



Wilk v. AMA

25 Years Later: Why It Still Isn't Over

By Lori A. Burkhart

The future of the chiropractic profession changed on Aug. 27, 1987, when federal court judge Susan Getzendanner found the American Medical Association (AMA) guilty of conspiring to destroy chiropractic.¹

Early History

The nefarious plot was hatched in 1962 when the Iowa Plan was adopted by the Iowa Medical Society with the goal of eradicating chiropractic in that state. The Iowa Plan is summed up in the plaintiffs' 132-page aid to the court, submitted June 25, 1987, in the *Wilk* case.

The Iowa Plan's section "What Medicine Should Do About The Chiropractic Menace" includes a Part G titled "Undertake a positive program of 'containment'" in which an often quoted phrase in chiropractic literature can be found: "If this program is successfully pursued, it is entirely likely that chiropractic as a profession will 'wither on the vine' and the chiropractic menace will die a natural but somewhat undramatic death. This policy of 'containment' might well be pursued along the following lines:

- Encourage ethical complaints against doctors of chiropractic;
- Oppose chiropractic inroads in health insurance;
- Oppose chiropractic inroads in workmen's compensation;
- Oppose chiropractic inroads into labor unions;
- Oppose chiropractic inroads into hospitals; and
- Contain chiropractic schools."

The Iowa Plan states that such actions taken by the medical profession should be persistent and behind-the-scenes whenever possible. The medical community should never give professional recognition to doctors of chiropractic (DCs), and thus a successful program of containment will result in the decline of chiropractic.

In *Wilk v. AMA*, Judge Getzendanner explains that the AMA hired as its general counsel Robert B. Throckmorton, the author of the Iowa Plan, and that "as early as September 1963, the AMA's objective was the complete elimination of the chiropractic profession." Two months later, the AMA formed the Committee on Quackery under its Department of Investigation (DOI), and by 1964 its goal was to do away with chiropractic throughout the United States.

Judge Getzendanner noted that during the 1960s and 1970s, H. Doyl Taylor, the AMA DOI chairman, and the Committee on Quackery worked aggressively to achieve its goals by:

- Conducting nationwide conferences on chiropractic;
- Distributing publications critical of chiropractic;
- Assisting others in preparation of anti-chiropractic literature;
- Warning that professional association between medical physicians and chiropractors was unethical; and
- Discouraging colleges, universities and faculty from cooperating with chiropractic schools.

In 1966, the AMA adopted a resolution calling chiropractic an "unscientific cult." That label implicitly invoked AMA's Principle 3, making it unethical for a physician to associate with an "unscientific practitioner." In 1967, the AMA Judicial Council issued an opinion under Principle 3 specifically making it unethical for physicians to associate with chiropractors. That included making referrals; accepting referrals; providing diagnostic, laboratory or radiology services; teaching chiropractors or practicing together in any form. The opinion was sent to 56 medical specialty boards and associations.

That policy statement was used as a successful tool to spread the boycott to other medical groups. The Committee on Quackery made a report, PX 464, of its activities to the AMA Board of Trustees on the policy statement, noting that

it was successful in widening the base of its campaign, but that some tactics were best left hidden. The report states: "The hoped-for effect of this widened base of support was and is to minimize the chiropractic argument that the campaign is simply one of economics, dictated and manipulated by the AMA." It continues that to make public some of its activities "would have been and continues to be unwise," and so "this report is intended only for the information of the Board of Trustees."

Keeping DCs out of hospitals was another of the boycott's goals. Judge Getzendanner explains that in 1973, the AMA drafted Standard X, which incorporated the unscientific practitioner's ethics bar into the Joint Commission on Accreditation of Hospitals (JCAH) accrediting standards. AMA urged JCAH to adopt Standard X, and it complied.

In fact, the judicial opinion points out that when chiropractic was included under Medicare in 1973, the AMA became concerned that this would allow DCs to join hospital staffs. Doyl Taylor, in response, caused the AMA Office of General Counsel to publish an article titled "The Right and Duty of Hospitals to Exclude Chiropractors" in the Journal of the American Medical Association (JAMA). It warned every hospital attorney that JCAH accreditation might be lost if hospitals dealt with DCs.

The Committee on Quackery disbanded in December 1974. Chiropractic was now licensed in all 50 states, and services were reimbursable through Medicare, Medicaid and virtually all private health insurance plans, plus chiropractic colleges were accredited via the U.S. Department of Education. The Committee on Quackery, however, considered itself a success, and the AMA believed chiropractic would have achieved greater growth without its activities. Then in 1975 the DOI disbanded.

