

1 MR. SLATER: Your Honor, if I may, one brief house-
2 keeping matter. The plaintiffs have identified the chart,
3 the graph, pictorial representation, if you will, which Mr.
4 Fuller drew during his opening statement as Plaintiff's
5 Exhibit 3,000, merely for purposes of identification at a
6 later date.

7 THE COURT: Very well.

8 MR. FULLER: No objection.

9 THE COURT: Bring in the jury, please.

10 (Whereupon, the following proceedings
11 were had in open court, in the presence
12 and hearing of the jury:

13 THE COURT: Please be seated, ladies and gentlemen.
14 Mr. Cherney, are you prepared to make your opening
15 statement?

16 MR. CHERNEY: Yes, I am, your Honor.

17 THE COURT: Very well.

18 OPENING STATEMENT BY MR. CHERNEY ON

19 BEHALF OF DEFENDANTS

20 MR. CHERNEY: Your Honor, Judge Bua.

21 THE COURT: Mr. Cherney.

22 MR. CHERNEY: Counsel. Ladies and gentlemen of the
23 jury.

24 My name is James Cherney, and I represent the
25 American College of Radiology, defendant in this action.

1 I would like to also introduce John McCambridge
2 who has been sitting next to me at the counsel table, who
3 will be assisting me in the course of this trial, represent-
4 ing the College of Radiology.

5 From time to time during the trial various repre-
6 sentatives of the American College of Radiology will appear
7 as witnesses and spectators in the case. As the occasion
8 arises, I will make an attempt to introduce them to you so
9 you can meet them as well.

10 The American College of Radiology is a not-for-
11 profit, professional, educational, and research organization
12 with 12,000 members throughout the United States.

13 The great majority of the members of the college
14 are Board-certified radiologists who practice radiology.

15 They are medical physicians who specialize in
16 radiology.

17 Mr. McAndrews, in his opening remarks, has referred
18 to the college's ethical position and position statements
19 on chiropractic. The College admits that it has taken posi-
20 tions on chiropractic. However, the evidence will show that
21 it has taken these positions not for any competitive or
22 economic reasons but, rather, because they felt that this
23 insured optimal patient care, consistent with the highest
24 standards of radiology practice.
25

1 In fact, radiologists will testify in this trial
2 and the evidence will show that radiologists who acted
3 consistent with the College's position were acting against
4 their economic interests by refusing to accept consultations
5 from doctors of chiropractic.

6 In order to understand why this is the case, some
7 explanation is necessary of what radiology is and what the
8 American College of Radiology does.

9 As some of you may be aware, radiology is a specialty
10 in medicine that deals with the use of radiation in the
11 diagnosis and treatment of disease.

12 There are two principal ways in which radiation is
13 used in medicine. The first is in the treatment of various
14 conditions, particularly cancer, as a therapy. Radiologists
15 who specialize in this type of medical care are called
16 therapeutic radiologists.

17 The other use of radiation is for diagnostic pur-
18 poses. Radiologists in this field use radiation to diagnose,
19 as a diagnostic tool, to help determine medical problems
20 such as fractures, blood clots, or other disease states.

21 The most common use of this second type of radiation
22 is the simple X-ray, in which a picture is taken of some
23 portion of your body so as to enable a radiologist or other
24 physician to see things inside the body, such as bones or
25 organs.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

I am sure most of you are familiar with this type of X-ray.

The American College of Radiology represents both types of radiologists, diagnostic radiologists and therapeutic radiologists, and its many activities deal with both aspects of radiology.

end

1 However, the lawsuit deals principally with
2 diagnostic radiology. There are two things about diagnostic
3 radiology that are very important to this suit and about which
4 you will hear much evidence. I urge you to listen to this
5 evidence very carefully.

6 The first is that radiation may be harmful to people.
7 Scientific evidence has demonstrated that radiation can alter
8 the material that is in the nucleus of cells of the body.
9 It causes the cells to deteriorate, bringing about disease
10 and possible death from over-exposure to radiation.

11 Thus, in order to use radiation properly for medical
12 diagnoses, every effort should be made to minimize the
13 exposure to radiation. The only time a patient should be
14 exposed to radiation is when a judgment has been made by a
15 physician that the potential gain of exposing a patient to
16 radiation outweighs the risk to the patient of exposing them
17 to radiation. The physician must evaluate a number of
18 factors. For example, what information can be obtained from
19 the X-ray that is taken. Is that same information available
20 from some other diagnostic technique that might be utilized.
21 How serious is the condition or disease which might be
22 detected by the X-ray.

