BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
BOARD OF CHIROPRACTIC EXAMINERS

IN THE MATTER OF	)	**FINAL ORDER**
	)	
	)	OAH Case No. 800556
CHRISTIAN K. SCHUSTER, D.C.	)	Agency Case No. 2006-1032 et al.,

HISTORY OF THE CASE

On April 2, 2008, the Board of Chiropractic Examiners (Board) issued a Notice of Proposed Disciplinary Action to Christian K. Schuster, D.C. (Licensee). On April 30, 2008, Licensee requested a hearing on the notice, filing an Answer that admitted the factual allegations made in the Notice but challenged the proposed sanctions. The matter was referred to the Office of Administrative Hearings (OAH) on June 3, 2008.

Motion for Summary Determination. On November 12, 2008, Lori Lindley of the Department of Justice filed a Motion for Partial Summary Determination on behalf of the Board. Licensee, through his attorney Jim Vick, did not object to granting the motion as to any admissions made in Licensee's Answer. On December 3, 2008, ALJ Alison Greene Webster granted the Board's motion and limited the scope of the hearing to the nature and extent of the sanctions to be imposed by the Board. The case was thereafter reassigned to ALJ Rick Barber for hearing.

Hearing. Hearing was held on December 18 and 19, 2008, and on February 2, 2009. Licensee was present and represented by Mr. Vick. The Board was represented by Ms. Lindley. Board investigator Michael Summers also attended the hearing. The evidentiary record closed on February 2, 2009, and the hearing record closed on March 16, 2009, after written closing arguments. The record was again opened briefly in April 2009, to allow the parties to comment on the legal interpretation of the civil penalty statute, ORS 684.100(9), and closed finally on May 1, 2009. Exceptions to that proposed order were due within a period of 10 days which expired on June 1, 2009. No exceptions were filed. An Amended Proposed Order was issued on June 12, 2009. Exceptions to that proposed order were due by agreement by July 6, 2009. Written exceptions were filed by Licensee and considered by the Board at their July 16, 2009 Board meeting.

During its case in chief, the Board called the following witnesses: Licensee; Summers; Patients 1, 2, 4, 5, 6, and 9;[1] paralegals Emily West, Laura Tapfer and Sharla

[1] Although the patients' names were used in hearing, the Board has chosen to keep the identities of Licensee's patients confidential outside of the hearing itself. The numbers used in this Proposed Order correspond to the same patient numbers used in the Notice of Proposed Action.

Harris; Licensee's former employee, Ametha Ross; Rodney Cross, DC; and SAIF claims adjuster Jennifer Williams.

Licensee called the following witnesses during his case in chief: Michael Conner, PsyD; Michael Freeman, DC; and Licensee. On rebuttal, the Board called Licensee's former girlfriend, Merle Ross, Express Personnel manager Stephanie Miller, and Jerome Gordon, PsyD, as witnesses.

ISSUE

Whether Licensee should be sanctioned for his admitted professional conduct violations and, if so, what are the appropriate sanctions?

EVIDENTIARY RULINGS

Exhibits A1 through A16, including Exhibit A3a, were identified and offered by the Board. Licensee objected to Exhibits A1, A2, A3, A6, A7, A8, and A12 arguing a lack of authentication, but later withdrew the objections. The Board withdrew pages 5, 6 and 28 of Exhibit A6 in response to Licensee's objections. Licensee's objections to Exhibit A12 were sustained due to lack of authentication. All of Licensee's other objections were overruled.

Licensee submitted Exhibits C1 through C5. Exhibit C5 was not admitted into evidence, but the other documents were admitted without objection. In summary, all of the offered exhibits, with the exception of A12, C5, and three pages of Exhibit A6, were admitted into evidence.

In addition to the exhibits, the documentary record includes several procedural documents, numbered by the Board as Documents P1 through P15. To that list, the ALJ has added the Ruling on Summary Determination (P16); Licensee's Hearing Brief (P17); the Board's Closing Argument (P18); Licensee's Closing Argument (P19); Licensee's Response Brief (P20); the Board's Reply Brief (P21); ALJ's (?) email of April 23, 2009 (P22); the Board's response (P23); and Licensee's response (P24).

FINDINGS OF FACT

1. Claimant is a chiropractic physician licensed by the Oregon Board of Chiropractic Examiners. He has been in practice since approximately 1982, primarily in Bend, Oregon. In the early years, he practiced with another chiropractor, Michael Lang, D.C., but began a solo practice in approximately 1984. (Test. of Licensee).

Patient 1

2. Patient 1 became Licensee's patient in 1998, initially receiving maintenance care, which is general health treatment unrelated to any trauma or condition. Patient 1 returned to Licensee's office on March 7, 2005 because of the first of two motor vehicle accidents (MVAs) that occurred in March 2005 and July 2005. Patient 1 had

been a friend of Tarie, Licensee's office manager, for 15 or more years. Patient 1 retained attorney Roy Dwyer to represent her against the MVA insurer, Unitrin. Sharla Harris is Dwyer's paralegal. (Ex. A6).

3. Shortly after the MVA, Harris requested medical records from Licensee on Patient 1's behalf, but Licensee did not provide them. On August 19, 2005, Unitrin Insurance contacted Dwyer's office and said it had been prejudiced by Patient 1's failure to provide medical records supporting her claim. (Ex. A6 at 27). On September 13, 2005, Harris wrote to Licensee's office to again request treatment records. (Ex. A6 at 3). As of December 14, 2006, Licensee had still not provided all of the medical records requested by Patient 1. (Id. at 11). Patient 1 eventually changed doctors so that she could obtain the treatment and records she needed. (Test. of Harris; Ex. A6).

