a single occasion, although dated to appear as if they were created on the date of each treatment.

23. Respondent treated patient Jennifer Lium on and between September 7, 1993 and August 23, 1995. During this period, he billed third party payors Heritage Insurance, General Casualty Insurance, and a health insurance plan sponsored by the Wisconsin Sheet Metal Workers union, for the same services and without informing any of them that the others were being billed.

24. Respondent treated, and failed to keep contemporaneous clinical notes for, patient Cari Horton between February 5, 1992, and September 24, 1992. Respondent then wrote the chart notes on a single occasion so they could be sent to a requester pursuant to the patient's authorization, and dated them to appear as if they were created on the date of each treatment.

25. On January 17, 1996, Respondent received a request from Wayne Scholtz's Workers' Compensation carrier for Wayne Scholtz's records. Respondent failed to send those records until February 28, 1996, after writing all the clinical notes in a single session. Respondent failed to keep clinical notes contemporaneous with the services provided. All entries in the clinical notes were written on a single occasion, although dated to appear as if they

were created on the date of each treatment.

26. Between July, 1994 and June, 1995, Respondent instructed employee staff to bill patients John McLaughlin and Wayne Scholtz's insurance companies for services not rendered, in that the patient had an appointment with respondent to be provided services, but then canceled or failed to appear. The bills were never actually sent.

27. Respondent failed to keep contemporaneous clinical notes for patient Margaret Smith between August 3, 1994 and September 27, 1995. He then wrote all the clinical notes on a single occasion, and dated them to appear as if they were created on the date of each treatment.

28. In having been convicted of battery on his plea of no contest on February 10, 1994, for having struck Ms. Schmidt in the face with his fist multiple times, causing multiple injuries to her facial area, in respondent's chiropractic office while Ms. Schmidt was still employed by him, respondent has been convicted of a crime the circumstances of which substantially relate to the circumstances of the practice of chiropractic.

CONCLUSIONS OF LAW

1. The Chiropractic Examining Board has jurisdiction in this matter pursuant to sec. 446.03, Code.

2. In having placed advertisements in the yellow pages of the Ameritech telephone directory for Altoona/Chippewa Falls/ Eau Claire area in the 1993-94 edition, in the 1994-95 edition, and in the 1995-96 edition, falsely indicating that respondent was a member of the Wisconsin Chiropractic Association and of the American Chiropractic Association, respondent has advertised in a manner that is false, deceptive or misleading by containing a misrepresentation of fact, in violation of sec. Chir 6.02(15)(a), Code; has obtained or attempted to obtain a thing of value by fraudulent representation in the practice of chiropractic, in violation of sec. 446.03(4), Stats.; and has used professional advertising containing a statement of a character tending to deceive or mislead the public, in violation of sec. 446.04(5)(a), Stats. Respondent has thereby engaged in unprofessional conduct, within the meaning of sec. 446.04, Stats., and sec. Chir 6.02, Code.

3. In preparing the October 22, 1985, chiropractic evaluation of Ms. Schmidt, respondent obtained or sought to obtain a thing of value by fraudulent representation, in violation of sec. 446.03(4), Stats., and engaged in conduct of a character likely to deceive or defraud the public, in violation of sec. 446.04(1), Stats.

4. In having had sexual contact and intercourse with Ms. Smith between 1989 and December, 1993, including occasional sexual contact and intercourse with Ms. Smith in his chiropractic office between 1981 and May, 1993, respondent did not engage in sexual intimacies with a patient in the office, within the meaning of sec. Chir 6.02(7), Code, as it existed prior to July 1, 1993, and did not engage in sexual contact with a patient, within the meaning of sec. Chir 6.02(7), Code, as it existed after July 1, 1993.

5. In having been convicted of battery, in violation of sec. 940.19(1), Stats, based upon his having struck Ms. Schmidt in the face with his fist multiple times, causing multiple injuries to her facial area in respondent's chiropractic office, while Ms. Schmidt was still employed by him, respondent has been convicted of a crime the circumstances of which substantially relate to the circumstances of the practice of chiropractic, within the meaning of, and in violation of, sec. Chir 6.02(24).

6. In having failed to report his conviction for battery, respondent violated sec. Chir 6.02(3), Code.

7. This tribunal does not have jurisdiction to decide whether respondent, in having regularly physically and psychologically abused Ms. Smith between may, 1994, and November, 1995, is guilty of battery, in violation of sec. 940.19(1), Stats., or of disorderly conduct, in violation of sec. 947.01, Stats. Accordingly, there is not a basis for finding that the respondent was convicted of a crime substantially related to the practice of chiropractic, in violation of sec. Chir 6.02(24), or that he violated a law substantially related to the practice of chiropractic, in violation of sec. Chir 6.02(2), Code. Finally, the conduct in question did not constitute a substantial danger to the health, welfare or safety of patient or the public, within the meaning of sec. Chir 6.02(1), Code.

8. In having simultaneously billed three third party payers, General Casualty, State Farm, and Wausau Insurance, for the same services in his treatment of Jason Scholtz, without informing any of them that the others were being billed, and in having received payments from both General Casualty and Wausau Insurance in an aggregate amount exceeding the amounts billed for the services to the patient, and in having kept the excess money received from the insurance companies in the amount of at least $579.20, without their knowledge or consent, and in having transferred some of the monies received from insurance companies for payment on this patient's account to apply to amounts due on the patient's father's account, without consent of the payer, respondent has violated secs. 446.03(4), 446.03(5), and 446.04(1), Stats, and sec. Chir 6.02(14), Code.

9. In having forgiven the patient co-pay for patient Teresa Scholtz, on and between 9/24/93 and 5/24/95, without reducing by an equal proportion his own claim to Travelers Insurance Company, the third party payor which paid for the services rendered to the patient during this period, respondent has violated sec. Chir 6.02(29), Code.

