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CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT  
AMERICAN COLLEGE OF RADIOLOGY

MR. CHERNEY: Your Honor, Judge Bua --.

THE COURT: Mr. Cherney.

MR. CHERNEY: --Mr. McAndrews, counsel, and ladies  
and gentlemen: Let me thank you very much for the attention  
you have given to us and the patience you have exhibited in  
listening to us for eight weeks, not six weeks, of trial.

The plaintiffs took six weeks to put on their  
evidence, and the defendants have put on one week of their  
defense, and you are about to receive the case for your  
deliberations.

I would like to go back also, as Mr. Mc  
Andrews did, to the opening statements, and ask you to  
recall what was said at that time.

Mr. Mc Andrews told you that he was going to  
prove that the defendants engaged in a conspiracy to contain  
and eliminate chiropractic, that each defendant engaged  
in and joined such a conspiracy, that he was not opposed  
to defendants speaking out and exhibiting and expressing  
their point of view on any issue of health care. He was  
not opposed to open statements by any organization or any  
individuals about their own beliefs about health care.

I told you in the opening statement that  
the American College of Radiology would show that it had

1 expressed its point of view concerning the radiation hazard  
2 of chiropractic, concerning the abuses of radiation and  
3 x-ray by chiropractors. I told you that the American  
4 College of Radiology had Principles of Ethics which reflected  
5 the collective judgment of radiologists concerning the  
6 best practice of radiology and the best patient care, and  
7 that these ethics were guidelines or an advisory to the  
8 members of the College.

9 I told you that I would show that chiro-  
10 practic is not synonymous with manipulation, and that there  
11 is a very important distinction to be made between those  
12 two. I told you I would show that radiologists who re-  
13 fused to accept consultations with chiropractors were  
14 acting against their economic interests. They were acting  
15 in such a way to hurt themselves economically, and that  
16 that was inconsistent with any anticompetitive intent or  
17 purpose on the part of radiologists.

18 Let me suggest to you that the evidence  
19 shows that I have borne out the burden I have undertaken,  
20 and that Mr. Mc Andrews has not proven what he set out to  
21 prove.

22 I would like to review the evidence that has  
23 been offered against the American College of Radiology  
24 and discuss it with you.

25 Mr. Mc Andrews said this morning that the

2-6p3

Cherney - closing

1 American College of Radiology joined a conspiracy to con-  
2 tain and eliminate chiropractors in 1968, apparently, five,  
3 or six or seven years after this so-called conspiracy was  
4 formed. That the American College of Radiology joined it  
5 by issuing a policy statement. The Council of the American  
6 College of Radiology passed a policy statement. Let me  
7 read to you the policy statement of the American College  
8 of Radiology in 1968:

9 "Be it resolved, that the members of the  
10 American College of Radiology advise the people of  
11 the United States that they regard the use of radia-  
12 tion for medical purposes by chiropractors as an  
13 unwarranted use of radiation without potential  
14 for medical gain to balance the potential risk;  
15 and

16 "Be it further resolved, that the American  
17 College of Radiology call upon the Public Health  
18 Service, the American Medical Association, and the  
19 Radiation Control Agencies of the various states to  
20 warn the public against the misuse and unsafe uses  
21 of x-rays on patients by chiropractors."

22 Let me ask you: Is that or is that not a  
23 statement, an open public statement, of the position of the  
24 American College of Radiology about chiropractic use of  
25 x-ray?

Cherney - closing

1                   Now, what information did the American  
2 College of Radiology have in 1968 when it issued that  
3 statement about chiropractic? Let me review the evidence  
4 with you of the information that the College had at that  
5 time that may have influenced the College about chiro-  
6 practic.

7                   You remember Mr. Stronach testified that  
8 Dr. Richard Elmer of Atlanta, Georgia, had attended a  
9 chiropractic seminar, and Mr. Stronach said that Dr. Elmer  
10 said that:

11                   "As much misinformation went out at that  
12 meeting as one is apt to find at any meeting."

