

BEFORE THE OREGON
BOARD OF CHIROPRACTIC EXAMINERS

In the matter of the License of
TERRY WAYNE WOMACK, DC

HEARINGS CASE NO.
91-CEB-002

FINAL ORDER

History of the Case: The Board of Chiropractic Examiners (Board) served the licensee with Notice of Intent to Revoke License and Assess Penalty on November 23, 1990. After several stipulations and suspension notices, an Amended Notice of Intent to Revoke License and Assess Penalty was issued on August 21, 1991. A request for hearing was made on September 13, 1991, with an affirmative defense of laches in regard to ¶ 4 and 5 of the Amended Notice of Intent to Revoke.

A hearing was held before Wendy Comstock, a hearings officer, on November 13, 1991, in Salem, Oregon. Assistant Attorney General Paul Sundermier appeared as counsel for the Board. Jim Vick, attorney at law, represented the licensee. Testimony was taken from numerous witnesses.

On August 15, 1991, licensee's counsel issued a subpoena duces tecum to the custodian of records at St. Anthony's Hospital in Pendleton. After the submission of written argument by both counsel, which are incorporated into this record, the motion was quashed. Those documents are incorporated into this decision and made part of the record.

At the hearing, counsel for licensee indicated that he had reissued the subpoena. Arguments were made during the course of the hearing in regard to the admissibility of those hospital records. At the hearing, the complainant waived the doctor/patient privilege. Issues of relevance still remained. By the time oral testimony was concluded, the subpoenaed documents had not yet been delivered, and the parties agreed that the hearings officer should have an in camera viewing of the record, upon its receipt. The purpose of that viewing was to discern whether there was any information which would impugn the credibility of the complainant. Those records were delivered November 18, 1991, and were viewed in camera. There was nothing in those records which would have shed further light on the complainant's credibility, and no part of those files were made part of the record.

Also at the hearing, Assistant Attorney General Paul Sundermier moved to strike ¶ 6 of the Amended Notice, and moved to amend the first and second sentences of ¶ 7, to read: "During the period June 20, 1988, through December 8, 1989, Womack treated female patient who presented with upper back, neck and right shoulder pain. After several visits, the treatment at each visit included Womack having her sit straddle on a bench with her back to Womack while he adjusted her

shoulder". Attorney for licensee had no objections to these motions and the motions were allowed.

After the conclusion of testimony the parties were given until December 6, 1991, to submit briefs. Both parties submitted briefs by December 6, 1991.

Those briefs have been made a part of the record. After the closing of the record on December 6, 1991, Mr. Sundermier made a Motion to Reopen the Hearing for the purpose of submitting opinion letters. This Motion was made because of statements made by the licensee's attorney in his closing brief. Within that Motion, Mr. Sundermier stated that if any objections were raised, the State would withdraw the Motion. The State submitted the opinion letters in a sealed envelope accompanying the Motion. On December 12, 1991, Mr. Vick filed an objection to the Motion. As a result the Motion was withdrawn, and the sealed envelope has not been opened.

Legal Issues: (A) Did the licensee violate ORS 684.100(1)(g)(A) and (B), ORS 684.100(1)(s), OAR 811-15-005(1), OAR 811-15-015, OAR 811-35-005(11) and/or OAR 811-35-005(6)? If so, should the licensee's license to practice chiropractic be revoked; or should a lesser penalty be imposed?

(B) Should a civil penalty be assessed for violations of ORS Chapter 684?

(C) Should the licensee be required to pay the costs of this proceeding under ORS 684.100(9)(g)?

Motions: The issue of whether laches or a statute of limitations applies to the allegations in the Notice related to remains. The alleged incidents occurred more than five years before the Board action. No arguments on laches were presented by either counsel. Laches is a form of equitable estoppel preventing a party from asserting a claim because of the length of time which has passed since the wrongful act. The argument is that such a delay in asserting a claim prejudices the party against whom the claim is asserted.

There is no assertion that the licensee has been prejudiced by the delay in bringing the charges by Nor is there any implied damage done to the doctor for this delay. Therefore, there is nothing in this record to estop the charges from being considered.

However, more importantly, the allegations made by include a blocking out of her memory. It is a factual question as to whether she did, in fact, block out her memories of treatment by the licensee. If she did block out the memories, then applying laches would be inappropriate because the charges were made within a reasonable period of time after discovery of the act. If she did not block out the memories, then the charges would wholly lack credibility and would be dismissed on their merits.

Licensee's Affirmative Defense of laches is without merit. There is no statute of limitations which is applicable to this proceeding, and that argument also fails.

Credibility Discussion: Although there were numerous other witnesses, the credibility of only four are critical to this case, those of the three complainants and the licensee. Each of these witnesses will be addressed separately.

Complainant, _____ was very credible. Her demeanor throughout her testimony was observed and found to be believable. Additionally, her testimony was consistent and articulate. The only area of any inconsistency was in her testimony about the time which passed during her final exam by the doctor. This inconsistency is not of such a character to make the testimony of the events not credible. Under the circumstances, it would not be unusual for a patient to believe that the time was long, even if it were as short as a minute. Numerous attempts were made by counsel for the licensee to impugn the credibility of this witness. He attempted to find evidence that she had lied during her deposition, that she had lied to her parents, and that she had lied for purposes of receiving Worker's Compensation benefits. He also challenged the complainant's credibility on grounds that she had a drug problem, that she had been previously abused, that she was trying to make her fiancé jealous, and that she had a propensity for making false charges.

The deposition was made part of the record, and there were no inconsistencies between that testimony and that given at the hearing. The complainant and her mother denied that she had lied to her parents, but her fiancé (now husband) said that she lied to protect him. The question of whether the complainant has ever lied to her mother has nothing to do with whether she was lying under oath. Further, there is no credible evidence that she lied to receive Worker's Compensation benefits. The attempts to show this were weak. There was no relevant evidence submitted which would show _____ to be incredible.

Neither was there any reliable evidence that the complainant's alleged drug problem would lead to her distortion of the facts, that complainant was trying to make her fiancé jealous, had been previously abused, or had a propensity for making false charges. Further, but for a propensity for making false charges, none of the other allegations would infer any lack of credibility on the complainant's part.

The attacks on the complainant's credibility were an attempt to put the complainant on trial, much like a rape victim is often put on trial. However, these attempts went well beyond those concerns which are customarily raised in such cases. Counsel for the licensee was unable to show anything more than a girl who had occasional disagreements with her parents about her lifestyle. None of this "impeaching" evidence is relevant to this proceeding.

appeared via the telephone, and her physical demeanor could not be evaluated. However, it appeared that she was testifying honestly. testified that she had blocked out her experience with the doctor until she learned of experience, and that the memories returned at that point. Despite involvement with a domestic violence service, she did not report the incident to anyone, but did feel uncomfortable enough to never return.

The record shows that had blocked out a previous incident of sexual abuse for many years. It is internally consistent that she might have blocked out a subsequent act in the same way.

recollection did not include her actually seeing the licensee's treatment or positioning. The evidence indicates that it would be difficult for the licensee to have straddled the patient on his knees and maintained his balance, but it would not be impossible.