23 On the other side of the coin, what are the risks
24 of the X-ray examination. Radiation presents greater risk to
25 pregnant women and children. For these patients a very careful

1 evaluation is necessary before they are given X-rays.

2 Repeated X-rays can be harmful to the reproductive organs.

3 This is an additional consideration to be taken into account.

4 How much radiation exposure will the patient
5 receive from the examination. You will hear testimony and
6 evidence that different types and different size X-rays
7 project different amounts of radiation. Generally large
8 X-rays such as 14-inch by 36-inch X-rays expose the patient
9 to a great deal more radiation than smaller films.

10 There are other potential hazards. Certain X-ray
11 procedures such as gallbladder studies and other procedures
12 involve the introduction of a radiopaque substance or
13 dye into the system. Often valuable diagnostic information
14 can be obtained by tracing the substance through the
15 patient's system. These procedures present additional
16 hazards that must be taken into account. However, the
17 diagnostic value to the physician of using these procedures
18 frequently outweighs the risk you expose the patient to.

19 The second important thing about diagnostic
20 radiology about which you will hear testimony during this
21 trial is that radiologists are exclusively consultative
22 practitioners or consultants. Mr. Fuller has alluded to this
23 category of physicians in his opening statement.

24 What this means is that radiologists consult with
25 primary care physicians who are actually examining and treating

1 the patient. Radiologists almost never see a patient
2 directly about a medical problem.

3 For example, if you had chest pains, you would see
4 your family physician or internist who would take a history
5 from you. He would give you a physical examination. He
6 might engage in certain tests himself and if he felt it was
7 necessary, he would order X-ray studies from a radiologist.

8 Upon the prescriptive order of your doctor you
9 would then have chest X-rays taken at either a hospital, a
10 radiologist's office or a clinic. These would actually be
11 taken by a technologist or a technician who would
12 physically take the X-ray. The X-ray would be read by the
13 radiologist, who would prepare a report that would be sent
14 back, a report of his findings that would be sent back to
15 your physician to be incorporated with the rest of his
16 findings as part of his diagnosis or evaluation of your
17 problem.

23, 2

18

19

20

21

22

23

24

25

1 Thus, patients are never examined, almost never
2 examined or treated by a radiologist, a diagnostic
3 radiologist. Patients do not take a problem to a radiologist
4 in the first instance. I doubt if any of you who have had
5 a complaint have ever gone to see a radiologist without
6 seeing a physician. The radiologist is a physician's
7 physician. He provides one component of information to
8 help the primary physician diagnose the medical problem.
9 He is a consultant to your treating physician.

10 As a result, the radiologist expects the primary
11 physician to carry out the findings, the radiology findings
12 and to carry them through into the diagnosis, proper
13 diagnosis of disease and the treatment of the condition
14 that the primary finds of value from his evaluation.

15 The evidence will show that patients receive no
16 benefit from a radiologist's findings unless and until the
17 primary physician who sees the patient properly utilizes
18 those findings in an overall evaluation to detect and treat
19 the problem of the patient. Obviously, it is a matter of
20 great concern to radiologists that these findings be so
21 properly utilized.

22 As might be expected of individuals whose work
23 is so specialized, radiologists must undertake a great deal
24 of training. Following four years of college they attend
25 a full four years of medical school followed by a one-year

1 internship, followed by three years of radiology residency
2 or specialized training. That is 12 years of training followin
3 high school.

4 On the other hand, with respect to chiropractic
5 the evidence will show that until approximately ten years
6 ago, that is about 1970, most chiropractic schools accepted
7 students directly from high school. Today, as we sit here
8 today the schools, the chiropractic schools only require
9 two years of college training before chiropractic school.
10 The curriculum in chiropractic schools today, the evidence
11 will show is 36 months long or three calendar years.

12 Radiologists have the same medical school training as other
13 medical doctors with whom they consult. They have to because
14 they work as a team in the diagnosis and care of the patient.

15 They use the same language, they use the same
16 systems, they have the same theories of disease causation.
17 They use the same techniques and they have the same goal
18 with respect to patient care.

19 Mr. McAndrews in his opening statement referred
20 to hospitals. Radiologists are active in hospitals. They
21 have a somewhat hospital-based practice. They use radiology
22 equipment in hospitals. This probably comes as no great
23 surprise that hospitals generally ask radiologists to head
24 up the radiology department in hospitals. That is a very
25 common practice.

