BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BOARD OF CHIROPRACTIC EXAMINERS

IN THE MATTER OF THE LICENSE OF	)	**FINAL ORDER**
	)	**OF REVOCATION**
	)	
TERRY WOMACK, D.C.	)	OAH Case No. 126605
	)	OBCE Case # 2004-1033, 2005-1051,
	)	2005-1052, 2005-1053, 2005-1055,
Licensee.	)	2005-1056, 2005-2059, 2006-1001,
	)	2006-1011, 2006-1017, 2006-1022

On July 19, 2006, ALJ Barber issued the Proposed Order in this matter. On July 28, 2006, Licensee filed Exceptions to that Proposed Order. After considering those exceptions the Board hereby adopts and incorporates by reference the Proposed Order issued by ALJ Barber dated July 19, 2006 in it's entirety (attached herein beginning at page 4) with the following additions: (Note, all additions are in bold type)

1. Finding of Fact number 23: Patient 8 felt that the touching by Licensee on the first visit had been sexual, so she dressed differently when she had to return to him in November 2005. On the second visit, Licensee again touched her left breast **with his fingers**, this time over clothing, and did not touch her groin. Nevertheless, Patient 8 felt Licensee's actions were not appropriate. She was talking with a friend one day at Shari's Restaurant about what happened; the friend was one of the other complainants and happened to be there meeting with the Board investigator at the time. Patient 8 decided to join the complainants. She perceived both visits with Licensee to have involved sexual touching. (Test. of Patient 8).

2. Finding of Fact number 25: Patient 9 began treating with another chiropractor in the region, Dr. Zimmerman, and was amazed at how his treatment was not painful and did not involve touching her private parts. The only reason she returned to Licensee in May 2003 was because she could not get another appointment with Dr. Zimmerman for some time and needed to be seen. When she came into Licensee's treatment room she told him to just adjust her neck and hips, and not to do a full body adjustment. The doors were closed and no one else was in the room. Patient 9 was taken to the bench and Licensee straddled the bench behind her, sitting very close. Patient 9 specifically told Licensee to not touch her breasts, but Licensee massaged them **with his fingers** anyway. Patient 9 (who had been married in the interim between visits in 2000 and 2003), recognized that Licensee had an erection and it was pressing into her. Patient 9 told Licensee that she was uncomfortable with the touching of her breasts. Then Licensee moved her to the table, where she laid face down. Licensee placed his hands on her buttocks, with the fingers pointing toward the head and his thumbs between her

legs, near her crotch. She said, "Now I'm *very* uncomfortable!" (Emphasis hers). Patient 9 got up and left Licensee's office. She went home and told her husband, who wanted to press charges. Patient 9 decided not to press charges, because she perceived that Pendleton was not a town where sexual crimes would be prosecuted. (Test. of Patient 9).

3. On page 29 under the heading Determining the Appropriate Discipline:

Having found several violations of Licensee's duties as a chiropractor under the statute and rule noted above, the next question is what discipline is appropriate. Licensee suggests (in the event he is found to be in violation), that he should be required to have a **chaperone with female patients and** take some "boundary violation" courses. The Board seeks revocation of his license and the payment of costs, including investigative costs and attorney fees.

4. On page 24:

Patient 7. Licensee's vaginal penetration of this patient occurred in approximately 1989. Licensee has given no valid reason for inserting his fingers into Patient 7's vagina. He testified that the only person he had ever performed a vaginal treatment on was his own wife. I do not accept this testimony, based upon the findings in the previous disciplinary order and the evidence in this case. Licensee's actions were contrary to the recognized standard of ethics of the chiropractic profession, based upon the testimony of Drs. Chaser and Turnbull, and based upon the evidence from the Executive Director of the Board. Even Licensee himself previously testified that there was no chiropractic basis to insert a finger in a patient's vagina. (Ex. A32). Licensee violated ORS 684.100(1)(g)(A) in his treatment of Patient 7.

5. On page 25:

breast in 1990. As Licensee was reported to have testified in the first revocation hearing, there is no chiropractic reason to touch breast tissue. (Ex. A8 at 4). Drs. Chaser and Turnbull agree. Licensee's placing of his hand on Patient 4's bare breast was contrary to the recognized standard of ethics for his profession, and violated ORS 684.100(1)(g)(A).

Patient 3. Also in 1990, Licensee treated Patient 3 for a hip problem. Licensee attempted to massage breast tissue, but Patient 3 would not allow it. Licensee then brought his hands around Patient 3 (he was behind her on the bench) and into Patient 3's groin area, close enough to the genitals that Patient 3 felt uncomfortable. Licensee did not explain why he was putting his hands in her groin, even after the patient asked for an explanation. He did not give her any warning of his intent to touch her groin area. Although it is possible that the groin area can be touched as a part of valid treatment, Licensee's failure to explain his actions or to note any reasons for putting his hands there (particularly while reaching around from behind Patient 3, meaning more of his body was in contact with hers), convinces me that Licensee again violated the recognized standard of ethics for his profession, and violated ORS 684.100(1)(g)(A).

6. On page 18 after first paragraph:
Add:

The Board reviewed Dr. Chaser's testimony and would like to emphasize that clinical justification is needed for the touching of a patient in the breast tissue or genitalia and the Board is in agreement with Dr. Chaser's findings that clinical justification was not found in any of the complainants' cases. In addition, the board would like to emphasize the importance of obtaining informed consent from the patient for touching the private parts of the body, also not evidenced in this case.

7. On page 28 after the first paragraph:
Add:

Since the record of evidence closed in this case, the Board has received several letters from patients of Licensee. Since they were not presented as evidence in the hearing, the Board is not considering them in making this final order.

Costs and Attorney Fees. The Board seeks a finding that it be awarded its costs, including investigative costs, and attorney fees. I find the Board's request appropriate under ORS 684.100(9)(g) **and *George Adams v. The Board of Medical Examiners, 170 Or App 1, 11 P. 3d 676, September 27, 2000*, costs are awarded as noted below.**

Investigative Costs: $1,799 (travel & motor pool)
Attorney General Costs: $33,915
Expert Costs: $1,735
OAH Costs: $ 6054
Total Costs: $43,503

ORDER

IT IS HEREBY ORDERED:

That the license to practice chiropractic granted to Licensee is hereby revoked effective on the date of this final order.

That Licensee is ordered to pay the costs and attorney fees of the Board pursuant to ORS 684.100(9)(g) as noted above, in the sum of $43,503 payable to the Board within 30 days of this order.

Original signature on file
at the OBCE office.

Dominga Guerrero D.C.
President, Oregon Board of Chiropractic Examiners

Date: 8-10-06

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 on you. See ORS 183.480 et seq.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
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BOARD OF CHIROPRACTIC EXAMINERS

IN THE MATTER OF THE LICENSE OF	)	**PROPOSED ORDER**
	)	
	)	
TERRY WOMACK, D.C.	)	OAH Case No. 126605
	)	Agency Case No. 2004-1033 et al.

HISTORY OF THE CASE

On December 27, 2005, the Oregon Board of Chiropractic Examiners (Board) issued a Notice of Proposed Disciplinary Action. Terry Womack, D.C. (Licensee) requested a hearing on January 23, 2006. On February 15, 2006, an Amended Notice was served on Licensee. On March 9, 2006, Licensee filed an Answer that included several affirmative defenses. On April 17, 2006, a Second Amended Notice was served on Licensee. On May 16, 2006, an Answer to the Second Amended Notice was filed.

Hearing was held in Pendleton, Oregon from June 12 through June 16, 2006, with the undersigned presiding. Licensee was present and represented by his attorney, Michael Breiling. The Board was present through its executive director, Dave McTeague, and its investigator, Michael Summers, and was represented by Lori Lindley, Assistant Attorney General.

The following were called as witnesses by the Board: Licensee, Patients 1 through 11,[1] the husband of Patient 1, Bruce Chaser, D.C., Michael Summer, Dave McTeague, Jimmye Angel, Ph. D., and Kenneth Simmons. The following witnesses were called by Licensee, in addition to his own testimony: Ed Taber, Debbie Stiles, Candi Fenton, Sharon Burns, Sondra Ross, Floyd Turnbull, D.C., and Anita Hyatt. The record of the hearing closed on June 16, 2006.

ISSUES

Whether Licensee's license to practice chiropractic should be revoked because of violations of ORS 684.100(1)(g)(A) and/or its accompanying administrative rules.

Whether Licensee's affirmative defenses, including laches, claim preclusion, due process, and a right to a jury trial, have been shown to preclude or prevent this administrative proceeding.

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[1] In the Notice documents, the patients were referred to by number, with a confidential key identifying each patient. In the hearing, complete names were used with the understanding that the hearing was confidential. The names of the complainants will not be used in this Order. It is respectfully requested that the Board provide the same privacy to the complainants and, if the matter is appealed, that the Court of Appeals place some limitation on public access to the transcript of hearing and hearing record.

RULINGS ON MOTIONS

Request for deposition. Several weeks before the hearing, Licensee requested the right to depose Patient 1. In its response to Licensee's motion, the Board indicated that it had reviewed the request and determined that a deposition was not necessary and, due to the nature of the subject matter in the case, would be overly burdensome to the witness. The motion for deposition was denied in an order issued before the hearing. (P-12, 13, 14).[2]

Right to a jury trial. At the hearing, Licensee's request for a jury trial was denied on the record. A party has a right to a jury trial in the classes of cases for which a right to a jury trial was available and customary at the time in 1857 when the Oregon Constitution was adopted. *SAIF v. Anderson,* 124 Or App 651, 656 (1994) (a claim by a workers' compensation carrier to recover money paid to a health care provider did not exist in 1857 and is not entitled to a jury trial); *Salem Decorating v. Nat'l Council on Comp. Ins.,* 116 Or App 166, 169-70 (1992) *rev den* 315 Or 643 (1993).

There is no basis for a jury trial in this administrative proceeding. There has been no showing that licensing actions (including discipline for professional misconduct) were customarily entitled to a jury trial in 1857. In fact, there is no showing that licensing actions even existed at that time. There is no basis to have a jury trial in this case. By statute, Licensee was entitled to a contested case hearing under the Administrative Procedures Act. A hearing before an administrative law judge (ALJ) is the appropriate forum to address the issue.

Admissibility of polygraph evidence. At the hearing, the Board objected to the admissibility of polygraph evidence.[3] The matter was taken under advisement at the time. While it was under advisement, Licensee presented the testimony and reports of Ed Taber, and the Board presented the testimony and reports of Kenneth Simmons, pending my ruling. Having now reviewed the statute and the case law, I conclude that the polygraph evidence must be excluded from the record. *Higley v. Edwards,* 67 Or App 488 (1984); *Graham v. OSP,* 83 Or App 567 (1987). Accordingly, I will not consider the testimony of Taber or Simmons, and I will exclude certain exhibits, as noted below.

EVIDENTIARY RULINGS

The following exhibits were identified for the record: Exhibits A1 through A33 and L1 through L16. Exhibit L6 was withdrawn by Licensee. Licensee objected to exhibits A2 through A8, A11, A12, A17, A18, A20 through A25, and A31. The objections were overruled. Licensee also objected to three articles, Exhibits A15, A28 and A29. The three articles were not admitted initially, but were re-offered and admitted during the testimony of Mr. McTeague.

The Board objected to Exhibit L1 and page 7 of their own Exhibit A17, as part of their

[2] As described in the "Evidentiary Rulings" section, *infra.*, "P" documents are the pleading documents, "A" exhibits are the agency exhibits, and "L" exhibits are licensee exhibits.

[3] Although not discussed at hearing, I have designated the Board's memorandum concerning the polygraph evidence as Document P17, and I am including it with the pleading documents.

objection to the polygraph evidence. As a result of my ruling in this order, I am excluding Exhibits L1, A17 (page 7 only), and A33. Licensee secondarily argues that page 7 of Exhibit A17 should remain in the record for completeness of the exhibit. However, that page (which is an attachment to a police report) is not necessary to a complete understanding of the admissible portion of the exhibit. Consequently, page 7 of Exhibit A17 is excluded from the evidence along with the other mentioned documents.

The Board also objected to Exhibits L2, L12 and L15, but the objections were overruled. The Board's objections to Exhibits L8 (pages 22 through 31) and L14 were sustained.

