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ACUPUNCTURE BOARD

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **FRANK SHYU, L.Ac.** **2162 S. Garfield Avenue** **Monterey Park, CA 91754** **Acupuncturist License No. AC850,** Respondent.	Case No. 1A-2012-151 **ACCUSATION**

Complainant alleges:

PARTIES

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

2. On or about August 21, 1978, the Acupuncture Board issued Acupuncturist License Number AC850 to Frank Shyu, 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 April 30, 2016, unless renewed.

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, of the Code states, in pertinent part:

"As used in this chapter, unless the context otherwise requires:

"...

"(d)

"'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, 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:

"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.

"(c) For purposes of this section, a 'magnet' means a mineral or metal that produces a magnetic field without the application of an electric current.

"(d) For purposes of this section, 'plant, animal, and mineral products' means naturally occurring substances of plant, animal, or mineral origin, except that it does not include synthetic compounds, controlled substances or dangerous drugs as defined in Sections 4021 and 4022, or a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code.

"(e) For purposes of this section, 'dietary supplement' has the same meaning as defined in subsection (ff) of Section 321 of Title 21 of the United States Code, except that dietary supplement does not include controlled substances or dangerous drugs as defined in Section 4021 or 4022, or a controlled substances listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code. "

7. Section 4955 of the Code states, in pertinent part:

"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:

". . .

"(c) False or misleading advertising.

"(d) Aiding or abetting in, or violating or conspiring in, directly or indirectly, the violation of the terms of this chapter or any regulation adopted by the board pursuant to this chapter.

". . .

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

". . ."

8. 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."

9. Section 4955.2 of the Code states:

"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:

"(a) Gross negligence.

"(b) Repeated negligent acts.

"(c) Incompetence."

10. California Code of Regulations, title 16, 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."

11. California Code of Regulations, title 16, section 1399.455, states, in pertinent part:

". . .

"(b) It is improper advertising as provided in Section 4955 of the code to disseminate any advertising which represents in any manner that the acupuncturist can cure any type of disease, condition or symptom.

"(c) It is improper advertising as provided in Section 4955 of the code to disseminate any advertising of a practice, technique or procedure which is not within the scope of the practice of acupuncture as defined in Sections 4927 and 4937 of the code and which is the unlawful practice of medicine."

COSTS

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.

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

Facts

13. On or about August 24, 2012, the California Acupuncture Board (Board) received a complaint from YS[1] regarding Respondent's treatment of her mother, who lives in China. The Board initiated an investigation of the events underlying this report through the Department of Consumer Affairs, Division of Investigation (DOI). The DOI investigator conducted interviews regarding the events and prepared a report for the Board.

14. YS told the DOI investigator she heard an advertisement for Respondent on a Chinese radio station which stated Respondent guaranteed he could cure urinary incontinence, also known as "weak bladder."

15. YS called Respondent's acupuncture office and told Respondent that her 77 year old mother, SD, who lived in China, had suffered from "weak bladder" for many years. Respondent assured YS that he could treat SD even though she lived in China and asked YS to see him at his acupuncture office.

16. YS met with Respondent in his office where Respondent showed YS a TENS[2] unit and explained that YS could purchase the TENS unit for SD to use to treat her urinary incontinence per Respondent's instructions.

17. Respondent assured YS that it was no problem to treat SD even though she lived in China.

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[1] The names of the patients and/or witnesses are abbreviated to protect their privacy rights. The names will be provided to Respondent upon written request for discovery.

[2] A TENS unit is a small, portable, battery-powered device used to treat pain. The TENS unit uses mild, safe electrical signals to help control pain. The TENS unit sends painless electrical signals through the electrodes to the nerves under the skin.

18. In addition to telling YS to purchase the TENS unit Respondent also told YS she should purchase medicine from Respondent for SD to take to treat her urinary incontinence.

19. During the conversation with YS Respondent did not ask if SD had any health issues other than urinary incontinence nor did he ask any questions about SD's family's health history.