1 On the other hand, you will hear evidence that
2 radiologists have office practices as well as hospital
3 practices. With respect to the Joint Commission on
4 Accreditation of hospital standards concerning radiology
5 which Mr. McAndrews referred to in his opening statement,
6 it is correct and the evidence will show that the Joint
7 Commission suggests that hospitals have a radiologist as
8 the head of the radiology department in the hospital.

9 You will evaluate that evidence. You will hear
10 the evidence about the way this is set up. You will hear
11 testimony from several witnesses about the American College
12 of Radiology and its activities.

13 The College was founded in 1923 when radiology
14 as a medical discipline was in its infancy. X-ray had
15 only been discovered by a physicist named Roentgen in
16 1890.

17 In 1923 various state legislatures including
18 California were considering legislation which would allow
19 laymen to operate radiology laboratories. A group of
20 radiologists in California urged the Governor of California
21 to veto such legislation. That group was the genesis
22 for the American College of Radiology.

rad.

1 Thus, radiology is a relatively young medical
2 specialty in terms of the history of medicine. Since that
3 time the American College of Radiology has evolved and
4 grown into a national organization which seeks to further
5 the science of radiology, ensure proper use of radiation,
6 take positions on legislation that relate to radiation,
7 educate the public concerning radiation and its proper use,
8 and generally advocate the collective point of view of
9 radiologists on matters of radiology, whether they affect
10 medical doctors, patients or hospitals, or the public at
11 large.

12 The evidence will show that the great majority of
13 the College's programs are related to research and education.
14 Approximately 57 per cent of the College's annual budget is
15 provided by funds from federal government grants. Twelve
16 per cent of the College's annual budget is provided by
17 funds from services such as publications and educational
18 seminars. Only 27 per cent of the College's budget is
19 provided by funds from members' dues.

20 The College is composed of a number of segments.
21 Its policymaking or legislative body is the council, which
22 has approximately 120 members, which come from all 50 states
23 and are elected by the state chapters of the College in the
24 various states.

25 The executive body of the College is known as the

1 Board of Chancellors. It implements the policy which is
2 made by the council.

3 Then there are commissions and committees of the
4 College which engage in a whole host of activities concerning
5 radiation and radiation protection.

6 The commissions include a commission on cancer, one
7 on standards of radiologic practice, one on nuclear medicine,
8 radiation therapy, public health and radiation protection.

9 The College is a service organization. It
10 services the needs of its members and the needs of the
11 community on issues pertaining to radiation and health care.

12 In pursuing these goals and various activities
13 it deals with radiologists, with hospitals, with other
14 physicians and organizations, with government entities and
15 with the public.

16 In addition to representing the collective point
17 of view of radiologists, the College is a repository of
18 information and expertise which it hopes and intends will
19 benefit the public. Among the subjects relating to
20 radiation protection which the College has addressed is
21 chiropractic.

22 You heard Mr. McAndrews in his opening statement
23 attempt to explain what chiropractic is. Contrary to some
24 public misconception, I think the evidence will show that
25 chiropractors are not back specialists.

1 The evidence will show that chiropractic is a
2 method of healing or theory of health care which is different
3 from the orthodox or traditional medical theory of health
4 care and disease causations. It is an alternative method
5 of care to medical health care.

6 Mr. McAndrews referred to "warts" that chiropractic
7 has. I believe the evidence will show that chiropractic is
8 not even a uniform discipline. One of the warts is an
9 inability by the members of the chiropractic profession to
10 agree to a definition of what chiropractic is. The evidence
11 will show that the feud about what chiropractic is by
12 definition has been going on within the chiropractic
13 profession for 20 or 30 years, perhaps longer.

14 The evidence will show that radiologists had a
15 number of reasons to be concerned about chiropractic. The
16 first was that chiropractors routinely expose patients to
17 radiation for reasons that, in the view of radiologists
18 are unsound.

19 Mr. McAndrews referred to chiropractors taking
20 X-rays for so-called postural studies. Radiologists reject
21 this as a reason for taking X-rays. Many of the chiropractic
22 views of X-rays, the evidence will show, for postural studies
23 are different from the radiology views that are
24 taken by medical doctors. They are not exchangeable.

25 Radiologists claim that they cannot see or detect

1 chiropractic subluxations on an X-ray. This has been their
2 position for many years.

3 The evidence will show that chiropractors, including
4 some of the plaintiffs in this case, say that they cannot
5 detect a chiropractic subluxation on an X-ray. Even if this
6 X-ray did detect a chiropractic subluxation, if such a thing
7 exists, radiologists would not consider this a valid reason
8 for radiation exposure as these subluxations have never been
9 demonstrated, the evidence will show, to have any connection
10 to good health or curing disease or ailments.

11 The second concern of the radiologists about
12 chiropractic was their belief that suspected medical problems
13 should be evaluated and treated by a medical physician. Thus,
14 if a chiropractor or anyone else detects a medical problem,
15 they should suggest that the individual go to a medical
16 doctor who treats patients under medical care to evaluate and
17 diagnose that problem. If X-rays are then necessary, the
18 medical doctor would order them from a radiologist who is
19 a consultant in medical care.

20 Chiropractors are trying to send patients to the
21 wrong source if they try to send them to radiologists when
22 they suspect a medical problem. Mr. McAndrews in his opening
23 statement referred to the X-ray that had a possible shadow
24 on it, and the problem of the chiropractor in getting an
25 evaluation of that situation. The radiologists and the

1 American College of Radiology would suggest that if there
2 is a possible problem of a spot on the lung, the patient
3 should see a medical physician. He should see a treating
4 medical physician who can evaluate and diagnose that problem.

-k25

- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

1 I think the evidence will show if you were that
2 person, you would want to see a medical physician about that
3 problem.

4 Why don't chiropractors suggest that their patients
5 see the medical physician about the possible medical problem?
6 The evidence will show that they don't do that because they
7 don't want to lose the patient. Therefore they ask the
8 radiologist to participate as an intermediary in chiropractic
9 care, by consulting with the chiropractor and allowing the
10 chiropractor to deal with the medical problem. Radiologists
11 reject that procedure.

12 As I mentioned earlier, the testimony will show
13 that radiologists are part of the medical system. They are
14 trained and educated as consultants to medical doctors.
15 Chiropractic is a different system of health care with dif-
16 ferent theories of disease causation and treatment.

17 You will hear radiologists testify that they held
18 these reviews and refused to consult with chiropractors
19 even though that designation decreased their income because
20 it eliminated a source of revenue that the radiologists might
21 obtain from accepting those consultations from chiropractors.

22 They did so because they thought it was the proper
23 thing to do and would lead to the best patient care.

24 Mr. McAndrews, in his opening statment, para-
25 phrased a position statement of the American College of

1 Radiology on chiropractic. I don't think his paraphrase
 2 was very accurate and I am going to read the statement, but
 3 before I do, bear in mind that Mr. McAndrews said he didn't
 4 want to stop free speech by the defendants. He didn't want to
 5 stop them from making public statements. He didn't want to
 6 stop them from making overt statements.

7 Let me read you the position of the American College
 8 of Radiology as enacted by its Counsel in 1963.

9 The resolution stated:

10 "The members of the American College of Radiology
 11 advise the people of the United States that they regard
 12 the use of radiation for medical purposes by chiropractors
 13 as an unwarranted use of radiation, without potential
 14 for medical gain to balance the potential risk."

15 The resolution went on to call upon the Public
 16 Health Service, the American Medical Association, and
 17 the radiation control actions of the various states to
 18 warn the public against the misuse and unsafe use of
 19 X-rays on patients by chiropractors."

20 That is the position statement of the American
 21 College of Radiology advising the people of the United States.

22 A substantially similar resolution was enacted by
 23 the Council of the College in February 1969 and immediately
 24 adopted by its Board of Counselors.

25 A similar resolution with the same advice to the

1 people of the United States was enacted by the American
2 College of Radiology in 1975.

3 We expect to hold Mr. McAndrews to his statement
4 that he doesn't wish to cut off free speech, and we suggest
5 that that is free speech.

6 The evidence will show that at the time these
7 resolutions were adopted, the College had gathered information
8 about chiropractic from a number of sources and was concerned
9 about chiropractic use of radiation. Some of the information
10 had come from other organizations like the American Medical
11 Association. Other information by chiropractic was available
12 in the public domain, such as chiropractic advertisements and
13 promotion of Miss Posture contests in media.

14 Since the resolution of the College was adopted
15 by its 120-member Council, presumably it reflected the col-
16 lective experience of these 120 radiologists throughout the
17 country with chiropractic.