Therefore, the following documents have been admitted into evidence: Exhibits A1 through A32, (excepting page 7 of Exhibit A17), L2 through L5, L7 through L13 (excepting pages 22 through 31 of Exhibit L8), L15 and L16.[4] These exhibits, together with the Pleading documents P1 through P17, constitute the documentary record of the case. The excluded exhibits are included in the file, but are kept separate from the admitted documents.

FINDINGS OF FACT

(1) Licensee is a doctor of chiropractic, licensed to practice in the State of Oregon. His office is in Pendleton, Oregon. (Test. of Licensee).

(2) On November 23, 1990, the Board served a Notice on Licensee, indicating its intent to revoke his license to practice chiropractic due, *inter alia*, to sexual boundary issues with patients. On that same date, an Emergency Suspension Order was served on Licensee, preventing him from practicing chiropractic unless he stipulated to limitations on his practice pending the outcome of the revocation hearing. (Ex. A2). On November 28, 1990, Licensee stipulated that he would only treat female patients when a chaperone was in the room, and that he would post a notice about those limitations at the outside entrance to his office and in a place in the reception area where it would "always be visible." (Ex. A3). On January 31, 1991, the Board issued a Second Emergency Suspension Order because Licensee was still treating female patients without a chaperone, because the outside notice was face down on the ground, and because the reception-area notice was hidden behind a "no smoking" sign. (Ex. A31). On February 27, 1991, Licensee again agreed to the limitations on his practice pending the outcome of the revocation hearing. (Ex. A6).

(3) A hearing on the notice of intent to revoke, as amended, was held on November 13, 1991, before ALJ Comstock. Judge Comstock took evidence and, on February 7, 1992, issued a Proposed Order finding the sexual allegations against Licensee to be true, finding Licensee to be a non-credible witness, and recommending revocation of Licensee's chiropractic license. (Ex. A8). On May 21, 1992, the Board issued a Final Order that incorporated Judge Comstock's findings of fact but gave Licensee a 90-day suspension instead of revoking his license. (Ex. A9). Licensee appealed the matter to the Court of Appeals; the court affirmed without opinion. (Ex. A14).

[4] The Board (without objection) added pages to Exhibit A19 at the time of the hearing. A19 now has 115 pages. Additionally, the Board offered a signed final page to Exhibit A13. Although offered as "page 3," I have substituted it for the unsigned page 2 and discarded the unsigned page.

(4) Complainant HVNC in the 1990 case was treated by Licensee from 1987 to 1990. On June 1, 1990, she was treated for a workers' compensation back injury that occurred on May 31, 1990. Licensee treated her hips, neck and shoulder. During the examination, HVNC was required to lower her pants. Licensee applied pressure near the pubic area, then moved HVNC's underwear aside and inserted his fingers into her vagina, making "small talk" with her while he moved his fingers around inside her vagina. HVNC returned home upset and told her boyfriend what had happened. When HVNC's boyfriend came to see Licensee that same day, Licensee told him he was licensed to do rectal exams and deliver babies. He admitted he had entered HVNC's vagina. HVNC filed a police report that day. Licensee denied entering her vagina when he was interviewed by the police. (Ex. A9 at 7).

(5) SF, another complainant in the 1990 case, treated with Licensee between 1988 and 1990. During his treatments of SF, Licensee would sit behind her on a bench in the office, bring his arms around and massage near and on her breast. Licensee's chart notes did not mention any treatment to the breast or involvement of breast tissue. (Ex. A9 at 6). Licensee testified in the 1991 hearing that it was not appropriate to massage breast tissue. (Ex. A8 at 4). PD, another complainant in the 1990 case, had severe low back complaints. As part of her treatment, Licensee pulled her pants and underwear down so that SF's buttocks were exposed, and worked on her low back while straddling her, with his thighs in contact with her upper thighs. (Ex. A9 at 6).

(6) In approximately 1989, Patient 7 treated with Licensee for a hip problem. She saw him one time. The door was closed and no one else was in the room. Licensee had Patient 7 undo her pants for the hip adjustment and then, in the patient's words, he went "up inside of me." Licensee inserted an ungloved finger or fingers into Patient 7's vagina. Patient 7 was physically uncomfortable from the contact, but also uncomfortable as a woman, feeling violated. She reported the vaginal touching to her husband, wondering if she should go to the police. Her husband talked her out of going to the police, reminding her that Licensee was a doctor and undoubtedly knew what he was doing. Patient 7 did not report the matter to anyone other than chiropractors she later treated with, until January 2006 when she saw a newspaper article about other women who had filed complaints against Licensee. She decided to join them and contacted the Board's investigator, Michael Summers. (Test. of Patient 7).

(7) Patient 3 treated with Licensee in the 1980s and into the fall of 1990. In her next-to-last treatment with Licensee, a visit for a hip problem, he sat behind Patient 3 on the bench and started putting his hands on her side, between her ribs and arm, in the bra area. Patient 3 pushed his hand away before he could contact her breast, saying she was ticklish in that area. A week or two later, on Patient 3's last visit with Licensee, she had again come for hip problems. Licensee again had her straddle the bench and sat behind her on the bench. Licensee's hands came around and went into her groin area on top of her clothing. Patient 3 asked, "What are you doing?" Licensee did not explain his actions, nor had he warned Patient 3 that he would be putting his hands on that part of her body. Patient 3 felt something wrong had occurred, but was not sure. She asked a friend, whose father was a chiropractor, if there was any reason why a doctor would touch her in the groin area. The chiropractor's daughter said there might be a procedure, but the doctor was required to warn her and to have another person present in the room. Patient 3 also sought counseling and told the counselor of the contact. (Test. of Patient 3).

(8) Patient 3 did not come forward and complain about Licensee for a long time, but it continued to bother her. Later, when Patient 3 became a nurse, she realized that there had been a boundary violation. Once at work, she saw another nurse "lose it" over an interaction with a doctor. In a conversation with that nurse, known in this proceeding as Patient 4, she discovered that a similar thing with Licensee had happened to her. Patient 3 and 4 are not friends, and have not seen each other for several years. (Test. of Patient 3).

(9) Patient 4 moved to the Pendleton area in 1986 or 87 to attend Blue Mountain Community College, and found Licensee's office through the yellow pages. She had broken her back in high school and injured her neck in 1988, treating with Licensee for both. Her last appointment with Licensee was in late 1990 or early 1991, at a time when she was going through marital problems. On that last visit, the door was closed and no one else was in the room. Licensee adjusted Patient 4 on the table and then moved her to the bench where he took up position behind her. After massaging her shoulders, Licensee put his right hand inside Patient 4's shirt and bra and cupped her bare left breast. Licensee used a caressing motion on the breast. He gave her no warning or indication that he was going to touch her in that fashion. Patient 4 was stunned and did not say anything to him about the contact. When she returned home, she told her family about what happened but just wanted to forget it, so she did not report it at that time. She only later, in 2005, reported the matter to the Board at the urging of Patient 3. She decided to come forward because she felt the need to resolve the issue in her own life. She believes the caressing of her breast by Licensee was a sexual advance. (Test. of Patient 4).

(10) Patient 6 sought treatment with Licensee in approximately 1999. She treated with him twice. She had injured her shoulder and neck in 1993. Patient 6 had seen several chiropractors before Licensee, going back to about age 14. On the first visit with Licensee, he sat her on the bench and straddled behind her, his groin area up against her low back, and began to massage her shoulders, neck and upper back. He then put his arms underneath her armpits and began to massage her breast tissue with his fingertips. Patient 6 was very uncomfortable with this contact with the breast but did not say anything to Licensee about it. Licensee then moved Patient 6 to the table, having her lay on her stomach first and then roll onto her back. Licensee used his hands to palpate from the feet to the knees, then up the inside of her thighs to the groin/genital area. On one of the two occasions, Patient 6 cannot remember which, Licensee put his hands up under her skirt to perform this palpation. His fingers went up under the elastic of her panties at the crotch and she jerked away. Licensee did not warn Patient 6 of his intent to touch her in the groin/genital area. (Test. of Patient 6).

(11) After the first visit, Patient 6 was suspicious, wondering why she was being touched in that fashion. When she returned to work, however, she asked around to see if he did the same thing with others (her coworkers had initially referred her to Licensee). Her friends thought that his treatments were great, and the non-sexual portions of the treatment had been helping Patient 6's condition, so Patient 6 wondered if her perceptions about the sexual touching were incorrect. She returned for a second visit. Licensee again massaged Patient 6's breast tissue, this time under the bra and touching the areola and nipple, and he touched her groin/genital area (on the pubic bone, under the panties but outside the vagina). Patient 6 perceived the contact as sexual, and felt "cornered" by Licensee's actions. (Test. of Patient 6).

(12) Patient 6 intended to never return to Licensee after her experiences there, but was required to come back to him in 2001 after a workers' compensation issue arose. Licensee was the "preferred" physician by her employer for such examinations—that is, all employees with a possible work injury were referred to Licensee by the employer. When Patient 6 was seen on those two occasions in 2001, she told Licensee specifically to only touch her low back; however, Licensee performed a full examination including the massage of breast tissue and the hands to the groin. Some time later, Patient 6 received a card (from Patient 4, whom she had known previously), with the Board investigator's phone number on it. She contacted the Board's investigator. Patient 6 is not good at recollecting exact dates. However, she has a firm memory of her experiences with Licensee: "The details of what he did have always been clear in my mind. It was traumatizing[.]" (Test. of Patient 6).

(13) Patient 1 was a licensed massage therapist who moved from Eugene to Pendleton in 2002 to begin working at the local athletic club. In Eugene she had worked with a number of chiropractors and had built a referral network among them; she hoped to do the same in Pendleton and, at the urging of her boss, the athletic club manager, met for lunch with Licensee at the Red Lion. After a short lunch, Licensee asked Patient 1 if she would like to see the office and Patient 1 said she would. When they arrived at the office, they went in through a back door. No one else was in the office, and Licensee said it was lunchtime. Licensee asked Patient 1 if she would like a complimentary adjustment, and Patient 1 agreed. Licensee laid her on the table, face down, and then had her roll over. While she was on her back, Licensee massaged her shoulders and chest area. Licensee put his hands inside Patient 1's dress and bra and massaged the breasts, touching all but the nipple. He then moved his hands down into the groin area, between her legs. The touching of her breasts bothered Patient 1, but she was especially upset that Licensee touched her between the legs without her permission. Licensee terminated the rest of the adjustment. (Test. of Patient 1).

(14) After that first visit, Patient 1 was conflicted about Licensee. He provided some good treatment, and some people she knew felt his treatments were great. She was, however, concerned about the sexual touching. She made the decision to continue referring patients to Licensee but privately decided to not refer any women to him. Patient 1 had several medical issues that arose in 2003, including a motor vehicle accident (MVA) and the need for a hysterectomy due to problems caused, she believes, by E. coli. After her hysterectomy, Licensee visited Patient 1 in the hospital and met Patient 1's husband. Neither Patient 1 nor her husband knew why Licensee came, or how he knew about her surgery. A few weeks afterwards, while Patient 1 was recovering from her hysterectomy and was still unable to have intercourse with her husband, Patient 1 returned to Licensee to obtain a closing report for her neck condition from the MVA. When she was seen on August 26, 2003, she told him she was just there for treatment for the neck. She was taken to the treatment room; as at her other visit, the door was closed and no chaperone was in the room. Although Patient 1 told Licensee that she only needed her neck examined, Licensee indicated she had a hip that was out and proceeded to treat the hip without permission. He had Patient 1 lay back on the bench with her feet up (as if she was doing a crunch maneuver), then he palpated the neck and some breast tissue, although not as much as during the first visit. He then moved his hands down to her groin. (Test. of Patient 1).

(15) Patient 1 was wearing drawstring pants, and she was not wearing underwear because she still had stitches from the hysterectomy that were irritated by panties. Licensee put his hand

down Patient 1's pants and cupped the vaginal area, with his fingers on the labial lips and one finger partially inserted in the vagina. His hand was ungloved. While he was performing these actions, he was talking to Patient 1 about his airplanes and looking out the window. When his finger penetrated her vaginal area, she cried, "What are you doing? I can't even have sex with my husband yet!" (Test. of Patient 1).