13                   That is what Dr. Elmer found at the chiro-  
14 practic meeting.

15                   But the information for the American  
16 College of Radiology came to the American College of  
17 Radiology a lot earlier than that. In 1963, David Pettengill  
18 -- ACR Exhibit 1299; Mr. Pettengill was the assistant  
19 executive director, Mr. Stronach's assistant -- wrote to  
20 Dr. Charles Bernstein in New York, May 16, 1963:

21                   "Your letter of May 10, addressed to  
22 Dr. David Carroll, chairman of the board of chan-  
23 cellors, has been received in the College offices.

24                   "We are accumulating a file of these sort  
25 of letters in an effort to get a broad national

Cherney - closing

1 picture of the chiropractic use of x-ray.

2 "Your recent comments are most welcome.

3 You may be sure that we will call your letter to  
4 Dr. Carroll's attention.

5 "Sincerely yours."

6 In 1963, the evidence shows, the American  
7 College of Radiology was gathering information about chiro-  
8 practic abuse of x-ray. Well, what was some of the infor-  
9 mation they received at that time?

10 Dr. William Marble, a medical doctor, from  
11 Dallas, Texas, sent the American College of Radiology, Mr.  
12 William Stronach, some information in ACR Exhibit 1304.  
13 This is dated July 12, 1962.

14 Dr. Marble sent the College information about  
15 a Miss Posture contest that was being sponsored by a chiro-  
16 practic organization. Let me read it to you from ACR 1303  
17 which was the information that was sent to the American  
18 College of Radiology.

19 "Miss Spine. Contestants in the Miss Correct  
20 Posture contest paraded beneath the chandeliers of  
21 the Hotel Texas' grand ballroom in Fort Worth,  
22 Convention City for the State Chiropractic Asso-  
23 ciation. Some 700 delegates are on hand as 12 girls  
24 compete for the posture title. Judges who consider,  
25 among other things, the contestants' spinal x-rays, include

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WBAP's Bobbie Wyant. Winner of the State contest will represent Texas in national competition at Detroit later this month. Contestants include Judy Flemister from Hillcrest High in Dallas. She was named one of the runners-up.

"The crown went to 17-year-old Linda Box of Kingsville, a high school majorette who has several other titles to her credit.

"Miss Correct Posture is 5-foot-2, weighs 107 pounds, measures 34-22-35, and has one of the prettiest spines in Texas."

(Laughter.)

Here is a picture of Miss Correct Posture attached to the exhibit.

1-7rtl  
Exhibits,

1 Now, that may sound humorous, but let me  
2 ask you if that is the way that X-ray should be used?  
3 You have heard the evidence about the effects of radiation  
4 to human beings. Let me ask you if that is the way X-ray  
5 should be used in a Miss Posture Contest. Consumer Union  
6 didn't think that is the way it should be used because  
7 they wrote to Dr. Marble on June 28, 1962, ACR 1303.

8 Consumer Union:

9 "Dear Dr. Marble:

10 "Thank you for calling to our attention the  
11 Miss Correct Posture contest and the irresponsible  
12 abuse of X-ray in promoting this contest. We are  
13 planning to comment on this subject directly as  
14 a result of your observations and hope it will  
15 be published in the September or October issue of  
16 Consumer Reports.

17 "Sincerely yours, Harold Aaron, Medical Advisor,  
18 Consumer Union, Publisher of Consumer Reports."

19 That was in the files of the American College of  
20 Radiology. That was information that the American College  
21 of Radiology had when it passed its resolution on chiropractic.  
22 May 10, 1963, ACR 1303A Exhibit, to Dr. David Carroll, ACR  
23 Board of Chancellors, from Charles Bernstein, MD:

24 "Dear Dr. Carroll:

25 "I am enclosing a clipping from a local

1 suburban newspaper containing a chiropractic  
2 advertisement."

3 Ladies and gentlemen, let me show you the  
4 advertisement that is attached to ACR 1303-A. Here is a  
5 chart of the spine: "Spinal Nerve Pressure Causes Many  
6 Diseases." Does that chart look familiar to you? Mr.  
7 McAndrews said that the Parker chart may not have really  
8 been used. Does that chart look familiar to you?