Patient 2

4. Patient 2 was involved in an MVA on August 10, 2003, and sought treatment from Licensee. Both Patient 2 and the insurer, American Family Insurance, requested records from Licensee. Licensee did not provide records, and American Family denied the claim because it had no proof of an injury. (Ex. A4 at 59). Patient 2 was involved in two more MVAs in December 2005 and January 2006, and again sought treatment from Licensee. Neither Patient 2 nor the involved insurance companies ever received Patient 2's records from Licensee. (*Id.*). Patient 2 remains very angry and frustrated with Licensee, because an attorney told her that her claims in the MVAs and for a malpractice claim against Licensee were all barred by the statutes of limitations. (Test. of Patient 2).

5. When Board investigators reviewed Licensee's four files concerning Patient 2, the only documents in the files were intake forms and dermathermogram (DTG) printouts with Licensee's handwritten notations on the back. (*Id.*; Test. of Summers). DTG printouts and handwritten notes, without anything else, do not meet the professional standards of the chiropractic profession. (Admission of Licensee).

Patients 3 and 4

6. Patients 3 and 4, husband and wife, were involved in an MVA on August 30, 2004, and treated with Licensee. The insurer in the case began requesting Licensee's treatment records in its evaluation of the case. No copies were provided at that time. In January 2006, the insurance company and its attorney again requested documents. Again, no documents were provided. The patients went by Licensee's office to see if they could get the documents, but they too were turned away without them. (Test. of West).

7. In April 2006, the insurer's attorney issued a subpoena duces tecum to Licensee, demanding copies of his notes concerning Patients 3 and 4. Licensee did not comply with the subpoena, but began dictating chart notes in the files from his existing

records, which consisted of intake forms and DTG printouts with his handwritten comments. (Ex. A9).

8. On May 24, 2006, the attorney's office contacted Licensee's office staff by telephone and threatened to seek a contempt order against the doctor for failing to comply with the subpoena. The staff member responded that the attorney should obtain the contempt order because Licensee's office staff could not get him to respond to the need for records. (*Id.* at 5). Licensee provided some of the records on May 26, 2006, but delayed providing the other documents so long that the attorney issued a second subpoena duces tecum in November 2006, for the same documents. (*Id.* at 13). Licensee provided most of the records by November 27, 2006, and the last record on December 28, 2006. (*Id.* at 19-20).

9. Patients 3 and 4's efforts to settle their cases arising from the MVA were slowed by Licensee's delay in providing medical records, and also by his delay in providing the amount of his bill. (Test. of West; Test. of Tapfer).

Patients 5 and 6

10. Patients 5 and 6, husband and wife, were injured in an MVA on November 20, 2004, and sought treatment from Licensee. Licensee's records of treatment consisted of intake sheets and DTG printouts with his handwritten notes. The patients and the Personal Injury Protection (PIP) provider requested medical records. The patients retained Roy Dwyer to represent them in the personal injury cases arising from the MVA, and he also requested records. Patient 6's records were dictated from the DTG notes and provided to Dwyer in July 2005, and Patient 5's records were dictated and provided on June 22, 2006. (Ex. A5, A8).

11. Dwyer's paralegal, Harris, was very frustrated by Licensee's failure and delay in providing medical records for her clients. Harris suggested to several other clients, all of whom were having the same difficulties obtaining records from Licensee, that they file complaints with the Board. (Test. of Harris).

Patient 7

12. Patient 7 was treated by Licensee after a workers' compensation injury that occurred on March 29, 2006. Patient 7 filed his claim with SAIF Corporation. By law, the insurer has 90 days to determine what the condition is, whether it was caused by the work exposure or incident, and whether to accept or deny the claim. If an insurer fails to make an accept/deny decision within 90 days, it can defer that decision but may become liable for penalties and attorney fees as a result. Adjusters need to have the attending physician's medical records in order to make the compensability decision. As a result, doctors are supposed to provide their records within 14 days. (Test. of Williams).

13. SAIF sent a request for medical records to Licensee on April 7, 2006, citing the administrative rules and informing Licensee that he had 14 days to provide the

records. Licensee did not respond in that time period, and SAIF sent a second request on April 27, 2006. SAIF also made several phone calls to Licensee's office seeking the records. Licensee had not responded by May 9, 2006, so SAIF filed a Motion for Sanctions with the Worker' Compensation Division. (Ex. A10 at 1).

14. SAIF's Motion for Sanctions was early and therefore untimely. On May 19, 2006, SAIF filed another motion seeking sanctions and the Division sought a response from Licensee. (Id. at 4). The Division decided not to act on the request because Licensee provided records to SAIF on May 30, 2006. (Id. at 3).

Patient 8

15. Patient 8 was treated by Licensee after a workers' compensation injury occurring on June 20, 2007. SAIF requested medical records from Licensee on June 25, 2007, July 27, 2007, and August 14, 2007, but Licensee did not provide records. SAIF filed a Motion for Sanctions with the Division, and the Division requested a response from Licensee on October 11, 2007. Licensee was reprimanded by the Division on October 30, 2007, for failing to respond to SAIF and to the Division. (Ex. A13). SAIF was unable to make the accept/deny decision within 90 days because it did not have Licensee's records. (Test. of Williams).

Patient 9

16. Patient 9 was in Patient 1's vehicle when she had the first MVA in March 2005, and also became Licensee's patient. He treated with Licensee for 26 visits between April 6 and August 8, 2005. Patient 9's attorney, Dwyer, requested records in June 2005 but they were not provided until September 2005. (Ex. A7).

17. Licensee believes that Patient 9 was faking his injuries. (Test. of Licensee). None of Licensee's records for Patient 9 indicate his concern with the patient's truthfulness or the legitimacy of his symptoms. (Ex. A7).