(16) Licensee and Patient 1 had planned to go out to lunch after the examination to talk about Licensee's daughter, who was in training to become a massage therapist. They went to a restaurant called the Cookie Tree, but Licensee was silent the whole time. Patient 1 "froze" for two weeks, unable to talk about what had happened. She was undergoing counseling with Jimmye Angell, Ph.D. at the time. (Test. of Patient 1). Dr. Angell saw Patient 1 on May 8, but she did not report her contact with Licensee on that visit. Patient 1 told Dr. Angell about the matter on May 20, 2003, the second visit after Patient 1 left Licensee's office. (Ex. A26).

(17) On May 23, 2003 Patient 1 was cited for Driving Under the Influence of Intoxicants. She had traces of amphetamine (from a medicine for ADD), hydrocodone (a pain medication from a series of surgeries, the most recent being the hysterectomy), and marijuana. Patient 1 entered a diversion program in lieu of a conviction on the charge. In February 2004, claimant self-admitted in a treatment facility called Lake Chelan. The first twelve days were for a psychological issue (diagnosed as post-traumatic stress disorder, or PTSD), and the last 18 days were for Patient 1's perception that she had a problem with pain medications. (Test. of Patient 1). During her treatment, it became apparent to staff—and it was conveyed to Patient 1's husband—that Patient 1 needed to resolve the matter of sexual touching by Licensee in order to get better. (Test. of Patient 1's husband).

(18) In order to resolve the matter, Patient 1 filed a police report against Licensee in April 2004. The Pendleton Police Department interviewed Patient 1 over the phone but never met with her to take a statement. The police did personally interview Licensee. (Ex. A17). Patient 1 met with the Board's investigator (Summers) in July 2004 and gave him a statement at that time. When Summers made an error in his written summary of her statement (about whether Patient 1 was wearing panties on the second visit with Licensee), Patient 1 contacted Summers and told him of the error. (Test. of Patient 1).

(19) Patient 2 grew up in Pendleton. In her years as an athlete going through school, she treated with Licensee every couple of months for a recurrent hip problem. She moved to Portland for two years, from 2000 until 2002. Patient 2 noticed something different on her last three visits with Licensee. On all three visits, the door to the examining room was closed and no one else was present in the room. The first of those last visits took place in approximately 2002, while she was still living in Portland and was back in Pendleton for a visit. She again sought treatment for her hip problem. On that visit, Licensee adjusted Patient 2's hips, neck, shoulders and hands. He put his hands in Patient 2's groin area, over her clothing, without touching the vaginal area. He then moved Patient 2 to the bench and had her raise her arms. He then cupped her right breast in his hand, again over the clothes. On the next-to-last visit, in approximately 2004, another visit for just a hip problem, Licensee again touched Patient 2's groin and again cupped her right breast. When the same thing happened on the last visit, Patient 2 decided to not return. The breast touching made her uncomfortable. She spoke to her husband and her father (a long-time patient of Licensee), and they

agreed she should not return. Patient 2, thinking back, believes that Licensee had been touching her in the breast area for years but she had been too young to understand what he was doing. On the last three visits, she believes he was trying to "cop a feel." (Test. of Patient 2).

(20) Patient 10 moved to the Pendleton area in 2001, after leaving a job in the electronics industry. She sought treatment from Licensee in May 2002, after having had "an eight-month-long headache." Suspecting that she might have a pinched nerve in her neck, she sought Licensee's services. Her first and only appointment took place mid-morning; she was wearing black slacks, a white shirt and a gray sweater, and was accompanied by her boyfriend (now husband), who remained in the waiting room. Patient 10 was escorted to the examination room and told to lay face down on the table. The doors were closed and no one else was in the room. Licensee started at the foot level, checking for any leg length discrepancy. Licensee put one hand on Patient 10's buttocks and put the other hand cupped in her crotch, palm touching the crotch over clothing. Patient 10 asked Licensee what he was doing; Licensee responded that he was checking for hip alignment. He did it three times, each time pausing with his hand cupping her crotch, touching her vaginal area over her clothes. While Patient 10 was still laying on her stomach, Licensee put both hands up the center of her back, then around her rib cage to where he cupped her breasts (over her clothes) in between her breasts and the table. Patient 10 asked, "What are you doing now?" Licensee responded, "Don't you know that you need a breast exam every 30 days?" When Licensee made contact (through clothing) with Patient 10's left nipple, he drew back his hand slightly. During the entire exam, it was "uncomfortably quiet" in the examination room. (Test. of Patient 10).

(21) When Patient 10 left Licensee's office in her vehicle, she did not talk to her boyfriend for about six blocks. Then she began to cry, telling him she felt as if she had been raped or violated. Her boyfriend told her to turn around and go back; Patient 10 refused to turn around, afraid that her boyfriend was angry enough to harm Licensee. Likewise, she told her sister-in-law but not her brothers because of the same fear. She did not file a police report but, when she found out about the Board complaint, she contacted the investigator. Patient 10 has a social anxiety disorder, including agoraphobia, and takes both an antidepressant and an anti-anxiety medication. She is currently on disability due to her anxiety condition. Neither her medications nor her condition affect her ability to perceive reality. Patient 10 did not want to come forward but, having a daughter herself, she wanted to stop Licensee's actions, which she considered sexual. (Test. of Patient 10).

(22) Patient 8 was first treated by Licensee in May 2002 at the recommendation of her husband, whose former wife had been a patient. There was nothing unusual in the initial treatments. Patient 8 returned to Licensee two times in 2005. On both visits, the doors were closed and no one else was in the room. On the first 2005 visit, Patient 8 was wearing cut-off overalls that were tight around the waist but loose at the leg openings. On that visit, Patient 8 was not wearing a bra or panties. Licensee had Patient 8 stand on the table (then in its upright position), then knelt behind her and put his hands up her shorts. He massaged in the gluteal region and then moved his hands down, toward the genital area (closer to the vagina than the anus). Patient 8 thought this was inappropriate and moved, so Licensee stopped. He did not touch the vagina. Although Patient 8 was not having any rib pain, Licensee put her on the bench and sat behind her. Licensee reached through her overalls and touched her rib area, with Patient 8's bare breasts resting on his hands. (Test. of Patient 8).

(23) Patient 8 felt that the touching by Licensee on the first visit had been sexual, so she dressed differently when she had to return to him in November 2005. On the second visit, Licensee again touched her left breast, this time over clothing, and did not touch her groin. Nevertheless, Patient 8 felt Licensee's actions were not appropriate. She was talking with a friend one day at Shari's Restaurant about what happened; the friend was one of the other complainants and happened to be there meeting with the Board investigator at the time. Patient 8 decided to join the complainants. She perceived both visits with Licensee to have involved sexual touching. (Test. of Patient 8).

(24) Patient 9 is a self-employed business woman in the Pendleton area, having lived there since 1998. She first treated with Licensee in 1999 after a skiing injury to the right shoulder. She saw him a total of seven times, and felt uncomfortable on all occasions. On the five visits in 1999 (for the shoulder injury), he placed Patient 9 on the bench and sat behind her very closely. Licensee put his left arm over her shoulder, and his right arm under her armpit. Licensee cupped the right breast, touching all parts of it except the nipple. All five visits were the same, except on one occasion in 1999 Licensee additionally examined her on the table. After those visits, and a similar one in 2000, Patient 9 decided to change chiropractors. Although uncomfortable with Licensee's touching of her breasts in 1999, she had not initially perceived the touching on those visits as sexual, primarily (she thinks) because she had made the life decision to be abstinent until marriage and was sexually inexperienced. She sees the touches differently now, after having been married. (Test. of Patient 9).

(25) Patient 9 began treating with another chiropractor in the region, Dr. Zimmerman, and was amazed at how his treatment was not painful and did not involve touching her private parts. The only reason she returned to Licensee in May 2003 was because she could not get another appointment with Dr. Zimmerman for some time and needed to be seen. When she came into Licensee's treatment room she told him to just adjust her neck and hips, and not to do a full body adjustment. The doors were closed and no one else was in the room. Patient 9 was taken to the bench and Licensee straddled the bench behind her, sitting very close. Patient 9 specifically told Licensee to not touch her breasts, but Licensee massaged them anyway. Patient 9 (who had been married in the interim between visits in 2000 and 2003), recognized that Licensee had an erection and it was pressing into her. Patient 9 told Licensee that she was uncomfortable with the touching of her breasts. Then Licensee moved her to the table, where she laid face down. Licensee placed his hands on her buttocks, with the fingers pointing toward the head and his thumbs between her legs, near her crotch. She said, "Now I'm *very* uncomfortable!" (Emphasis hers). Patient 9 got up and left Licensee's office. She went home and told her husband, who wanted to press charges. Patient 9 decided not to press charges, because she perceived that Pendleton was not a town where sexual crimes would be prosecuted. (Test. of Patient 9).

(26) Patient 9 is involved with a cosmetics company which uses multi-level marketing techniques, including recruiting and training. At a training session, she was in a conversation with a recruiter who attended Licensee's church. A third woman was involved in the conversation as well. The recruiter began to criticize the complainants against Licensee as "poor white trash" who were making up the stories and just trying to get money from Licensee. The third woman began to weep, and Patient 9 pulled her aside to ask if she was okay. The third woman (known in this hearing as Patient 11), had been a patient of Licensee's as well, and told Patient 9 her story in rough detail.

Patient 9 admitted that she had been a patient, too, and the two women prayed together. Patient 9 decided to contact the Board after that incident. (Test. of Patient 9).

(27) Patient 11 is a self-employed business woman in the Pendleton area, and is the woman Patient 9 talked with at the training meeting. She first treated with Licensee in 1991 and then again in 1994, at about the time her daughter was born. She then went eleven years without returning to Licensee. She was treated two times in 2004 or 2005. Her husband accompanied her on the last two visits, and actually had an appointment to be seen by Licensee on the same date as her last visit. He waited in the waiting room for her. During that last visit, Licensee asked Patient 11 to undo her pants. He then placed Patient 11 on the bench and straddled the bench behind her. His legs were touching Patient 11's buttock/low back area. Licensee reached under Patient 11's arms and, with one hand (over clothing) lifted her breast while using the other hand on breast tissue and the rib area underneath the breast area. He reversed his hands and did the same actions on the other breast. Patient 11 felt his actions were rough and very painful; Licensee told Patient 11 that the treatment had to be painful. (Test. of Patient 11).

(28) Next, Licensee took Patient 11 to the table and she was initially face down. Licensee performed some manipulations and then had Patient 11 turn over. When she was lying on her back, Licensee put his hand down her pants (outside her underwear) and pressed on her pubic bone to the top of the labia but without touching her genitals. He did not give her notice that he was going to touch her there; he did ask, as he was pressing on the pubic bone, whether the pressing hurt. Patient 11 had trusted Licensee about the breast touching (figuring that it must be okay since he was a doctor), but she was shocked by the placing of his hand in her pubic area. The only time Licensee talked during the examination was when he was touching her breasts or had his hand down her pants. (Test. of Patient 11).

(29) Determined never to return to Licensee, Patient 11 saw a chiropractor in Spokane when she was up there on business in 2005. The doctor in Spokane was very gentle in comparison to Licensee; when she was first seen in consultation, she asked the doctor if she should undo her pants. The doctor stated an emphatic "no!" and never touched any of Patient 11's private areas. As Patient 11 realized that Licensee's actions had not been appropriate, she felt shame. When she talked with Patient 9 after the training meeting, she realized that she needed to come forward to complain about Licensee's actions. Patient 11 felt that the touching in her pubic area was offensive, if not sexual, and that Licensee had touched her where only her husband had a right to touch her. Patient 11 felt that if she had encouraged Licensee at all, he would have gone further sexually. (Test. of Patient 11).

(30) Patient 5 has lived in the Pendleton area for seven years, and has worked as a manager in the restaurant industry for most of that time. In 2003, having suffered from headaches and nausea, Patient 5 sought treatment from Licensee. She was referred by one of the cooks in her restaurant. When Licensee took Patient 5 into the examining room, he had her lay on her back on the table. He did not do a full examination of Patient 5, but he "all of a sudden" placed his hands under her sweat pants, on top of her underwear, and pressed in her groin area (above the genital area, and not coming in contact with the genitals). Patient 5 was uncomfortable with Licensee's contact in the groin area and, looking back, felt it "could have been" sexual. She went back and talked to the cook who had referred her and complained about what Licensee had done. The cook laughed and said that Licensee had "magic fingers." Patient 5 still thought it odd that Licensee was treating her headaches

by putting his hands into her pants. (Test. of Patient 5).