9 Let me read to you from ACR 1303-A. This is the  
10 advertisement that Dr. Bernstein sent to the ACR Board of  
11 Chancellors:

12 "A slight pinching of nerves at this point"--  
13 pointing arrow one.

14 "--will cause so-called headaches, eye diseases,  
15 deafness, epilepsy, insomnia, wry or stiff neck,  
16 facial paralysis, dizziness, polio, arthritis,  
17 abnormal blood pressure, anemia, colds, hayfever,  
18 sinus trouble, nervousness, et cetera.

19 "No. 2, a slight nerve difficulty in this  
20 part of the spine is the cause of so-called  
21 throat trouble, neuralgia, pain in the shoulders  
22 and arms, goiter, nervous frustration, la grippe,  
23 nosebleed, disorder of gums..."  
24 et cetera, and on, and on, and on.

25 Where does it say on this ad, ladies and gentlemen,

1 that these conditions have been diagnosed by a medical  
2 doctor first, as Mr. McAndrews contends. Where does it  
3 say that on this ad? I don't see it anywhere.

4 Where does it say anything about referred pain  
5 or mimicking a disease condition because of a spinal  
6 condition? It doesn't say that anywhere. Do you think this  
7 is misleading or not?

8 What other information did the American College  
9 of Radiology have at the time it passed its resolution on  
10 chiropractic? ACR 1306.

11 Mr. William Stronach who testified by deposition  
12 in the trial, the executive director of the College, sent  
13 a letter to Carl Lechner, MD, Erie, Pennsylvania, forwarding  
14 Dr. Lechner some information on testimony given by Dr.  
15 Albert Jutra and Dr. Borrelli before the New York Assembly  
16 Rules Committee on March 25, 1963. It is attached to  
17 1306. Albert Jutra's statement before the New York Assembly:

18 "I am Dr. Albert Jutra of Montreal, Quebec,  
19 Canada, and I am professor and chairman of the  
20 Department of Radiology at the University of  
21 Montreal. I am a Fellow of the Royal College  
22 of Physicians and Surgeons of Canada, and am an  
23 officer of the Academy of France."

24 It goes on to say that he visited the Palmer College  
25 of Chiropractic in Davenport, Iowa, the National College of

1 Chiropractic in Chicago, Illinois, which you people have  
2 heard about, and the Canadian Memorial Chiropractic College  
3 in Toronto, Canada.

4 With respect to the National College of Chiropractic,  
5 which Mr. McAndrews asked everyone if they had visited --  
6 this is back in the early 1960s we are talking about --  
7 and Dr. Jutra is speaking:

8 "We stopped first at the first of two  
9 X-ray installations we were to see while at  
10 this college. The X-ray equipment was located  
11 in a room roughly 12 by 6. There was one patient  
12 on the X-ray table. The only protection we saw  
13 was a piece of lead approximately 42 inches  
14 high by three feet wide which was attached  
15 to the wall in the corridor. No presentday  
16 radiologist would accept this kind of prehistoric  
17 and inadequate shielding.

18 "Our guide then took us to a room which  
19 contained an illuminator, a device used to  
20 view films. He took several films from an  
21 envelope and placed them on the illuminator  
22 all upsidedown. The films showed a gallbladder  
23 filled with contrast drug and containing  
24 gallstones. Our guide, however, did not  
25 comment upon the gallstones. Instead, he replaced

1 the films with others which he said would show  
2 a gallbladder. These films were also placed  
3 on the illuminator upside down. His second  
4 series of films showed a healthy gallbladder.  
5 But the chiropractor explained to us that,  
6 'This is the gallbladder.' At which point he  
7 sketched with his finger not the gallbladder,  
8 but a loop of the intestine slightly distended  
9 with gas.

10 "Later on, we asked our guide who taught  
11 anatomy at the school, and he replied, 'I do.'

12 "The second installation at the school  
13 in Chicago sent a shudder through us. The X-ray  
14 machine was mounted in a classroom completely  
15 unshielded. Our guide told us the machine was  
16 used to instruct students in the operation of the  
17 equipment, and that they practiced on another.'

