

IN THE MATTER OF

*

BEFORE THE STATE

ROBERT A. JACOBS, C.M.T.

*

BOARD OF CHIROPRACTIC

Respondent

*

EXAMINERS

* * * * *

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to Md. Code Ann., Health Occ. ("H.O.") § 3-315(a), and Maryland Code of Regulations (COMAR) 10.43.02.07, The Maryland State Board of Chiropractic Examiners (the "Board") hereby renders the following final decision and order:

BACKGROUND

On August 30, 2004 the Board charged Mr. Robert A. Jacobs, Respondent, for violations of certain provisions of the Md. Health Occ. Code Ann. § 3-5A-01, et. seq., ("the Massage Therapists Act"). Specifically, the Board charged the Respondent with violation of the following provisions of § 3-5A-09:

(a) Subject to the hearing provisions of § 3-315 of this title, the Board may deny a certificate or registration to any applicant, reprimand any certificate holder or registration holder, place any certificate holder or registration holder on probation, or suspend or revoke the certificate of a certificate holder or the registration of a registration holder if the applicant, certificate holder, or registration holder:

- (2) Fraudulently or deceptively uses a certificate or registration;
- (8) Does an act that is inconsistent with generally accepted professional standards in the practice of massage therapy;
- (19) Fails to cooperate with a lawful investigation conducted by the Board;
- (20) Engages in conduct that violates the professional code of ethics; or
- (21) Knowingly does an act that has been determined by the Board to be a violation of the Board's regulations.

The Board further charges the Respondent with a violation of its Code of Ethics, Code of Md. Regs. tit. 10, § 43.18 (October 16, 2000). Specifically the Board charges the Respondent with violating the following subsections:

.03 Standards of Practice.

A. The certificate holder or registration holder shall be concerned primarily with the welfare of the client.

C. A certificate holder or registration holder shall:

(2) Engage in professional conduct at all times, with honesty, integrity, self-respect, and fairness;

(5) At all times respect the client's dignity, autonomy, and privacy;

(7) Cooperate with a lawful investigation conducted by the Board of Chiropractic Examiners, including:

(a) Furnishing information requested,

(b) Complying with a subpoena,

(d) Providing meaningful and timely access to relevant client records;

D. A certificate holder or registration holder may not

(2) Knowingly engage in or condone behavior that:

(d) Involves moral turpitude;

.05 Professional Boundaries, thereof:

A. A certificate holder or registration holder shall:

(1) Maintain professional boundaries, even when the client initiates crossing the professional boundaries of the professional relationship; and

(2) Respect and maintain professional boundaries and respect the client's reasonable expectation of professional conduct.

The above-mentioned charges arose out of a complaint received by the Board on or about September 9, 2003. This complaint alleged that Respondent had not properly performed massage therapy on Patient A¹ (Complainant). Patient A, a forty-seven year old female, went to Respondent for a massage on or about August 11, 2003. Among other things, it was alleged that Respondent had not properly massage or draped Patient A. Additionally, it was alleged that Respondent had violated Patient A's boundaries.

A hearing on the merits was held on April 14, 2005. Present were the following Board members, which constituted a quorum: Dr. Brian Ashton, President of the Board, who presided at the hearing; Dr. Marc Gamerman; Dr. Margaret Renzetti; Dr. Duane Sadula; Dr. Kay O'Hara; and Mary Anne Frizzera-Hucek. Also present were Roberta Gill, Assistant Attorney General/Administrative Prosecutor; Grant D. Gerber, Board Counsel; Luiz R. Simmons, Respondent's Counsel, Robert Jacobs, Respondent; and James J. Vallone, Board Executive Director.

EXHIBITS

The following exhibits were introduced at the hearing:

STATE'S EXHIBITS

No. 1	Undated Complaint from Patient A
2	Computer Printout of Licensing Information
3	Subpoena dated 4/1/03
4	Treatment Record of Patient A
5	First Investigative Report

¹ The patients' names are confidential, but may be disclosed to the Respondent by contacting the Administrative Prosecutor.