Further, there is no specific testimony to rebut statement of the treatment she received. The doctor did not review her file, and, therefore, was unable to specifically address her accusations. He had knowledge that his license to practice was being challenged and that was one of the complainants. Nothing in this record indicates that was not credible.

testified in person, and her demeanor was observed. She was adamant about the events to which she testified. She provided a reasonable explanation as to why she never pressed the matter with any authorities. She mentioned her discomfort with the treatment, and her co-workers and her husband responded in disbelief. The only real difference between her testimony and that of the doctor is whether the doctor massaged under her breast, reaching musculature, or whether the doctor massaged breast tissue itself. She was assured in her testimony that it was breast tissue itself which was being massaged. While the doctor said that it was not appropriate to massage breast tissue, and that he might have been massaging near the breast, he also said he had no specific recollection of the patient. Both the licensee and were credible but there was a misunderstanding on part as to what tissue was being treated. described the identical treatment area the licensee had previously testified to and that area was inferior to the breast tissue.

The licensee's attacks on this complainant's credibility by attempting to present ex-husbands' opinions are farfetched. The evidence he sought to introduce is not relevant as to the truth or veracity of the complainant's testimony at the hearing.

Dr. Womack

Dr. Womack is entirely incredible in his testimony as to He explained that when his fiance came to talk with him after her final treatment, the fiance was calm and wanted to know about the treatment which had been rendered. Dr. Womack was not told of any specific allegations about the treatment, but he admitted responding by indicating to the fiance that he could deliver babies and conduct rectal exams. It is nonsense to believe that Dr. Womack would say such things if he had simply worked on muscles and had not inserted his finger in her vagina. Dr. Womack also never mentioned the allegation with his office help until restrictions were placed on his practice months later. Then, he said it was the first he had heard of the problem. That is ridiculous. Dr. Womack heard of the allegation the very same day when the police paid him a visit. He did nothing to try to defend himself at that time. He did not discuss his state of mind when she left the office with his secretary until it was too late for her to have any clear recollection.

Dr. Womack was evaluating her for a Worker's Compensation injury. He testified that she had leg pain which caused him to massage in areas near her vaginal opening. However, he did not record any leg pain on his records. If there had been leg pain related to a Worker's Compensation injury, it is not reasonable that he would have omitted it from his report.

Finally, in his closing brief, counsel argues that it would be ridiculous to assume that the licensee would do the acts alleged because he is "a happily married man, who is a church-goer, and who has an unblemished reputation as a chiropractor". Further, it is argued that "sex abusers don't just drop out of the sky, there is usually a long history of other acts, a strong connection to pornography and oftentimes a history of being sexually abused themselves. None of these are present here". The record is essentially devoid of any evidence to either rebut or support these statements made by counsel. No character witnesses testified for the licensee. Those statements are simply emotional arguments, without value in this proceeding.

Findings of Fact: (1) Licensee has a license to practice chiropractic in the State of Oregon. He operates out of an office in Pendleton, Oregon. (2) Licensee does not practice obstetrics or proctology, and has no medical reason for entering the vagina during the course of treatment. (3) The doctor keeps files on his patients. He combines information and records on more than one patient in a file. For example, he will combine files of spouses, their children, and sometimes other relatives. (4) When a patient arrives for a visit, the patient completes the front side of a form, indicating a specific complaint. (5) The backside of the form is used by the doctor in recording his treatment. The licensee would indicate portions of the vertebra that was treated, and sometimes make additional notes. (6) [Name] was treated by the licensee in 1986. She was having severe back pain. She was not getting any relief from the treatment rendered by the licensee. (7) On third, and final visit, she was lying face down on a treatment

on a treatment table. Her pants and underpants were lowered to expose her buttocks. (8) Licensee had his hands on her lower back, and she felt pressure on her upper thighs. (9) Licensee treated the piriformis muscle. (10) stated that she blocked out the memory of that treatment, but remembered some discomfort about it. She did not return for another treatment. Eventually discovered that her back problem required surgery. (11) had been sexually abused as a child. has been active as an advocate against domestic violence for about five years. (12) Some chiropractors have underwear removed during massage of areas of the buttocks. Many chiropractors find that they are able to provide adequate treatment while the patient wears undergarments.

(13) was referred to the licensee by some co-workers after she experienced some upper back and shoulder pain. During 1988 through 1990, she occasionally consulted with the licensee. She had occasional upper back and chest pain. (14) Initially, felt relief from the treatments rendered by the licensee and was satisfied with the treatments. After a time, during her visits, would sit on a bench. The licensee would sit behind her on the bench and massage her. He would bring his arm around to her front and massage near her breasts. (15) did not like this aspect of the treatment, but she did not question the doctor. She found that the treatments, overall, provided relief. (16) mentioned to co-workers that the licensee massaged her breast. Her co-workers scoffed at her, and she decided not to mention it again. (17) continued to see the licensee when she had pain despite her discomfort with the treatment because he provided her with relief. Licensee recorded on the chart notes those areas of the spine on which he worked and that had shoulder pain. He did not put any diagnosis or treatment codes or make any notation of breast treatment, even when the patient specifically complained of breast area tenderness. Each bill related to the treatment included the identical diagnostic codes. Each chart note had substantially similar indication of the parts of the spine worked on by the licensee. (18) Some chiropractors avoid massaging the muscles near the breast because it is perceived to be inappropriate by many female patients. However, massaging the muscles near the breast is an appropriate chiropractic procedure for some problems. Massaging breast tissue itself is not an appropriate chiropractic procedure.

(19) first visited the licensee in February, 1987. Her mother had consulted with the licensee on occasion. was in high school at the time. Over the next three years, she visited the licensee for treatment nine times. She felt relief from the treatments rendered. She had pains in her neck, her upper and lower back, and her hips on varying occasions. (20) On May 31, 1990, hurt her back while at work. (21) On June 1, 1990, had an appointment with the licensee at 4:00 p.m. She complained of lower back and neck pain. She had no discomfort in her legs. (22) saw the doctor sometime after 4:00 p.m. on June 1, 1990. She had completed some paperwork in regard to a Worker's Compensation claim. (23) The licensee worked on her neck and shoulders and then "popped" her hips. During the examination, he had her lower her outer pants. She complied with the request. (24) Licensee began applying pressure near her pubic area. Licensee moved underpants aside and inserted his fingers into

her vagina. During this, he was asking her about her job. Licensee had never made small talk with complainant before. Licensee was keeping his eyes on public area during the insertion. His fingers moved around her vagina. (25) Licensee then had the patient pull her clothes up and go to the bench, another office apparatus. He twisted her back from behind. (26) Licensee told the patient to return in a week. (27) She left the doctor's office and began crying in her car. (28) She drove home, where she lived with her boyfriend and his mother. She was upset and did not confide about the problem, but indicated to her boyfriend that there had been a problem at the licensee's office. (29) After calling mother to come to talk with the boyfriend went to visit licensee. (30) The boyfriend spoke with the licensee after waiting for a patient to leave. He asked the doctor what had happened. (31) Licensee first tried to explain the treatment rendered by showing the boyfriend books and other medical information. He further explained that he could perform rectal exams and could deliver babies. Licensee told the boyfriend that he had entered the vagina. (32) decided to contact the police and made a statement on June 1, 1990. The police referred her to the local domestic violence service. (33) Upon visiting the domestic violence center, met the director. She told her story. (34) During the course of the conversation, told that she had a disturbing experience with the licensee and was only just recalling it. (35) The police visited with the licensee on June 1, 1990. He made a statement to the police at that time, denying vaginal entry.