The *Wilk* lawsuit was brought in 1976 by four DC plaintiffs: Drs. Chester A. Wilk, James W. Bryden, Patricia B. Arthur and Michael D. Pedigo. (The original lawsuit had a fifth plaintiff, Steven G. Lumsden, DC, who was not named in the 1976 proceeding.)

But they couldn't find a law firm to take their antitrust lawsuit charging restraint of trade under the Sherman Act against the powerful AMA. George P. McAndrews, who founded a large patent law firm in Chicago, ended up with the job. He took the case based on personal history as he boasts many chiropractors in his family: father, sister, brother and daughter. "My brother called me and asked me if I would find a lawyer in a big-time Chicago firm who would take the Wilk case, as this is the capital of American medicine and the home of the AMA and all the technical societies," McAndrews explains. "So I called around, and all the firms told me, 'We can't touch chiropractors; we won't get any of the medical business in this huge city if we do,'" he says. "Finally my brother told me, 'If you don't take *Wilk*, our father will kick the lid off his coffin.'"

The Damage Was Done

Judge Getzendanner rendered her opinion in 1987 in the U.S. District Court for the Northern District of Illinois, but the damage to the chiropractic profession was done and still has not been fully repaired. McAndrews first filed *Wilk* in 1976, and it concluded in 1992 when the U.S. Supreme Court denied review of the AMA's appeals. He said one of the real reasons the case took so long to prosecute is some of the evidence was so complex, and he had to take 174 depositions in 35 states to track down the conspiracy part of the proceeding.

Judge Getzendanner found plaintiffs established injury to reputation suffered by chiropractors, because in addition to labeling all chiropractors as unscientific cultists and depriving them of association with medical physicians, injury to reputation was ensured by the AMA's name-calling practices. "For example, in 1973, Dr. Sabatier, an AMA official, described chiropractors as rabid dogs and killers," the judge writes.

In the mid-1970s, the American College of Radiology (ACR) included 12,000 of the 14,000 radiologists in the country. ACR conditioned membership on adherence to AMA's Principles and the Principles of Ethical Radiological Practice, which contained Principle 3 since the 1940s, identical to AMA's. At the urging of the AMA, the ACR passed resolutions in 1968 and in 1969 stating that ACR advised the people of the United States that it regards the use of radiation for medical purposes by chiropractors as an unwarranted use of radiation without potential for medical gain to balance the possible risk.

In 1975, the ACR passed a resolution prohibiting the submission of X-rays to chiropractors even at the request of a patient. This resolution was amended in 1981 to permit radiologists to provide previously taken X-rays to a chiropractor or a patient; this was in response to changing state laws. In 1981, the College Council adopted a policy statement stating that the ACR "regards the prescription and use of radiation by chiropractors as unwarranted and without likelihood of significant benefit to patients." ACR was found by the judge to be part of the AMA conspiracy but settled with plaintiffs prior to judgment.

When AMA was found guilty of restraint of trade, a permanent injunction was issued to the AMA. The AMA was permanently enjoined from restricting the freedom of any AMA member or hospital from associating with chiropractors or chiropractic institutions. The *Wilk* court order was required to be published in JAMA and a copy sent to each member of AMA.

"I administer a nationwide injunction," says McAndrews, which still is in effect today. He explains it is common for the AMA via House of Delegates (HOD) resolutions to go after all kinds of groups, not just DCs, that could possibly compete with it for patients; for example, the nurse practitioners who operate in big box stores and pharmacies like Walgreens and CVS. But if that happens with DCs, McAndrews calls the AMA attorney, and the resolution is taken off the AMA HOD docket.

McAndrews explains there is nothing one can do about the right to petition the government to redress of grievances, which is part of the 1st Amendment. Anything the AMA can do via the government is allowed. "If the AMA had moved in the 50 states to remove the chiropractic licenses, they can, but they lost in all 50 states," he says. "If they go to the federal government and try to bar the chiropractors from getting Medicare or Medicaid, that is legal."