18 Dr. Jutra concludes:

19 "To entrust the health and life of citizens  
20 to the completely unqualified products of these  
21 schools is to endanger the public health. The  
22 visits demonstrated conclusively that these  
23 schools do not have the barest standards of  
24 education and training commensurate with sound  
25 medical practice."

1           The other statement which was attached to this  
2 letter: Dr. Frank J. Borrelli, Professor and Chairman  
3 of the Department of Radiology at the New York Medical  
4 College. He pointed out to the Committee quoting from  
5 "Modern X-ray Practice and Chiropractic Spinography,"  
6 a text by P. A. Remmier, a chiropractor associated with  
7 the Palmer Chiropractic School in Davenport, Iowa.  
8 Dr. Remmier in the book lists the following as a quote:

9           "Reasons why the chiropractor should  
10 spinograph in every case."

11           By the way, you will recall the testimony of the  
12 plaintiffs in this case, that they X-ray 99 percent of the  
13 people who come into their offices. Some of them went down  
14 into the lower 90s in terms of their estimate.

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"Why to spinograph every case?

"1. It promotes confidence.

"2. The analysis could not be complete or correct without the spinogram.

"3. It creates interest among patients.

"4. It procures business.

"5. It attracts a better class of patients.

"6. It adds prestige in your community.

"7. It builds a reliable reputation.

"8. It is an investment and not an expense.

"9. It provides good interest on your investment.

"10. The income makes it possible to arrange a better service.

"11. It enables one to care for more patients daily.

"12. It helps to eliminate the so-called starvation period that many chiropractors go through.

"13. It discloses the other fellow's mistakes."

This was all information that was in the American College of Radiology's files at the time that the resolution was passed in 1968.

1           One final example, A. R. Tolk, MD, President  
 2 of the Kings County Radiological Society, a radiologist,  
 3 wrote to the College, ACR 1300, sent in a case report.  
 4 On Dr. Tolk's stationery, letterhead:

5           "Case Report. Mrs. E. E. Age 39, one child  
 6 age 10, had right mastectomy 1951. Diagnosis:  
 7 Carcinoma."

8 which is cancer.

9           "In 1959, she complained of pain in the  
 10 lumbar area. X-ray examination revealed a localized  
 11 osteolytic area in L-1. A course of ionizing  
 12 radiation was advised. Instead, the patient went  
 13 to a chiropractor. She was under his care for  
 14 fully one year and received weekly treatments.

15           "On September 17, 1961, she again appeared  
 16 in my office. At this time, X-ray example revealed  
 17 metastases throughout the skull, chest, spine,  
 18 and pelvis. She passed away in October 1962."

19           This was the information that the American College  
 20 of Radiology had when it passed the position statement  
 21 that I read to you on chiropractic in 1968.

22           By the way, Mr. McAndrews this morning referred  
 23 to medical organizations as if there is some huge corporate  
 24 entity that doesn't act in accordance with the wishes of  
 25 its members.

1           The American College of Radiology is an association  
2 of radiologists who come together and make decisions about  
3 what they think constitutes good radiology practice.

4           Dr. Meaney and Mr. Stronach both testified to  
5 you that the Council of the College is composed of 125  
6 radiologists from throughout the country who come together  
7 and determine the policy of the American College of Radiology.

8           The 1968 statement that I read to you was acted  
9 upon by the Council of the American College of Radiology.  
10 It reflected the vote of 125 radiologists from throughout  
11 the country. Presumably, these radiologists brought with  
12 them their collective experience on this issue that is  
13 addressed in the resolution.

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1 Now, Mr. McAndrews pointed out that the resolution  
2 was sent to the American Medical Association. Of course,  
3 the resolution says that the information in the resolution,  
4 should be disseminated to the public, to medical societies,  
5 to the Public Health Service, and, yes, it was disseminated,  
6 it was sent to the American Medical Association, it was sent  
7 to the Public Health Service, and it was sent to anyone  
8 who asked what the college position was about chiropractic.