(31) When the Board received the initial complaints in this case, it was especially concerned because there had been two previous notices issued to Licensee, seeking revocation of his license to practice chiropractic. Due to changes in the makeup of the Board and incompleteness of the records, the current Board could not figure out the previous Board's logic in the 1992 case, when the ALJ had recommended revocation and the Board had instead imposed a 90-day suspension and probation. The current Board was also unaware of the circumstances involved in the second attempted revocation, in which one of the major complainants did not testify in the hearing. The Board wondered how many other women might have similar complaints involving Licensee, so an investigator and local news articles were used to find out. At least eleven complainants eventually came forward. After taking the information from these individuals, the Board decided to again seek revocation of Licensee's license to practice. (Test. of McTeague).

(32) Floyd Turnbull D.C. is a colleague of Licensee, practicing in Hermiston, Oregon. Although employing a different philosophy of chiropractic (Licensee uses the Palmer method, from Palmer College, and Dr. Turnbull uses the "osseous manipulation diversified" method from Western States College), the two doctors have treated each other and found that their techniques are remarkably similar. Their methodology is very different when treating women. Dr. Turnbull never touches a woman's breast; if the woman is large-breasted and the anterior ribs below the breast need to be treated, Dr. Turnbull has the woman lift her own breast out of the way so that he can palpate or treat the rib area below the breast. He rarely touches the upper part of the breast (which is over the pectoralis muscle), because he has found that he can loosen that muscle by just treating the top of it, where it inserts into the collarbone. Dr. Turnbull will not put his hands in the groin area on a woman except for one adjustment to the pelvis—and then only when the patient is unable to lay on her stomach, since the same area is better adjusted from the back (that is, with the patient on her stomach). Dr. Turnbull does not need to touch the breast in order to treat a rib that is out. Dr. Turnbull is licensed by the same Board as Licensee, and was aware that the Executive Director of the Board was in the room during his testimony. (Test. of Turnbull).

(33) Bruce Chaser D.C. is a chiropractor who practices in Portland. Part of his practice involves doing independent chiropractic examinations for insurance companies and the Board. He prepared reports and testified at the request of the Board; he is also subject to licensure by the Board. He received his training at Western States, the same school as Dr. Turnbull. He examined Licensee's charts with regard to most of the patients who complained (some of the charts were lost by Licensee's office and not provided to the Board for Dr. Chaser's review). Dr. Chaser noted that Licensee's records did not include treatment plans or lists of complaints. From his review of the charts, there was no justification for the touching of breast tissue or genitalia in any of the complainants' cases. There was no indication in the charts of obtaining informed consent for touching the private parts of the bodies. There was no reason shown for touching the patients under their clothing. Dr. Chaser felt it was appropriate to touch a patient's buttocks and the rib areas under the breasts, in certain cases. He also felt there were times when the leg crease or the upper thigh might be palpated, for hip problems. Dr. Chaser would obtain informed consent from the patient before touching in or around the patient's private areas. (Test. of Chaser).

(34) Dr. Chaser noted that there was a "power differential" between a doctor and patient,

with the doctor having a responsibility to protect the patient. Dr. Chaser could not understand why Licensee would treat a headache by working on the patient's hips. He is familiar with the Palmer method, having practiced for a year with another Palmer method chiropractor. Dr. Chaser, like Licensee, wants to work on as much of the pectoralis muscle as he can (unlike Dr. Turnbull, who just works on the topmost part of the muscle). However, Dr. Chaser will not touch a woman's breast and, if moving the breast is needed, will have the patient move the breast tissue. All three chiropractors will use the "Logan method" of pressing on pressure points in the gluteal region of the buttocks for treatment of certain conditions. Only Licensee palpates from the gluteals into the groin area (as opposed to straight down the leg). Dr. Chaser is not aware of any chiropractic treatment justifying this move into the groin. (Test. of Chaser).

(35) Dr. Chaser acknowledged that on a few occasions he had accidentally brushed the breast or groin of a woman patient while providing treatment on the outside of the clothing. In those cases, Dr. Chaser immediately apologized to the patient. (Test. of Chaser).

(36) Licensee has practiced in Pendleton for many years and has many patients in the area who are happy with his treatment. Many of these patients believe that Licensee could not have done the things to the complainants that he did. (Ex. L15).

CONCLUSIONS OF LAW

Licensee violated the statute and the accompanying administrative rules on repeated occasions, and his license to practice chiropractic should be revoked. Licensee's affirmative defenses all lack merit.

OPINION

The Oregon Board of Chiropractic Examiners contends that Licensee's license to practice chiropractic should be revoked based upon his actions that led to the eleven complaints presented here. Licensee contends that the Board has failed to prove its case or, in the alternative, that various affirmative defenses apply to bar the action. The Board has the burden of proof to establish that revocation is justified, and Licensee has the burden to establish his affirmative defenses. ORS 183.450(2).

The evidence provided by Licensee and the Board is directly in conflict. All eleven complainants have testified to facts that, if accurate, indicate that Licensee was touching them in inappropriate places for reasons that could reasonably be interpreted as sexual. Licensee denies touching several of the women in the places they claim, and does not recall touching the other women in the places alleged. All eleven complainants testified that they were treated with the door closed and no one else in the room; Licensee's assistant testified that the door to the treatment room was always open and that she was often in the room during the treatment. In short, the testimony of complainants and Licensee (including his assistant) are mutually exclusive of the other. As a result, the credibility or reliability of the evidence provided will be a key component to my decision. Before addressing credibility issues, however, I will address the affirmative defenses raised by Licensee.

Licensee's Affirmative Defenses

In his Answer to the Notice provided by the Board, and again at the beginning of the hearing, Licensee raised several affirmative defenses, including laches, claim preclusion, and due process violations (including notice and the right to a "meaningful hearing"). Additionally, as previously addressed, Licensee argued he had a right to a jury trial under Article 1, § 17 of the Oregon Constitution. The jury trial motion was denied at hearing, and the reason for that denial has been explained above. All other affirmative defenses were taken under advisement and will now be addressed.

Claim Preclusion. The crux of Licensee's claim preclusion argument, which concerns the complaints of Patients 3, 4 and 7 (and the treatment of these three patients in 1989 and 1990), is that the Board is precluded from bringing those matters against Licensee because they could have been included in the previous revocation proceeding. Licensee argues that the doctrine of claim preclusion applies to bar consideration of the claims of Patients 3, 4 and 7 in this proceeding.

The law of preclusion, commonly separated into "claim preclusion" and "issue preclusion," is a judicially-created doctrine:

> Issue and claim preclusion principles determine the "binding effect on a subsequent proceeding of a final judgment previously entered in a claim." *Drews v. EBI Companies,* 310 Or 134, 139, 795 P2d 531 (1990). Although they are related doctrines, they are distinguishable. Claim preclusion prohibits a party from relitigating a cause of action *against the same defendant involving the same factual transaction as was litigated in the previous adjudication* * * *

Shuler v. Distribution Trucking Co., 164 Or App 615, 621-22, 994 P2d 167 (1999) (emphasis added). The emphasized portion of the Court's decision shows why claim preclusion does not apply in this case.[5] None of the "factual transactions" raised in the complaints of Patients 3, 4 and 7 were part of the 1991 revocation proceeding. If the Board had been aware of the three complaints and left them out of the 1991 proceeding, Licensee might have a valid argument for the application of claim preclusion. However, the Board has argued, and the facts of the present case indicate, that the Board was unaware of Patients 3, 4 and 7 at the time of the previous litigation. The Board cannot be held responsible to litigate complaints that had not yet been made.

Licensee argues that the previous litigation involved a "pattern and practice" of Licensee, rather than specific allegations of specific individuals, and he claims that other evidence of his pattern and practice at the same time are barred by claim preclusion. Licensee misreads the previous decisions; there were *specific* complaints made by HVNC, SF and PD, and the Board acted on those specific complaints, not on a pattern and practice of Licensee. Claim preclusion does not apply to bar consideration of the complaints by Patients 3, 4 and 7 in this case.

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[5] At least, it does not apply in the manner suggested by Licensee. The law of preclusion *does* apply with regard to Licensee's intimations in the record that the previous vaginal penetration of HVNC and the other actions that were part of the 1991 revocation proceeding) did not really happen. As a matter of law, I must conclude that the actions *did* happen and cannot accept Licensee's evidence to the contrary.

Due Process Violations. Licensee argues that his license to practice chiropractic is a property interest, and that the notice statute unconstitutionally violates due process. Licensee claims he has been denied the practical opportunity to defend himself. This position is contradicted by the facts that the notice (as amended) indicates exactly what the Board intended to prove—and a five day hearing was held to allow both parties to present the evidence they wished to present on the matters encompassed within the notice. Licensee had every opportunity to defend himself.

Licensee's argument about a "meaningful hearing" is really a restatement of his argument concerning laches, addressed below. Licensee argues that anything that happened more than two years before the notice would be "stale," because the possible criminal charges for the actions would, after that time, be beyond the statute of limitations. However, Licensee fails to establish that the criminal statute of limitations should even be considered in this case. This is not a criminal matter. It is a civil, administrative matter. There is no proof of a due process violation in this matter.

Laches. Licensee argues that the complaints of Patients 1, 2, 3, 4, 6, 7, 10 and 11 should be excluded under the equitable doctrine of laches because of the delay in time between the events and the complaints being made. The Oregon Court of Appeals has given a very clear statement of what must be shown to establish that the equitable remedy of laches applies:

> Laches has three elements: (1) the plaintiff must delay asserting his claim for an unreasonable length of time, (2) with full knowledge of all relevant facts, (3) resulting in such substantial prejudice to the defendant that it would be inequitable for the court to grant relief. *Stephan v. Equitable S & L Assn.*, 268 Or 544, 569, 522 P2d 478 (1974); *Clackamas Co. Fire Protection v. Bureau of Labor*, 50 Or App 337, 342, 624 P2d 141, *rev den* 291 Or 9 (1981).

Rise v. Steckel, 59 Or App 675, 684 *rev den* 294 Or 212 (1982).

The essence of Licensee's laches argument concerns the passage of time between when the interactions between Licensee and the complainants occurred and when this action was brought. Licensee misses an important distinction in this case: the distinction between the delay of witnesses' actions in reporting to the Board and the Board's actions in bringing this revocation proceeding. It is true that a couple of the complainants waited in excess of ten years to come forward with their stories. It is *not* true that the Board, the movant in this matter, delayed its action for that length of time. Licensee must show a delay of an unreasonable length of time, and must show that *the Board* delayed "with full knowledge of all relevant facts," and must show "substantial prejudice."

Here, Licensee has not attempted to prove the first two elements necessary for laches. As to the prejudice element, Licensee testified that he cannot recall much of what happened with the complainants. As will be seen below, I found much of his testimony simply unbelievable on that point. However, even acknowledging that a physician who sees dozens of patients each day will not recall all of his patients, the record contains the testimony of other witnesses and the doctor's own

chart notes that should be able to refresh his recollection.[6]

I conclude that none of the affirmative defenses raised by Licensee have been proved. I turn now to the credibility evidence, which is the key evidence in this case.

The Credibility Evidence

The hearing in this case lasted the better part of five days, with many witnesses testifying on behalf of the Board and the Licensee. Most of Licensee's direct evidence in the case, besides the testimony of Licensee, Anita Hyatt and Dr. Turnbull, involved the testimony of character witnesses supporting Licensee and, in some cases, offering evidence about the truth and veracity of the complainants. Credibility of the witnesses on both sides is an important factor in this case. Therefore, it is necessary to address the credibility or reliability of the witnesses in order to determine the facts of the case. With two important exceptions, all of the witnesses who testified were credible based upon both demeanor and the content of their testimony.

Debbie Stiles, Sharon Burns. Both women testified on Licensee's behalf. There is no reason to question the reliability of their testimony. Stiles is the sister of Licensee's assistant and has been a patient of Licensee's for several years. Burns has likewise been a patient for years. Neither witness, when asked, was aware of any of the complainants' reputation for truth and veracity in the community.