(36) Each visit made by resulted in a bill from the licensee, indicating the identical diagnostic codes. (37) Licensee did not discuss the matter of with his secretary until after he was served with a notice of emergency suspension and a stipulation requiring that he have someone be in the examination room with him when he examined female patients. That notice came in November, 1990. At that time, the licensee told his secretary that he had just learned of the problem. At that time, she could not recollect anything unusual about June 1, 1990.

(38) Many chiropractors treat patients with their pants on and, if it is difficult to treat the proper area, they have them put on a gown. Some have patients move the outer garments to allow more direct treatment. (39) During his treatment of the aforementioned patients, licensee did not provide an explanation of the treatment he would be giving prior to the rendering of that treatment. He did tell that he needed to feel something inside while he had his fingers inserted in her vagina. (40) Licensee often left the window coverings in his street level office open so that patients could be viewed from outside. He oftentimes left the examining room door open while performing treatments. The receptionist walked in the examining rooms at will, without knocking.

CONCLUSIONS AND REASONSUnprofessional, dishonorable or unethical conduct

The licensee violated ORS 684.100(1)(g).

ORS 684.100(1) currently provides, in part: "(1) The board may * * * suspend or revoke a license, or impose a civil penalty not to exceed \$1,000 upon any of the following grounds:

"(g) Unprofessional or dishonorable conduct which includes but is not limited to:

"(A) Any repeated conduct or practice contrary to recognized standard of ethics of the chiropractic profession or any conduct or practice which does or might constitute a danger to the health or safety of a patient or the public * * *.

(B) Wilful and repeated ordering or performance of unnecessary laboratory tests or studies; administration of unnecessary treatment; * * *, or otherwise ordering or performing any chiropractic service, X-ray, or treatment which is contrary to recognized standards of practice of the chiropractic profession." (As amended in 1987)

Prior to 1987 provided that the Board could discipline for "Wilful and consistent utilization of any chiropractic service, x-ray, or treatment which is contrary to the recognized standards of practice * * *." Prior to 1991, the maximum civil penalty which could be imposed was \$1,000.

The legislature has provided the Board with an opportunity to promulgate administrative rules to clarify the statutory scheme. The Board has not written any rules which further define unprofessional or dishonorable conduct. Some standards of ethics are enumerated by administrative rule. Unprofessional or dishonorable conduct is an overly broad term and cannot be defined without administrative rules and, therefore, a license cannot be revoked simply for unprofessional or dishonorable conduct. However, a disciplinary act can be imposed for violation of the standards of ethics, as determined by contested case proceedings and for violations of administrative rules enumerating some of those standards.

In regard to the patient, the licensee treated her lower back with the patient's underpants lowered. The patient's buttocks was fully exposed during treatment. There is no clear evidence the licensee straddled the patient while applying the treatment. The actual treatment applied to is not in question. It appears likely that the licensee was working on the appropriate body parts and was using accepted techniques. The treatment could have been

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applied through the underpants. Some chiropractors remove the underpants when treating some lower back problems.

OAR 811-35-005(6) requires that doctors of chiropractic shall respect the rights of their patients as individuals and conduct themselves accordingly. In the treatment of the licensee did not violate OAR 811-35-005(6).

was unsure as to whether the treatment she received was appropriate. The massaging of breast tissue, rather than muscle, is inappropriate. All of the experts agreed on this point. The licensee agreed. The fact that was unsure as to whether the treatment was appropriate is not surprising. Patients necessarily establish a trust with their doctors. They expect them to perform their duties with the standards of ethics and follow medically accepted procedures. is not a chiropractor and would have no way of knowing whether the treatment was proper. She only knew that it caused her concern. It is for the experts to decide whether it was proper. In this case, there was simply a misunderstanding, and the licensee was trying to reach the muscles. It is more likely than not that the licensee was treating the pectoralis muscle tissue and not massaging breast tissue. Therefore, there is no violation of ORS 684.100(1)(g)(A)(B) or OAR 811-35-005(6).

was improperly treated. It is agreed by all of the experts that there is no reason for vaginal insertion. Despite this, the licensee entered the vagina. This is clearly a violation of the patient's rights and contrary to the standards of ethics in the chiropractic community. Licensee argued that he provided treatment near the vaginal orifice, but did not enter. However, he was not found to be credible on this point. Because there was vaginal entry, it must be concluded that he violated ORS 684.100(1)(g)(A) and (B) and OAR 811-35-005(6).

Without reiterating the findings made above in the credibility discussion, it is necessary to address some of the allegations made by the licensee. Licensee opened the hearing by arguing that was sexually abused prior to June 1, 1990, that she was having a difficult relationship with her boyfriend and was trying to make him jealous, that she had psychiatric disorders which would show a propensity for making false claims of abuse, and that there was a conspiracy to get Dr. Womack.

Firstly, the evidence which the licensee presented on these points were, for the most part, not relevant. Some of the relevancy arguments were made in regard to the licensee's attempt to subpoena the complainant's hospital records. The order quashing the subpoena fully addressed those issues. Secondly, the evidence presented, even if it had been given weight, would not have supported any of these allegations. The complainant seems to have been a somewhat typical teenager.

There were moments of tension between her and her mother. Nothing in the record would indicate that there was any likelihood of any of the problems alleged by the licensee.

Licensee argues that none of the complainants saw any indication that the licensee was acting unusually during his treatment. He acted clinically and professionally. Therefore, it is argued that he was not treating these patients in a way which would cause him sexual gratification. The treatment of _____ was not done for chiropractic reasons, and it is not important whether the doctor was sexually gratified or excited by the treatment. The statute does not require a sexual reason before discipline can be imposed.

Further, only the licensee would know whether he was gratified by his conduct. Gratification is an internal process. The fact that he did not show signs of ecstasy does not indicate that he gained no pleasure from the inappropriate touching. In fact, it seems that he must have gained some pleasure from the touching, or he would not have done it. There was no professional reason for this actions.

The licensee took advantage of the doctor/patient relationship and his position of trust by touching _____ in private body parts. This is sexual abuse, and cannot be tolerated within the profession.