Patient 10

18. Patient 10 began treating with Licensee in 1999, then again in 2004 and 2006. Licensee did not dictate treatment notes for Patient 10 until December 2007. The patient made many requests for records, and her attorney made a formal request on October 26, 2007. Records were not provided until after December 26, 2007. (Admission of Licensee).[2]

The Investigation

[2] Patient 10's records (Ex. A12) were excluded at Licensee's objection during the hearing, but Licensee had already admitted the accuracy of the facts in Paragraph 9 of the Notice of Proposed Disciplinary Action.

19. Michael Summers is the Board's investigator and performed the investigation in this case. After receiving and reviewing the complaints, he visited Licensee's office two times in July 2006 and one time in December 2006, to review files and to interview Licensee and others. He discovered that Licensee's records in the files consisted of intake sheets and DTG printouts with handwritten comments by Licensee. (Test. of Summers).

20. Summers was aware of Licensee's prior discipline, having observed the previous administrative hearing held by ALJ Betterton in April 2000. Judge Betterton's Proposed Order recommended that Licensee should not be disciplined in that case, (Ex. A3a), but the Board disagreed and settled the case with Licensee in lieu of issuing a Final Order. Pursuant to that settlement, the Board asked Rodney Cross, DC to mentor Licensee with monthly meetings for a year. (Ex. A2).

21. The Board asked Cross to work with Licensee concerning the adequacy of his chart notes, which consisted then of the DTG printouts and handwritten notes. (Ex. A1). When Cross began working with Licensee, Licensee was confused about how to do a SOAP (Subjective, Objective, Assessment, Plan) chart note. As of March 19, 2001, Cross felt Licensee knew how to do such chart notes and that his charting had "significantly improved." (Ex. A3).

22. DTG printouts with handwritten notes are not sufficient records in a chiropractor's practice. Chart notes, preferably in SOAP format or something similar, should be drafted or dictated on the same day as the treatment is rendered, if possible, but dictation on the same day is not a specific requirement by the Board. The expectation is that the notes be clear enough that another physician could pick up treatment of the patient, based upon those notes, if the doctor were to die or become incapacitated. This expectation is known as the "dead doctor rule." (Test. of Cross; Test. of Summers).

23. Merle Ross is a dental office manager who dated Licensee from 2004 until December 2007. Ross was attracted to Licensee's energy and zest for life. For a period of time, Ross came into the office as a consultant for a few hours per week to help "pay off" an expensive ski outfit Licensee purchased for her. On one occasion, she met with Licensee's office manager, Tarie. Ross reviewed the billing practices of the office and was appalled at the office's failure to bill for treatment rendered. Ross determined that the problem was caused by Licensee's failure to provide chart notes and billing information to the office staff, rather than any problem with the office staff. (Test. of M. Ross).

24. On one occasion, when Licensee's son was in trouble with the law, Licensee's attorney told Licensee to tell the judge that Ross was his domestic partner, to convince the judge that his son had a stable family situation to return to. Licensee followed that advice and told the judge that Ross was his domestic partner. However, Ross and Licensee were only dating occasionally and Ross was not living in the home. (Test. of M. Ross).

25. At Merle Ross's suggestion, Licensee hired Ametha Ross (no relation) to work in the office with Tarie. Ametha Ross worked for Licensee from November 14, 2005 until June 14, 2006. Ametha Ross resigned because Licensee continually blamed staff members for all of the problems in the office, and because her paycheck was not honored on two occasions. (Test. of A. Ross; Ex. A11).

26. Licensee went through a protracted custody battle with his ex-wife involving his son between 2000 and approximately 2002. His mother helped him take care of his son until she died in 2003. Licensee grieved over her loss. (Test. of Licensee).

27. Licensee's son got in trouble with the law in 2006 and 2007. As a result, he was directed to seek counseling and began treating with Michael Conner, PsyD in the fall of 2007. Licensee would sometimes accompany his son to the counseling sessions and Conner observed him there. Conner recommended counseling for Licensee, but Licensee refused at that point to seek counseling. (Test. of Licensee).

28. In April 2008, Licensee decided to seek treatment with Dr. Conner. Conner believed Licensee was stressed and depressed based on his observations of Licensee in the fall of 2007. Conner administered MMPI testing and concluded Licensee was depressed and socially alienated. He diagnosed anxiety secondary to major depression with some elements of post-traumatic stress disorder (PTSD). (Test. of Conner).

29. Conner attributed Licensee's depression to his experiences in post-World War II Germany, the custody battle for his son, his relationship with Merle Ross, his mother's death, and his son's criminal behavior. Conner did some investigation of Licensee's office setup, but has not tried to corroborate Licensee's complaints about his past because he sees himself as a "treating expert" rather than an "independent expert." As a treating expert, he believes it is his job to accept what his patient says and work within that framework, rather than to try to determine the accuracy of the given history. (Test. of Conner).

30. Conner has not prescribed or recommended any medications for Licensee's depression. Conner's treatment of Licensee consists of counseling him and holding him accountable to make changes in the office. Conner has counseled Licensee that Tarie is not a good manager and must be replaced with a different office manager. Conner believed at the time of hearing that Licensee was making that change and had hired someone to be office manager through Express Personnel. (Test. of Conner).

31. As of the date of hearing in February 2009, Licensee had not talked to anyone at Express Personnel since November 2008. At that time, Licensee was looking for a staff person, not an office manager. (Test. of Miller).

32. Conner does not believe Licensee is disabled from patient care, which he does well, but that he avoids the bookkeeping and recordkeeping because it is not as

exciting and as rewarding as being with people. He believes Licensee is impaired in his ability to pay attention to unpleasant details. (Test. of Conner).