10. In having treated patient Krista Haase between 12/12/93 and 6/21/95, and simultaneously billing third party payers, the Wisconsin Medical Assistance program and American Family Insurance, and/or Midwest Security Insurance, for the same services and without informing any of them that the others were being billed, respondent has violated sec. 446.03(4), Stats., and sec. Chir 6.02(14), Code.

11. In having failed to keep contemporaneous clinical notes for patient Krista Haase while treating her, and in writing several years' worth of chart notes on a single occasion, representing them as having been made contemporaneously with the services provided, respondent has violated sec. 446.02(7m)(a), Stats., and sec. Chir 11.02, Code.

12. In having treated Carol Burlum from January 3, 1994, until October 25, 1994, at a time when Ms. Burlum received both Medicare and Medicaid benefits, and by accepting co-payments from Ms. Burlum throughout the period in which she was on both Medicare and Medicaid, respondent has violated sec. 446.03(4), Stats.

13. In having failed to keep contemporaneous clinical notes for Carol Burlum while treating her, and by writing what purport to be such notes on a later occasion, dating them in a manner as to represent that they were made contemporaneously with the services provided, respondent has violated sec. 446.02(7m)(a), Wis. Stats., and sec. Chir 11.02, Code.

14. In having treated Annette Hayden and billing three third party payors, Allstate Insurance, Integrity Insurance, and a law firm, for the same services rendered to the patient, all without informing any that the others were being billed, respondent has violated sec.446.03(4), Stats.

15. In having treated patient Annette Hayden from 5/15/91 to 1/95, and in failing to keep contemporaneous clinical notes, and by writing all entries but the last entry on a single occasion, although dated to appear as if they were created on the date of each treatment, respondent has violated sec. 446.02(7m)(a), Wis. Stats., and secs. Chir 11.02 and 11.04, Code.

16. In having billed third party payers Allstate Insurance, Wausau Insurance, Secura Insurance, and a law firm for the same services rendered to patient Laverne Hayden from 1/5/94 to 8/23/94, without informing any of them that the others were being billed or might provide coverage, respondent has violated sec. Chir 6.02(14), Code, and secs. 446.03(4), 446.03(5), and 446.04(1), Stats.

17. In having treated patient Laverne Hayden from 5/15/91 to 1/95 and failing to keep contemporaneous clinical notes, and by writing all entries in the clinical notes on a single occasion, although dated to appear as if they were created on the date of each treatment, respondent has violated sec.446.02(7m)(a), Stats., and secs. Chir 11.02 and 11.04, Code.

18. In having treated patient Jennifer Lium on and between 9/7/93 and 8/23/95, and billing third party payors Heritage Insurance, General Casualty Insurance, and a health insurance plan sponsored by the Wisconsin Sheet Metal Workers union, for the same services and without informing any of them that the others were being billed, respondent has violated sec. Chir 6.02(14, Code, and secs. 446.03(4) 446.03(5), and 446.04(1), Stats.

19. In having failed to keep contemporaneous clinical notes for patient Cari Horton between 2/5/92 and 9/24/92, and by writing the chart notes on a single occasion so they could be sent to a requester pursuant to the patient's authorization, and by dating them to appear as if they were created on the date of each treatment, respondent has violated secs. Chir 6.02(28), 11.04 and 11.02, Code, and sec. 446.02(7m)(a), Stats.

20. By having failed to provide records in response to the 1/17/96 request from patient Wayne Scholtz's Workers' Compensation carrier until February 28, 1996, and by writing all the clinical notes in a single session rather than keeping the clinical notes contemporaneous with the services provided, although dated to appear as if they were created on the date of each treatment, respondent has violated secs. Chir 6.02(28), 11.04 and 11.02, Code, and sec. 446.02(7m)(a), Stats.

21. In having instructed employee staff to bill patients John McLaughlin and Wayne Scholtz's insurance companies for services not rendered, in that the patient had an appointment with respondent to be provided services, but then canceled or failed to appear, respondent has violated sec. Chir 6.02(14), Code, and sec. 446.03(4), Stats.

22. In having failed to keep contemporaneous clinical notes for patient Margaret Smith between 8/3/94 and 9/27/95, and by writing all the clinical notes on a single occasion and dating them to appear as if they were created on the date of each treatment, respondent has violated sec. Chir 6.02(28), 11.04 and 11.02, Code, and sec. 446.02(7m)(a), Stats.

<u>ORDER</u>

NOW, THEREFORE, IT IS ORDERED that the license of Richard Golde, D.C., be, and hereby is, REVOKED, effective

on the tenth business day following the date of this Final Decision and Order.

IT IS FURTHER ORDERED that pursuant to sec. 440.22, Stats., the costs of this proceeding shall be assessed against the respondent.

EXPLANATION OF VARIANCE

The Proposed Decision presented to the board by Administrative Law Judge Wayne Austin included 28 findings of fact. All of the findings of fact are adopted.

The Proposed Decision included 22 conclusions of law. One was a statement of jurisdiction. In 13 of the other 21, the ALJ concluded that Dr. Golde had violated one or more rules or statutes, and the Proposed Decision contained a recommendation that Dr. Golde's license be suspended for three months with a provision for reinstatement. The board determined that even those violations justified more significant discipline than a three-month suspension. However, the board reached six different conclusions of law and found additional violations by Dr. Golde in numbers 3, 6, 10, 14, 16, and 18. Based on the additional violations and the board's appraisal of the seriousness of all of the violations, the board revokes Dr. Golde's license.