Record Keeping

Dr. Womack, although treating _____ for a new Worker's Compensation injury, did not note that she was having any leg pain on his chart notes. Yet he says he was applying pressure near the vagina because of leg pain. He says he only reported the major source of pain. However, he used five ICD-9 codes to address lower back pain and mentioned a cervical problem. It is not likely that, for a new Worker's Compensation claim, the doctor would omit a source of pain which allegedly caused him to treat from above the patient's knee up her inner thigh to near the vagina. If the licensee had treated _____ as he indicated in testimony, he would have been required to keep a record of that treatment. He did not do so. This would be a violation of ORS 684.100(1)(s) and OAR 811-15-005, which require that accurate and complete chart notes be kept. However, because it is concluded that the licensee did not treat the claimant as he testified, it cannot be determined whether his chart notes reflect his actual treatment. All that can be concluded is that he failed to chart those aspects of the visit which were not appropriate medical procedures.

In regard to _____ however, the licensee did not indicate breast massage or massage of the muscles near the breast in his chart notes for _____. He argues that he was doing appropriate massage under the breast. He did not record that in his records. Licensee's failure to keep accurate and complete chart notes is a serious concern. Insurance companies and other doctors rely on the completeness and accuracy of such records.

Licensee's chart notes were insufficient, and his failure to keep more detailed, accurate notes is a violation of OAR 811-15-005.

Further, the licensee did not keep organized records by combining the records of several family members. To combine the treatment records of individuals, some of whom may not have a legal right to review the records of the others, the licensee was creating a potential problem for improper disclosure. This record keeping problem, however, is not of such a serious nature that discipline would be recommended by the finder of fact. More importantly, there were no allegations in the Notice of Intent to Revoke that the combining of patient files was an issue. The licensee was not given notice that this aspect of his record keeping was to be scrutinized. It would violate his due process rights to consider this problem in the case at hand. This record-keeping problem shall not be considered in recommending discipline.

Licensee did have notice that his failure to keep detailed records of treatment were at issue. He had an opportunity to present evidence on those charges. Licensee did not keep accurate records. ORS 684.100(s) provides that the Board may discipline an individual for violating a provision of ORS Chapter 684, or any rule adopted therein. Some level of discipline would be appropriate for failing to keep accurate records of treatment, but the licensee should not have his license revoked for those failings alone.

Office Procedures

Office procedures were not stated in the Notice of Proposal to Revoke the License. Consequently, office procedures are not considered as a factor in the decision to discipline.

Other allegations

The Notice of Intent to Revoke also alleged violations of OAR 811-15-015, failure to obtain informed consent prior to treatment. However, because a patient cannot give informed consent to conduct which constitutes sex abuse, there is no clear violation of this rule. If the licensee had admitted the actions alleged and argued that there was a medical reason for such treatment, he would have been required to obtain informed consent. That was not the case here, and the rule is inapplicable.

FINAL ORDER

Licensee has violated ORS 684.100(1)(g)(A) and (B) and OAR 811-15-005(1). The penalty imposed is:

- 1) A 90 day suspension from the practice of chiropractic, active or inactive, to begin June 30, 1992.
- 2) (a) A 5 year probationary period beginning on the September 30, 1992.
(b) During the probationary period the licensee will not treat any female patient unless the female patient is accompanied by another adult female in the treatment room.
(c) Licensee shall be evaluated within 60 days by a licensed clinical psychologist or psychiatrist, to be approved by the Board, who specializes in sex abuse cases. The approved mental health provider shall report to the Board and the licensee shall complete any recommended course of treatment.
- 3) A civil penalty of \$1000 shall be imposed upon the licensee, payable no later than June 30, 1992.
- 4) Costs of the disciplinary proceedings are assessed against the licensee under ORS 684.100(9)(g) and ORCP 68A(2): compensation for the referee, in the amount of \$7,249.

Original signature on file
at the OBCE office.

Christie Joacham
Executive Director
Oregon Board of Chiropractic Examiners

5-21-92
Dated

Those briefs have been made a part of the record. After the closing of therecord on December 6, 1991, Mr. Sundermier made a Motion to Reopen the Hearing for the purpose of submitting opinion letters. This Motion was made because of statements made by the licensee's attorney in his closing brief. Within that Motion, Mr. Sundermier stated that if any objections were raised, the State would withdraw the Motion. The State submitted the opinion letters in a sealed envelope accompanying the Motion. On December 12, 1991, Mr. Vick filed an objection to the Motion. As a result the Motion was withdrawn, and the sealed envelope has not been opened.

Legal Issues: (A) Did the licensee violate ORS 684.100(1)(g)(A) and (B), ORS 684.100(1)(s), OAR 811-15-005(1), OAR 811-15-015, OAR 811-35-005(11) and/or OAR 811-35-005(6)? If so, should the licensee's license to practice chiropractic be revoked; or should a lesser penalty be imposed?

(B) Should a civil penalty be assessed for violations of ORS Chapter 684?

(C) Should the licensee be required to pay the costs of this proceeding under ORS 684.100(9)(g)?

Motions: The issue of whether laches or a statute of limitations applies to the allegations in the Notice related to P.D. remains. The alleged incidents occurred more than five years before the Board action. No arguments on laches were presented by either counsel. Laches is a form of equitable estoppel preventing a party from asserting a claim because of the length of time which has passed since the wrongful act. The argument is that such a delay in asserting a claim prejudices the party against whom the claim is asserted.

There is no assertion that the licensee has been prejudiced by the delay in bringing the charges by P.D. Nor is there any implied damage done to the doctor for this delay. Therefore, there is nothing in this record to estop the charges from being considered.

However, more importantly, the allegations made by P.D. include a blocking out of her memory. It is a factual question as to whether P.D. did, in fact, block out her memories of treatment by the licensee. If she did block out the memories, then applying laches would be inappropriate because the charges were made within a reasonable period of time after discovery of the act. If she did not block out the memories, then the charges would wholly lack credibility and would be dismissed on their merits.

Licensee's Affirmative Defense of laches is without merit. There is no statute of limitations which is applicable to this proceeding, and that argument also fails.

Credibility Discussion: Although there were numerous other witnesses, the credibility of only four are critical to this case, those of the three complainants and the licensee. Each of these witnesses will be addressed separately.

H.V.N.C

Complainant, H.V.N.C., was very credible. Her demeanor throughout her testimony was observed and found to be believable. Additionally, her testimony was consistent and articulate. The only area of any inconsistency was in her testimony about the time which passed during her final exam by the doctor. This inconsistency is not of such a character to make the testimony of the events not credible. Under the circumstances, it would not be unusual for a patient to believe that the time was long, even if it were as short as a minute. Numerous attempts were made by counsel for the licensee to impugn the credibility of this witness. He attempted to find evidence that she had lied during her deposition, that she had lied to her parents, and that she had lied for purposes of receiving Worker's Compensation benefits. He also challenged the complainant's credibility on grounds that she had a drug problem, that she had been previously abused, that she was trying to make her fiancé jealous, and that she had a propensity for making false charges.