33. Jerome Gordon, PsyD, has not examined Licensee but observed Conner's testimony and reviewed his records. Gordon does not believe that Conner's interpretation of the MMPI results is supported by the literature because he did not address an important validity scale (the L scale) and failed to address other aspects of the testing that called into question Conner's results. Gordon questioned Conner's conclusions about the length of Licensee's symptoms since there was no treatment before April 2008. Gordon also doubted the diagnosis of PTSD because of the lack of a specific intrusive trauma. Gordon suggested several other psychological tests that should have been performed before a diagnosis was made. Gordon could not make a diagnosis himself, having never assessed or treated Licensee, but questioned the thoroughness of Conner's assessment and the accuracy of his conclusions. (Test. of Gordon).

CONCLUSION OF LAW

A suspension with additional sanctions and civil penalties is appropriate for Licensee's violations in this case.

OPINION

As a result of the admissions in Licensee's Amended Answer, as well as the result of the Motion for Summary Determination, the Board has established multiple instances of unprofessional conduct and gross negligence by Licensee, during his involvement with ten patients and their representatives:

- Patient 1's attorney began requesting records from Licensee in April 2006 but Licensee did not provide them until December 2006;
- Patient 2 had several motor vehicle accidents (MVAs) and was Licensee's patient for ten years. She requested records for MVAs in 2003, 2005 and 2006, and Licensee never provided any records to her. Her four files in Licensee's office consisted of intake forms and dermathermographic (DTG) forms with notations on the back;
- Patients 3 and 4, husband and wife, were involved in an MVA in August 2004, and were treated by Licensee shortly thereafter. Treatment records were not dictated or provided until May 2006;
- Patients 5 and 6, husband and wife, treated with Licensee after a November 2004 MVA. Chart notes were not dictated or received until June 2006;
- Patient 7, a workers' compensation claimant, sought treatment in March 2006 but records were not provided until May 31, 2006;
- Patient 8, another workers' compensation claimant, was injured in June 2007 and no records were provided by Licensee until November 2007, earning him a reprimand from the Workers' Compensation Division Sanctions Unit.
- Patient 9 was injured in an MVA in March 2005 and records were not prepared or provided until September 2006;

- Patient 10 claimed an injury in 2004, and Licensee's records from that time were requested in October 2007. Licensee prepared and provided the chart notes on December 26, 2007

Licensee admitted that these facts were accurate, and further admitted that his actions violated the statutes and administrative rules cited by the Board. Therefore, the Ruling on Motion for Summary Determination concluded that the only issue remaining was that of sanctions.

Affirmative Defenses. Although Licensee agrees that sanctions are the only remaining issue, he contends that sanctions are not appropriate because of two interrelated affirmative defenses: his ongoing depression and the Board's failure to take into account Title II of the Americans with Disabilities Act (ADA). The Board will address them in reverse order, primarily because of a procedural argument raised by the Board.

Applicability of the ADA. Licensee contends that he is a "qualified person with a disability" and that the Board must accommodate his disability in this case by not sanctioning him in the fashion it has proposed. Under Licensee's theory, he is an impaired physician and any attempt to sanction him for the violations of the professional conduct standards would violate Title II of the ADA, which prohibits discrimination on the basis of disability.

There are several reasons why the Board concludes that the provisions of the ADA do not affect the sanctions to be applied in this case. First, the waiver argument raised by the Board is convincing. Second, Licensee has failed to establish that he is a qualified person with a disability. Finally, even if the ADA applied and had been properly raised, there is no basis on this record to explain how it would require the Board to ignore admitted unprofessional conduct and gross negligence on the part of Licensee.

The ADA defense was waived. The Board argues, and Licensee admits, that the ADA issue was not raised in Licensee's Answer to the Notice of Proposed Disciplinary Action. It was not raised in the Amended Answer, either. OAR 811-001-0010 states in part:

> (1) Requiring an answer to charges as part of notices to parties in contested cases: In addition to the requirements of the Attorney General's Model Rules of Procedure adopted by the Board, the notice to parties in contested cases may include a statement that an answer to the assertions or charges will be requested and, if so, the consequences of failure to answer. A statement of the consequences of failure to answer may be satisfied by enclosing a copy of section (2) of this rule with the notice.
>
> (2) Hearing requests and answers: Consequences of failure to answer:

(a) A hearing request, and answer when requested, shall be made in writing to the Board by the party or his attorney and an answer shall include the following:

(A) An admission or denial of each factual matter alleged in the notice;

(B) *A short and plain statement of each relevant affirmative defense the party may have.*

(b) Except for good cause:

(A) Factual matters alleged in the notice and not denied in the answer shall be presumed admitted;

(B) *Failure to raise a particular defense in the answer will be considered a waiver of such defense;*

(C) New matters alleged in the answer (affirmative defenses) shall be presumed to be denied by the agency; and

(D) Evidence shall not be taken on any issue not raised in the notice and answer.

(Emphasis added).

The ADA defense was not raised by Licensee until Licensee's trial memorandum was submitted on the first day of hearing. Licensee admits that this was the first mention of the defense in the case, but argues that the ADA, a federal statute, nevertheless applies.

The Board's rule is quite clear in its requirement that affirmative defenses be raised in the Answer. On August 28, 2008, Licensee filed an Amended Request for Hearing that incorporated an amended Answer. This amended Answer incorporated the medical allegations but did not make any claim under the ADA or even mention the federal statute. (Doc. P6).

In response to the Board's waiver argument, Licensee contends that the Board had ample notice because the hearing was continued for approximately six weeks for additional evidence.[3] However, giving notice on the first day of hearing is not sufficient notice, even if the case is continued.

Furthermore, the ADA defense in this case is entirely personal to Licensee, and was not reliant upon any need for discovery or other information from the Board. Therefore, the defense could and should have been raised no later than the Amended Request for Hearing. Licensee has waived the ADA defense in this case.