9 When Judge Bua instructs you about free speech,  
10 he will tell you that the First Amendment to the United  
11 States Constitution guarantees the right to freedom of  
12 speech. There is nothing in First Amendment law which  
13 defines or restricts the subject matter of protected speech.  
14 The Amendment affords protection not merely to the voicing  
15 of abstract opinions upon public issues, it also protects  
16 implementing conduct which is in the nature of advocacy.

17 He will also tell you that the First Amendment  
18 guarantees the right to freedom of association. The law holds  
19 that the freedom to engage in an association for the  
20 advancement of beliefs and ideas is an inseparable aspect  
21 of freedom of speech. The basis for this principle is the  
22 fact that effective advocacy of both public and private  
23 points of view, particularly controversial ones, is undeniably  
24 enhanced by group association. The freedom to associate  
25 is a basic constitutional freedom.

1 Your Honor, do you want to tell me how I am doing  
2 on time? I don't know what time I started.

3 THE COURT: You have 18 minutes.

4 MR. CHERNEY: 18 minutes. Thank you, your Honor.

5 Now also with respect to the purpose of this  
6 resolution that is supposedly a part of the conspiracy  
7 to contain and eliminate chiropractic, you heard Dr. Meaney  
8 testify about the fact that a 14 by 36 X-ray film exposes  
9 a patient to 20 to 100 times, a female patient, 20 to 100  
10 times more radiation in the ovaries than a seven inch X-ray.  
11 That similarly, with respect to a breast film, there is 12  
12 times more exposure to radiation with that film.

13 You also heard Dr. Meaney testify about the  
14 long history of concern by the American College of Radiology  
15 about radiation exposure. Dr. Meaney testified that the  
16 College expressed concern about radiation abuse, whether  
17 it was done by medical doctors, or by chiropractors, or  
18 anyone else. He testified it has been going on as long as  
19 the College has existed. Without discrimination, whoever  
20 abuses ~~the~~ radiation, the American College of Radiology  
21 has criticized it. There is no contradictory evidence.  
22 Dr. Meaney's testimony on that point is unrebutted in the  
23 record in this case.

24 Now, can there be any doubt that the purpose of  
25 this resolution and the activities of the American College

1 of Radiology, were to protect the public, to protect the  
 2 patient? Why would a group criticize a potential source  
 3 of business and call them names? Why would you put off a  
 4 potential customer if you didn't think that it was in the  
 5 public interest? How can it be anticompetitive for a  
 6 group of consultative practitioners to suggest that they  
 7 don't want to have anything to do with customers, and  
 8 say that, "We won't take your business"? How can that  
 9 be anticompetitive?

10 Now, the plaintiffs also contend that the  
 11 Principles of Medical Ethics of the American College of  
 12 Radiology are a part of this conspiracy to <sup>constrain</sup> ~~maintain~~ and  
 13 eliminate chiropractic.

14 The Principles of Medical Ethics appear in the  
 15 bylaws of the American College of Radiology.

16 Mr. McAndrews and the plaintiffs did not prove  
 17 that these Principles were promulgated for any reason having  
 18 to do with chiropractic. The reason he didn't prove that  
 19 is because it is not true. Defendants' Exhibit 7007 is the  
 20 1951 version of the American College of Radiology Bulletin  
 21 containing the bylaws which says that:

22 "The Principles of Medical Ethics of the American  
 23 Medical Association shall be the Principles of  
 24 Ethics of the American College of Radiology, and  
 25 the said Principles of Medical Ethics are made  
 part of the bylaws of said College."

1           In 1951, at least as early as 1951, the College  
 2 incorporated by reference the Principles of Ethics  
 3 as guidelines for its members.

4           Dr. Meaney testified that the Principles of  
 5 Ethics are guidelines. Mr. Stronach testified that the  
 6 Principles of Ethics are guidelines.

7           The Principles, themselves, say in the Preamble:

8           "These Principles are intended to aid  
 9 physicians individually and collectively in  
 10 maintaining a high level of ethical conduct.  
 11 They are not laws, but standards by which a  
 12 physician may determine the propriety of his  
 13 conduct in his relationship with patients,  
 14 with colleagues, with members of allied professions  
 15 and with the public."

16           The Principles of Ethics represent the judgment  
 17 of radiologists as to what constitutes the highest standard  
 18 of medical care.