The deposition was made part of the record, and there were no inconsistencies between that testimony and that given at the hearing. The complainant and her mother denied that she had lied to her parents, but her fiancé (now husband) said that she lied to protect him. The question of whether the complainant has ever lied to her mother has nothing to do with whether she was lying under oath. Further, there is no credible evidence that she lied to receive Worker's Compensation benefits. The attempts to show this were weak. There was no relevant evidence submitted which would show H.V.N.C. to be incredible.

Neither was there any reliable evidence that the complainant's alleged drug problem would lead to her distortion of the facts, that complainant was trying to make her fiancé jealous, had been previously abused, or had a propensity for making false charges. Further, but for a propensity for making false charges, none of the other allegations would infer any lack of credibility on the complainant's part.

The attacks on the complainant's credibility were an attempt to put the complainant on trial, much like a rape victim is often put on trial. However, these attempts went well beyond those concerns which are customarily raised in such cases. Counsel for the licensee was unable to show anything more than a girl who had occasional disagreements with her parents about her lifestyle. None of this "impeaching" evidence is relevant to this proceeding.

P.D.

P.D. appeared via the telephone, and her physical demeanor could not be evaluated. However, her telephone demeanor showed a resolve which indicates that she was testifying honestly. P.D. testified that she had blocked out her experience with the doctor until she learned of H.V.N.C.'s experience, and that the memories returned at that point. Despite P.D.'s involvement with a domestic violence service, she did not report the incident to anyone, but did feel uncomfortable enough to never return.

Counsel for the licensee argues that it is ludicrous to assume someone in P.D.'s position would block out such an occurrence. However, the record shows

that P.D. had blocked out a previous incident of sexual abuse for many years. It is internally consistent that she might have blocked out a subsequent act in the same way.

It is further argued that P.D.'s description of the event is physically impossible, and that, therefore, her recollection of the events is not accurate. The evidence does indicate that it would be difficult for the doctor to have his knees next to the patient's thighs and maintain balance, but it would not be impossible. The evidence does not indicate that it would be difficult for him to sit on her thighs with his legs dangling over the sides. The story told by P.D. is not as incredible as the licensee would have us believe.

Further, there is no specific testimony to rebut P.D.'s statement of the treatment she received. The doctor did not review her file, and, therefore, was unable to specifically address her accusations. He had knowledge that his license to practice was being challenged and that P.D. was one of the complainants. Nothing in this record indicates that P.D. was not credible.

S.F.

S.F. testified in person, and her demeanor was observed. She was adamant about the events to which she testified. She provided a reasonable explanation as to why she never pressed the matter with any authorities. She mentioned her discomfort with the treatment, and her co-workers and her husband responded in disbelief. The only real difference between her testimony and that of the doctor is whether the doctor massaged under her breast, reaching musculature, or whether the doctor massaged breast tissue itself. S.F. is found to be more credible than the doctor on this point. She was assured in her testimony that it was breast tissue itself which was being massaged. While the doctor said that it was not appropriate to massage breast tissue, and that he might have been massaging near the breast, he also said he had no specific recollection of the patient. S.F. was very credible.

The licensee's attacks on this complainant's credibility by attempting to present ex-husbands is farfetched. The evidence he sought to introduce is not relevant as to the truth or veracity of the complainant's testimony at the hearing.

Dr. Womack

Dr. Womack is entirely incredible in his testimony. He explained that when H.V.N.C.'s fiance came to talk with him after her final treatment, the fiance was calm and wanted to know about the treatment which had been rendered. Dr. Womack was not told of any specific allegations about the treatment, but he admitted responding by indicating to the fiance that he could deliver babies and conduct rectal exams. It is nonsense to believe that Dr. Womack would say such things if he had simply worked on muscles and had not inserted his finger in her vagina. Dr. Womack also never mentioned the allegation with his office help until restrictions were placed on his practice months later. Then, he said it was the first he had heard of the problem. That is

ridiculous. Dr. Womack heard of the allegation the very same day when the police paid him a visit. He did nothing to try to defend himself at that time. He did not discuss H.V.N.C.'s state of mind when she left the office with his secretary until it was too late for her to have any clear recollection.

Dr. Womack was evaluating H.V.N.C. for a Worker's Compensation injury. He testified that she had leg pain which caused him to massage in areas near her vaginal opening. However, he did not record any leg pain on his records. If there had been leg pain related to a Worker's Compensation injury, it is not reasonable that he would have omitted it from his report.

Finally, in his closing brief, counsel argues that it would be ridiculous to assume that the licensee would do the acts alleged because he is "a happily married man, who is a church-goer, and who has an unblemished reputation as a chiropractor". Further, it is argued that "sex abusers don't just drop out of the sky, there is usually a long history of other acts, a strong connection to pornography and oftentimes a history of being sexually abused themselves. None of these are present here". The record is essentially devoid of any evidence to either rebut or support these statements made by counsel. No character witnesses testified for the licensee. Those statements are simply emotional arguments, without value in this proceeding.

Hearings Officer's Findings of Fact: (1) Licensee has a license to practice chiropractic in the State of Oregon. He operates out of an office in Pendleton, Oregon. (2) Licensee does not practice obstetrics or proctology, and has no medical reason for entering the vagina during the course of treatment. (3) The doctor keeps files on his patients. He combines information and records on more than one patient in a file. For example, he will combine files of spouses, their children, and sometimes other relatives. (4) When a patient arrives for a visit, the patient completes the front side of a form, indicating a specific complaint. (5) The backside of the form is used by the doctor in recording his treatment. The licensee would indicate portions of the vertebra that was treated, and sometimes make additional notes.

(6) P.D. was treated by the licensee in 1986. She was having severe back pain. She was not getting any relief from the treatment rendered by the licensee. (7) On P.D.'s third, and final visit, the licensee had her lower her pants to work on the lower back. She also had her underpants lowered so that her buttocks was exposed. P.D. laid on a treatment table, which stands approximately two feet off the ground. While exerting pressure and massage on her lower back, licensee had his thighs against her thighs and put some of his weight on her upper legs. (8) P.D. blocked out her memory of the treatment, but remembered some discomfort about it. She did not return for another treatment. Eventually P.D. discovered that her back problem required surgery. (9) P.D. had been sexually abused as a child. She blocked out that abuse until adulthood. P.D. has been active as an advocate against domestic violence for about five years. (10) Some chiropractors have underwear removed during massage of areas of the buttocks. Many chiropractors find that they are able to provide adequate treatment while the patient wears undergarments. It was not necessary to have the buttocks fully exposed to administer proper treatment to P.D. It is never appropriate to straddle a patient while applying treatment.