Sondra Ross. Ross has been Licensee's patient since 1986. She testified that Licensee followed his probation requirements while treating her, including having a chaperone in the room between 1992 and 1997. When asked about the truth and veracity of complainants, she knew the reputations of three. She considered Patient 2 to have a good reputation, and Patients 1 and 6 to have reputations for being untruthful. Ross also knew Patients 7 and 9, but was unfamiliar with their reputations for truth and veracity in the community. Ross's testimony about Patient 1 involved business dealings between them. Patient 1 rented space from Ross and, in Ross's opinion, was untruthful in reporting her financial situation. Ross did not clarify the reasons for doubting Patient 6's reputation. I conclude that Ross's testimony is basically reliable, although her opinion about the truth and veracity of some of the complainants, while no doubt her actual opinion, are unsupported and of little help in this case.

Candace Fenton. Fenton has been Licensee's patient for four years and, in the course of her treatments, has been touched under the breast and in the crease in the groin area. Licensee's actions did not bother her. She believes Licensee is a good chiropractor and would be "angry" if he were to lose his license. Fenton was a high school classmate of Anita Hyatt, Licensee's assistant, but they do not socialize very much. Fenton's husband is a friend of Licensee. She believes Patient 2 has a reputation for being "hedgy" and a gossip. She received her information about the complainants and the case against Licensee through the gossip of her mother-in-law. In spite of this willingness to accuse Patient 2 of gossiping while doing it herself, Fenton appeared to testify truthfully. Again,

[6] Whether the chart notes in this case will be able to do so is in some doubt, since they are woefully inadequate according to other expert witness testimony. However, Licensee's failure to keep adequate records is not a valid reason to dismiss the complaints of those who complained in this case.

however, I consider the testimony that one of the complainants was "hedgy" and a gossip of little help in this case. Even if true, it does not impeach the reliability of the complainant as to the issues in this case.

Dave McTeague. As the Executive Director of the Board, McTeague testified about the history of Licensee's issues and the Board's actions, and provided the history of the administrative rules as well. There is no basis to discount the reliability of his testimony.

Dr. Angell. Dr. Angell treated Patient 1, and apparently still does. Dr. Angell testified credibly by telephone, albeit in limited fashion due to a limited release given by Patient 1. She answered credibly but incompletely the questions counsel asked her about what she remembered that was not written down on her chart (see discussion in Patient 1's credibility finding, below). Dr. Angell explained that the majority of her treatment provided to Patient 1 addressed other issues, so she did not take copious notes concerning the issue involving Licensee. (Test. of Angell). I find her testimony credible.

Husband of Patient 1. Patient 1's husband testified about his experiences with his wife and her admission into the treatment center, as well as the one time he met Licensee. I found his testimony basically credible but wrong in one important instance: he woefully understated the period of time it would have taken his wife to "recover" from her radical hysterectomy. His testimony was variously one week to one month; his wife's testimony (backed up by Dr. Angell) was that it took considerably longer for her to recover.

Michael Summers. Summers is the Board's investigator. The only credibility attack on his testimony was made collaterally, with several of the complainants being asked whether Summers (and Ms. Lindley) had pressured them or suggested facts to them in preparation for testimony. In all instances, the complainants testified that the Board and its attorney had conducted themselves appropriately, asking questions but not suggesting answers. I found Summers to be a credible witness.

Drs. Chaser and Turnbull. Although testifying for different parties in the case, both experts testified quite credibly about what they do and do not do in their practices. As Licensee pointed out in the direct examination of Dr. Turnbull (and as is equally true with Dr. Chaser), both are licensed by the same Board that is seeking revocation of Licensee's license. I have no doubt that testifying in a proceeding before the Board provided some pressure, particularly for Dr. Turnbull who could rightly be perceived as testifying on behalf of the one the Board was "after."[7] However, both chiropractors testified clearly about how they practice—testimony which sometimes supported and sometimes disagreed with Licensee's techniques—and Dr. Chaser's testimony, while generally critical of Licensee's practice methods, also agreed with Licensee on occasion. I do not believe either physician was cowed by the presence of the Executive Director of the licensing board in the room. Both testified credibly.[8]

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[7] If Licensee was truly concerned about the impact of the executive director's presence on the testimony of his expert, it would not have been difficult to obtain the services of a chiropractor from nearby Washington, where there would be no such pressure.

[8] Although I have excluded the evidence of both polygraph experts, it should be noted for the record that both Taber and

The Complainants. Ultimately, the credibility information in this case comes down to an assessment and comparison of the eleven complainants' testimony with that of Licensee and Anita Hyatt, his assistant. I will start with the complainants.

Patient 1. Patient 1 testified about skin to skin contact between Licensee's hands and her breasts, as well as insertion of his finger into her vagina. She came under heavy attack by Licensee on credibility issues; Ross testified that Patient 1 was untruthful concerning a business issue while sharing space in Ross's building. Licensee examined Patient 1 about what she told her counselor, Dr. Angell, about the Licensee's actions. This cross-examination was based on a faulty foundation, since Licensee sought to impeach Patient 1 based upon comments attributed to Dr. Angell, as if the doctor had said something entirely different from Patient 1. In actuality, Dr. Angell's comments were made to counsel based upon her recollection *after* testifying that she was treating Patient 1 for other matters and had not made notes in her chart about the circumstances involving Licensee. The questions to Patient 1 were presented as if Dr. Angell had said something entirely different than Patient 1's testimony, but Patient 1 held her ground.

Patient 1 was accused of changing her testimony in two other areas. First, she was confronted with a Board summary that indicated Licensee put his hands underneath her panties in the second visit, after she had testified she was not wearing panties on that visit. However, Patient 1 testified that the Board summary was incorrect, and that she informed the Board's investigator of the error. There was no contradictory evidence. Second, there was a difference in the written documents and Patient 1's testimony as to which finger Licensee inserted into her vagina; the report stated it was the Index finger, while her testimony was that it was the Middle finger. Patient 1 sheepishly admitted that she thought the Middle finger *was* the Index finger (that is, she was not sure which finger people generally referred to as the Index finger). (Test. of Patient 1).[9]

Patient 1 was also asked about her drug use and a DUII arrest that occurred in May 2003, shortly after her final visit with Licensee. Licensee contended that Patient 1 was in no condition to remember what happened to her due to the drugs in her system. However, I find Patient 1 basically credible. She testified about the aftermath of her visits with Licensee, and some of her testimony was actually verified by Licensee.[10] She testified about the problems that led her to self-admit to Lake Chelan treatment center, and her testimony was ably supported by her husband. There is no evidence in the record to establish that the medications she was taking would cause her to hallucinate or forget or misinterpret the actions which occurred in Licensee's office.[11] Expert evidence would be needed to establish such a conclusion. Likewise, even if there were problems between Ross and Patient 1 there is no nexus to the current situation.

Simmons testified credibly.

[9] Interestingly, Patient 8 (in an entirely different context from this matter) testified that she was not sure which finger was her Index finger. (Test. of Patient 8).

[10] In opening statement, Licensee argued that there was never a second visit or treatment to Patient 1. The testimony showed otherwise, including Licensee's verification that, on some occasion, he and Patient 1 had lunch at the Cookie Tree.

[11] Patient 1 testified that taking all of her medications at the same time would probably affect at least her short term memory; she also testified that she never took all of the medications at the same time. (Test. of Patient 1).

The only evidence in the hearing that gave me any pause about Patient 1's credibility actually came before she testified, when Dr. Angell (who was called out of turn) indicated that she could not talk about the other areas of Patient 1's treatment because of the limitation Patient 1 put on the release of information. After consideration of what Patient 1 did testify about, including divulging her issues with drugs and psychological disorders, I conclude that it was not inappropriate for Patient 1 to want to keep other aspects of her life private. I was especially impressed with her demeanor as counsel asked her questions allegedly based upon what Dr. Angell testified to. If Patient 1 had wanted to change her story or was not sure of her convictions, the opportunity was there for her to "bend" her testimony to ostensibly match the doctor's testimony. She did not. I find that Patient 1 testified credibly.

Patient 2. Patient 2 testified credibly about the three occasions where Licensee cupped her breast outside her clothing. Licensee had little credibility evidence against Patient 2; Fenton testified that Patient 2 was "hedgy" and a gossip. Fenton's opinion about Patient 2 is probably her candid opinion, but there is nothing specific to support her conclusion about Patient 2. In fact, Ross (another of Licensee's witnesses) testified that Patient 2 had a *good* reputation for truth and veracity. (Test. of Ross). Patient 2 testified credibly.

Patient 3. Licensee offered no credibility evidence against Patient 3, and there was no reason, based upon demeanor and the content of her testimony, to disbelieve her testimony. Licensee asked Patient 3 about some of the records that seemed to indicate that she had returned for further treatment after the episodes for which she complained. However, a review of the document in question is ambiguous at best; it appears to be a billing date with an "adjustment" (financial, not chiropractic) to write off an additional $3 charge. (Ex. L5). Patient 3 testified credibly.

Patient 4. Patient 4 testified that Licensee put his hand under her shirt and bra and cupped her left breast, caressing it. Licensee asked the patient about previous statements about how long the contact with the breast had continued; Patient 4 agreed that she could not be sure of the exact length of time. However, there is no evidence that calls into question Patient 4's credibility about the contact itself. She candidly agreed that memory decreases with the passage of time. However, with Patient 4 as with all of the complainants, I was very impressed with the recall of the events. It is not surprising, perhaps, given the circumstances. Patient 4 testified credibly.

Patient 5. Patient 5 testified credibly.

Patient 6. Licensee attacked the credibility of Patient 6, who has accused Licensee of massaging breast tissue, placing his hands underneath her skirt and panties in the inner thigh and groin area, coming in contact on one occasion with the vaginal lips. Other than Ross's unsupported testimony that Patient 6 had a "general" reputation for untruthfulness in her community, there is no credible evidence to show that Patient 6's testimony should be discounted or disregarded. I found Patient 6 entirely credible.

Patient 7. Patient 7's testimony was credible. She testified about vaginal penetration by Licensee, but explained it as he had to "go up inside of me." Her testimony was unrehearsed and believably presented, and Licensee's only attack against Patient 7 was to ask whether the passage of

time had dimmed her memory. While admitting that her memory has declined with the passage of years, her testimony nevertheless shows that she remembers exactly what occurred in Licensee's office.

Patient 8. Licensee made no attack on Patient 8's credibility, and I found that she testified in a straightforward fashion. There is no reason to question Patient 8's testimony, and I find it credible.

Patient 9. Patient 9 testified credibly both in demeanor and content. She testified about his massaging of her breasts (all but the nipple and areola) on several occasions and the presence of Licensee's erection on one occasion. Licensee's primary credibility attack against Patient 9 concerned her perception that Licensee had an erection at the last visit, suggesting that she was feeling the edge of Licensee's jeans. I conclude Patient 9 testified credibly, and accept her testimony concerning the erection.

Patient 10. Licensee suggested that Patient 10's social adjustment disorder caused her to hallucinate about the matters for which she complained, but again offered no expert evidence to support that theory. Patient 10 denied hallucinations of any kind. It was clear that Patient 10 was uncomfortable on the witness stand, and I have no doubt that she would rather have been anywhere else except in that hearing room. This discomfort did not affect her veracity. Patient 10 has an anxiety condition and was being asked to testify about an obviously painful encounter with Licensee. Her nervousness was evident, but was not (in my opinion) evidence of any doubt about her testimony. Her testimony was clear, with good recollection. I find no reason to doubt the credibility of Patient 10.

Patient 11. Patient 11 was also a credible witness. The emotional effect of Licensee's boundary violation on Patient 11 was made clear both by Patient 11 herself, and by Patient 9. I have no reason to doubt the credibility of Patient 11.

In summary, the eleven complainants testified credibly throughout the hearing. Their recall was excellent by and large, although they were not always clear on dates (and Licensee's incomplete records were also unhelpful in pinning the dates down).

Anita Hyatt. Both the demeanor and the content of Ms. Hyatt's testimony cause me to doubt her credibility in this case. Hyatt testified twice during the hearing; the second episode occurred after a funeral (from which she hurried back to finish her testimony). She was weeping at that time. Her demeanor at that time I attribute entirely to the funeral service and I do not consider that as part of her demeanor credibility. However, in her earlier testimony she was, in my opinion, inappropriate in the lightness of her demeanor. When asked if she could lose her job if Licensee lost his license, she said she could but nonchalantly stated that the loss of the license could not happen (even though she was testifying in a hearing where license revocation was the issue).