19           You will recall that Dr. Meaney testified about  
 20 the problems he perceived in professionally associating  
 21 with a chiropractor. He pointed out an X-ray consultation  
 22 does not explain what a patient's problem is. It is only  
 23 one limited piece of information in determining the patient's  
 24 problem. It very rarely determines dispositively whether  
 25 a patient has a disease or condition. It very rarely rules

1 anything out. It is one piece of information for a primary  
2 provider to use. It is intended as aid to someone who  
3 does a differential diagnosis, a primary health care provider  
4 who does a differential diagnosis.

5 Dr. Pedigo testified that he doesn't do a  
6 differential diagnosis. He said he does a differential  
7 diagnosis within the scope of his limited practice. What  
8 does that mean? If you go to Dr. Pedigo, and he can determine  
9 what the problem is if it is within the realm of his area,  
10 but he cannot if it is outside his area, how will  
11 he know what is within and what is without his area?

12 Dr. Meaney also pointed out communication problems.  
13 He pointed out the problems of a radiologist being an  
14 intermediary in the delivery of a type of care, a philosophy  
15 of health care, and to which he does not subscribe.

16 After listening to six, seven weeks of evidence,  
17 is there any doubt in your mind that chiropractors have a different  
18 theory of health care than medical doctors? Is there  
19 any doubt that there is a great number of conditions that  
20 chiropractors treat one way and medical doctors treat another  
21 way? There should be no doubt. Every chiropractor who took  
22 the stand expressed the fact that he treats organic diseases,  
23 conditions that are treated by medical doctors, not just  
24 musculoskeletal problems, but diseases in a way differently  
25 from the way they are treated by medical doctors.

1 Radiologists do not wish to become intermediaries in the  
 2 delivery of care to which they do not subscribe.

3 Why do chiropractors wish to have a radiological  
 4 consultation? They claim that they can't see a subluxation  
 5 on an X-ray. Every plaintiff who testified said that he  
 6 couldn't see a subluxation on an X-ray, that it must be  
 7 determined otherwise. The reason chiropractors wish to  
 8 have a consultation with a radiologist is in order to determine  
 9 medical problems, disease problems. As Dr. Meaney explained, those are within  
 10 the province of a medical doctor. If a chiropractor suspects  
 11 a medical problem, he should send the patient to a medical  
 12 doctor, a primary medical care provider, for evaluation of  
 13 that problem.

14 By the way, with respect to a subluxation, did you  
 15 hear anyone explain what a subluxation is? Mr. Stronach  
 16 testified that when the Medicare regulations were implemented,  
 17 the Federal Government came to the American College of  
 18 Radiology and said, "How do you see a subluxation on an  
 19 X-ray" and the College tried to assist and wasn't able to  
 20 determine what a subluxation was. The chiropractors indicate  
 21 that they cannot see what a subluxation is.

22 Mr. McAndrews pointed to a so-called problem having  
 23 to do with obtaining previously taken X-rays, and indicated  
 24 that we were preventing that. Was there any evidence in the  
 25 case? Did you hear any witness say that any chiropractor was

1 unable to obtain previously taken X-rays as a result of any  
2 action of the American College of Radiology? I submit to you  
3 that there was no evidence to that.

4 Here's what the evidence is: Dr. Meaney testified  
5 that he gives previously taken X-rays to any patient or  
6 health care provider who asks for them. Dr. Meaney is the  
7 speaker of the Council of the American College of Radiology.

8 Plaintiffs' Exhibit offered in evidence by the  
9 plaintiffs, 122-A, from Mr. Robert Becker to Mark McLain,  
10 Fairmount, West Virginia, to the College. Mr. Becker  
11 responded to Dr. McLain's inquiry by saying in a letter dated  
12 November 18, 1975:

13 "If a specific patient asks you to forward a  
14 film and its report to a chiropractor, it would be  
15 appropriate to do so. It is not appropriate, however,  
16 to establish a professional relationship either  
17 directly or indirectly with chiropractors.

18 "Hoping this information is of help to you."