20. Respondent did not provide any information about what substance(s) were in the two (2) bottles of capsules he sold to YS for SD to treat her urinary incontinence.

21. Respondent charged YS $260 for the TENS unit and two (2) bottles of medication, and provided YS with instructions for the TENS unit, but did not provide YS with a receipt for the $260 that she paid Respondent for those items.

22. YS mailed the TENS unit, the instructions, and two bottles of medication to China for SD's use.

23. After SD used the TENS unit and medication for three months her urinary incontinence had not improved. YS called Respondent and told him there had been no improvement in her mother's physical condition.

24. Respondent told YS to tell SD to increase the duration and frequency of the TENS unit usage.

25. YS gave SD Respondent's updated instructions. However, after following Respondent's revised instructions for one month SD experienced no improvement in her urinary incontinence, and returned the TENS unit to YS.

26. When YS called Respondent and told him there had been no improvement in SD's physical condition he told YS to have SD increase the frequency and duration of the TENS unit treatments. YS said SD did not want to continue using the TENS unit.

27. YS told Respondent she wanted her money returned for the TENS unit because of Respondent's guarantee that the TENS unit would help people with "weak bladder." Respondent denied making guarantees regarding the efficacy of TENS unit treatment for urinary incontinence.

28. On or about March 16, 2015, the DOI investigator interviewed Respondent at his office and Respondent verified he has practiced acupuncture since 1980.

29. Respondent stated he previously shredded his records regarding SD, but remembered

her.

30. Respondent stated he did not perform a physical on SD.

31. Respondent stated he knew he was selling YS the TENS unit and herbal medicine for SD's use.

32. Respondent stated he was aware that a licensed acupuncturist must first perform a physical examination and determine a diagnosis prior to treating a patient.

33. Respondent stated he routinely determines patient treatment by reviewing medical information the patient brings from a primary care physician, as well as the patient's health questionnaire which the patient completes at Respondent's office, and then performing a physical on the patient.

34. Respondent stated he prescribed the TENS unit and herbal medication for SD despite his lack of physical examination because YS gave him SD's diagnosis.

35. Respondent stated he was wrong to prescribe the TENS unit and herbal medication to SD when he had not met her.

36. Respondent said he used poor judgment when he prescribe the TENS unit and herbal medication to SD when he had not met her.

37. The standard of care requires an acupuncturist to disseminate advertising which represents the acupuncturist can treat, as opposed to cure, any type of disease, condition, or symptom.

38. An acupuncturist's dissemination of advertising material which declares that the acupuncturist can cure any type of disease, condition, or symptom is a departure from the standard of care.

39. The standard of care requires an acupuncturist to inform the patient about the contents, risks, adverse outcomes, and contradictions of any medication provided to or prescribed for a patient.

40. An acupuncturist's failure to inform the patient about the contents, risks, adverse outcomes, and contradictions of any medication provided to or prescribed for a patient is a departure from the standard of care.

41. The standard of care requires an acupuncturist to obtain information regarding the patient's other health issues, family health history, allergy to medications or herbs, and any additional information the patient believes is necessary to apprise the acupuncturist about prior to the acupuncturist's diagnosis and treatment of the patient.

42. An acupuncturist's failure to obtain information from the patient about the patient's other health issues, family health history, allergy to medications or herbs, and any additional information the patient believes is necessary to apprise the acupuncturist about prior to the acupuncturist's diagnosis and treatment of the patient is a departure from the standard of care.

43. The standard of care requires an acupuncturist to maintain complete, accurate, adequate, and current medical records of the patient's medical history, condition and treatment.

44. An acupuncturist's failure to maintain complete, accurate, adequate, and current medical records of the patient's medical history, condition and treatment is a departure from the standard of care.

45. The standard of care requires an acupuncturist to complete an evaluation and examination of the patient prior to modifying the patient's treatment.

46. An acupuncturist's failure to complete an evaluation and examination of the patient prior to modifying the patient's treatment is a simple departure from the standard of care.