The board determines that Dr. Golde falsified client records and omitted a material fact when he prepared the four-page chiropractic evaluation of Ms. Schmidt on October 22, 1985, to be used in settling an auto accident claim. This is based on the fact that there are no contemporaneous clinical notes in Dr. Golde's records for Ms. Schmidt which support the evaluation, and the fact that Dr. Golde made the report appear to be written by a practitioner who has only a professional relationship with the patient by saying nothing about the fact that the patient was his domestic partner although he did disclose that she was an employee of the office. He therefore violated various rules and statutes: he obtained or sought to obtain a thing of value by fraudulent representation, in violation of sec. 446.03(4), Stats., and he engaged in conduct of a character likely to deceive or defraud the public, in violation of sec. 446.04(1), Stats.

The board determines that Dr. Golde violated sec. Chir 6.02(3), Code by having failed to report his February 10, 1994, conviction for battery, which was a crime committed in his chiropractic office against a person who was an employee of the office as well as his domestic partner, and who had earlier been a patient. Dr. Golde may not justify his failure to report by alleging that he did not consider the crime to be substantially related to the practice of chiropractic. By failing to report the conviction, he disregarded his obligation to the board and to the profession. The board does not accept the ALJ's reasoning that "The substantial relationship concept is obviously not a simple one to analyze; it took the Wisconsin Supreme Court three tries before the court decided that it had finally gotten the test right. Respondent may be forgiven for viewing his conduct as not sufficiently related to his professional practice to require that he report it." Although the analysis of whether a crime is substantially related to the practice of chiropractic may ultimately be a legal one, that analysis is for the board, not for the individual practitioner, and failing to report such a conviction may result in a violation of sec. Chir 6.02 (3) (the duty to report), as well as a violation of sec. Chir 6.02 (24) (being convicted of a crime substantially related to the practice of chiropractic). As a practical matter, any conviction should be reported. If the crime is substantially related, it must be reported; if it is not, the board will take no action on it.

The board disagrees with the ALJ's conclusions and determines that Dr. Golde violated rules of professional conduct by billing multiple third party payors for services provided to patients Krista Haase, Annette Hayden, Laverne Hayden, and Jennifer Lium without informing any of the third party payors that the others were being billed. Dr. Golde's attempt to obtain compensation by fraud was not negated by the fact that he failed to recover the multiple payments, and the board considers such fraudulent billing practices to be extremely serious.

Since the board did not have the benefit of the hearing officer's observations and impressions regarding the demeanor of witnesses when it issued its Final Decision dated September 7, 2000, the board on December 13, 2001, consulted with Administrative Law Judge Wayne Austin, who had conducted the hearing and prepared the Proposed Decision. The board asked Mr. Austin "with regard to the findings of fact you made, were there any issues of witness credibility and, if so, what were your observations?" Mr. Austin responded that in no instance, either during the hearing or in preparing his Proposed Decision, were any of his findings based on the demeanor of Dr. Golde or any other witness. Mr. Austin explained that the credibility of testimony and other evidence may be based either on witness demeanor, or on the evidence's consistency or inconsistency with other evidence and other testimony. Mr. Austin stated that all of his findings of fact were based on the consistency of testimony with other testimony and with the documentary record, and that observations of witness demeanor were of no significance in his findings of fact. Following the meeting with Mr. Austin on December 13, 2001, the Chiropractic Examining Board affirmed its previous Final Decision.

Because it contains a useful analysis of the facts and the issues, the ALJ's original opinion is appended to this Final Decision and Order.

Dated this 17th day of **December, 2001**.

Dale Strama, D.C., Chair

APPENDIX

Administrative Law Judge's Opinion

The Findings of Fact set forth above fall into five categories. First there is the question of respondent's allegedly fraudulent yellow pages advertising. Second, there are the various findings relating to respondent's relationship with Ms. Schmidt. Third, there are those findings regarding his relationship with Ms. Smith. Fourth, there are findings concerning respondent's billing practices concerning a number of patients and, finally, there are findings describing the manner in which respondent maintained his patient records.

Respondent's allegedly fraudulent yellow pages advertising.

Little need be said in support of the findings that respondent represented in his advertisements in the local Ameritech yellow pages that he was a member of the Wisconsin Chiropractic Association and the American Chiropractic Association for a number of years after his membership in those organizations had lapsed. Neither the authenticity of the copies of those yellow pages advertisements nor the evidence that he was not a member of the effected organizations at the times in question was challenged. Respondent's testimony was that he was in fact a member of the two organizations at the time of the publication of the 1993-1994 yellow pages in September, 1993, but that his dues were in arrears. To the extent that respondent is testifying that he considered himself still to be a member six months after he quit paying dues, that testimony is not credible. Nor is his testimony that the appearance of the same ads in the next two editions was mere oversight.

Whether membership in these two organizations constitutes an important inducement to potential patients to select one chiropractor over another may be questionable, but there is no question but that in placing that information in his advertisement, respondent intended it as an inducement. If so, then the fact that he was not a member rendered the ad fraudulent and misleading.

Ms. Schmidt.

Respondent admitted the allegations underlying Findings of Fact 6 and 7, regarding his social/sexual, his employer-employee, and his chiropractor relationship with Ms. Schmidt, denying only that they ever had sexual intercourse in the office in violation of the rule then in effect prohibiting sexual intimacies with a patient in the office (Exh. 24, p. 37). Ms. Schmidt, in her deposition, testified that they had sexual intercourse in the office on four or five occasions during the period of their relationship (Exh. 15, p. 7). Given respondent's obvious motive to claim that no such activity took place, and the fact that Ms. Schmidt has no apparent motive to claim that it did, her testimony is credited. Whether that conduct took place or not, however, is irrelevant, for such conduct is deemed not to be a violation of sec. Chir 6.02(7), either before or after July 1, 1993.

As reflected in Findings of Fact 6 and 7, respondent entered into a social and sexual relationship with Ms. Schmidt in 1980 and they became cohabitants later that year. It was not until January, 1981, that respondent first provided chiropractic treatment to Ms. Schmidt, well after they had established their relationship as sexual and domestic partners. Even complainant's expert, Meredith Bakke, D.C., was forced to agree that there is no violation of the prohibition against sexual contact with a patient in those circumstances, and it would have been difficult for her to take a contrary view. She and her husband, who is also a chiropractor, provide chiropractic treatment to each other. A few excerpts from Dr. Bakke's testimony may demonstrate the dilemma that she confronted in attempting to support the allegation that respondent's sexual relationship with his domestic partner was unprofessional.