Better Evidence

American Chiropractic Association (ACA) President Keith Overland, DC, points out that post *Wilk*, the bias is more subtle. It takes a long time to undo years of damage, and he points to the artificial barriers that have been created and must be overcome. He notes that DCs have been wellness and prevention experts for over 100 years. "Given that clinical evidence now supports many of the treatments and procedures we offer patients, such as adjustments/manipulations and many wellness and lifestyle modifications, other provider groups are attempting to take over what we do," he says. "What is more fascinating is the insurance industry is happy to pay for common procedures shown to be effective, but not if a chiropractor does them. So we are being discriminated against just because we have a 'DC,' not 'MD' behind our name."

The need for more evidence to bolster the scientific basis for chiropractic was made clear by Judge Getzendanner in her opinion. Another aftereffect of the *Wilk* case has been to promote evidence-based chiropractic studies and more research in general.

"The plaintiffs clearly want more from the court," Judge Getzendanner pronounced. "They want a judicial pronouncement that chiropractic is a valid, efficacious, even scientific health care service." I believe that the answer to that question can only be provided by a well designed, controlled, scientific study..."

The judge found that in the absence of such a study, the court was left to decide the issue on the basis of largely anecdotal evidence, and she declined to pronounce chiropractic valid or invalid on that basis. She did note, however, that the anecdotal evidence in the record favored chiropractors.

For example, Dr. Per Freitag, a medical physician who associated with chiropractors, observed that patients in one hospital who received chiropractic treatment were released sooner than patients in another hospital where he was on staff that did not allow chiropractors. John McMillan Mennell, MD, testified in favor of chiropractic. Judge Getzendanner noted even the defendants' economic witness, Mr. Lynk, assumed that chiropractors outperformed medical physicians in the treatment of certain conditions.

The judge did point out that the defendants offered some evidence as to the unscientific nature of chiropractic. Judge Getzendanner found most defense witnesses, surprisingly, appeared to be testifying for the plaintiffs. She concluded "only that the AMA has failed to meet its burden on the issue of whether its concern for the scientific method in support of the boycott of the entire chiropractic profession was objectively reasonable throughout the entire period of the boycott. This finding is not and should not be construed as a judicial endorsement of chiropractic."

Ongoing Economic Harm

In the *Wilk* case, Judge Getzendanner pointed to a statement by Dr. Joseph A. Sabatier, a member of the Committee on Quackery, that "the doctor of chiropractic is stealing the young medical physician's money."

She did find "some evidence that the Committee on Quackery and the AMA were motivated by economic concerns—there are too many references in the record to chiropractors as competitors to ignore—I am persuaded that the dominant factor was patient care and the AMA's subjective belief that chiropractic was not in the best interests of patients." The judge concluded, however, that the AMA failed to carry its burden of persuasion on the patient care defense.

Despite Judge Getzendanner's finding that the "dominant factor" behind the AMA boycott was not to produce economic harm to the chiropractic profession, it has had long-lasting economic effects. According to Dr. Keith Overland: "Once they were found guilty of trying to crush our profession, they went underground, and used payment mechanisms to try and prevent patients from having equal access to our care."

There now exists an inherent bias against the chiropractic profession. According to Dr. Overland, many MDs are on the boards of insurance companies, and medical boards have attempted to prevent chiropractic patients from having a level playing field.

"The AMA tried to keep us out of Medicare, limit our access to major educational institutions, and keep us from having a unified profession," Dr. Overland says. The reason is that, "MDs have a different model built on support from the pharmacology industry with hospital-based health care as the cornerstone of many treatment pathways." He adds, "It is disease oriented and symptom-based, often not advocating wellness and prevention first."

The *Wilk* case shows it takes generations to erase discrimination. Dr. Overland points to Medicare as a prime example of ongoing prejudicial practice. He explains there are some 10,000 codes for insurance billing for the practice of medicine, but chiropractors have only three, and they really are variations of one code. "DCs are required to diagnose, examine and develop a care plan and be a physician-level provider, but are only paid as a technician," he says. "So those seniors must reach into their pockets if they want to see a chiropractor."

Dr. Overland explains that when Medicare was introduced there was no intention to have DCs included at all, and so DCs and patients marched on Washington to get the right to have their senior patients covered, but were ultimately given only one code for manipulation of the vertebral subluxation. "We were thrown a bone," he says. "Now that we have grown bigger, we are unable to break that medical monopoly in many federal programs such as Medicare, and instead we have to go to the legislature," he explains. "Even for an X-ray we can't refer in order to get paid because we are DCs and not MDs."

McAndrews argues the AMA cheated patients and caused a lot of suicides. "Well, if you are a patient with unremitting pain and all the MD can tell you is he is going to give you a shot or give you some chemical sedatives and make you dependent on it, it is not unusual for the ultimate end to be some taking their own lives; when in fact the AMA knew that people were getting relief for musculoskeletal pain by going to chiropractors," he explains. "They knew it, and the judge became furious."

Dr. Overland sums up the situation: "There is a medical bias against the profession. I am always amazed that the patients don't come first."

But looking forward, McAndrews is optimistic. "Why don't you call the MD and ask him or her to go play golf?" he asks. He notes that his daughter, a DC, has MD patients. "They refer patients to her that they know they are not capable of caring for, and she refers patients to them that are out of her bailiwick," he says. "A lot of chiropractors forget," he explains, "that a chiropractor is competing for the same patient that the MD is and you have to have a friendly relationship."

Early Lawsuits

Since its founding in 1895 by Daniel David Palmer, chiropractic has conflicted with allopathic medicine. He was the first chiropractor jailed in 1906 for practicing medicine without a license.

According to "A Century of Organized Chiropractic," written in 2006 by P. Reginald Hug, DC, past president of the Association for the History of Chiropractic, and Felicity Feather Clancy, ACA's former vice president of communications, in 1906, the Universal Chiropractors Association (UCA) formed to defend chiropractors from prosecution. There were 15,000 prosecutions through 1931 (there were only 12,000 chiropractors). B.J. Palmer was the UCA's founding secretary, a position he held for almost 20 years. At first, UCA membership was open to any chiropractor for a \$5 annual fee, which guaranteed an attorney if the member was sued for practicing medicine, surgery, obstetrics or osteopathy without a license.

The UCA hired attorneys such as Wisconsin state senator Tom Morris and Fred Hartwell, who are said to have saved the profession. In 1907, Morris won the earliest known acquittal of a chiropractor, Shegataro Morikubo, a graduate of the Palmer School, charged with unlicensed practice. Until his death in 1928, Morris was the chief legal counsel for the UCA and principal defender of chiropractic. Headquartered in Lacrosse, Wis., Morris' law firm defended thousands of DCs and won 75 to 80 percent of cases by arguing that chiropractic was "separate and distinct."

Morris was a celebrity. Chiropractors would pack his courtroom; chiropractors would adjust from jail and, once released, would go right back to practicing.

However, B.J. Palmer stated that UCA membership covered liability up to a limit of \$5,000 per case, but only if one practiced straight chiropractic, which was the beginning of a downturn in UCA membership. Palmer also demanded that state chiropractic organizations exclude "mixers." By 1922, dissatisfaction with Palmer and the UCA had grown so strong that a rival group called the American Chiropractic Association, which was at least the third organization with that name, was established by dissenters tolerant of broad-scope chiropractic.

Because of dissension, Palmer lost his quest to exclude non-strights from joining the UCA. In 1926, he failed to win re-election, withdrew from UCA and created a new organization called the Chiropractic Health Bureau, which in 1940 became today's International Chiropractors Association.

In 1930, the UCA and ACA merged to form the National Chiropractic Association— immediate predecessor of today's

American Chiropractic Association.

Chiropractic vs. Medical Colleges Then and Now

According to Charles Wilk's 1996 book, *Medicine, Monopolies, and Malice*, between 1900 and 1910 there existed some 392 schools in the United States for chiropractic learning. That contrasted with 76 medical schools.

In 2012, there are 18 chiropractic colleges in the United States, while the Association of American Medical Colleges reports the number of U.S. medical schools at 134, and as of March 11, 2011, seven new schools were designated by the Liaison Committee on Medical Education as having "applicant school" or "candidate school" status.

Patient Care Defense

The AMA in *Wilk* used a patient care defense to argue that it genuinely entertained a concern for scientific method in fighting against chiropractic.

Judge Getzendanner pointed out the AMA acknowledged that after the Committee on Quackery disbanded, chiropractic improved, and the AMA took partial credit for it. For example, Mr. Carlson, one of the AMA's trial attorneys, stated in final arguments:

"Dr. Winterstein testified that chiropractic has changed. And it has changed. And we suggest that one reason that it changed was because of the criticism of its bizarre methods. Now, do you hear in this courtroom anything about one cause/one cure? Sure don't.

You hear about neuromusculo reasons, neuromusculo diagnosis, neuromusculo-conditions. This is the new parlance. They have done away, for the most part, with the one cause/one cure. I understand there is one small element of chiropractic that still adheres to it. But it's not the major element.

... And they have improved.... Chiropractic, I think, is still changing. It began really changing when the accrediting arm of the ACA [American Chiropractic Association], as opposed to the ICA [International Chiropractic Association], was accepted, was recognized by the Department of Education as the sole accrediting body for chiropractic.

And that occurred in '73, '74, '75, something like that. And that's really when chiropractic began to evolve."

Most significantly, Dr. Alan R. Nelson, then current chairman of the Board of Trustees of the AMA, testified:

"My personal position, and I think that I can accurately reflect the position of the AMA in this, is that the fundamental theory of chiropractic as it was earlier portrayed was not supported by scientific evidence, first.

Secondly, that the nature of services that are being delivered by chiropractors are now diverse and include some forms of manipulation that do have a scientific basis.

And, third, the responsibility for determining what is in the best interest of an individual patient rests with the individual practitioner and that there is nothing unethical about me asking a chiropractor to deliver a form of manipulative therapy that appears to me to have a scientific basis...

Most defense witnesses agreed that some chiropractic treatment is therapeutic— although certainly no one involved in this case, including the plaintiffs, believes that chiropractic treatment should be used for the treatment of diseases such as cancer, diabetes, heart disease, high blood pressure and infections. It is hard to pinpoint when the changes in chiropractic testified to by AMA witnesses occurred, but it is likely that they occurred while the boycott was still in effect. Thus the AMA's own evidence suggests that at some point during the boycott there was no longer an objectively reasonable concern that would support a boycott of the entire chiropractic profession."

The Injunction

The Permanent Injunction Order Against AMA was published in the Jan. 1, 1988 issue of the Journal of the American Medical Association. The AMA was permanently enjoined from restricting the freedom of any AMA member or hospital from associating with chiropractors or chiropractic institutions. Also published with that injunction was a Statement From AMA's General Counsel Kirk B. Johnson pointing out why the AMA disagreed with the order in *Wilk v. AMA* and why it will (and did) file an appeal. The AMA believed it complied with antitrust requirements when it revised its ethical guidelines in 1977 to permit association with chiropractors and so the court's order was "unjustified."

The AMA remained antagonistic and found it noteworthy in *Wilk v. AMA*:

The decision to associate with chiropractors continues to be left to individual physicians and hospitals;
The court did not endorse chiropractic or make any findings as to scientific validity;
The court rejected the claim that the Joint commission on Accreditation of Health Care Organizations

conspired through AMA and other members to restrict competition with chiropractors by enacting a standard that requires a majority of the executive committee of the medical staff be physicians; and
The AMA is not restrained from speaking out on any health care practice or issue, including chiropractic.

The AMA lost on appeal, the U.S. Supreme Court denied review and the permanent injunction remains in effect.

The AMA Bias Continues

ACA President Keith Overland, DC, points out that post *Wilk*, the bias is more subtle and, for example, AMA has created statutory language that limits the legal definition of physician to MDs, DOs and dentists. "Their explanation is that consumers can't understand," he says. "I disagree. We have smart consumers."

"These are documented ongoing strategies under the guise of patient protections," according to Dr. Overland. He points to the recent AMA House of Delegates (HOD) meeting that targeted Section 2706 of the Patient Protection and Affordable Care Act (PPACA) for elimination. That is the section that does not allow for discrimination against chiropractors or other health care providers, putting them on equal footing with MDs, and the AMA wants it removed.

At the 2010 AMA Annual Meeting held in Chicago June 11-16, 2010, the AMA House of Delegates adopted the following resolution:

HOUSE ACTION: ADOPTED AS FOLLOWS See Policy H-35.968.

RESOLVED, That our American Medical Association work to repeal new Public Health Service Act Section 2706, so-called provider "Non-Discrimination in Health Care," as enacted in PPACA, through active direct and grassroots lobbying of and formal AMA written communications and/or comment letters to the Secretary of Health and Human Services and Congressional leaders and the chairs and ranking members of the House Ways and Means and Energy and Commerce and Senate Finance Committees.

Reference:

1. *Wilk et al., v. American Medical Ass'n. et al.*, 671 F. Supp. 1465 (1987), aff'd, 895 F. 2nd 352 (7th Cir. 1990), cert. denied, 498 U.S. 982, 111 S. Ct. 513 (1990).

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