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ACUPUNCTURE BOARD

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **ERIK NIELSEN, L.Ac.** **1864 Orinda Ct.** **Thousand Oaks, CA 91362** **Acupuncturist License No. AC 3657,** Respondent.	Case No. 1A-2013-118 **A C C U S A T I O N**

Complainant alleges:

PARTIES

1. Terri Thorfinnson (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Acupuncture Board.

2. On or about August 23, 1989, the Acupuncture Board issued Acupuncturist License No. AC 3657 to Erik Nielsen, L.Ac. (Respondent). The Acupuncturist License was in full force and effect at all times relevant to the charges brought herein and will expire on June 30, 2016, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Acupuncture Board (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 4928.1 of the Code states:

"Protection of the public shall be the highest priority for the acupuncture board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

5. Section 4927, subdivision (d), of the Code states:

"'Acupuncture' means the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion."

6. Section 4937 of the Code states, in pertinent part:

"An acupuncturist's license authorizes the holder thereof:

"(a) To engage in the practice of acupuncture.

"(b) To perform or prescribe the use of Asian massage, acupressure, breathing techniques, exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements to promote, maintain, and restore health. Nothing in this section prohibits any person who does not possess an acupuncturist's license or another license as a healing arts practitioner from performing, or prescribing the use of any modality listed in this subdivision.

". . ."

7. Section 4955 of the Code states:

"The board may deny, suspend, or revoke, or impose probationary conditions upon, the license of any acupuncturist if he or she is guilty of unprofessional conduct.

"Unprofessional conduct shall include, but not be limited to, the following:

"..."

"(i) Any action or conduct that would have warranted the denial of the acupuncture license.

"..."

8. Section 4955.2 of the Code states, in pertinent part:

"The board may deny, suspend, revoke, or impose probationary conditions upon the license of any acupuncturist if he or she is guilty of committing any one of the following:

"...

"(c) Incompetence."

9. Section 2052 of the Code states:

"(a) Notwithstanding Section 146, any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or with or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, by imprisonment in a County jail not exceeding one year, or by both the fine and either imprisonment.

"..."

"(c) The remedy provided in this section shall not preclude any other remedy provided by law."

9. Section 726 of the Code states, in pertinent part:

"The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3."

10. Section 4955.1 of the Code states, in pertinent part:

"The board may deny, suspend, revoke, or impose probationary conditions upon the license of any acupuncturist if he or she is guilty of committing a fraudulent act including, but not be limited to, any of the following:

". . ."

"(e) Failing to maintain adequate and accurate records relating to the provision of services to their patients."

11. California Code of Regulations, Title 19, section 1399.453, states:

"An acupuncturist shall keep complete and accurate records on each patient who is given acupuncture treatment, including but not limited to, treatments given and progress made as a result of the acupuncture treatments."

COST RECOVERY

12. Section 4959 of the Code states:

"(a) The board may request the administrative law judge, under his or her proposed decision in resolution of a disciplinary proceeding before the board, to direct any licensee found guilty of unprofessional conduct to pay to the board a sum not to exceed actual and reasonable costs of the investigation and prosecution of the case.

"(b) The costs to be assessed shall be fixed by the administrative law judge and shall not in any event be increased by the board. When the board does not adopt a proposed decision and remands the case to an administrative law judge, the administrative law judge shall not increase the amount of any costs assessed in the proposed decision.

"(c) When the payment directed in the board's order for payment of costs is not made by the licensee, the board may enforce the order for payment in the superior court in the county where the administrative hearing was held. This right of enforcement shall be in addition to any other rights the board may have as to any licensee directed to pay costs.

"(d) In any judicial action for the recovery of costs, proof of the board's decision shall be conclusive proof of the validity of the order of payment and the terms for payment.

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"(e) All costs recovered under this section shall be considered a reimbursement for costs incurred and shall be deposited in the Acupuncture Fund."

FACTUAL SUMMARY

13. Respondent has been an acupuncturist licensed in California since 1989, whose practice is located in his residence. Patient Ms. Z.[1] had been to Respondent's practice previously for herbs and acupuncture treatment. In May, 2013, Ms. Z. was told by her physician she was unable to conceive. Ms. Z. and her husband then consulted with Respondent, who stated he would treat her with both herbs and acupuncture to increase her fertility. After the consultation Respondent treated Ms. Z. with acupuncture for 30 to 40 minutes, provided her and her husband with herbs, and told Ms. Z. to return for additional treatment. At the conclusion of this visit Ms. Z. paid Respondent for both the acupuncture treatment and the herbs.

14. On or about June 8, 2013, Ms. Z. went to Respondent's practice for another treatment. Ms. Z.'s husband did not accompany her on this visit. Respondent told Ms. Z. He needed to examine her stomach. Respondent showed her to a bedroom which was set up as a treatment room, gave her a gown, and left the room while she changed into the gown. Ms. Z. kept her underwear on under the gown. Respondent returned to the treatment room and Ms. Z. lay on her back on the exam table while Respondent examined her abdomen by pressing it with both hands. After Respondent finished examining her abdomen he asked Ms. Z. if he could examine her breasts for lumps and Ms. Z. allowed him to do so, although she did not remove her bra.