> Q. (by Mr. Wolfe) My recollection is that you said it is not unprofessional for a chiropractor to treat an intimate partner.
>
> A. (by Dr. Bakke) And I agree with that.
>
> Q. Okay. Why is that, in light of Chir 6.02(7)?
>
> A. I stated that it was not unprofessional conduct to treat an intimate partner**?**
>
> Q. I don't want to put words in your mouth.
>
> A. Yeah.

> Q. It's my recollection that -- that that's what you said.
>
> A. Okay.
>
> Q. And I think you just agreed that you did say it.
>
> A. I'm saying that it is not unprofessional conduct to treat an intimate partner.
>
> * * * *
>
> Q. Sure. And the question is this. Why is it not unprofessional conduct for a chiropractor to treat an intimate partner when unprofessional conduct is defined at [sec. Chir 6.02(7), Code) as, among other things, engaging in sexual contact with or in the presence of a patient?
>
> A. It may be a problem with the wording. I -- and I -- and I think we're -- we are getting caught up on some semantics here, aren't we?
>
> Q. I don't know. Where are we getting caught up on semantics?
>
> A. My -- my opinion is that it is not unprofessional conduct to treat an intimate partner.
>
> Q. I appreciate that. My question is why? Why, given the wording of the rule defining unprofessional conduct as sexual contact with a patient, why is it not therefore unprofessional conduct to treat an intimate partner?
>
> A. I believe it has more to do with the -- okay. Engaging in sexual contact, exposure, gratification or other sexual behavior with or in the presence of a patient. I believe this has more to do with the context of the doctor-patient relationship. (Tr., pp. 79-80)

The problem, of course, is that the provision in question is drafted so as to prohibit conduct which may be entirely appropriate; for example where, as in the case of Dr. Bakke, a wife provides chiropractic services to her husband. If one looks at the corresponding provision in the rules of conduct for the Board of Nursing, one finds reference to "engaging in *inappropriate* sexual contact;" and the Medical Examining Board eschews any specific reference to sexual contact in its rules of conduct, preferring instead to prosecute cases of inappropriate sexual contact under its provision defining as unprofessional "any practice or conduct which tends to constitute a danger to the health, welfare or safety of patient or public." If it was not unprofessional conduct for respondent and Ms. Schmidt to have continued to engage in sexual conduct after respondent began providing chiropractic services to her, then Sec. Chir 6.02(7), Code was not violated regardless of which version of the rule was in effect.

Respondent admitted in his Answer that the four page chiropractic evaluation of Ms. Schmidt prepared on October 22, 1985, was not based on contemporaneous clinical notes in respondent's patient chart for Ms. Schmidt. It was also admitted that the report says nothing about the fact that the patient was respondent's domestic partner, and appears to be written by a practitioner who has only a professional relationship with the patient, although it does disclose that the patient is an employee of the office. Respondent denies, however, that these facts lead to the conclusions that, in preparing the chiropractic evaluation of Ms. Schmidt, respondent obtained or sought to obtain anything of value by fraudulent representation; engaged in conduct of a character likely to deceive or defraud the public; knowingly falsified patient records; engaged in practice which constitutes a substantial danger to the health, safety or welfare of patient or the public; practiced in a manner which substantially departs from the standard of care ordinarily exercised by a chiropractor; or failed to conduct a competent assessment, evaluation or diagnosis.

Dr. Bakke testified that there was "a professional responsibility to inform the insurance company of the relationship between Dr. Golde and the patient of whom --about whom he is writing." She added, ". . . to anyone reading this report, that would suggest that there has been some permanent disability and that ongoing care may be needed. And so I think there is a professional responsibility to inform the insurance company regarding the relationship between the doctor and the patient at this point." As to the patient notes upon which the report was based, Dr. Bakke was asked whether she had an expert opinion on whether the patient notes for 1985 were competently kept. She responded, "Well, the first entry -- it looks like the date of accident was April 4th, 1985. The first entry is April 10th, 1985. And it's very sketchy. It doesn't talk about the accident in -- in specifics. It doesn't make reference to the accident being on April 4th. It doesn't speak to the elements of the mechanism of injury and the patient's -- an -- any initial evaluation. . . . The information that was presented in the letter to the insurance company of October 22, 1985 is certainly not reflected in his clinic notes." (Tr., pp.19 & 23)

On cross-examination, respondent addressed these issues as follows:

> Q. (by Mr. Wolfe) Did you look at all of the pages that are included in [Ms. Schmidt's file]?. . . . Prior to responding to Mr. Thexton's questions on direct examination, had you reviewed all the pages that make up Exhibit B?

A. (by Dr. Bakke) I had, I believe, looked through them. You know, this is the first time I -- today is the first time I've seen these.

Q. Okay.

A. And actually I believe that when Mr. Thexton had asked me the question, I had gotten down through that narrative report.

Q. And not farther?

A. And not further.

Q. Had you gotten farther, you would have seen that there is -- there are items in the file which describe the facts of the collision, correct?

A. Yes, there's the automobile accident loss report.

Q. There are also items in there which indicate that the insurer to whom the narrative report was directed, American Family, was aware that Dr. Golde was the owner of the car that was involved in the incident; correct?