19 Another letter to New Jersey, February 5, 1976,  
20 Plaintiffs' Exhibit 123 from Mr. Becker, the same response:

21 "If a specific patient asks you to forward a  
22 film and a report to a chiropractor, it would be  
23 appropriate, but it is inappropriate to associate  
24 professionally in a consultation with a chiropractor."

25 Plaintiffs' Exhibit 126, a letter to Fishkill, New

1 York, May 19, 1976, exactly the same response. That is the  
 2 evidence in the case about the information given out by the  
 3 American College of Radiology about previously-taken X-rays  
 4 being provided to patients and their providers.

5 THE COURT: You have five minutes, Mr. Cherney.

6 MR. CHERNEY: Thank you, your Honor.

7 Now, with respect to the Principles of Medical  
 8 Ethics of the American College of Radiology and whether they  
 9 are part of the conspiracy to contain and eliminate chiropractic,  
 10 let me tell you what the Court will direct you concerning  
 11 conspiracy in the instructions:

12 "Mere similarity of conduct among various  
 13 persons, and the fact that they may have  
 14 associated with each other, and may have assembled  
 15 together and discussed common aims and interests  
 16 does not necessarily establish proof of the  
 17 existence of a conspiracy. A conspiracy is a  
 18 combination of two or more persons by concerted  
 19 action to accomplish some unlawful purpose or to  
 20 accomplish some lawful purpose by an unlawful  
 21 means. The essence of conspiracy is a combination  
 22 or agreement to violate or to disregard the  
 23 law."

24 We submit that there is no such evidence as  
 25 to the American College of Radiology. The mere fact that

1 the American College of Radiology utilized the Principles  
 2 of Ethics and advised its members against unscientific  
 3 practice does not make it part of any conspiracy to contain  
 4 and eliminate chiropractors.

5 By the way, Mr. McAndrews suggested that  
 6 radiologists compete with chiropractors, and pointed out  
 7 the hypothetical about Bonnie falling out of the tree.  
 8 The Court will instruct you concerning competition:

9 "In determining whether chiropractic  
 10 services compete with certain kinds of medical  
 11 services, I instruct you that products or  
 12 services are regarded as competitive if they  
 13 are regarded by consumers as being reasonably  
 14 interchangeable."

15 Now, do you think that consumers view chiropractic  
 16 services as interchangeable with radiology services? Do  
 17 you think that people out in the world think that a radiologist  
 18 performs the same service as a chiropractor? I think that  
 19 the question answers itself.

20 And if radiologists perform the same services  
 21 as chiropractors, why did Dr. Pedigo want to send his patients  
 22 to a radiologist? Why wasn't he accepting patients and  
 23 doing X-ray work for other people? Why weren't any of the  
 24 other plaintiffs accepting patients and doing radiology work  
 25 rather than trying to send their work to a radiologist? I

1 think the answer again is clear.

2 Dr. Meaney and Mr. Stronach testified that in the  
3 history of the American College of Radiology, not one  
4 radiologist has been disciplined, or censured, or reprimanded,  
5 or otherwise called to task for associating professionally  
6 with a chiropractor.

7 Now, if you want to determine whether or not the  
8 ethics are guidelines or not, let's look at the evidence in  
9 this case. Four of the five plaintiffs were interested in  
10 obtaining some form of radiology service. But let's  
11 review the situation. Dr. Chester Wilk from 1976 to 1980  
12 obtained radiology services from the Holy Family Hospital in  
13 the Chicago area for four years. Mr. McAndrews said this  
14 morning that after he sent his first letter in 1976, there  
15 was an inquiry to the Joint Commission one year later, but  
16 apparently for four years, his service from Holy Family  
17 Hospital continued uninterrupted because Dr. Wilk testified  
18 on the stand that he stopped receiving these services one  
19 yea ago. That would be in 1980. He received radiology  
20 services for four years.

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years

1 Dr. Michael Pedigo, who had X-ray equipment, himself,  
 2 he wrote and sought services. Is there any evidence that  
 3 the American College of Radiology had anything to do with  
 4 his inability to obtain services in California? There is  
 5 no evidence in the record to that effect.

