BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: MICHAEL JOHN GUEN, Acupuncturist License No. AC 4412 Respondent.	Case No. 1A-2013-168 OAH No. 2015100110 **ORDER OF DECISION**

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Acupuncture Board as its Decision in the above-entitled matter.

This Decision shall become effective on May 18, 2016.

IT IS SO ORDERED this 18th day of April, 2016.

By: _____

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In the Matter of the Accusation Against: MICHAEL JOHN GUEN, Acupuncturist License No. AC 4412 Respondent.	Case No. 1A-2013-168 OAH No. 2015100110

PROPOSED DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on February 29 and March 1, 2016, in Oakland, California.

Joshua M. Templet, Deputy Attorney General, represented complainant Terri Thorfinnson.

Colin L. Cooper, Esq., The Cooper Law Offices, represented respondent Michael John Guen, who was present.

The matter was submitted on March 1, 2016.

FACTUAL FINDINGS

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

2. On October 15, 1992, the Board issued acupuncturist license number AC 4412 to respondent Michael John Guen. That license expired on February 29, 2016, unless it has been renewed. His address of record is 130 Steiner Court, Santa Rosa, California.

3. The Board seeks to discipline respondent's acupuncturist license for unprofessional conduct because he engaged in sexual misconduct/relations with a patient.

Background

4. Respondent has been a licensed acupuncturist in California since 1992. In 2003, respondent also facilitated paid weekly educational classes for a group of women where he taught martial arts, relationship advice, and Chinese culture/traditions, medicine, and principles. Patient P,[1] a massage therapist, participated in the group from 2003 to 2013.

5. Patient P began receiving acupuncture sessions from respondent in July 2004, to help her deal with the stress of planning her upcoming wedding. Between July 2004 and March 6, 2013, Patient P had acupuncture sessions primarily at respondent's office, as follows: in November 2005, May 2006, October 2006, May 2007, June 2007, August 2007, September 2007, May 2008, August 2009, October 2009, November 2009, and almost every month in 2011 and 2012. Her last sessions were on February 6, and March 6, 2013.

6. On September 27, 2013, Patient P filed a complaint with the Board alleging the following:

> I became Michael Guen's student in 2003 and have received acupuncture sessions from him on and off in the past ten years. I had primarily been a member of his women's personal growth group during that period of time. In 2007, Michael Guen manipulated me into [having] sexual experiences with him. I was twenty-seven years old and married to my ex-husband at the time. As part of his "teaching," he conditioned me to believe that I was unfulfilled in my relationship and that it would benefit my marriage to be opened sexually by him. He also explained to me that women initiated experiences with him throughout the years and that women were the perpetrators. There were five instances of sexual encounters which mostly took place in his acupuncture office in Santa Rosa, CA. In May 2011, once I was divorced from my husband, he initiated a massage trade with me in exchange for acupuncture. During that session, he initiated sexual intercourse with me. That was the last encounter we had. I continued to receive personal weekly acupuncture sessions with him from November 2011 through December 2012 which I paid $90 per session. Until now, I have been shamed into silence. He has accused me of initiating the sexual experiences. I believe that Michael Guen is running a destructive cult (please see www.freedomofmind.com for more information) and I had been under the influence of his manipulation until I went through an intervention with my partner. I also believe that he is manipulating other people through the use of hypnosis and encouraging people in his cult

[1] The patient's name has not been used to protect her privacy.

> to take expensive acupuncture sessions with him. He is an unethical person and had violated his professional boundaries. Date of incident: 05/01/2011. Requested Resolution: I would like him to refund the $55,000, I paid him over the past ten years in tuition and acupuncture sessions. I would also [like] an investigation done to either suspend or revoke his license to practice acupuncture.