More importantly, the content of Hyatt's testimony simply does not jibe with the other evidence in the case. All eleven complainants testified that that they were treated with the doors

closed[12] and no one else in the room other than Licensee. Hyatt testified that the doors to the office were *never closed.* Her testimony was impeached by all eleven complainants and Michael Summers, the Board investigator, who observed that the door was closed when he came to see Licensee. (Test. of Summers). Hyatt also testified that she *never* escorted a patient into the treatment room (attempting to impeach the testimony of Patient 10). Hyatt was impeached by Patient 10 and again by Summers, who watched her escort an elderly patient into the treatment room.

Furthermore, Hyatt's testimony was too perfect. Besides testifying that the door was never closed and she never escorted patients, both shown to be untrue, Hyatt testified that she recalled the specific visits of Patient 1 after a period of three years, and even testified about how long the second visit lasted (5-6 minutes), claiming she was in the room for four of the minutes. Based upon this claimed presence during Patient 1's examination, Hyatt could then testify that the vaginal penetration and other touching did not happen (she specifically testified that the doctor's hands never went below Patient 1's waist). Hyatt's alleged recall of the exact time periods involved in the treatment and her time in the room with them and her alleged recall of where Licensee's hands were on Patient 1's body—despite reportedly being in the room to pick up a file or two—is simply too convenient to be true.

Similarly, Hyatt testified that she knew Patient 2 as a child, having been her babysitter, and feels Patient 2 likes to "stretch the truth" a bit based upon her experiences with Patient 2 *as a child.* Hyatt again conveniently remembers visiting with Patient 2 before and after her visits to Licensee—again, a matter of years earlier—and specifically remembers that Patient 2 was *not* upset when she left Licensee's office (she felt better, in fact). Hyatt's testimony, which contains "memories" which just happen to contradict damaging testimony from the Board's witnesses, is not believable.

In fact, the evidence shows that her supposed memory of events is faulty. For instance, she testified that Patient 1's first visit was not paid because it was for a car accident; actually, it was a professional courtesy "comp" visit. Hyatt was not a credible witness.

Licensee. After a review of all the evidence, I conclude that Licensee is also lacking in credibility. I base this conclusion on the content of his testimony, on his demeanor the first day he testified, and on a review of the circumstances in the 1991 revocation proceeding. I also base this conclusion on Licensee's failure to correct the record after Hyatt testified.

On the first day of hearing, Licensee was called by the Board as a witness. His response to simple questions was so slow, and his affect so blank, that I had to interrupt to make sure that he was not impaired by medications or for some other reason. The second time he testified (during his case in chief), he was more lively and responded with alacrity to the questions. My impression of his first day's testimony was that Licensee was trying to reinforce his argument about laches by making a show of not recalling the circumstances of the previous litigation and the treatment of the complainants. Although I am sure that any physician who sees many patients would have problems remembering each and every one of them, Licensee's hesitation on the first day seemed contrived and artificial.

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[12] Patient 11 testified that, one time, the door was open about four inches. (Test. of Patient 11). This testimony still disagrees with Hyatt's testimony, since she testified the door was always 60-70 percent open. (Test. of Hyatt).

There were several examples from the content of Licensee's testimony that also put his credibility in doubt. First, he initially testified that he had only one method of providing treatment to patients—a full spinal treatment that started with the Thompson table and then proceeded to the adjusting bench. Licensee testified that he did the full body exam with each patient, in the same order, each time. However, several of the patients testified that they were taken immediately to the adjusting bench and had no treatment on the table at all.

Second, Licensee testified he would never put his hands underneath underwear, or up the leg of a patient's shorts. However, several of the patients who testified credibly testified to his putting his hands in their pants or shirts, including touching bare breast tissue and penetrating the vagina. Licensee testified that the only chiropractic reasons to penetrate a patient's vagina was to treat a pregnancy (which he did not do) or to adjust the muscles in the vaginal wall. In a deposition for the 1991 hearing, Licensee stated that there was *never* a reason to penetrate the vagina. (Ex. A32 at 29-30). Licensee testified in the 2006 hearing that the only time he had performed a vaginal adjustment was on his wife. (Test. of Licensee). Patient 1 and Patient 7 credibly testified otherwise, as did HVNC in the 1991 case.

Third, Licensee intimated in his own testimony and relied upon Hyatt's testimony to the effect that the door to his treatment room was always open and that his office staff was going in and out of the room while treatment was being rendered. This testimony was impeached by the testimony of the 11 complainants as well as the Board's investigator, Summers.

Fourth, I do not accept Licensee's testimony that he could "not recall" the ultimate findings by the previous ALJ—that is, the recommendation for revocation and the finding that Licensee lacked credibility in the 1991 hearing. He testified that he did not recall the second time a revocation hearing was held, and he could not recall the circumstances of being sued by HVNC. This testimony is questionable. Licensee considers the ability to practice chiropractic a "gift," one that he tearfully testified (during this 2006 hearing) that he did not want to lose. I cannot accept the notion that Licensee would be worked up about losing his license in 2006 and have forgotten the previous efforts by the Board to revoke his license. Licensee's repeated statements that he could "not recall" the past circumstances were not believable.

Fifth, as previously noted, the testimony of Licensee and the eleven complainants is diametrically opposed. Either Licensee is telling the truth and the eleven complainants are lying, or the opposite is true. Licensee's argument that most of the complainants simply misinterpreted what the doctor was doing does not hold up on close inspection. It is one or the other. While the eleven complainants testified about different encounters with Licensee, their tales of boundary violations are eerily similar to each other and to the complainants in 1991. All testified credibly; there was no evidence of a connection or a motive to cause eleven people to testify falsely against Licensee. Based upon their testimony, as well as the problems with Licensee's testimony noted above, I conclude that he is not a credible witness.

Finally, while I do not consider Judge Comstock's credibility finding in 1991 binding upon Licensee in the present case, I find that her conclusions reinforce my conclusion here. Licensee was

untruthful in that proceeding; the evidence in this case shows that he continues to be untruthful in this one.

Summary of credibility evidence. To summarize my credibility findings, I have concluded that all witnesses, other than Licensee and Hyatt, are basically credible. That is, based upon my review of their demeanor and the content of their testimony, I do not believe that any witness other than Hyatt and Licensee demonstrated an intent to deceive.

For some witnesses, such as the complainants and the chiropractic experts, the credibility finding is important. However, for the rest of the witnesses, their credibility or reliability is of lesser value. For instance, the testimony of Stiles, Burns, Ross and Fenton, while credible, was not very relevant or helpful. Evidence of the Licensee's prior "good acts" have some relevance to what the man is like sometimes, but no evidence at all of what he was like on the occasions complained of in this case.

At its root, the credibility battle is between Licensee and the eleven complainants. I have already explained why I accept the testimony of the complainants, and why I must discount the testimony of Licensee and of his assistant, Hyatt. I conclude that Licensee did the acts complained of by the eleven. That is, he penetrated Patient 7's vagina with his fingers; he attempted to touch Patient 3's breast and palpated her groin area without warning; he cupped and caressed Patient 4's bare breast; he massaged Patient 6's breasts and put his hands up her skirt and underwear to touch the area near her vagina; he massaged Patient 1's bare breasts and penetrated her vagina with the tip of his finger; he cupped Patient 2's right breast and touched her groin area over clothing; he cupped Patient 10's genital area, as well as telling her he was doing a "breast exam" with his hands between her breasts and the table; he touched Patient 8's bare breast and put his hands up the loose legs of her shorts to touch her bare buttocks; he massaged Patient 9's breasts and massaged her buttocks with his thumbs in the crotch area, between her legs; he touched the clothed breasts of Patient 11 and put his hands in her pants (over underwear) to touch the top of the labia without actually touching her genitals; and he put his hands down Patient 5's pants to press on the groin area above the genital region.

In the previous hearing, Licensee argued that there was a conspiracy to get him by the women involved. In the current hearing, there was testimony that the complainants were considered "low lifes" who were coming after the doctor for money. However, no true conspiracy argument was made in this proceeding. In fact, no explanation for why these women would make up such stories was ever suggested by Licensee. Indeed, no such explanation presents itself. There is no bond between the eleven women involved, other than their issues with Licensee. Some of the complainants know one another; a couple worked together in the past, a couple frequent the same restaurant. There is no vendetta against chiropractors or chiropractic: most of the complainants went to chiropractors before Licensee or have treated with other chiropractors afterwards. There is no evidence of financial gain for the complainants, most of whom would be beyond the statute of limitations for filing a lawsuit against Licensee.

In short, only one reason presents itself to explain the concerted actions of eleven complainants who do not know each other: that their stories are true. Licensee contends that most of

the cases are just misunderstandings, and that he is just more "aggressive" than the other two chiropractors who testified. The real problem, he argued, was with his failure to clearly record what happened in his chart because he would be tired at the end of the day. Interestingly, though, this argument by Licensee's attorney actually disagrees with Licensee's testimony about how seriously he took charting—how he would have the chart right next to him and make all entries when he performed the treatment.

There is a further problem with the "just a misunderstanding" argument. In 1991 and 1992, Licensee went through an earlier hearing on substantially similar issues, stemming from his vaginal penetration of one patient, massaging of breast tissue, and massaging a patient's bare buttocks. At the very least, the previous hearing should have taught Licensee the importance of fully charting what he was doing, of obtaining at least oral informed consent (and noting it in the chart), and of finding more appropriate ways to treat female patients.

Dr. Turnbull, a witness called by Licensee, has never been accused of a boundary violation or other sexual matter. In his testimony, the reason why is obvious. Dr. Turnbull does what he can to avoid touching his female patients in private areas, and he is nevertheless able to provide the same relief to his patients through his treatment. Licensee failed to learn from Dr. Turnbull's example.

Applying the Appropriate Standard

Having made the preceding findings of fact based upon the credible testimony of the eleven complainants, I must now determine whether Licensee's actions violated his responsibilities as a chiropractor.

The applicable law. ORS 684.100 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.

(Emphasis added). This statute has been in effect, virtually unchanged, during all of the times pertinent to this case. In 1995, the Board enacted administrative rules to aid in the interpretation of the statute. The 1995 version of OAR 811-35-015 states in part:

> Unprofessional conduct means any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable chiropractic practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of

actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a Chiropractic physician:
(1) engaging in any conduct or verbal behavior that may reasonably be interpreted by the patient as sexually seductive or demeaning[.]

The 1999 version of the same rule (amended and slightly renumbered as OAR 811-035-0015) stated:

(1)(a) Engaging in *any conduct or verbal behavior with or towards a patient that may reasonably be interpreted as sexual, seductive or sexually demeaning* (also see ORS 684.100)
(b) A licensee shall not engage in sexual relations with a current patient * * *
(c) "Sexual relations" means:
(A) sexual intercourse; or
(B) *any touching of sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the licensee for the purpose of arousing or gratifying the sexual desire or either licensee or patient*[.]

(Emphasis added). A 2003 amendment to the rule retained this same language but added the additional prohibition against a "romantic relationship" between chiropractor and patient.[13]

Licensee argues that his actions before the 1995 enactment of the administrative rule cannot be judged under that rule. Licensee is presumed to know his ethical obligations as a chiropractor at any given time during his practice, based upon the statute. However, he cannot be held responsible for violating rules that had not yet been written. Accordingly, Licensee's various interactions with the eleven complainants will be examined under the statute and whatever rule was in effect at that time. Therefore, Licensee's actions involving Patients 3, 4 and 7 will be evaluated under the statute alone (since there was no administrative rule at the time), while all of the other complaints will be evaluated under the statute and the 1999 or 2003 rules, which are substantially the same.

1. Under the statute alone.

Patient 7. Licensee's vaginal penetration of this patient occurred in approximately 1989. Licensee has given no valid reason for inserting his fingers into Patient 7's vagina. He testified that the only person he had ever performed a vaginal treatment on was his own wife. I do not accept this testimony, based upon the findings in the previous disciplinary order and the evidence in this case. Licensee's actions were contrary to the recognized standard of ethics of the chiropractic profession, based upon the testimony of Drs. Chaser and Turnbull, and based upon the evidence from the Executive Director of the Board. Even Licensee himself previously testified that there was no chiropractic basis to insert a finger in a patient's vagina. (Ex. A32). Licensee violated ORS 684.100(g)(A) in his treatment of Patient 7.