A. That is evident -- I mean that's -- excuse me. That is what is represented on this automobile accident loss report.

Q. Sure.

A. I don't know if they made the connection.

Q. There's another item in here with notes about history, is there not?

A. Well, you know, there's a piece of paper that says Schmidt, right pelvic dorsals, you know, treatment plan, C2 on right, exercises. There's no date on it so I don't know what that's reflective of. The automobile accident report, and then there's a note here about neck stiffness, desk typing, occasional pain down left arm. There's no date on that. Pulling up x-ray boxes of film. I mean it sounds like the things that aggravate or exacerbate the problem. Once again there's no reference to the patient and there's no date on there, so --

Q. So that is a yes, there are notes that reflect elements of history?

A. I wouldn't know that because there's no date on there and there's --

Q. Well --

A. -- the patient name. It happens to be in this file. I'm -- I'm --

Q. Assuming --

A. Yeah.

Q. -- that Mr. Thexton's representation that this is Gail Schmidt's file is correct, then -

A. Then --

Q. -- there are notes in there reflecting elements of a history, correct?

A. Elements of the history, yes.

A preponderance of the evidence does not establish that respondent, in preparing the evaluation of Ms. Schmidt, obtained or sought to obtain anything of value by fraudulent representation; engaged in conduct of a character likely to deceive or defraud the public; knowingly falsified patient records; engaged in practice which constitutes a substantial danger to the health, safety or welfare of patient or the public; practiced in a manner which substantially departs from the standard of care ordinarily exercised by a chiropractor; or failed to conduct a competent assessment, evaluation or diagnosis.

On February 10, 1994, respondent was convicted of battery to Ms. Schmidt on his plea of no contest. The battery occurred on December 29, 1994, and Ms. Schmidt filed a Complaint against respondent on January 3, 1995. At that time, as set forth in the Criminal Complaint (Exh. 17), it was reported that "the defendant struck Ms. Schmidt multiple times in the face with his fist. These blows caused a bloody nose and various other injuries." The Complaint describes "black coloration around both of Ms. Schmidt's eyes and . . . a swollen nose with a cut in it." This description of Ms. Schmidt's appearance some five days after the battery occurred is fully borne out

by photographs taken at that time (Exh. 18).

In her deposition, Ms. Schmidt described the incident as follows:

> So by the time our little incident in December came up, it was pretty edgy between the two of us, and I didn't want to go up to his lake home, I think, that weekend, New Years weekend or something, and he insisted on it. We were arguing about that, and then we argued because I didn't want to take the Christmas lights down, and it was just one little thing after another, and he came into the reception area where I was sitting doing my work and we started fighting there and just started whaling on me, and it was with his fists. It wasn't with an open hand. It was with his fists. He had me down on the floor, and he just didn't quit, you know. He hit me one time and right away the nose started bleeding, and then he hit me again and he hit me again, and finally he just got huffy and left, and my nose was bleeding for ten minutes, and I just packed up my stuff and left the office and didn't go back. (Schmidt Deposition, Exh. 15, p.18)

Respondent of course tells quite a different story:

> Q. (by Mr. Wolfe) Would you describe [the incident leading to the battery charge], please, for the Judge?
>
> A. (by respondent) Well, it was after Christmas and we had office decorations, Christmas decorations still up, and I said to Gail, it's time that they, you know, get put away. And she wanted to keep 'em up through the new year, and I said look, I want to get the office back the way it normally is, just an office office. And no, they're staying. One thing led to another, an argument ensued and I slapped her.
>
> Q. How many times?
>
> A. Once.
>
> Q. Why do you use the word slap?
>
> A. Because that's what it was. It was an open-handed slap.
>
> Q. With what hand?
>
> A. My left.
>
> Q. Are you left-handed?
>
> A. Yes.
>
> Q. What part of Ms. Schmidt did you strike with your left hand?
>
> A. I would almost have to say that it probably caught a good portion of the palm and the fingers.
>
> Q. What part of her did your hand contact?
>
> A. Across the bridge of her nose. (Tr., pp. 155-156)

A preponderance of the evidence, including most particularly the photographic evidence, supports the finding that the incident occurred essentially as Ms. Schmidt described it. The importance of that finding is that the allegation of the Complaint is that the circumstances leading to the battery conviction are substantially related to the practice of chiropractic, and those circumstances include the nature of the attack on Ms. Schmidt.

Respondent argues that the conviction is not related to the practice of chiropractic because the incident did not involve or arise out of the provision of chiropractic services.

> Chiropractic is defined, and quite narrowly defined, quite narrowly defined at 446 01 and at Chir 402 subs (1) and (2). The rules of statutory construction suggest that the only way to interpret what is substantially related to the practice of chiropractic is to hold it up to the statutory and regulatory definitions of chiropractic. . . . That is a narrow definition. It is necessarily narrow. It is necessarily narrow as a result of the efforts of organized medicine to preclude chiropractors from expanding scope of practice. Chiropractic being so narrowly defined, and defined as it is in the statute and the rule, a fact-finder who will later apply the law to the facts found is bound by the law in applying it to those facts. In other words, if a chiropractor's conduct in something other than the practice of chiropractic as herein defined, doesn't fall with under -- within the jurisdiction of this tribunal. For example, were a -- a lawyer to be arrested for smoking marijuana in her office, the mere fact that she is in her office could not, in -- in any way be said to substantially relate to the practice of law. It is the mere situs of the infraction. To try to bootstrap a domestic incident into the prac -- into substantial relationship to the practice of chiropractic by saying it is substantially related because it happened in the office is

> specious and has to be rejected because it simply isn't within the scope of the statute or the rules applicable in this case. For that reason, no -- unless we adopt the position of Dr. Bakke that because a chiropractor is a chiropractor 24 hours, 7 days a week, that there is no offense for which a chiropractor might be convicted that she need not report herself to the Board. Well, if that was what the Board intended, if that is what the legislature intended, they could have and presumably would have said so. Instead, they restricted it to the practice of chiropractic. And the incident which Dr. Golde did not report to the Board was clearly not substantially related to any of the things contained within the definitions at Chir 4.03 or 446.01.