---

[3] The basis of the continuance was to allow time for Licensee and rebuttal witnesses to testify, because the two days scheduled were insufficient.

Failure of Proof. Even if Licensee had not waived the defense, the Board would conclude that he has failed to establish the relief that he seeks under the ADA.

Licensee claims that Title II of the ADA applies in this case because he is a "qualified person with a disability"[4] and is substantially impaired in a major life activity—his work. However, even if Title II applied in this case, the Board would conclude that Licensee's status as a "qualified person with a disability", even if proved, was not pertinent to the time periods in this case.

The psychological opinion rendered by Dr. Conner after Licensee's first visit in April 2008, even if it is diagnostically accurate, is applicable to 2008. It does not sufficiently correspond to the time period in which the actions occurred and the complaints were made. The complaints filed against Licensee were filed in 2006 and 2007 for the most part. The actions leading to the discipline took place in those years and earlier. Conner's assessment of Licensee occurred well after the events in question.

To be sure, Conner believes that Licensee was depressed in those earlier years. However, there are no records of treatment or evidence of psychological complaints in the years before 2008. Conner believes that Licensee had been depressed long before he first met him in late 2007, basing his opinion on the accuracy of Licensee's recollections from that time. Conner observed Licensee in late 2007, while treating Licensee's son, but those observations also miss most of the period in question. Conner is entirely reliant upon Licensee's history to him. As will be seen, that history is suspect.

There are three reasons why that reliance was insufficient to prove Licensee's case. First, by Conner's own admission in testimony, he was more concerned with treating Licensee than with verifying the accuracy of his history. He did not seek corroboration of that history to determine whether Licensee was actually depressed during the years before 2008. His opinion is lacking in evidentiary foundation.

Second, other evidence in the record disputes Licensee's claim to have been depressed during those years. Merle Ross, who dated Licensee from 2004 until December 2007, was attracted to Licensee's zest for life. This "zest for life" that Ross observed is the opposite of what one would expect from a depressed person. Ametha Ross, Licensee's employee, never saw signs of depression. Summers, the Board's investigator, did not notice any signs of depression when he visited the office on several occasions in 2006.

---

[4] **§ 35.104 Definitions** states in part:
Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Third, Conner's reliance upon the accuracy of Licensee's history is suspect. Licensee has not shown himself to be forthright when addressing his legal issues. When he was having problems keeping his son out of jail, he told the judge that Merle Ross was his domestic partner in an attempt to allow the son to come home to a stable happy family. At the time, he and Ross were only occasionally dating, in a platonic relationship. That he would attempt to mislead the judge in a legal matter concerning his son leads to the question whether he would mislead Conner in order to avoid sanctions in this matter.

Licensee has not been truthful with Conner. He told Conner that he was hiring another office manager through Express Personnel, and Conner testified that this was an example of how Licensee had changed and was accepting direction from him. However, the manager from Express Personnel testified, in February 2009, that there had been no contact by Licensee since November 2008—and at that time Licensee was seeking a front office worker, not an office manager.

This latter issue is particularly important because it shows that Licensee was not being honest with Conner about resolving the problems in his office. For all of these reasons, the Board concludes that Conner's trust in Licensee's uncorroborated history about his previous psychological problems was misplaced.

Thus, whether Conner's diagnosis in 2008 is correct, Licensee has failed to establish any causal nexus between his diagnosis in 2008 and his unprofessional conduct and gross negligence in the previous years. Therefore, even if Licensee were somehow found to be a "qualified individual with a disability," the Board concludes that he had failed to show that a disability in 2008 had any impact on his work performance in the previous years. For these reasons, the Board finds the ADA defense to be without merit.

Applicability to Sanctions. As a final reason for not applying the ADA in this case, it is important to note that Licensee seeks to establish the applicability of the ADA to avoid sanctions for unprofessional conduct, not to provide equal access under the ADA. Moreover, his attack is against sanctions, and not the underlying unprofessional conduct. While there might be arguments, in a hypothetical case, for finding that an impaired professional had not actually violated the rules due to the impairment, such is not the issue here. In this case, the professional has admitted to unprofessional conduct and gross negligence but seeks to avoid sanctions because of the ADA.

Licensee misreads the applicability of Title II in that situation. Title II of the ADA does not provide a basis for a practitioner to avoid the consequences of his actions after violating his professional responsibilities. The purpose of Title II is found in the language of the Act itself:

> **§ 35.101 Purpose.**
> The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

§ 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

The broad focus of Title II appears to be to allow qualified persons with a disability to have equal access to the "services, programs, and activities provided by * * * public entities."

If the ADA applies at all to the imposition of sanctions under Title II, it would at most require the Board to tailor any sanctions imposed, to accommodate a disability. For instance, if Licensee had a reading disability (and if it qualified under Title II), the Board would need to appropriately tailor any continuing education to accommodate for that disability. Title II does not, based upon any information provided to the Board, prevent the imposition of sanctions in this case.

The Depression Defense. Although the ADA defense was waived by Licensee, he did raise the issue of his depression as the basis for his rule violations, and for the reason that sanctions should not be required in this case.

Licensee's argument here is essentially the same as under the ADA—that he has been suffering from depression (and possibly PTSD) for years, and it prevented him from doing the difficult paperwork part of his chiropractic practice. Under Licensee's theory, the appropriate response to his transgressions of the Board's rules is to treat him as an impaired physician and require him to obtain the treatment he is already receiving from Dr. Conner, in lieu of any other sanctions.

However, as the Board would have ruled on the ADA issue if it had been properly before them, Licensee has failed to establish that his rule violations were caused by his psychological condition, which was first treated and diagnosed in 2008. As described above, there is no reliable evidence that shows Licensee was depressed contemporaneously with the rule violations in this case, and the lay evidence suggests he was not depressed. No causal nexus has been shown.