Patient 4. Licensee placed his had inside Patient 4's bra and cupped and caressed her bare

[13] The changes in the administrative rule may be found in Document P16, provided by the Board.

breast in 1990. As Licensee was reported to have testified in the first revocation hearing, there is no chiropractic reason to touch breast tissue. (Ex. A8 at 4). Drs. Chaser and Turnbull agree. Licensee's placing of his hand on Patient 4's bare breast was contrary to the recognized standard of ethics for his profession, and violated ORS 684.100(g)(A).

Patient 3. Also in 1990, Licensee treated Patient 3 for a hip problem. Licensee attempted to massage breast tissue, but Patient 3 would not allow it. Licensee then brought his hands around Patient 3 (he was behind her on the bench) and into Patient 3's groin area, close enough to the genitals that Patient 3 felt uncomfortable. Licensee did not explain why he was putting his hands in her groin, even after the patient asked for an explanation. He did not give her any warning of his intent to touch her groin area. Although it is possible that the groin area can be touched as a part of valid treatment, Licensee's failure to explain his actions or to note any reasons for putting his hands there (particularly while reaching around from behind Patient 3, meaning more of his body was in contact with hers), convinces me that Licensee again violated the recognized standard of ethics for his profession, and violated ORS 684.100(g)(A).

2. Under the statute and applicable OAR.

Patient 6. In 2000, Licensee massaged Patient 6's breasts (including the nipple and areola) with his fingertips and then, while Patient 6 was laying on her back, used his hands to palpate the upper thighs, into the groin/genital area. Licensee went under Patient 6's panties with his hands, touching the pubic area but staying just outside of the vagina. Patient 6 perceived this contact as sexual and testified that she felt "cornered" by Licensee's actions.

The 1999 version of OAR 811-035-0015 prohibits Licensee from engaging in any "conduct or verbal behavior with or towards a patient that may reasonably be interpreted as sexual, seductive or sexually demeaning * * *." Patient 6 has interpreted Licensee's actions as sexual; the question is whether that is a reasonable interpretation. I find that Licensee's massage of the patient's breasts, and placing of his fingers under her panties just outside her vagina (without giving any chiropractic reason for the touch) were reasonably interpreted by Patient 6 as sexual. Licensee violated the administrative rule and ORS 684.100 in this touching of Patient 6.

Patient 1. In 2002, Licensee massaged the breasts (under the bra) and penetrated the vagina of Patient 1 with his finger. The trauma from this contact with Licensee was one of the major issues Patient 1 had to deal with in a 30-day in-patient admission for psychological and drug issues. (Test. of Patient 1's husband). Patient 1 testified that Licensee seemed more perverted than just sexual, but the sexual nature of the contact was made clear when Licensee put his finger in her vagina shortly after her hysterectomy, and Patient 1 stated: "What are you doing? I can't even have sex with my husband yet!" (Test. of Patient 1). Licensee's actions are reasonably interpreted as sexual or sexually demeaning. Licensee violated OAR 811-035-0015 and the statute.

Patient 2. Licensee cupped Patient 2's breast and put his hands in her groin area in 2002 and, again, in 2004. Patient 2 was being seen for a hip condition on both visits, and could not understand why Licensee was holding her breast to treat a hip condition. Indeed, there is no reasonable chiropractic basis for holding a patient's breast even if treatment was needed in the rib or shoulder

area. Patient 2 interpreted the contact as sexual; she testified that Licensee was trying to "cop a feel" on those last two visits, and realized he had been doing it (cupping her breast) on previous visits as well, all the way back to high school. Patient 2's interpretation of Licensee's actions as sexual was reasonable. Licensee's contact with Patient 2's breasts, while over the clothing, constitutes a violation of the statute and of the administrative rule, in both its 1999 and 2003 versions.

Patient 10. In 2002, Licensee cupped Patient 10's vaginal area and cupped her breasts (hands between breast and a table), suggesting that he was doing a "breast exam" of Patient 10. After enduring this "treatment," Patient 10 told her boyfriend that she felt she had been raped or violated. She considered Licensee's actions to be sexual in nature. (Test. of Patient 10). Patient 10's interpretation of the actions as sexual is reasonable. Licensee's actions violated the statute and the 1999 version of the administrative rule.

Patient 8. Patient 8 was treated by Licensee on two occasions in 2002. Licensee reached his hands up under Patient 8's overall shorts (she was not wearing panties) and massaged her bare buttock, then moved his hands toward her genital region, coming close but not touching her vagina. Licensee also came in contact with Patient 8's bare breast when he massaged her ribs underneath the breast. Expert evidence at hearing indicated that there was no chiropractic reason for the massaging of the buttock to veer into the genital region instead of proceeding down the leg. Likewise, there was no valid chiropractic reason for Licensee to put his hands under Patient 8's shirt to massage the rib. Patient 8 perceived the touching to be sexual in nature. I conclude that the touching of the bare breast on the first visit was reasonably construed as sexual, and Licensee violated the statute and OAR 811-035-0015. Licensee's touching of Patient 8's bare buttocks may have had a therapeutic purpose and so is less clear, but I find that she could reasonably conclude (based upon his invasion of her clothing without permission), that the movement toward her crotch area was sexual in nature. This action, too, violated both the statute and the rule.

Patient 9. Licensee cupped Patient 9's right breast on several visits in 1999, touching all of it except the nipple. She did not at the time interpret those touches as sexual because of her inexperience with men. When she had to return to Licensee in 2003 (her current chiropractor was not available for several weeks), she specifically told Licensee not to touch her breasts and just to treat the neck and hips. Licensee massaged both breasts anyway and developed an erection while massaging Patient 9's breasts. Licensee also palpated Patient 9's buttocks, placing his thumbs between her legs in the crotch area. Expert testimony established that there was no valid chiropractic basis for Licensee's thumbs to be in the crotch area. Patient 9 perceived the contact as sexual, and contemplated filing a police report but perceived that Pendleton was not a town that took sexual crimes seriously. Patient 9's interpretation of the breast contact and the thumbs in the crotch as sexual is reasonable. Licensee violated the statute and the administrative rule.[14]

Patient 11. In 2004 or 2005, Licensee lifted Patient 11's breasts so he could treat the area underneath. Licensee also placed his hands inside Patient 11's pants, on top of her underwear, and

[14] Depending on the date of the treatment in 2003, the newer administrative rule could apply. However, the language on the issue of reasonable interpretation is the same and I would reach the same conclusion. I would also reach this same conclusion even if Patient 9 was mistaken about the presence of the erection. The touching itself violates the rule and the statute.

pressed on the pubic bone. Expert testimony at hearing established that the more prudent method of treatment would be to avoid touching the pubic area if at all possible (and to get informed consent if necessary). Additionally, the other chiropractors would ask a large-breasted patient to lift her own breast out of the way so treatment could be performed.

Licensee portrayed himself as more aggressive in such matters, lifting the breast tissue out of the way himself. In light of the fact that this very issue—the touching of breast tissue while trying to treat the ribs—led to at least one of the complaints in 1991, Licensee was on notice that some patients would interpret such touching as offensive or sexual in nature. Patient 11's interpretation of the contact as sexual was reasonable in this case. Licensee violated the statute and the administrative rule.

Patient 5. In 2003, Licensee was treating Patient 5's headache complaints when he suddenly put his hand down her pants, over her underwear, and pressed on the pubic area. Patient 5 was shocked by this action and testified it "could have been" sexual. The evidence is not entirely clear in this complaint as to whether the intent was sexual or whether Licensee just did a poor job of explaining the nature of his treatment to Patient 5. Patient 5's perception of this action—that it "could have been" sexual—is insufficient, in my opinion, to establish what needs to be shown to establish a violation under the Notice in this case.[15] No violation of statute or rule, as alleged in the Notice, took place here.

Determining the Appropriate Discipline

Having found several violations of Licensee's duties as a chiropractor under the statute and rule noted above, the next question is what discipline is appropriate. Licensee suggests (in the event he is found to be in violation), that he should be required to take some "boundary violation" courses. The Board seeks revocation of his license and the payment of costs, including investigative costs and attorney fees.

In determining the appropriate discipline, I note particularly the severity and sheer numbers of complaints made against Licensee in the past few years, suspecting that there may be others who were unable or unwilling to come forward with similar stories. I also take into account the 1991 hearing and the boundary violations established in that hearing.

In fact, the most astounding fact of this case is how little Licensee learned from the 1991 hearing. After five years of probation and a requirement that a chaperone be in the room when treating a female patient, Licensee returned to treating female patients without a chaperone. Even if none of the complainants had testified correctly—if Licensee was entirely accurate and all eleven complainants were lying—Licensee set himself up for further discipline by failing to continue the reasonable practice of having a chaperone in the room. In fact, however, the lack of a chaperone appears to have been Licensee's choice along with his decision to return to violating the sexual boundaries of some of his patients.

[15] The failure of proof here has nothing to do with the courage of Patient 5 (along with the other complainants), or with the validity of her testimony. Rather, the problem with Patient 5's complaint involved the limited scope of the issues raised in the Notice as amended.

Licensee was previously suspended and placed on probation; he learned nothing. I conclude that Licensee's license to practice chiropractic should be revoked for the reasons previously set forth in this decision.

Costs and Attorney Fees. The Board seeks a finding that it be awarded its costs, including investigative costs, and attorney fees. I find the Board's request appropriate under ORS 684.100(9)(g).[16]

ORDER

IT IS HEREBY PROPOSED:

That the license to practice chiropractic granted to Licensee in this case be revoked.

That Licensee be required to pay the costs and attorney fees of the Board pursuant to ORS 684.100(9)(g).

Rick Barber
Rick Barber, Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: July 19, 2006

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Oregon Board of Chiropractic Examiners (Board). If you disagree with any part of this recommendation, you may make written objections, called "exceptions," to the recommendation and present written argument in support of your exceptions. Exceptions and argument must be filed with the Oregon Board of Chiropractic Examiners not later than ten (10) days following the date of service of the proposed order at the following address:

Oregon Board of Chiropractic Examiners
3218 Pringle Road SE, Suite 150
Salem, Oregon 97302-6311

1. The exceptions shall be confined to factual and legal issues which are essential to the ultimate and just determination of the proceeding, and shall be based only on grounds that:

[16] Since no method of setting the amount of said costs and fees has been set forth in the Board's rules, and no evidence on those matters has been presented, it is assumed that the Board intends to set that amount in its Final Order or to go to Circuit Court for determination of the correct amounts.

a. A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence in the record;

b. A necessary legal conclusion is omitted or is contrary to law or the Board's rules or written policies;

c. Prejudicial procedural error occurred.

2. The exceptions shall be numbered and shall specify the disputed findings, opinions or conclusions, identified by page and line number of the proposed order. The nature of the suggested error shall be specified and the alternative or corrective language provided.

3. If you file timely written exceptions with the Board, the Board may also consider oral argument on exceptions. If you wish to present oral argument to the Board, you must specifically request oral argument in your written exceptions. The Board will consider oral argument only on those points raised in the written exceptions.

FINAL ORDER

After considering all the evidence, the proposed order, and the timely filed exceptions, if any, the Board will issue the final order in this case. This final order may adopt the proposed order prepared by the Administrative Law Judge as the final order or modify the proposed order and issue the modified order as the final order (*see* OAR 137-003-0665).

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 on you. *See* ORS 183.480 et seq.

CERTIFICATE OF SERVICE

I certify that on July 19, 2006, I served the attached Proposed Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

TERRY WOMACK
409 SW 4TH ST
PENDLETON OR 97801

BY FIRST CLASS MAIL

MICHAEL BREILING
ATTORNEY AT LAW
225 SW EMIGRANT
PENDLETON OR 97801

BY FIRST CLASS AND CERTIFIED MAIL
CERTIFIED MAIL RECEIPT # 7005 2570 0001 4246 1778

DAVE MCTEAGUE EXECUTIVE DIRECTOR
BOARD OF CHIROPRACTIC EXAMINERS
3218 PRINGLE RD SE #150
SALEM OR 97302

BY FIRST CLASS MAIL

LORI LINDLEY
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
1162 COURT ST NE
SALEM OR 97301-4096

BY FIRST CLASS MAIL

Original signature on file
at the OBCE office.