The problem with respondent's argument is that it fails to consider what the Wisconsin Supreme Court has determined to be the appropriate test for determining whether the circumstances of a conviction are substantially related to the circumstances of a licensed activity. In COUNTY OF MILWAUKEE v. LIRC, 139 Wis.2d 805 (1987), 407 N.W.2d 908, the court discussed the proper manner in which to make the analysis, stating in part,

> The basic question is: What is the nature of the inquiry required by sec. 111.32(5)(h)2b? Answering this question requires that this court determine what the legislature intended when it chose to phrase the exception in terms of the "circumstances" of the offense and "circumstances" of the particular job. Depending on what meaning is ascribed to the term "circumstances," the question remains: What procedure is required in order that courts may assess the "circumstances" in the particular case?
>
> * * * *
>
> We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit a broad interpretation of "circumstances." However, they are entirely irrelevant to the proper "circumstances" inquiry required under the statute. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.
>
> The full assessment of what may be termed the "fostering" circumstances may, at times, require some factual exposition. For instance, in "disorderly conduct" cases the type of offensive circumstances is not as explicit as it is in sexual assault, armed robbery, theft or embezzlement convictions for example. However, such factual inquiry would have as its purpose ascertaining relevant, general, character-related circumstances of the offense or job. 824 Wis. 2d at 824-825

The determination whether the circumstances of respondent's battery conviction are substantially related to the circumstances of the practice of chiropractic is thus not dependent on whether he was practicing chiropractic at the time of the occurrence, is not dependent on whether or not the incident occurred in the chiropractic office, and is not dependent on whether respondent provided incidental chiropractic services to his domestic partner. Rather, the question is whether the circumstances which fostered the criminal activity, including the opportunity for criminal behavior, the reaction to responsibility, and the character traits of the perpetrator militate for the conclusion that a substantial relationship exists. Respondent is an independent health care professional who provides services to vulnerable populations. He has the opportunity to carry out similar criminal activity in his practice setting and has displayed character traits which establish that he is not reluctant to physically attack defenseless persons who provoke him. The circumstances of the battery conviction are thereby substantially related to the practice of chiropractic.

Which does not lead to a necessary conclusion that respondent, in having failed to report the conviction, violated the disciplinary rule that requires that licensees "notify the board of any criminal conviction, the circumstances of which relate substantially to the practice of chiropractic." The substantial relationship concept is obviously not a simple one to analyze; it took the Wisconsin Supreme Court three tries before the court decided that it had finally gotten the test right. Respondent may be forgiven for viewing his conduct as not sufficiently related to his professional practice to require that he report it.

<u>Ms. Smith.</u>

Again, the chronology of respondent's relationship with Ms. Smith is not in dispute; and again it is not disputed that their social and sexual relationship predated any chiropractic services provided by a number of months. The discussion relating to the relationship between respondent and Ms. Schmidt is equally applicable, and the conclusion lies that respondent's having treated Ms. Schmidt following the establishment of their social and sexual relationship does not violate sec. Chir 6.02(7), Code.

Mr. Wolfe's comment in regard to the lawsuit pending between Ms. Smith and the respondent, that Ms. Smith has

a million reasons to testify as she did, may have some validity. Nonetheless the pattern of conduct described by Ms. Smith is chillingly similar to that described by Ms. Schmidt, and adds to her credibility. Ms. Smith's testimony at hearing was entirely consistent with her testimony at her January, 2000, deposition (Exh. 20), and consistent as well with the deposition testimony of former employees Teri Wright (Exh 12), Teresa Scholtz (Exh. 14), and Donna Adank (Exh. 15). Moreover, Ms. Smith's demeanor while testifying at hearing evinced an individual profoundly distraught and humiliated at respondent's treatment of her. Ms. Smith's version of the facts is credited, and respondent's version, in which he essentially denied everything, is not.

While his conduct with Ms. Smith resulted in a civil law suit, it did not result in a criminal conviction, and this tribunal obviously has no authority to issue such a criminal conviction. Accordingly, to find that the conduct constitutes a violation of the board's disciplinary rules, it must be found that the conduct was a practice "which constitutes a substantial danger to the health, welfare or safety of a patient or the public," in violation of sec. Chir 6.02(1), Code. If the primary relationship between respondent and Ms. Smith were deemed to be a chiropractor-patient relationship, then the violation would be clear. Any chiropractic care provided, however, was merely incidental to their principal relationship, which was a personal one, and the psychological and physical abuse occurred in the context of that relationship rather than in the context of a professional relationship. Stated another way, it is concluded that respondent's conduct toward Ms. Smith constituted domestic abuse rather than patient abuse.

Which is not to say that his treatment of Ms. Smith is irrelevant to this matter. The fact that his conduct with Ms. Smith was almost identical to the manner in which he conducted his relationship with Ms. Schmidt further corroborates conclusions reached as to his character traits and the manner in which those traits establish the substantial relationship between his conviction and the practice of chiropractic.

Billing Practices.

Findings of Fact 12, 14, 18, 20 and 23 all find that respondent billed multiple third party payors for the same services without informing them that other were being billed or might provide coverage. Respondent admitted these allegations in his Answer, but denies intent to defraud or deceive.

On direct examination, Dr. Bakke testified that the practice was problematic, though she stopped short of calling it unprofessional. When asked as to the standard practice in the profession, Dr. Bakke testified in part as follows:

> A. I'll tell you how we do it in our office and how we traditionally have done it, and this, in my opinion, is the common practice in Wisconsin and probably nationally. We would determine, our office staff would determine the primary liability and the billings would go to that entity. Now, in some cases the patient's own insurance may choose to pay the bills on an ongoing basis and then recoup the money that they paid us from the other -- from the insurance company of the person who struck our patient. So our job is to determine primary liability and to bill that entity, and at the point where maybe maximum chiropractic improvement has been made and we're ready to discharge the patient, then perhaps the health insurance would pick up at that point. So we bill one entity. We certainly inform the patient of the ongoing charges, although we're not expecting them to pay out-of-pocket, and then we -- at some point, when the entity that's primarily responsible is discharged from their responsibility, then we would bill insurance company, health insurance company.
>
> Q. Okay. Do you believe that it is ever ethical to directly bill multiple insurance companies at the same time for the same service?
>
> A. I think it would be -- my opinion is it would be unethical in that the -- the expectation may be that you would have multiple entities paying that bill, and that certainly would not be acceptable. (Tr., pp. 30-31)

Dr. Bakke's testimony on cross-examination was somewhat less certain.