(11) S.F. was referred to the licensee by some co-workers after she experienced some upper back and shoulder pain. During 1988 through 1990, she occasionally consulted with the licensee. She had occasional upper back and chest pain. (12) Initially, S.F. felt relief from the treatments rendered by the licensee and was satisfied with the treatments. After a time, during her visits, S.F. would sit on a bench. The licensee would sit behind her on the bench and massage her. He would bring his arm around to her front and massage near her breasts. During the massage, the licensee would massage her breast tissue. (13) S.F. did not like this aspect of the treatment, but she did not question the doctor. She found that the treatments, overall, provided relief. (14) S.F. mentioned the breast massage to co-workers who scoffed at her, and she decided not to mention it again. (15) S.F. continued to see the licensee when she had pain despite her discomfort with the breast massage because he provided her with relief. Licensee recorded on the chart notes those areas of the spine on which he worked and that S.F. had shoulder pain. He did not put any diagnosis or treatment codes or make any notation of breast treatment, even when the patient specifically complained of breast area tenderness. Each bill related to the treatment included the identical diagnostic codes. Each chart note had substantially similar indication of the parts of the spine worked on by the licensee. (16) Many chiropractors avoid massaging the muscles near the breast because it is perceived to be inappropriate by many female patients. However, massaging the muscles near the breast is an appropriate chiropractic procedure for some problems. Massaging breast tissue itself is not an appropriate chiropractic procedure.

(17) H.V.N.C. first visited the licensee in February, 1987. Her mother had consulted with the licensee on occasion. H.V.N.C. was in high school at the time. Over the next three years, she visited the licensee for treatment nine times. She felt relief from the treatments rendered. She had pains in her neck, her upper and lower back, and her hips on varying occasions. (18) On May 31, 1990, H.V.N.C. hurt her back while at work. (19) On June 1, 1990, H.V.N.C. had an appointment with the licensee at 4:00 p.m. She complained of lower back and neck pain. She had no discomfort in her legs. (20) H.V.N.C. saw the doctor sometime after 4:00 p.m. on June 1, 1991. She had completed some paperwork in regard to a Worker's Compensation claim. (21) The licensee worked on her neck and shoulders and then "popped" her hips. During the examination, he had her lower her outer pants. She complied with the request. (22) Licensee began applying pressure near her pubic area. Licensee moved H.V.N.C.'s underpants aside and inserted his fingers into her vagina. During this, he was asking her about her job. Licensee had never made small talk with complainant before. Licensee was keeping his eyes on H.V.N.C.'s pubic area during the insertion. His fingers moved around her vagina. (23) Licensee then had the patient pull her clothes up and go to the bench, another office apparatus. He twisted her back from behind. (24) Licensee told the patient to return in a week. (25) H.V.N.C. left the doctor's office and began crying in her car. (26) She drove home, where she lived with her boyfriend and his mother. She was upset and did not confide about the problem, but indicated to her boyfriend that there had been a problem at the licensee's office. (27) After calling H.V.N.C.'s mother to come to talk with H.V.N.C., the boyfriend went to visit licensee. (28) The boyfriend spoke with the licensee after waiting for a patient to leave. He asked the doctor what had happened. (29) Licensee first tried to explain the treatment rendered by showing the boyfriend books and other medical information. He further

explained that he could perform rectal exams and could deliver babies. Licensee told the boyfriend that he had entered the vagina. (30) H.V.N.C. decided to contact the police and made a statement on June 1, 1990. The police referred her to the local domestic violence service. (31) Upon visiting the domestic violence center, H.V.N.C. met P.D., the director. She told P.D. her story. (32) During the course of the conversation, P.D. told H.V.N.C. that she had a disturbing experience with the licensee and was only just recalling it. (33) The police visited with the licensee on June 1, 1990. He made a statement to the police at that time, denying vaginal entry.

(34) Each visit made by H.V.N.C. resulted in a bill from the licensee, indicating the identical diagnostic codes. (35) Licensee did not discuss the matter of H.V.N.C. with his secretary until he was served with a notice requiring that he have someone be in the examination room with him when he examined female patients. That notice came in November, 1990. At that time, the licensee told his secretary that he had just learned of the problem. At that time, she could not recollect anything unusual about June 1, 1990.

(36) Many chiropractors treat patients with their pants on and, if it is difficult to treat the proper area, they have them put on a gown. Some have patients move the outer garments to allow more direct treatment. (37) During his treatment of the aforementioned patients, licensee did not provide an explanation of the treatment he would be giving prior to the rendering of that treatment. He did tell H.V.N.C. that he needed to feel something inside while he had his fingers inserted in her vagina. (38) Licensee often left the window coverings in his street level office open so that patients could be viewed from outside. He oftentimes left the examining room door open while performing treatments. The receptionist walked in the examining rooms at will, without knocking.

CONCLUSIONS AND REASONS

Unprofessional, dishonorable or unethical conduct

The licensee violated ORS 684.100(1)(g), and his license should be revoked.

ORS 684.100(1) currently provides, in part: "(1) The board may * * * suspend or revoke a license, or impose a civil penalty not to exceed \$1,000 upon any of the following grounds:

"(g) Unprofessional or dishonorable conduct which includes but is not limited to:

"(A) Any repeated conduct or practice contrary to recognized standard of ethics of the chiropractic profession or any conduct or practice which does or might constitute a danger to the health or safety of a patient or the public * * *.

(B) Wilful and repeated ordering or performance of unnecessary laboratory tests or studies; administration of unnecessary treatment; * * *, or otherwise ordering or performing any chiropractic service, X-ray, or treatment which is contrary to recognized standards of practice of the chiropractic profession." (As amended in 1987)

Prior to 1987 provided that the Board could discipline for "Wilful and consistent utilization of any chiropractic service, x-ray, or treatment which is contrary to the recognized standards of practice * * *." Prior to 1991, the maximum civil penalty which could be imposed was \$1,000.

The legislature has provided the Board with an opportunity to promulgate administrative rules to clarify the statutory scheme. The Board has not written any rules which further define unprofessional or dishonorable conduct. Some standards of ethics are enumerated by administrative rule. Unprofessional or dishonorable conduct is an overly broad term and cannot be defined without administrative rules and, therefore, a license cannot be revoked simply for unprofessional or dishonorable conduct. However, a disciplinary act can be imposed for violation of the standards of ethics, as determined by contested case proceedings and for violations of administrative rules enumerating some of those standards.

In regard to the patient, P.D., the licensee treated her lower back with the patient's underpants lowered. The patient's buttocks was fully exposed during treatment. The evidence indicates that it was not necessary for the buttocks to be exposed during treatment. The licensee straddled the patient while applying the treatment. The actual treatment applied to P.D. is not in question. It appears likely that the licensee was working on the appropriate body parts and was using accepted techniques.

However, the methodology used in applying the treatment was not acceptable. It was unnecessary to have the underpants lowered for treatment. The treatment could have been applied through the underpants. While some chiropractors remove the underpants when treating some lower back problems, it is not a common practice. Further, the straddling of the patient while her panties were lowered was shown by expert witnesses to be totally inappropriate.

OAR 811-35-005(6) requires that doctors of chiropractic shall respect the rights of their patients as individuals and conduct themselves accordingly. Straddling a patient while her buttocks are exposed is disrespectful and inappropriate. In the treatment of P.D., the licensee violated OAR 811-35-005(6). This violation of the administrative rule, alone, would not be an appropriate basis for revocation, although some level of discipline would be warranted. However, in combination with other acts, it constitutes repeated conduct which violates the standards of ethics of the profession.