6A	Subpoena dated 10/4/04
6B	10 Patient Records (Patients B – K)
6C	Second Investigative Report
7A	Letter of Procedure, dated 8/30/04
7B	Charges
7C	Summons
7D	Amended and Supplemental Charges, dated 12/04
8	Certified Mail Receipt

RESPONDENT'S EXHIBITS

1	Intake Information for Patient A
2	Certified Mail Receipt

SUMMARY OF PERTINENT WITNESS TESTIMONY

As a preliminary matter, Respondent objected to State's expert witness' testimony. Prior to the hearing, Respondent did not ever receive the State's expert's report. The Board did not allow the expert to testify because the State had not complied with the Board's procedure for qualifying an expert witness.

The Administrative Prosecutor objected to the Respondent's presentation of character witnesses. Respondent contended that these witnesses were relevant to his case. Respondent's character witnesses were allowed to testify.

The State's first witness was Patient A. Patient A testified that she had received a one massage from the Respondent. This massage occurred on or about August 11, 2003. Patient A was draped with two pillowcases during this massage. (T. 29 – 30 and State's Exhibit 1). These pillowcase drapes did not remain on Patient A during her entire massage. At some point during the massage, Patient A was totally exposed because these drapes were insufficient. (T. 38).

Patient A was unable to sufficiently articulate or explain the Respondent's alleged boundary violations during her massage. She could not point to the specific area of her body where the Respondent had allegedly touched her. (T. 34-38 and 57 - 62). This lack of specificity did not buttress Patient A's allegations of boundary violations.

Lisa Gagnon, testified that she had received a massage from the Respondent. Ms. Gagnon testified that she had received treatment on or about January 13, 2001. She testified that she had been draped with pillowcases during the course of her treatment. (T. 85 – 86). Ms. Gagnon was not entirely pleased with her massage, but did not file a complaint with MTAC. (T. 90).

The state's final witness was Paul Murphy, the Board's Investigator. Mr. Murphy testified that before he was employed by the Board, he was detective for the Baltimore City Police Department. Mr. Murphy testified that he was responsible for investigating the complaint that Patient A filed against the Respondent. The underlying complaint alleged that Respondent did not perform competent massage on Patient A and that Respondent had committed some boundary violations during this session.

As part of this investigation, Mr. Murphy interviewed the respondent. Mr. Jacobs admitted to the Board's investigator that he had draped Patient A with pillowcases during her massage and that she had become exposed during this session. (T. 102-103). Mr. Jacobs repeatedly and consistently denied that any boundary violations had occurred during his massage of Patient A.

Prior to this interview, Mr. Murphy sent Mr. Jacobs a subpoena. (State's Ex. 3 and State's Ex. 8). The subpoena at issue has the wrong date on it, but the certified mail receipt showed that Mr. Jacobs received the subpoena on October 1, 2003. *Id.* and (T. 116 – 119). Immediately before the start of the recorded interview, Mr. Murphy requested the documents he had subpoenaed from Mr. Jacobs. (T. 104 – 105). Respondent told Mr. Murphy that he did not want to give him all of his records and that he would rather not give him the records. (T. 105 and 125 – 126). Mr. Murphy subpoenaed the records in question, but did not receive the records at issue until charges and a second subpoena were issued. (T. 111).

The defense called Steven Silverman and Nancy Strong as character witnesses. These witnesses testified that Mr. Jacobs was honest and truthful in their dealings with them. Neither witness had any direct involvement with any of the events that led to the charges.

Robert Jacobs testified on his own behalf. Mr. Jacobs stated that he had not violated Patient A or Lisa Gagnon boundaries in any way. Additionally, he stated that both clients seemed quite satisfied with his treatment. (T. 173, 175). Mr. Jacobs admitted that he did not respond to the first subpoena. He also admitted that he did not give his records to Mr. Murphy, when asked for them before his recorded statement. (T. 177, 204). Respondent testified that he would just rather not give the Board his records.

Mr. Jacobs admitted that he had told both Patient A and Ms. Gagnon that it was customary to be completely nude during a massage. The two pillowcases that Mr. Jacobs used for draping patients were called the "bosom buddy" and "hip hugger." (T. 192). This form of draping was insufficient and caused Patient A to become exposed during her massage with Mr. Jacobs.

FINDINGS OF FACT

After considering the entire record in this case, including the testimony and exhibits entered into evidence at the hearing, and the arguments of counsel, the Board finds the following facts.