7. Katherine Arnautovic, investigator with the Department of Consumer Affairs, was assigned to investigate the complaint. She interviewed respondent, Patient P, and other patients and students of respondent. Arnautovic completed her investigation and determined that respondent had engaged in sexual conduct with Patient P. She issued a final report on May 15, 2014, and referred the case to the Board for review and appropriate action. The Board issued an Accusation on August 5, 2015.

Instances of Sexual Conduct

8. During his interview with Arnautovic, respondent stated the following:

a. Between 2006 and 2011, Patient P gave him approximately nine massage therapy sessions. They had a verbal agreement that he would give her extra martial arts classes in exchange for massage therapy. There was never an exchange of acupuncture sessions in exchange for massage therapy.

b. In 2007, Patient P revealed to respondent that she had a "psychic revelation" that she wanted to have sex with him. Prior to this, he was unaware of her sexual feelings for him. He had discussions with her on how to channel her feelings into her training. He told Patient P that her feelings were not going to lead to sex with him because he was in a monogamous relationship with his girlfriend.

c. In 2009, during a massage therapy session, Patient P removed her clothes and underwear while telling respondent that she was very attracted to him, and rubbing her hips against his arm. Respondent was naked underneath a sheet. Patient P lifted up the sheet and put his penis in her mouth for a few seconds. She climbed on top of him attempting to sit on his penis but was unsuccessful. He pushed her off and said, "Let's not do this." The massage therapy session ended. This was the first of four incidents of sexual conduct as described by respondent.

d. In November 2009, Patient P moved into respondent's "apprentice house" along with two males as part of a two-year commitment to pursue a "black sash" in his teachings and for Patient P to become a facilitator of one of his women's group. He charged $325 per month for tuition. Patient P also paid respondent $900 per month in rent.

e. In 2010, while giving respondent a massage, Patient P reached into his underwear and massaged his penis for a few minutes until he achieved a partial erection. Respondent stated that he did not like it, but he did not tell her to stop because he believed that it might be part of her Indian massage training. He stated that the massage ended with "no fanfare." This was the second incident of sexual conduct.

f. In spring or summer 2010, during a massage, Patient P manipulated respondent's genitals until he achieved an erection. She pulled down her pants and underwear and respondent rubbed her vagina. Patient P gave respondent oral sex and he ejaculated. Respondent states that he felt that she was seducing him and would set up conditions to allow this sexual conduct to occur. Afterwards, they went to dinner. He said that he felt vulnerable and likened his sexual urges to that of "animal instincts." This was the third incident of sexual conduct.

g. Again in 2010, during a massage, Patient P climbed on top of respondent while he was naked. He said, "You've had this yearning. I want to give you that experience." She put his penis inside of her vagina and they had sex. He explained that he acquiesced because he was "going through a hard time." This was the fourth and final incident of sexual conduct with Patient P.

9. Respondent acknowledged that Patient P was his acupuncture patient from 2006 through 2013. However, respondent contended that Patient P was his patient before and after the sexual events that he described, and that the sexual events did not occur during the time period that she was his patient. Respondent disputed Patient P's dates and descriptions of alleged sexual encounters with him. He also said that he did not run a cult.

Patient P

10. Patient P testified at hearing. Although there were no entries in the treatment records, Patient P believes that she received treatment from respondent in 2010. Patient P states that respondent never told her that he was no longer her doctor and he never referred her to another acupuncturist. She stated that she did receive acupuncture treatments from another licensed acupuncturist at some point who had helped others "release demons" and respondent had made her think she "had demons inside her body."

11. Patient P met her fiancé in 2012. Her fiancé became concerned because Patient P was using most of her income to pay rent and for classes with respondent. In February 2013, Patient P moved out of respondent's home. Her fiancé determined that Patient P had been indoctrinated by respondent, and he did an intervention with Patient P in May 2013 to "deprogram her." Also, in the summer of 2013, while vacationing in Germany, Patient P and her fiancé traveled to the home of respondent's then fiancée to tell his fiancée's parents that their daughter was in a cult led by respondent. