BRIEF CASE

SUMMARY: In this case, a patient alleged the insured took a nude photograph of her without her knowledge during an appointment.

The Patient and Condition

The patient, a 44-year-old single female athlete, initially presented to the insured with complaints of bilateral knee pain. The insured referred the patient to an orthopedic surgeon for X-rays and MRIs of her knees. However, the patient did not see the orthopedic surgeon. Instead, she returned to the insured six times over the next 15 months. At each of these visits, the insured repeated his recommendation to see an orthopedic surgeon. The patient eventually followed up with an orthopedic surgeon and had arthroscopy procedures on both knees.

The Treatment

The patient continued to see the insured for chiropractic care for multiple visits over the course of the next eight years. She received treatment for pain in her knees, thoracic spine, right thigh, hamstring, lumbar spine, and right shoulder. Most of the chiropractic treatments consisted of myofascial release techniques and electrical stimulation.

The Incident

According to the insured, the patient presented to his office and asked if he would take a picture of her in a yoga position. The insured agreed and left the exam room to get his phone. When he returned to the treatment room, he found the patient completely nude in a yoga position. The insured took the picture. The patient put her clothes back on and the insured provided treatment consisting of electrical stimulation and myofascial release for her shoulder pain. The patient continued to visit the insured on multiple occasions and referred others to his practice for treatment.

A year later, the insured's wife saw the nude photograph of the patient on her husband's phone and called the patient telling her not to return to the office. After the patient was told not to return to the office, she contacted the police to report that an unauthorized nude photograph was taken of her by the insured.

The Allegations

The patient claimed she suffered injury by the insured sexually assaulting, engaging in sexual misconduct with her, inappropriately touching her without her consent, and taking highly offensive photographs of her without her consent.

The patient hired an attorney and filed a lawsuit against the insured. Allegations against the insured include:

- Failure to adhere to the standard of care in the practice of chiropractic medicine.
- Failure to utilize appropriate techniques and methods to ensure the proper care of the patient.
- Improperly touching the patient during chiropractic visits.
- Failure to have in place and/or enforce the appropriate level of supervision to ensure the safety and privacy of patients.
- Committing harmful and offensive contact with the patient.
- Acting with reckless disregard of highly offensive conduct.
- Making defamatory communications to third parties.
- Conduct that went beyond all possible bounds of decency.
- Breach of fiduciary duty of the special relationship between the doctor and patient.

Risk Management Tips

In this instance, there was no documented evidence that the insured's treatment was inappropriate or outside the standard of care. However, there was documented evidence of an inappropriate photo which was a violation of ethical practice and put the insured's professional liability coverage in jeopardy.

- Refer to your professional liability insurance policy for specific language and exclusions therein. When claims are excluded from coverage, your personal assets are at risk.
- Use good professional judgment with your patients. Do not feel compelled to comply with an unreasonable patient request.
- Avoid clinical or non-clinical contact or behavior that a patient may perceive as a romantic or sexual overture.
- Follow professional ethical guidelines regarding intimate relationships with former, present, and future patients.
- During examination and treatment, educate patients about what to expect and the necessity of procedural touch and utilize only the amount of physical contact necessary for diagnosis and treatment.
- Give clear instructions about which articles of clothing the patient should remove, and which should remain on and provide the patient with a gown, sheet and/or other appropriate covering if appropriate for patient modesty.
- Give the patient a reasonable time to disrobe and drape, then knock on the examination room door to announce your reentry into the room and wait for a response.
- Institute a chaperone policy in your practice and communicate your policy to patients. A chaperone should be present in the examination/treatment room if the patient is asked to disrobe or if a patient requests a chaperone. Document the presence of a chaperone in the patient's record, or the patient's refusal of a chaperone if one is offered and the patient refuses.

The Defense

The police report filed by the patient was reviewed. The patient stated she received harassing phone calls from the insured's wife accusing her of posing for nude pictures which she found on her husband's phone. She stated she was asked to remove her clothing on several occasions for examination and treatment and that during one of these occasions the insured must have taken a photograph without her consent or knowledge.

The police interviewed the insured at his office. The insured stated that at one of her visits, the patient discussed her recent surgery and weight loss and asked him to take a photo of her to see what she looked like post-surgery. The insured obliged and took a photo of the patient on the examination table with her back arched upwards. The insured told the officer he sent the photo to the patient's phone and the photo was subsequently deleted off his phone. However, he was able to recover the deleted photo. The photo was as the insured described. The patient's face was not visible, but a tattoo on the patient was visible. The insured stated he did not think the photograph was inappropriate since the patient was proud of her recent weight loss.

The police interviewed the patient a second time and she admitted that she was nude in the insured's office on multiple occasions. When the officer asked her why she did not report this information during her first interview, she stated she had suppressed the memories and did not want to think about the situation. No criminal charges were filed against the insured.

The case and medical records were reviewed for the defense by a chiropractor. The chiropractor opined that the chiropractic treatment performed by the insured was appropriate and within the standard of care. He stated the photograph taken by the insured was not part of the provision of chiropractic services. He felt the evidence and circumstances established the insured took a nude photo of the patient at her request, and no evidence existed of inappropriate touching. However, there was a lapse in judgment that violated ethical practice.

The Outcome

Coverage for this claim was determined to be excluded from the insured's professional liability insurance policy. The insured opted to pay a modest and confidential sum to resolve the case with the patient.

Please note: Healthcare providers are bound by the HIPAA Privacy and Security rules to protect patient health information (PHI). Cell phone photography, using the installed application that comes with your cell phone, is never HIPAA compliant.