1. At all times relevant herein, the Respondent was certified to practice massage therapy in Maryland. The Respondent was first so certified on March 1, 2000. The Respondent's certification expired on October 31, 2004. The Respondent did not renew his certification.

2. At all times relevant herein, the Respondent practiced at his home in Annapolis, Maryland.

3. On September 9, 2003, the Board received a complaint from Patient A who reported, *inter alia*, that on August 11, 2003, she went to the Respondent's office for a massage, and that, while there, the Respondent directed her to completely disrobe and then draped her only with two pillow cases across the breast and hip areas. Patient A became exposed during this massage due to improper draping.

4. During the course of the investigation, on or about September 30, 2003, the Board subpoenaed 10 client records of other female patients who had been treated

recently in the Respondent's office. On April 9, 2004, the Investigator followed up this subpoena by requesting these records in person. The Respondent informed the Board's investigator that he would not release those treatment records, because he planned to retire soon and not renew his certificate.

5. After the above charges were issued to the Respondent on August 30, 2004, a subpoena was reissued for the 10 client records. In mid-October 2004, the Respondent complied with the subpoena for his records, sending to the Investigator the files for his entire patient population.

OPINION

An impetus for the enactment of Md. Code Ann., Health Occ. ("H.O.") § 3-5A-01 *et seq.* was to protect the citizens of Maryland from the kind of improper technique and practice conducted by the Respondent. The Board does not condone massage therapists providing pillow case sized drapes deemed "bosom buddies" and "hip huggers." The Board may use its "experience, technical competence, and specialized knowledge in the evaluation of evidence" in determining whether or not the standards of a profession have been breached. Md. Code Ann., State Gov't § 10-213(i).

Mr. Jacobs' draping was below the standard of care and in violation of § 3-5A-09 (8), (19) and (21). Additionally, these acts are in violation of the Board's regulations. Specifically, Mr. Jacobs was found to be in violation of COMAR 10.43.18.05(3)(C)(5) (at all times respect the client's dignity, autonomy, and privacy) and 10.43.18.05(5) (respect and maintain professional boundaries and respect the client's reasonable expectation of professional conduct). Based on the evidence and testimony presented

at the hearing, the Board found that the only boundary violations that occurred during Patient A's treatment were related to draping.

Mr. Jacobs admitted that he did not comply with Board's initial subpoena and subsequent request by its investigator. The Board finds that Mr. Jacobs did not fully cooperate with its investigation. Specifically, Respondent is found to be in violation of H.O. § 3-5A-09(19).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Opinion, the Board concludes, as a matter of law, that Mr. Jacobs violated H.O. § 3-5A-09(a) (8) Does an act that is inconsistent with generally accepted professional standards in the practice of massage therapy); (19) Fails to cooperate with a lawful investigation conducted by the Board; (20) Engages in conduct that violates the professional code of ethics; or (21) Knowingly does an act that has been determined by the Board to be a violation of the Board's regulations.

ORDER

Based on the foregoing Findings of Fact, Opinion and Conclusions of Law, it is, this 16th day of August, 2005, by the Maryland State Board of Chiropractic Examiners hereby

ORDERED that, pursuant to the authority vested in the Board of Chiropractic Examiners by Md. Code Ann., Health Occ. Article, § 3-5A-09, the Respondent's massage therapy certification is hereby **REPRIMANDED**; and be it further

ORDERED that the Respondent take a Board approved course on ethics;

ORDERED that the Respondent, reimburse the Board its hearing costs; and be it further;

ORDERED that this document is a public record, pursuant to Md. Code Ann., State Gov't Article, § 10-617(h).

8/16/15
Date


Marc Gamerman, D.C.
Board President

NOTICE OF RIGHT OF APPEAL

In accordance with Md. Code Ann., Health Occ. Article, § 3-316, you have a right to take a direct judicial appeal. A petition for appeal shall be filed within thirty days of your receipt of this Findings of Fact, Conclusion s of Law and Order and shall be made as provided for judicial review of a final decision in the Maryland Administrative Procedure Act, Md. Code Ann., State Gov't Article, §§ 10-201 *et seq.*, and Title 7 Chapter 200 of the Maryland Rules.