In regard to S.F., the licensee massaged breast tissue during treatment. Licensee argues that there is no allegation that the nipple was touched or that the breast was cupped. Further, it is argued that because S.F. was unsure as to whether the treatment she received was appropriate, it must not have been inappropriate. These arguments are without merit. The massaging of breast tissue, rather than muscle, is inappropriate. All of the experts agreed on this point. The licensee agreed. The fact that the licensee massaged breast tissue on repeated occasions when it was not a proper type of treatment makes the treatment unsuitable and shows a disrespect for the patient. In addition, this type of overreaching is likely to create an emotional health problem for the patient, thereby violating both ORS 684.100(1)(g)(A) and (B) and OAR 811-35-005(6).

The fact that S.F. was unsure as to whether the treatment was appropriate is not surprising. Patients necessarily establish a trust with their doctors. They expect them to perform their duties with the standards of ethics and follow medically accepted procedures. S.F. is not a chiropractor and would have no way of knowing whether the treatment was proper. She only knew that it caused her concern. It is for the experts to decide whether it was proper. Further, the fact that the licensee did not cup the breast or touch the nipple does not excuse the breast massage.

It is argued that there was simply a misunderstanding, and that the licensee was trying to reach the muscles. The patient was clear and concise. Her breast tissue was massaged. Any breast tissue massage is wrong in this case. The fact that the licensee did not progress to cupping the breast does not change this. The licensee simply did not go to the point which would have, with certainty, led to what a normal patient would allow. He masked what he was doing under the veil of treatment when, in fact, there was no medical reason to massage the patient's breast.

H.V.N.C. was also improperly treated. It is agreed by all of the experts that there is no medical reason for vaginal insertion. Despite this, the licensee entered the vagina. This is clearly a violation of the patient's rights and contrary to the standards of ethics in the chiropractic community. Licensee argued that he provided treatment near the vaginal orifice, but did not enter. However, he was not found to be credible on this point. Because there was vaginal entry, it must be concluded that he violated ORS 684.100(1)(g)(A) and (B) and OAR 811-35-005(6).

Without reiterating the findings made above in the credibility discussion, it is necessary to address some of the allegations made by the licensee. Licensee opened the hearing by arguing that H.V.N.C. was sexually abused prior to June 1, 1990, that she was having a difficult relationship with her boyfriend and was trying to make him jealous, that she had psychiatric disorders which would show a propensity for making false claims of abuse, and that there was a conspiracy to get Dr. Womack.

Firstly, the evidence which the licensee presented on these points were, for the most part, not relevant. Some of the relevancy arguments were made in regard to the licensee's attempt to subpoena the complainant's hospital records. The order quashing the subpoena fully addressed those issues. Secondly, the evidence presented, even if it had been given weight, would not have supported any of these allegations. The complainant seems to have been a somewhat typical teenager. There were moments of tension between her and her mother. Nothing in the record would indicate that there was any likelihood of any of the problems alleged by the licensee.

Licensee argues that none of the complainants saw any indication that the licensee was acting unusually during his treatment. He acted clinically and professionally. Therefore, it is argued that he was not treating these patients in a way which would cause him sexual gratification. Regardless of the purpose of these inappropriate treatments, they were inappropriate. They were not done for chiropractic reasons, and it is not important whether the doctor was sexually gratified or excited by them. The statute does not require a sexual reason before discipline can be imposed.

Further, only the licensee would know whether he was gratified by his conduct. Gratification is an internal process. The fact that he did not show signs of ecstasy does not indicate that he gained no pleasure from the inappropriate touching. In fact, it seems that he must have gained some pleasure from the touching, or he would not have done it. There was no professional reason for these actions.

When the three allegations are considered cumulatively, they demonstrate a pattern of repeated conduct which violates the ethical standards of the licensee's profession under the law as it existed before 1987 and today. The licensee took advantage of the doctor/patient relationship and his position of trust by touching the patients in private body parts. This is sexual abuse, and cannot be tolerated within the profession.

Record Keeping

Dr. Womack, although treating H.V.N.C. for a new Worker's Compensation injury, did not note that she was having any leg pain on his chart notes. Yet he says he was applying pressure near the vagina because of leg pain. He says he only reported the major source of pain. However, he used five ICD-9 codes to address lower back pain and mentioned a cervical problem. It is not likely that, for a new Worker's Compensation claim, the doctor would omit a source of pain which allegedly caused him to treat from above the patient's knee up her inner thigh to near the vagina. If the licensee had treated H.V.N.C. as he indicated in testimony, he would have been required to keep a record of that treatment. He did not do so. This would be a violation of ORS 684.100(1)(s) and OAR 811-15-005, which require that accurate and complete chart notes be kept. However, because it is concluded that the licensee did not treat the claimant as he testified, it cannot be determined whether his chart notes reflect his actual treatment. All that can be concluded is that he failed to chart those aspects of the visit which were not appropriate medical procedures.

In regard to S.F., however, the licensee did not indicate breast massage in his chart notes for S.F. He argues that he was doing appropriate massage under the breast. He did not record that in his records. Licensee's failure to keep accurate and complete chart notes is a serious concern. Insurance companies and other doctors rely on the completeness and accuracy of such records.

Dr. Womack, as a result of his less-than-adequate chart notes, diagnosed each visit by H.V.N.C. with the identical diagnostic codes. There was no variation in them indicating that there was no attention to detail. Likewise, the diagnostic codes used for S.F. were identical, although she had different symptoms during different visits. Licensee's chart notes were insufficient, and his failure to keep more detailed, accurate notes is a violation of OAR 811-15-005.

Further, the licensee did not keep organized records by combining the records of several family members. To combine the treatment records of individuals, some of whom may not have a legal right to review the records of the others, the licensee was creating a potential problem for improper disclosure. This record keeping problem, however, is not of such a serious nature that

discipline would be recommended by the finder of fact. More importantly, there were no allegations in the Notice of Intent to Revoke that the combining of patient files was an issue. The licensee was not given notice that this aspect of his record keeping was to be scrutinized. It would violate his due process rights to consider this problem in the case at hand. This record-keeping problem shall not be considered in recommending discipline.

Licensee did have notice that his failure to keep detailed records of treatment were at issue. He had an opportunity to present evidence on those charges. Licensee did not keep accurate records. ORS 684.100(s) provides that the Board may discipline an individual for violating a provision of ORS Chapter 684, or any rule adopted therein. Some level of discipline would be appropriate for failing to keep accurate records of treatment, but the licensee should not have his license revoked for those failings alone.

Office Procedures

Finally, the licensee operated his office in such a manner that the rights of his patients were not respected, in violation of OAR 811-35-005(6). The licensee allowed his secretary to walk into the examination room without knocking. He would oftentimes leave the door open so that the secretary could observe the examination from her desk. He did not keep his window coverings closed, so that the public could view inside the examination room. All of these factors contribute to the conclusion that the licensee failed to consider his patients' right to privacy. While there was no testimony from a complainant about these problems, the licensee and his secretary admitted to these practices. However, the licensee was not put on notice that these practices were at issue, or at all related to the Notice of Intent to Revoke. Consequently, they are not considered as a factor in the recommendation to discipline.