6 Dr. Patricia Arthur sought services in Estes Park,  
 7 Colorado. No mention of a radiologist at all. No mention  
 8 of the American College of Radiology or the ethical guidelines  
 9 of the American College of Radiology.

10 Dr. Steve Lumsden sought services in Negaunee,  
 11 Michigan, I'm sorry, Newberry, Michigan. No mention of a  
 12 radiologist; no mention of the American College of Radiology.  
 13 What Dr. Lumsden did mention, though, is that when he did  
 14 live in Negaunee he had sought services from the radiologist  
 15 there and had been given the services, but he didn't bother  
 16 to follow up on it. He didn't bother to follow up on it.  
 17 I think the evidence will show that the radiologist in  
 18 Negaunee, Michigan, is a member of the American College of  
 19 Radiology.

20 Dr. Burkhead who came in from Evanston, Illinois, and  
 21 testified for the Chicago Medical Society, testified that  
 22 he relates professionally to chiropractors. He is a member  
 23 of the American College of Radiology as set forth in Defendants  
 24 Exhibit 7004, the Directory of the American College of  
 25 Radiology.

1           Just very briefly, Mr. McAndrews pointed to the  
2 New York resolution of the American College of Radiology,  
3 and their position about chiropractic. Let me read to you  
4 from Defendants' Exhibit 7002 which is the New York Licensing  
5 Law which is the most restrictive licensing law in the  
6 country for chiropractors. It prohibits them from diagnosing  
7 and treating diseases:

8           "A license to practice chiropractic shall  
9 not permit the holder thereof to treat any  
10 infectious diseases, such as pneumonia, et cetera,  
11 any surgical condition, diabetes, benign or malignant  
12 neoplasms, to operate, to reduce fractures or  
13 dislocations, to prescribe, administer or dispense  
14 or use in his practice drugs or medicines, or  
15 to use diagnostic or therapeutic methods involving  
16 chemical or biological means."

17 all these things that a chiropractor may not do in New York.

18           You will recall what Dr. Jarvis said when he  
19 testified at the trial. If chiropractors merely manipulated  
20 for musculoskeletal problems, Dr. Jarvis said he would have  
21 no gripe with them. They wouldn't then be unscientific  
22 practitioners. But did you hear one chiropractor who  
23 testified in this case come in and say that he limits his  
24 practice to musculoskeletal problems? Did you hear  
25 one chiropractor say that he does not treat diseases in his

1 practice? No.

2 ~~THE COURT: Mr. Cherney, your time has expired, but you~~  
3 ~~may have a minute or so to conclude.~~

4 ~~MR. CHERNEY. Thank you, your Honor, I will conclude~~  
5 ~~now.~~

6 Just one final point. The lack of economic interest  
7 of radiologists, the economic disadvantage to radiologists in  
8 not dealing with chiropractors is borne out by the plaintiffs'  
9 damage theory. Do the plaintiffs claim damages from a failure  
10 to obtain radiological services? No, they do not. You know  
11 why they do not? Because they would lose money if they  
12 gained radiology services. If they sent their patients  
13 to radiologists, the radiologists would make money and the  
14 chiropractor would lose money. So these people, Dr. Arthur,  
15 Dr. Pedigo, Dr. Wilk, who were denied radiology services, do  
16 they claim damages as a result of the denial of radiology  
17 services? No, they do not. They claim damages because  
18 patients weren't referred to them by medical doctors.  
19 And they weren't able to go into hospitals and treat patients.  
20 But what are the allegations that are made? What is the  
21 story that each plaintiff came in and told you about his  
22 difficulty in obtaining radiology services? I believe that  
23 the plaintiffs' damage theory bears out the fact that  
24 radiologists have acted not in any anticompetitive sense,  
25 but have acted to protect the public. They have not conspired

1 with anyone, and I ask you to return a verdict in favor of  
 2 the American College of Radiology.

3 Thank you.

4 THE COURT: Thank you, Mr. Cherney.

5 ~~At this time, ladies and gentlemen, we will take~~  
 6 ~~a short recess.~~

7 ~~(Short recess.)~~

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