15. Following his examination of Ms. Z.'s breasts, Respondent asked if he could conduct an internal examination for fibroids. Ms. Z. told Respondent she wanted to have her husband present for that examination. Respondent asked again if he could examine her internally for fibroids and Ms. Z. said nothing. Respondent asked a third time to examine her internally and Ms. Z. reluctantly agreed.

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[1] Patient and certain other witness's names are abbreviated to protect their privacy rights. The names will be provided to Respondent upon a written request for discovery.

Respondent told Ms. Z. to remove her underwear, but did not leave the room while she removed her underwear. Ms. Z. laid on her back on the examination table with her legs extended in front of her during Respondent's internal examination which took approximately 2 minutes.

Respondent placed the gloved fingers of his hand into Ms. Z.'s vagina while he placed his other hand on her stomach. While Respondent had his hand in Ms. Z.'s vagina he told her to tighten her buttocks and suck in her stomach. Ms. Z. was surprised and humiliated by Respondent's instructions to tighten her buttocks and suck in her stomach, as she had never been instructed to do this during any other vaginal examination.

16. After Respondent removed his hand from Ms. Z.'s vagina he asked how her neck felt. Ms. Z. told Respondent her neck was fine but Respondent repeatedly asked if he could check her neck, so Ms Z. permitted him to do so. Respondent had Ms. Z. lay on her back and grasp the side of the examination table which caused her gown to open and expose her body to Respondent. Respondent stretched Ms. Z.'s neck and told her to stand up and face away from him. After Ms. Z. stood up Respondent picked her up and cracked her back.

Ms. Z. got dressed, and Respondent provided her with various herbs. When Ms. Z. paid Respondent he said he would only accept payment for the herbs and would not charge her for the other services he had performed during this visit. Ms. Z. filed a formal complaint with the Board about Respondent's actions during this visit.

17. Respondent's records for Ms. Z.'s June 8, 2013, visit document only the types of herbs he dispensed to her, and does not mention the breast or vaginal examination, nor the spinal manipulation he performed. The Board's investigator questioned Respondent about Ms. Z.'s treatment which included her June 8, 2013, visit. Respondent denied performing a breast or a vaginal examination. Respondent stated there was no reason for him to conduct a pelvic examination because he knew her fibroids were smaller after he palpated her stomach. During his interview with the Board's investigator Respondent stated he had performed acupuncture, ultrasound, deep heat, and oriental massage during Ms. Z.'s visit. However, Respondent's records for Ms. Z.'s June 8, 2013, visit do not reflect those treatments.

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FIRST CAUSE FOR DISCIPLINE

(Sexual Misconduct)

18. Respondent is subject to disciplinary action under section 726 of the Code in that he committed acts of sexual misconduct with Patient Ms. Z. during acupuncture treatment. The circumstances are as follows:

19. Complainant refers to, and by reference incorporates herein paragraphs 14 through 18, inclusive, above.

SECOND CAUSE FOR DISCIPLINE

(Unlicensed Practice of Medicine)

20. Respondent is further subject to disciplinary action under section 2052, subdivision (a) of the Code in that his acts of sexual misconduct with Patient Ms. Z. constitute the unlicensed practice of medicine.

21. Complainant refers to, and by reference incorporates herein paragraphs 14 through 18, inclusive, above.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

22. Respondent is further subject to disciplinary action under section 4955, subdivision (i) of the Code in that he engaged in unprofessional conduct by breaching the rules or ethical code of conduct of the profession of acupuncture, and by engaging in conduct unbecoming to an acupuncturist in good standing in the profession and which demonstrates an unfitness to practice acupuncture.[2] The circumstances are as follows:

23. Complainant refers to, and by reference incorporates herein paragraphs 14 through 18, inclusive, above.

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[2] See *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575.

FOURTH CAUSE FOR DISCIPLINE

(Incompetence)

24. Respondent is further subject to disciplinary action under section 4955, subdivision (c), of the Code in that the Respondent's care and treatment of Patient Ms. Z demonstrated incompetence.

25. Complainant refers to, and by reference incorporates herein paragraphs 14 through 18, inclusive, above.

FIFTH CAUSE FOR DISCIPLINE

(Inadequate and Inaccurate Records)

26. Respondent is further subject to disciplinary action under section 4955.1, subdivision (e), of the Code and section 1399.453 of title 16 of the California Code of Regulations in that he failed to keep complete and accurate records regarding the Respondent's care and treatment of Patient Ms. Z.

27. Complainant refers to, and by reference incorporates herein paragraphs 14 through 18, inclusive, above.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Acupuncture Board issue a decision:

1. Revoking or suspending Acupuncturist License Number AC 3657, issued to Erik Nielsen;

2. Ordering him to pay the Acupuncture Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 4959;

3. If placed on probation, ordering him to pay the Acupuncture Board the costs of probation monitoring; and;

4. Taking such other and further action as deemed necessary and proper.

DATED: APR 14 2015

TERRI THORFINNSON
Executive Officer
Acupuncture Board
Department of Consumer Affairs
State of California
Complainant

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