Other allegations

The Notice of Intent to Revoke also alleged violations of OAR 811-15-015, failure to obtain informed consent prior to treatment. However, because a patient cannot give informed consent to conduct which constitutes sex abuse, there is no clear violation of this rule. If the licensee had admitted the actions alleged and argued that there was a medical reason for such treatment, he would have been required to obtain informed consent. That was not the case here, and the rule is inapplicable.

Sanctions

There are no guidelines provided by administrative rule, or any other source, which provide the Board with assistance in determining the appropriate sanction. However, generally, there are four factors which should be considered in imposing sanctions. These factors are:

- (1) The duty violated
- (2) The licensee's mental state
- (3) The potential or actual injury resulting from the act, and
- (4) The existence of aggravating or mitigating factors.

In this case, the licensee violated his patients by taking advantage of the trust relationship between them. He wilfully and with wrongful intent sexually abused them. While there is no evidence of any substantial emotional or physical harm from the acts, the possibility of a severe emotional impact is great. There are no mitigating factors in this case. The licensee argues that there are only these three charges in many years of practice and that, in itself, is mitigating. He argues that his years of professional practice should be considered. While under some situations the length of service to a profession might be a mitigating factor, it is not when the violations involve sexual abuse. Because of the severity of the actions, revocation must be recommended. Again, it must be noted that the licensee's failure to keep accurate records would not cause the license to be revoked.

Civil Penalty

ORS 684.100(1) provides that the Board may "suspend or revoke * * * a license or may impose a civil penalty not to exceed \$10,000". The grounds for such discipline include those previously discussed. In 1985, the statute first allowed the imposition of a civil penalty of \$1,000. It was not until 1991 that the legislature increased it to \$10,000. Therefore, for purposes of these allegations, a civil penalty of \$1,000 would be the maximum amount which could be imposed.

Subsection (9) of the statute provides that in disciplining a person under subsection (1), the Board may use "any or all" of a list of methods. Included on this list are license revocation and a civil penalty not to exceed \$1,000 (In the law prior to 1991).

In Subsection (1), the Board is given the choice of three mutually exclusive means of discipline. In Subsection (9), the Board seems to have been given the discretion to impose both revocation and a civil penalty at the same time.

In the Matter of Llewellyn, a contested case proceeding in which a final order was issued on May 23, 1991, by the Board, it was held that the Board has the authority to order both a civil penalty and a license revocation. That policy decision of the Board is precedent and, consequently, it must be concluded that the Board can order both a civil penalty and revocation.

The question then remains whether such a penalty should be imposed in this case. The Board has not established any stated policy through rule or contested case which establishes the criteria for deciding under what circumstances a penalty is appropriate.

Because of this, the hearings officer recommends that no penalty be imposed, unless the Board chooses to subject the licensee to discipline less severe than license revocation. Absent a clearly stated policy about when such a penalty should be imposed, the hearings officer finds that imposition of a penalty in this case could be considered arbitrary.

Costs

In the Matter of Llewellyn, the Board also found that it was appropriate to assess costs of the administrative hearing process against the licensee when

it has been found that discipline is appropriate. That ruling is applicable here. The licensee has been found to have violated the standards of ethics of his profession, and discipline is being recommended. Under the circumstances, it is appropriate to assess costs of the disciplinary action as provided in ORS 684.100(9)(g).

PROPOSED ORDER

(A) Licensee has violated ORS 684.100(g)(A) and (B) and his license to practice chiropractic should be revoked.

(B) A civil penalty of \$1,000 should not be imposed upon the licensee under ORS 684.100(9).

(C) Costs of disciplinary proceedings should be assessed against the licensee under ORS 684.(9)(g).

Original signature on file
at the OBCE office.

Dated this 7th day of February, 1992

W. B. COMSTOCK
Referee

BEFORE THE OREGON
BOARD OF CHIROPRACTIC EXAMINERS

In the matter of the License of
TERRY WAYNE WOMACK, DC

HEARINGS CASE NO. 91-CEB-002

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PROPOSED ORDER

History of the Case: The Board of Chiropractic Examiners (Board) served the licensee with Notice of Intent to Revoke License and Assess Penalty on November 23, 1990. After several stipulations and suspension notices, an Amended Notice of Intent to Revoke License and Assess Penalty was issued on August 21, 1991. A request for hearing was made on September 13, 1991, with an affirmative defense of laches in regard to ¶ 4 and 5 of the Amended Notice of Intent to Revoke.

A hearing was held before Wendy Comstock, a hearings officer, on November 13, 1991, in Salem, Oregon. Assistant Attorney General Paul Sundermier appeared as counsel for the Board. Jim Vick, attorney at law, represented the licensee. Testimony was taken from numerous witnesses.

On August 15, 1991, licensee's counsel issued a subpoena duces tecum to the custodian of records at St. Anthony's Hospital in Pendleton. After the submission of written argument by both counsel, which are incorporated into this record, the motion was quashed. Those documents are incorporated into this decision and made part of the record.

At the hearing, counsel for licensee indicated that he had reissued the subpoena. Arguments were made during the course of the hearing in regard to the admissibility of those hospital records. At the hearing, the complainant waived the doctor/patient privilege. Issues of relevance still remained. By the time oral testimony was concluded, the subpoenaed documents had not yet been delivered, and the parties agreed that the hearings officer should have an in camera viewing of the record, upon its receipt. The purpose of that viewing was to discern whether there was any information which would impugn the credibility of the complainant, H.V.N.C. Those records were delivered November 16, 1991, and were viewed in camera. There was nothing in those records which would have shed further light on the complainant's credibility, and no part of those files were made part of the record.

Also at the hearing, Assistant Attorney General Paul Sundermier moved to strike ¶ 6 of the Amended Notice, and moved to amend the first and second sentences of ¶ 7, to read: "During the period June 20, 1988, through December 8, 1989, Womack treated female patient S.F. who presented with upper back, neck and right shoulder pain. After several visits, the treatment at each visit included Womack having her sit straddle on a bench with her back to Womack while he adjusted her shoulder". Attorney for licensee had no objections to these motions and the motions were allowed.

After the conclusion of testimony the parties were given until December 6, 1991, to submit briefs. Both parties submitted briefs by December 6, 1991.

STATEMENT OF MAILING
HEARINGS CASE NO. 91-CEB-002

I certify that the attached Proposed Order was served through the mail to the following parties in envelopes addressed to each at their respective addresses, with postage fully prepaid:

BOARD OF CHIROPRACTIC EXAMINERS
Old Governor's Mansion
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Salem, OR 97310

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TERRY WAYNE WOMACK, DC
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JAMES D. VICK, ATTORNEY
1505 Water St NE
Salem, OR 97303

Mailing/Delivery Date: 02-07-92
Hearings Clerk: SLS