> Q. With regard to the situation in which there might be more than one insurer who would fall somewhere in the -- in the priority of responsibility for payment on a particular patient, am I correct that it was your testimony today that it is unethical to bill more than one insurer in that scenario for a single date of service if there is an expectation that more than one of them is going to pay?
>
> A. In my opinion, the billing is one thing but expecting payment from multiple parties for the same services is unethical, yes.
>
> Q. And you would --
>
> A. Or accepting payment, yes.
>
> Q. You would agree with me that there is nothing inherently wrong with billing more than one simultaneously so long as you don't collect from more than one?

A. I think my opinion is the billing is not as great of a problem as the receiving or the receipt of -- of multiple payments for the same services.

Q. And my question is, you agree with me there's nothing inherently wrong with billing more than one insurer so -- simultaneously so long as you don't collect for more than one?

A. Well, I think billing is part of collecting, so if you're not billing multiple parties then you're certainly -- you're alleviating the problem of potentially receiving payment from multiple parties, so I think that those two pieces go hand in hand

Q. All right. (Tr., pp. 65-67)

Respondent's testimony was that billing multiple payors in traffic accident cases is standard practice.

Q. (by Mr. Wolfe) It is alleged that from October of '90 to April of '92, while Jason Sholtz was your patient, your office simultaneously billed three third party payors: General Casualty, State Farm and Wausau. True?

A. Yes.

Q. Those bills were for the same services and the same dates of service. Is that true?

A. Yes.

Q. Why?

A. Because there are three parties that may be responsible for care -- payment of care.

Q. What's the idea, let them sweat it out?

A. Exactly. . . . What happens is, it's not our responsibility to sort out who is primary as far as liability or as a priority as far as responsibility. That's a legal issue and I don't feel it's appropriate for a chiropractor to make that determination, because we're not attorneys. You can get into all kinds of trouble that way, in my opinion. What if there's apportionment on a claim where split liability? We don't know that. We're not privy to any of that. We just bill the responsible parties and let them sort it out.

Q. In billing the multiple payors, do you make any effort to hide from -- let's say if you're sending the bill to General Casualty, do you make any effort to hide from State Farm and Wausau the fact that General Casualty was billed?

A. No.

Q. Do you have any knowledge as to the custom and practice of chiropractors in your area with regard to billing multiple payors?

A. Yes.

Q. How do you have such knowledge?

A. In discussing with them at various, you know, seminars or getting together and just saying well, what's -- what's going on with you, and just common knowledge of things you talk about.

Q. And to your knowledge, then, that is the common practice?

A. Yes. (Tr., pp. 209-211)

Based on the record in this case, there is not a preponderance of the evidence establishing that to bill multiple insurers for the same services is unprofessional conduct, unless the chiropractor actually receives multiple payments for the same services. Respondent admitted at hearing that in having received such multiple payments in the case of Jason Scholtz, he acted improperly (Finding of Fact 12, Conclusion of Law 8).

Q. When billing -- and specifically in the case of Jason Sholtz, when billing the three third party payors simultaneously, did you do so with the intent to collect more than the amount due for the services on a particular date?

A. No.

Q. Then what was the intent?

A. The intent was to bill all parties, to notify them that the services were provided and have them have a record of it, have them sort it out as far as responsibility.

Q. If it's a common practice to bill multiple third party payors, does it happen commonly that more than one will pay for a particular date of service?

A. No.

Q. Does it happen rarely?

A. I believe so, yes.

Q. Are you aware, personally aware, of any situation other than the Jason Sholtz situation, in which more than one payor paid for the same date of service?

A. No, I'm not.

Q. Did it happen often enough, in your practice, that you had any policy as to what would happen if they did -- if more than one did pay for the same date of service?

A. No, that was rare and it is only on one occasion that I'm aware of.

Q. Are you aware that excess money was received from the insurers in the Jason Sholtz case?

A. Yes.

Q. Are you aware of what happens to that excess money?

A. Yes.

Q. What happened with it?

A. When it was excess, Teri Sholtz came to me and says we have this and she asked that it be applied to the other family member's accounts.

Q. Did you agree to that?

A. Yes.

Q. Why?

A. We weren't entitled to it, so it was either give it back to the patient, whatever they wanted to do with it was agreeable to us.

Q. You didn't keep the excess?

A. No.

Q. Was the payor -- well, were you able to ascertain which payer overpaid?

A. I do not know, no.

Q. Did you make any -- give any instruction to your office staff to attempt to contact the payors and find out which of them had overpaid?

A. I don't believe directly, no.

Q. In retrospect, do you believe allowing Ms. Sholtz to credit her husband's account with the overpayment was the proper course of action?

A. No.

Q. What would be the preferable course of action?

A. The overpayment should have been returned to the insurance carrier that overpaid. (Tr., pp. 211-212)

Respondent admitted in his Answer that he had forgiven the patient co-pay for services provided to Teresa Scholtz, without reducing his claim to the third party payor by an equal proportion (Finding of Fact 13; Conclusion of Law 9). Ms Scholtz was, however, an employee at the time in question, which is a mitigating circumstance. Nonetheless, a violation of sec. Chir 6.02(29), Code, is clear.