What Licensee has shown is that he liked treating patients but he did not like preparing and keeping his records of treatment. Because he did not keep good initial records of treatment, he especially did not like having to recreate records based upon requests from lawyers and insurers. While Licensee, and apparently Dr. Conner consider this a sign of depression, it is equally plausible that it is a sign of poor choices and poor organization.

Licensee's situation is less like a psychological impairment and more like the high school student who gets an A in English because he likes English, and an F in math because he dislikes math. There is no showing that Licensee is *impaired* from creating acceptable patient records—only a showing that he did not like to do so. Licensee has failed to establish that his rule violations were caused by depression or any other condition.

The Board's Intended Sanctions

The Board's authority to discipline its licensees is found in ORS 684.100, which states in part:

> (1) *The State Board of Chiropractic Examiners* may refuse to grant a license to any applicant or *may discipline a person upon any of the following grounds:*
>
> * * *
>
> (g) *Unprofessional or dishonorable conduct, including but not limited to:*
>
> (A) Any conduct or practice contrary to recognized standard of ethics of the chiropractic profession or any conduct or practice that does or might constitute a danger to the health or safety of a patient or the public or any conduct, practice or condition that does or might impair a physician's ability safely and skillfully to practice chiropractic.
>
> * * *
>
> (q) Violation of any provision of this chapter or any rule adopted thereunder.
>
> (r) Gross incompetency or gross negligence.
>
> * * *
>
> (9) *In disciplining a person as authorized by subsection (1) of this section, the board may use any or all of the following methods*:
>
> (a) Suspend judgment.
>
> (b) Place the person on probation.
>
> (c) *Suspend the license* of the person to practice chiropractic in this state.
>
> (d) Revoke the license of the person to practice chiropractic in this state.

(e) *Place limitations on the license* of the person to practice chiropractic in this state.

(f) *Impose a civil penalty not to exceed $10,000.*

(g) *Take other disciplinary action as the board in its discretion finds proper,* including assessment of the costs of the disciplinary proceedings.

(10)(a) Any information that the board obtains pursuant to ORS 684.100, 684.112 and 684.155 (9) is confidential as provided under ORS 676.175.

(Emphasis added).

At the hearing, the Board proposed the following discipline in the case:

- A suspension of three years;
- Civil penalties in the combined amount of $42,000;
- A continuing education (CE) requirement of 20 hours of record-keeping classes; and
- Payment of the costs of the investigation and the hearing

(Doc. P1). In the Proposed Order the ALJ addressed the specific sanctions proposed by the Board and proposed a modified set of sanctions. Upon review of the Proposed Order and the sanctions issued, the Board agrees with and considers the Proposed Order sanctions to be appropriate based upon the law and facts of this case.

Other Factors the AJJ Considered

It will be apparent in the discussion below that both the ALJ and the Board agree with the Board's imposition of a suspension and civil penalties, but the ALJ disagreed with the amounts in each case. There are some ameliorative aspects to Licensee's evidence that cause the ALJ to propose a different set of sanctions than those provided by the Board.

First, Licensee's skills as a chiropractor are appreciated by his patients. Even those who were most upset with his failure to provide written records acknowledged that his treatments were helpful and skillful. There are no allegations of boundary issues or inappropriate treatments being offered. This factor suggests that, if Licensee can develop the business and record-keeping side of his practice, he will be an asset to his community and to the chiropractic profession. The Board has not sought revocation of his license, which the ALJ infers to mean that it sees some of Licensee's good qualities even as it seeks to remedy the bad qualities.

Second, although the ALJ has found insufficient evidence to connect his rule violations with the conditions Dr. Conner is treating, Licensee is wisely continuing to receive treatment to overcome what he and Dr. Conner see as obstacles in his life. While

it remains to be seen how effective Dr. Conner's treatment will be, and how committed Licensee is to the process, he has shown a willingness to explore how his personal difficulties may be affecting his practice.

Finally, it is important in this case that Licensee has not, from the beginning, contested the violations that the Board raised against him. He has willingly admitted the truth of the Board's factual allegations and the correctness of the legal conclusions to be drawn from those facts.

The Board has reviewed these points and has additional points they considered as follows:

First, the Board felt that Licensee's conduct did cause harm to these ten patients. Several of them testified that they were harmed by his failure to provide records in a timely manner, some stating that they had suffered due to the number of accidents they had occur. These patients suffered because of his inaction and several were forced to find a new treating doctor in order to process their case. The damage to the patients was not only financial to their potential damage claims, but also to recovery of PIP benefits payments. In addition, Licensee not only affected patients, but insurance companies, their adjusters, the attorneys trying to work up the cases and the entire litigation process.

Secondly, this Licensee has had discipline previously, for similar violations. As the evidence shows, in 1999-2000 Licensee was disciplined for failure to keep adequate chart notes and was required to have a plan of supervision for a one year period. During the hearing, Licensee attempted to blame the Board for not being hard enough on him the first time he was disciplined. The Board agrees that they should be more aggressive in their discipline due to Licensee returning to his old habits as evidenced by this case.

Finally, Licensee's lack of credibility is an issue the Board considered. ALJ Barber commented that Licensee was not forthright when addressing his legal issues (see page 11) and was not honest with Dr. Conner about resolving problems in the office (see page 12). There are numerous instances in this record of Licensee not being truthful. He was not truthful about receiving prior counseling. He was not truthful about the physical activities he had ceased. He was not truthful about Dr. Cross choosing the records to review in the prior case. The Board finds that Licensee has not been truthful in this administrative tribunal when answering questions, and he has not been forthcoming on many levels beyond those pointed out by the ALJ.