18 By the way, Mr. McAndrews in his opening statement
19 mentioned that the defendants, some of the defendants, are
20 represented on the AMA, American Medical Association House
21 of Delegates, which, as Mr. McAndrews stated, has several
22 hundred members. The American College of Radiology for the
23 past two or three years has had one delegate to the American
24 Medical Association House of Delegates of these many hundred,
25 for the last two or three years, long after the allegations

1 that Mr. McAndrews made about a conspiracy to contain
2 chiropractic.

3 Like virtually all professional organizations, the
4 College has established a body of ethical principles to which
5 it asks its members to subscribe upon joining the College.
6 These principles represent the collective view of the radiol-
7 ogy profession concerning the highest standards of radiology
8 practice.

9 The evidence will show that until 1978 the college
10 supplemented the principles of ethics of the American Medical
11 Association with its own principles of ethical radiological
12 practice. Since that time the entire body of principles
13 has been consolidated as principles of ethical radiological
14 practice.

15 Among those principles is Principle Three which
16 you have already heard about. A physician should practice a
17 method of healing founded on a scientific basis, and he should
18 not voluntarily associate professionally with anyone who
19 violates that principle.

20 Similarly, Principle Five of the principles of
21 ethical radiological practice states:

22 "A radiologist should not associate himself in
23 any way with the improper practice of medicine."
24

25 These are the principles of ethics of the American
College of Radiology today. These are the standards of the

1 College.

2 However, these principles are clearly advisory in
3 nature. The 1976 bylaws of the College, which you will see
4 in evidence in this case, states:

5 "These principles are intended to aid physicians,
6 individually and collectively, in maintaining a high
7 level of ethical conduct. They are not laws but
8 standards by which a physician may determine the pro-
9 priety of his conduct and his relationship with
10 patients, with colleagues, with members of allied pro-
11 fessions, and with the public."

12 The evidence will show that the College encouraged
13 its members to abide by these principles, the standards of
14 the profession, but that the College never disciplined or
15 punished any member who opted not to follow the College's view.

16 Mr. McAndrews stated that he doesn't oppose overt
17 statements about chiropractic. The evidence will demonstrate
18 that the College has communicated for many years its views
19 about chiropractic to anyone who has inquired. This has in-
20 cluded members, other medical physicians, medical organiza-
21 tions, hospitals, government bodies and agencies, patients,
22 and even chiropractors who have asked for the College posi-
23 tion, it has been no secret.

24 Consistent with its views, the College has urged
25 Congress not to include chiropractic in government health

1 care programs such as Medicare.

2 There will be many witnesses who will testify about
3 the matters I have outlined in the last few minutes to you.
4 I urge you to listen carefully to the witnesses who tell you
5 what chiropractic is. Both M.D.s and chiropractors will
6 testify that chiropractic is a system of healing different
7 from medicine. Radiology is part of the medical system.

8 I urge you to listen for any evidence that chiro-
9 practors have proven their theories of healing by the
10 scientific method. I believe you will hear no such claim.

11 I ask you to listen for evidence about controlled
12 studies of clinical studies of chiropractic. You will hear
13 little such evidence. You will hear evidence that clinical
14 studies about manipulation and the efficacy of manipulative
15 care have been done by medical doctors.

16 I urge you to listen carefully to the evidence con-
17 cerning the role of X-rays in chiropractic cases. Listen to
18 why chiropractors say they need X-rays from radiologists or
19 hospitals. Is it for medical purposes or for chiropractic
20 purposes?

21 Finally, although this will be a long trial and
22 will deal with a great number of subjects, I urge you in behalf
23 of my client, the American College of Radiology, to listen
24 carefully to the evidence about its positions and its
25 actions on chiropractic. Listen to the reasons it claims

1 these positions were taken and the negative economic impact
 2 on the radiologists who formulated, advocated, and adhered
 3 to these positions on chiropractic.

4 This will aid you in making the determinations about
 5 my client which the Court will instruct you to make at the
 6 conclusion of the evidence.

7 I thank you very much for your attention and your
 8 willingness to be jurors in this case.

9 THE COURT: Thank you, Mr. Cherney.

10 Mr. Schuyler, do you care to make your opening
 11 statement. Thank you, Mr. Cherney.

12 OPENING STATEMENT BY MR. SCHUYLER ON
 13 BEHALF OF DEFENDANTS

14 MR. SCHUYLER: Thank you, your Honor. Ladies and
 15 gentlemen, opposing counsel. I suppose that some of you feel
 16 a little bit like Alice in Wonderland -- I know I do -- and
 17 that perhaps a quotation from Lewis Carroll may be pertinent
 18 here.

19
 20
 21
 22
 23
 24
 25