Lucy Garcia, Administrative Specialist
Office of Administrative Hearings

State of Oregon	)	**FINAL ORDER**
	)	**OF REVOCATION**
	)	
County of Marion	)	OAH Case No. 126605
	)	OBCE Case # 2004-1033, 2005-1051,
	)	2005-1052, 2005-1053, 2005-1055,
Terry Womack DC, Licensee	)	2005-1056, 2005-2059, 2006-1001,
	)	2006-1011, 2006-1017, 2006-1022

I, Dave McTeague, being first duly sworn, state that I am the Executive Director of the Oregon Board of Chiropractic Examiners, and as such, am authorized to verify pleadings in this case: and that the foregoing Final Order of Revocation is true to the best of my knowledge as I verily believe.

Original signature on file
at the OBCE office.

Dave McTeague, Executive Director
Oregon Board of Chiropractic Examiners

SUBSCRIBED AND SWORN to before me

this 10th day of August, 2006

Original signature on file
at the OBCE office.

NOTARY PUBLIC FOR OREGON
My Commission Expires:

10/7/07

OFFICIAL SEAL
KELLY J BIRD
NOTARY PUBLIC - OREGON
COMMISSION NO. 373440
MY COMMISSION EXPIRES OCT. 7, 2007

Certificate of Service

I, Dave McTeague, certify that on August 10, 2006, I served the foregoing Final Order for Revocation upon the party hereto by mailing, certified mail, postage prepaid, a true, exact and full copy thereof to:

Terry Womack DC
409 SW 4th
Pendleton, Oregon 97801

By regular mail to:

Michael Breiling AAL
225 SW Emigrant
Pendleton, Oregon 97801

Original signature on file
at the OBCE office.

Dave McTeague
Executive Director
Oregon Board of Chiropractic Examiners

BEFORE THE
BOARD OF CHIROPRACTIC EXAMINERS
STATE OF OREGON

In the Matter of TERRY WOMACK, D.C. Licensee.	)	**NOTICE OF PROPOSED DISCIPLINARY ACTION (REVOCATION)** **Case # 2004-1033, 2005-1051 2005-1052 2005-1053**

The Oregon Board of Chiropractic Examiners (hereafter "Board" or "OBCE") is the state agency responsible for licensing, regulating and disciplining chiropractic physicians and certified chiropractic assistants in the State of Oregon. Terry Womack, D.C. (hereafter "Licensee"), is a licensed chiropractic physician in Oregon. The Board proposes to discipline Licensee for the following reasons:

1.

In the summer of 2002, Licensee contacted Patient 1 who was a licensed massage therapist, to suggest they meet to discuss business opportunities between them. Patient 1 met with him and Licensee suggested she go on a tour of his clinic. When they arrived, Patient 1 noticed the two of them were alone in the building. After Licensee showed her the clinic, he asked if she would like an adjustment. Believing it was proper to accept and having the adjustment would give her more insight to his services for patient referrals, Patient 1 obliged. Patient 1 laid on a treatment table on her back and Licensee began doing an adjustment. Suddenly, without permission and without warning, Licensee began massaging under Patient 1's armpit and into the breast tissue. Licensee slid his hand under her shirt and bra and pressed his fingers into the breast nearly touching the nipple area. Licensee then went to her psoas muscle in

the groin area and then moved his hand directly into the groin area. Patient 1, feeling uncomfortable, ended the treatment session stating she had another appointment to go to.

2.

Some month's later and needing treatment for a neck injury from a motor vehicle accident, Patient 1 made an appointment with Licensee. She had just had a full hysterectomy 10 days previously. During the treatment session, Licensee made no effort to treat or examine her neck. Licensee placed Patient 1 on her back and suddenly slipped his hand under her pants and panties and inserted his middle finger into her vagina, all while talking to her in a normal manner. Patient 1 was in shock and soon told Licensee to stop it, explaining she had just had vaginal surgery. Licensee did not respond. Patient 1 immediately left the office and did not return. Within the next year, Patient 1 reported the treatment she received by Licensee to the Pendleton Police Department.

3.

During 2002, Patient 2 went for treatment with Licensee. She had been a patient since 1997. She was having hip problems due to standing a lot at work. She was not experiencing pain or problems in any other area. Licensee spent a large amount of time massaging her neck, shoulders and upper body. She recalled Licensee having her sit astride a low bench for the massage treatment. Licensee would seat himself astride the bench a few inches behind her with his legs straddling her. Licensee would proceed with the massage and would reach his hands up under her armpits until he was in contact with her breasts. Patient 2 thought it was odd that Licensee was touching her mid back when she specified hip problems. In addition, Licensee would have Patient 2 lie on her back on a treatment table and adjust her outer hip area and then

massage her lower abdomen below her navel and into her groin. (from the pubic bone and into the inside of her thighs to the inside of the base of the pubis) At first, Patient 2 believed Licensee because he was her doctor. However, during each subsequent treatment, Licensee would go further and further under her arms until he was touching more of her breast. During the last three visits Licensee touched her in increasingly intimate ways until it was quite clear to Patient 2 that it was not accidental, but was inappropriate.

4.

During September 1990 Patient 3 was having trouble with her hips due to being 8 months pregnant and sought treatment with Licensee. On her second to last visit, Licensee adjusted her hips and had her sit astride on a bench. Licensee straddled her on the bench a few inches behind her and began massaging her upper back, neck, shoulders and under her armpits, with his hands inside her shirt. After massaging for several minutes, Licensee slid his hand forward onto her breast and attempted to slip his hand underneath her bra.

At the next treatment session while lying on her back on a treatment table, Licensee put his hand onto her groin area slipping his fingers along the groove between her leg and abdomen in the area of her genitals. Patient 3 questioned licensee asking "what are you doing, you've never done that before?" Licensee did not respond. After this visit, Patient 3 was shocked and decided not to return for treatment from Licensee. Patient 3 did not report this to the board until years later because she was in a vulnerable state but did confide about the incident to a counselor years later.

5.

Patient 4 had been a patient from 1985-1989. She returned for treatment in 1990 for neck and back pain. Patient 4 had some stressors in her life and Licensee inquired about those. Patient 4 explained to him that she was newly married, had just started a new job and her husband was still living out of state. During treatment, Licensee had Patient 4 move to a low bench that was positioned behind the door. Licensee had Patient 4 sit astride the bench facing toward the door. He then straddled her on the bench seating himself a few inches behind her. Licensee began massaging her upper back, shoulders and neck for several minutes. He then leaned Patient 4 back toward him and reached over her shoulder with his right hand under her shirt, then put his hand on her collar bone area and massaged it. He then pushed his fingers inside the edge of her bra and fully cupped her left breast with his hand. Patient 4 did not return for treatment with Licensee.

6.

Patient 5 saw Licensee in March or April 2004 for back and neck pain. During treatment Licensee would start with her neck but then would move to the thigh in the area where the leg meets the top of the thigh next to her crotch area. He would massage right near the public area so Patient 5 would move so that Licensee would not touch her in the genital area. Licensee explained to Patient 5 the reasons why he needed to massage in that area when her complaints were to the back and neck. Licensee kept looking into Patient 5's eyes while he was massaging her in the leg area, making Patient 5 feel very uncomfortable.

7.

Patient 6 went to Licensee for back pain in January 2000. While sitting on a bench with Patient 6 and straddling the bench, Licensee started massaging her shoulders and then began to rub under her armpits which lead to directly massaging the breast tissue. The massage was painful and Patient 6 challenged why Licensee had to do this massage. Licensee said he had to work on this area. Licensee pressed very hard on her nipples and while doing that, kept looking into Patient 6's eye. Patient 6 kept telling Licensee to stop massaging her breast but Licensee insisted that he needed to massage in that location and became unpleasant toward Patient 6 when she requested that he stop. In addition, after he adjusted her legs he would work up to the groin area putting his hands and fingers directly on the pubic bone. Licensee would use so much force that it would hurt. Licensee would put his hands in the crease between the thigh and the genitals. Patient 6 had been required to see Licensee by her insurance carrier for a workers' compensation injury. At the last two treatments to Patient 6 she told Licensee only to adjust her back and not to touch her any place else. In each of these treatments, Licensee touched her groin area over her clothes. Patient 6 got off the table and left, never returning for treatment.

8.

In May 1992, Licensee was found in a Board Final Order, to be in violation of the statutes involving conduct very similar to this case. In that case, the Patients testified that he would have them straddle a bench with their back to Licensee while he adjusted them. Licensee would sit behind them on the bench and massage them. Licensee brought his arm around the front to massage near their breasts. Another patient testified that Licensee inserted his fingers into her vagina during treatment. The Final Order found Licensee violated the ethics statute and

rule for vaginal entry into a patient with his fingers. The order also found that Licensee was not credible as to his testimony against the patient that claimed vaginal entry performed. There was a finding by the judge that Licensees conduct as to the vaginal touching was sex abuse and should not be allowed in chiropractic. Licensee was suspended and put on probation for these violations, in addition to being required to be chaperoned for all female patients during probation.

9.

The Board finds that Licensee's conduct as described herein constitutes unprofessional conduct. Licensee's practice, as described above, constitutes violations of ORS 684.100 (1)(g)(A); and OAR 811-035-0015 and (1)(a) and (1)(c)(B).

10.

Due to the aforementioned violations, and the history of violations in the previous final order in 1992, in conjunction with the factual similarities in the 1992 case and the allegations from Patients 1 through 6, the OBCE proposes to revoke Licensee's license. To allow Licensee to continue to practice would pose too great a harm and risk to the patients of the State of Oregon and would not adequately protect those patients.

11.

Licensee shall pay costs of this disciplinary proceeding, including investigative costs and attorney fees pursuant to ORS 684.100(9)(g).

12.

Licensee has the right, if Licensee requests, to have a formal contested case hearing before the OBCE or its Administrative Law Judge to contest the matter set out above. At the

hearing, Licensee may be represented by an attorney and subpoena and cross-examine witnesses. That request for hearing must be made in writing to the OBCE, must be received by the OBCE within 30 days from the mailing of this notice (or if not mailed, the date of personal service), and must be accompanied by a written answer to the charges contained in this notice.

13.

The answer shall be made in writing to the OBCE and shall include an admission or denial of each factual matter alleged in this notice, and a short plain statement of each relevant affirmative defense Licensee may have. Except for good cause, factual matters alleged in this notice and not denied in the answer will be considered a waiver of such defense; new matters alleged in this answer (affirmative defenses) shall be presumed to be denied by the agency and evidence shall not be taken on any issue not raised in the notice and answer.

14.

If Licensee requests a hearing, before commencement of that hearing, Licensee will be given information on the procedures, rights of representation and other rights of the parties relating to the conduct of the hearing as required under ORS 183.413-415.

15.

If Licensee fails to request a hearing within 30 days, or fails to appear as scheduled at the hearing, the OBCE may issue a final order by default and impose the above sanctions against Licensee. Upon default order of the Board or failure to appear, the contents of the Board's file regarding the subject of this automatically become part of the evidentiary record of this

disciplinary action upon default for the purpose of proving a prima facie case.

Dated this 27th day of December 2005.

BOARD OF CHIROPRACTIC EXAMINERS
State of Oregon

Original signature on file
at the OBCE office.

Dave McTeague
Executive Director

State of Oregon
County of Marion) **Case # 2004-1033, 2005-1051,**
) **2005-1052, 2005-1053**

I, Dave McTeague, being first duly sworn, state that I am the Executive Director of the Board of Chiropractic Examiners of the State of Oregon, and as such, am authorized to verify pleadings in this case: and that the foregoing Notice is true to the best of my knowledge as I verily believe.

Original signature on file
at the OBCE office.

DAVE McTEAGUE, EXECUTIVE DIRECTOR
OREGON BOARD OF CHIROPRACTIC EXAMINERS

SUBSCRIBED AND SWORN to before me

this 27 day of Dec, 2005.

NOTARY PUBLIC FOR OREGON
My Commission Expires: 11-5-08

Original signature on file
at the OBCE office.

OFFICIAL SEAL
JANE A BILLINGS
NOTARY PUBLIC - OREGON
COMMISSION NO. 385081
MY COMMISSION EXPIRES NOV. 5, 2008

Certificate of Service

I, Dave McTeague, certify that on December 27, 2005, I served the foregoing Notice of Proposed Disciplinary Action upon the party hereto by mailing, certified mail, postage prepaid, a true, exact and full copy thereof to:

Terry Womack DC
409 SW 4th
Pendleton, Oregon 97801

Original signature on file
at the OBCE office.

Dave McTeague
Executive Director
Oregon Board of Chiropractic Examiners