Sanctions

Suspension. The Board wishes to suspend Licensee's license for a period of three years, and it has the power to do so. ORS 684.100 (9)(c). However, because Licensee is 59 years old, and because his is a solo practice in a smaller town, the ALJ felt that Licensee correctly points out that the imposition of a three year suspension would have the practical effect of revoking his chiropractic license. Certainly, a three year

suspension would require Licensee's patients to find a new doctor, and would make it difficult, if not impossible, to rebuild a practice at age 62.

The Board understandably wants to make sure that Licensee continues to keep good patient records. For this reason, the ALJ proposed that the Board levy a three-year suspension but hold all but 90 days of the suspension in abeyance pending successful completion of a three year probationary period. The Board agrees to this sanction with some additional findings:

Licensee is suspended for the three-year term and will serve a 90 day suspension immediately upon issuance of a final order. For the remainder of the three year suspension stay, Licensee is on probation. During probation, Licensee is subject to immediate suspension during that probation period.

During probation, Licensee shall keep good records and not fall behind in providing charts to parties that request them. If Licensee fails to keep good records, or were again to fall seriously behind in providing chart notes and other records, then the rest of the three year suspension would be immediately imposed. The Board interprets keeping good records to mean releasing records within a reasonable time not to exceed 30 days when requested; keeping current, accurate records (records that are understood by the majority of the Peer Review Committee) and records shall have complete soap chart notes on all patients. Licensee will also be required to be mentored as part of his probation as well as noted below. Failure of Licensee to participate with and fulfill the mentoring requirements will be cause for suspension during the probation period.

At any time that the Licensee ceases active practice, his license lapses or he changes to inactive status, this will not count towards completing the probationary or suspension periods.

Continuing Education and Mentoring. The Board deems that the record-keeping issue involved in this case is highly important, even if Licensee is considered a good practitioner by his patients. If Licensee is not keeping good records, and if he does not timely provide those to his patients, to insurers, and to other professionals, he is not doing his job. Because of this importance, the Board recommends a plan of supervision for two years. The plan is as follows:

a) Licensee will agree to a Plan of Supervision with a board appointed chiropractic physician (Mentor).

b) Licensee must participate in and successfully complete a mentoring plan as part of the Plan of Supervision with a board approved Mentor for a period of at least two years. The Mentor will be a licensed Oregon chiropractic physician chosen by the OBCE who will sign a personal services contract with the OBCE for the provision of this service. The mentoring plan will have a focus on development of acceptable examination, clinical justification, informed consent, charting and risk management practices to ensure compliance with statutes and rules and addressing all issues identified in this order. The Mentor will be responsible to review charts and report any findings to the Board that are appropriate. At any time that the Licensee ceases active practice, his license lapses or he changes to inactive status, this will not count towards completing of the mentoring period. The Mentor will perform file reviews of records and billings of Licensee's case work and report to the board on his progress at meeting minimum

standards of chiropractic health care. Licensee must allow the Mentoring Doctor to enter Licensee's business premises to examine, and review Licensee's patient or other records to determine compliance with the terms of this order, for the duration of this Mentoring plan. If the Mentor requests and with the patient's agreement, Licensee will allow the Mentor to observe a patient encounter. The Mentor will make periodic reports to the Board regarding Licensee's progress in meeting minimum standards of chiropractic health care. As part of this report, the Mentor may pull up to three patient files reviewed with identifiers redacted for the Board's review. The financial compensation for the mentoring doctor will be at Licensee's expense which will be due and payable to the Board. The Mentor will provide the Board with periodic billings for services and in turn the Board will bill the Licensee. The hourly rate will be determined by the Mentoring Doctor in agreement with the Board plus mileage at the state rate. Successful completion of the mentoring plan also requires that this financial obligation be met; however the Board will be reasonable in setting up a payment plan if Licensee makes a request. Failure of Licensee to fully cooperate with the Mentor and the mentoring plan will be grounds for invoking the suspension and/or further disciplinary action.

c) At any time the Mentor may retrieve patient files reviewed with identifiers redacted for the Board's review. Licensee is required to allow the Board or its representative to periodically review Licensee's patient records and chart notes. This includes review and photocopy of licensee's patient records to ensure licensee complies with the requirements of ORS 684 and OAR 811.

The Board has recommended that Licensee complete 20 units of continuing education focused on record-keeping, in addition to the required amounts for licensure. This will be completed within six months of the final date of this order with documentation provided to the Board.

Civil Penalties. Civil penalties are set according to either statute or rule. In cases involving this Board, they are set by reference to ORS 684.100, previously quoted:

> (9) In disciplining a person as authorized by subsection (1) of this section, the board may use any or all of the following methods:
>
> * * *
>
> (f) Impose a civil penalty *not to exceed $10,000.*
>
> (g) Take other disciplinary action as the board in its discretion finds proper, including assessment of the costs of the disciplinary proceedings.

(Emphasis added). The Board seeks a group of civil penalties adding up to $42,000 (including eight $5,000 penalties and two $1,000 penalties).

The question that arises under the emphasized portion of the statute is whether the $10,000 amount in the statute is per violation, or per case. There are no administrative rules interpreting that part of the statute, so there is no clarification from the Board as to how it arrives at ten separate civil penalties adding up to $42,000.

Because the Board's request for an aggregate penalty of $42,000 seemed to exceed the statutory amount quoted above, the ALJ reopened the record to give both attorneys a chance to address the interpretation of the statute. Licensee relies on the language "in disciplining" to establish that $10,000 is the limit, and argues that the language of the statute was crafted to prevent the Board from trying to collect civil penalties as they are doing in this case.