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence)

47. Respondent is subject to disciplinary action under 4955.2, subdivision (a), in that he was grossly negligent in his care and treatment of SD. The circumstances are as follows:

48. The standard of care requires an acupuncturist to determine a treatment for a patient by meeting and obtaining information from the patient regarding the patient's health, medical history, family health history, and chief complaint; assess the patient's condition by performing a standard physical examination and assessment of the patient; and evaluate the findings and determine a diagnosis based on all of this information before prescribing treatment for the patient.

49. An acupuncturist's failure to meet and obtain information from the patient regarding the patient's health, medical history, family health history, and chief complaint; to assess the

patient's condition by performing a standard physical examination and assessment of the patient; and to evaluate the findings and determine a diagnosis based on all of this information before prescribing treatment for the patient is an extreme departure from the standard of care.

50. Respondent's care and treatment of patient SD as set forth above includes the following acts and/or omissions which constitute extreme departures from the standard of care:

A. Respondent failed to see patient SD in person.

B. Respondent failed to obtain information from SD regarding SD's health.

C. Respondent failed to obtain information from SD regarding SD's family health history.

D. Respondent failed to obtain information from SD regarding SD's chief complaint.

E. Respondent failed to assess SD's condition by performing a standard physical examination and assessment of SD.

F. Respondent failed to evaluate findings from a standard physical examination and assessment of SD.

G. Respondent failed to determine a diagnosis for SD based on information obtained from the performance of a standard physical examination and assessment of SD.

H. Respondent prematurely provided treatment for SD.

51. Respondent's acts and/or omissions as set forth in paragraph 50 above, whether proven individually, jointly, or in any combination thereof, constitute gross negligence pursuant to section 4955.2, subdivision (a), of the Code and therefore cause for discipline exists.

SECOND CAUSE FOR DISCIPLINE

(Repeated Acts of Negligence)

52. Respondent is subject to disciplinary action under section 4955.2, subdivision (b), of the Code, in that he has committed repeated acts of negligence in the practice of acupuncture. The circumstances are as follows:

53. Complainant refers to and by reference incorporates herein paragraphs 50 above.

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THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate and Accurate Records)

54. Respondent is subject to disciplinary action under section 4955, as defined by section 4955.1, subdivision (e), in that he failed to maintain adequate and accurate records relating to the services he provided to SD. The circumstances are as follows:

55. Complainant refers to and by reference incorporates herein paragraphs 3 through 46, and 48 through 50, inclusive, above.

56. Respondent committed unprofessional conduct by failing to maintain adequate and accurate records relating to the services he provided to SD as follows:

A. Respondent failed to prepare and maintain adequate and accurate records of information obtained from SD regarding SD's health.

B. Respondent failed to prepare and maintain adequate and accurate records of information obtained from SD regarding SD's family health history.

C. Respondent failed to prepare and maintain adequate and accurate records of information obtained from SD regarding SD's chief complaint.

D. Respondent failed to prepare and maintain adequate and accurate records of information obtained from his performance of a standard physical examination and assessment of SD.

E. Respondent failed to prepare and maintain adequate and accurate records of information obtained from an evaluation of findings from his performance of a standard physical examination and assessment of SD.

F. Respondent failed to prepare and maintain adequate and accurate records of information obtained from his determination of the diagnosis for SD based on information obtained from his performance of a standard physical examination and assessment of SD.

G. Respondent failed to prepare and maintain adequate and accurate records of his modification of treatment for SD.

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FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

57. Respondent is subject to disciplinary action under section 4955.1 subdivision (e) of the Code, and California Code of Regulations, title 16, section 1399.453, in that he committed unprofessional conduct in his care and treatment of SD. The circumstances are as follows:

58. The facts and circumstances in paragraphs 13 through 56, inclusive, above are incorporated by reference as if set forth in full herein.

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 AC850, issued to Frank Shyu, L.Ac.;

2. Ordering Frank Shyu, L.Ac. 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 to the Acupuncture Board the costs of probation monitoring; and

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

DATED: NOV 09 2015

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

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