Respondent neither admitted nor denied in his Answer that in treating patient Carol Burlum between January and

October, 1994, he charged the Ms. Burlum for patient co-pay notwithstanding that she was receiving both Medicare and Medicaid (Finding of Fact 20, Conclusion of Law 12). At hearing, the allegation was never denied, but respondent offered evidence that a total of $3369.23 was written off Ms. Burlum's account. The problem is that the record does not disclose exactly what the nature of the write-off may have been. It was suggested by the prosecutor that this may have been simply the difference between respondent's usual charges and what Medicare/Medicaid paid, but whatever the basis for the write-off may have been does not alter the fact that respondent was improperly collecting patient co-pays.

Donna Adank, Teresa Scholtz and Teri Wright each credibly testified in their depositions that respondent had instructed them to bill the insurance companies for patients who failed to appear for their appointments (Exh. 14, p.12; Exh. 13, p. 24; Exh. 12, p.12). In responding to that charge, respondent testified,

> Q. (by Mr. Wolfe) Did you ever have occasion to discuss with your staff McLaughlin's missing appointments?
>
> A. Well, there was one time where he was the last one for the day, and of course, if it's -- if it's scheduled at, say, 5:30, 6:00, we always give them time, because they could be running late in traffic or got delayed and stuff, and so we were waiting for him and he never did show, and I made an offhand comment to the staff.
>
> Q. What was that offhand comment?
>
> A. I said that we should probably bill the guy for making us wait.
>
> Q. Did your office have a policy with regard to billing for no-shows?
>
> A. Yes, we did.
>
> Q. Was that policy in writing?
>
> A. No.
>
> Q. Was there any written indication on any record that a patient would receive that the office had a policy with regard to no-shows?
>
> A. Yes. On the appointment cards it was printed on the bottom that they needed to -- something effect of notify our office if they were going to cancel an appointment.
>
> Q. Was there any time frame on it?
>
> A. I believe 24 hours.
>
> Q. Was there a stated consequence if they failed to notify within 24 hours?
>
> A. That they could be billed.
>
> Q. Did the office have a policy that you followed with regard to billing for no-shows?
>
> A. We didn't bill for them.

Again, respondent's testimony was contradicted by no fewer than three of his former employees, and there is thus satisfactory evidence that respondent's directive to staff was something more than an offhand remark. And while the insurance company was never actually billed, it is clear that that was the staff's decision rather than respondent's.

<u>Respondent's recordkeeping.</u>

Respondent admitted the findings set forth at Findings of Fact 15, 17, 19, 22, and 24, each alleging that respondent failed to keep contemporaneous clinical notes on various patients, and then subsequently created what were purported to be such contemporaneous notes. Respondent did not address in his answer the similar finding found at Finding of Fact 25 (Complaint paragraph 29), but he did admit the allegation at hearing.

Finally, respondent in his Answer denied the allegation that he failed to send patient records in a timely fashion for patient Laverne Hayden when requested by the patient through his law firm. The delay was approximately four months, and respondent admitted at hearing that that was an unreasonable delay.

> Q. (by Mr. Wolfe) There's an allegation with regard to LaVerne Hayden that you failed to keep con -- that you failed to timely send records that were requested by an attorney. Do you recall record requests in LaVerne Hayden's case?

A. Yes.

Q. Do you have any recollection one way or the other whether you timely responded to that request?

A. I believe somewhere along the line there was a -- someone did a time frame as to when the request was and when they were received and it was a couple of months.

Q. If the evidence indicates that it's four months, would you have any reason to dispute that?

A. No.

Q. Do you believe that four months is a timely response to a request for records?

A. No.

Q. Do you have any explanation for why that took so long?

A. Low priority.

Q. Do you have any excuse or justification for why it took so long?

A. No.

Q. There is an allegation with regard to LaVerne Hayden that you failed to keep contemporaneous clinical notes. Do you have any reason to dispute that?

A. No.

Q. Is it likely that the failure to keep contemporaneous notes had something to do with the time it took to respond to the attorney's request?

A. Yes. (Tr., p. 228)

It is well established that the objective of licensing discipline is the protection of the public by promoting the rehabilitation of the licensee and by deterring other licensees from engaging in similar misconduct. *State v. Aldrich,* 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1968).

There are numerous findings of violation in this case, many of which would probably not have resulted in the filing of a formal Complaint if standing alone. But when the findings are viewed together, two major conclusions emerge. First, that respondent has demonstrated a disregard for established standards of conduct that pervades his entire practice and manifests itself in everything from his recordkeeping to his billing practices to his professional advertising. Second, that the circumstances of his criminal conviction demonstrate a tendency to engage in violent personal behavior which is antithetical to the required temperament of one providing individual health care services to what are in many instances vulnerable patients.

As to the first of these, it was never suggested, nor probably could it be, that respondent is ignorant of appropriate standards of practice in the recordkeeping and billing processes. If so, then requiring remedial education and training in these areas for purposes of rehabilitation would be superfluous. The deterrence objective has application here, however, and it is suggested that a three month suspension of respondent's license may serve to deter him and others from violating the rules of conduct in those areas.

More troubling is the violation relating to respondent's conviction for battery. Neither the conviction nor the substantial costs associated therewith deterred respondent from continuing in the same pattern of conduct with his next domestic partner, and the concern is that such conduct may ultimately, and perhaps inevitably, spill over to his clinical practice. What is required here by way of rehabilitation is that respondent be required to submit to a complete psychological evaluation for the purpose of assessing whether he is psychologically competent to safely practice his profession. To that end, it is recommended that he submit to an evaluation by John C. Gonsiorek, Ph.D., a psychologist specializing in evaluating and treating health care professionals who have boundary issue problems. It is recommended that the suspension of the

license not terminate until the psychological evaluation is complete, and that respondent be required to comply with any treatment or practice limitations recommended by Dr. Gonsiorek.