The Board concedes that the statute does not have a "per occurrence" phrase, unlike the governing statutes of other bodies, but reasonably argues that it could have filed ten separate contested case hearings instead of consolidating these into one. While the ALJ would be more comfortable with that argument if the Board had enacted administrative rules clarifying that the amount was per occurrence, the Board's interpretation is the most reasonable reading of the statute. The statute allows a civil penalty of up to $10,000 for a finding of unprofessional conduct. If a contested case includes more than one such case—for reasons of judicial economy, if nothing else—then multiple civil penalties would be appropriate. Therefore, the ALJ concluded in this case that the most reasonable reading of the statute is to allow a civil penalty not to exceed $10,000 in each case. Because this contested case hearing involves ten cases, the civil penalties may exceed the statutory amount in the aggregate. The Board does not agree with that conclusion and interprets that the $10,000 limit is a per violation limit and not limited on a per case basis. The Board looks at the entire statute in helping them interpret it. In the beginning of ORS 684.100, it refers to disciplining a person as authorized by section 1. In subsection 1, there are over 20 different forms of conduct enumerated that a licensee can perform that may result in discipline. By listing in the statute that it relates to subsection 1, and all types of conduct listed, the Board interprets that each of these possible violations would allow imposition of a $10,000 penalty.

Even though the civil penalty that the ALJ proposed was less than $42,000 sought by the Board, the Board is in agreement with issuing that amount. The Board's civil penalty is based upon the following language in the Notice:

> In addition, the Board proposes to assess a civil penalty in the sum of $42,000. For the more egregious cases in patients 1, 2, 3, 4, 5, 6, 7, and 8, the sum of $5,000 for each patient, and the less egregious cases patients 9 and 10, the sum of $1,000 each.

(P1 at 5).

The ALJ reasoned while the Board's assessment of the civil penalties is rational and supportable under the statute, that he proposed a lesser amount because, again, the apparent goal of discipline short of outright revocation is to send a message to Licensee,

to get his attention and hopefully change the course of a doctor who is good at treating patients but poor at record-keeping. The ALJ agreed with the Board that civil penalties are warranted and would have the effect of making the doctor realize that he must change his record-keeping practices. The ALJ and Board conclude that the appropriate aggregate civil penalty for the ten combined cases is $20,000, or $2,000 per violation.

Costs of Presenting the Case. As noted in the statute quoted above, the Board may assess costs for the disciplinary proceeding. The Board seeks payment of costs for the investigation and for the hearing. Licensee argues that most of the hearing was unnecessary because he admitted to the violations, but the issue is not quite that straightforward.

Licensee's affirmative defenses, presented for the first time at the beginning of the hearing, required the Board to present some of the evidence of the violations in response. The third day of the hearing, in particular, involved medical evidence by the Board that only became necessary because of testimony presented by Dr. Conner earlier, even though he was not noticed to the Board or to the hearings officer as a witness prior to the hearing?

Therefore, although the Board could have presented the sanctions case without quite as much evidence of the actual violations, it does have the right to present its case as it sees fit. Licensee must reimburse the Board for the costs of investigation and hearing.

The Board's request is appropriate under ORS 683.140(2)(e) **and** ***George Adams v. The Board of Medical Examiners, 170 Or App 1, 11 P. 3d 676, September 27, 2000.***

ORDER

The Board of Chiropractic Examiners issues the following order:

That the Notice of Proposed Disciplinary Action be AFFIRMED AS MODIFIED. All of the violations alleged by the Board have been proven, and the appropriate sanctions for Licensee's actions are as follows:

1. That Licensee be suspended for a period of three years. Licensee shall serve a continuous 90 day suspension effective August 1, 2009, with the balance being held in abeyance pending a three year probationary period. The probationary period includes maintaining good patient records and participating and completing the mentoring program. If Licensee fails to abide by the terms of the probation set by the Board, that the remaining balance of the suspension be imposed immediately;

2. That Licensee pays an aggregate of civil penalties of $20,000 on the ten acts of unprofessional conduct;

3. That Licensee is required to participate in a two year mentoring program and continuing education program as set forth in the body of this decision; and

4. That Licensee is required to pay the costs of the investigation and hearing as follows:

Attorney General Costs: $36,028.00
OAH Costs: $8,293.33
Total Costs: $44,321.33

Original signature on file at OBCE.

Michael Vissers D.C., President
Oregon Board of Chiropractic Examiners

DATE: July 16, 2009

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 et seq.

APPENDIX A
LIST OF EXHIBITS CITED

Ex. A1	Letter from Dr. Cross, 9/11/00
Ex. A2	Stipulated Order, Plan of Supervision, 9/11/00
Ex. A3	Letter from Dr. Cross, 3/19/01
Ex. A3a	Proposed Order, ALJ Betterton, 4/5/00
Ex. A4	Patient 2's records, 2002-2006
Ex. A5	Patient 5's records, 2005
Ex. A6	Harris correspondence re: Patient 1, 2005-2007
Ex. A7	Harris correspondence re: Patient 9, 2005/2008
Ex. A8	Harris correspondence re: Patient 5, 2006
Ex. A9	Hoffman Hart correspondents re: Patients 3 & 4, 2006
Ex. A10	SAIF letter re: Patient 7, 4/5/06
Ex. A11	Resignation letter, Ametha Ross, 6/13/06
Ex. A13	Correspondence re: Patient 8, 2007-2008

CERTIFICATE OF MAILING

On July 16, 2009, I, Dave McTeague, Executive Director, mailed the foregoing Final Order in the matter of Christian Schuster DC, OAH Case No. 800556, Agency Case No. 2006-1032 et al.

By: First Class Mail

James Vick
Attorney at Law
201 Ferry St SE Ste 400
Salem OR 97301

Christian Schuster, DC
We Care Chiropractic Center
932 NE 9th Street
Bend, Oregon 97701

Lori Lindley
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem OR 97301-4096

Original signature on file at OBCE

Dave McTeague, Executive Director
Oregon Board of Chiropractic Examiners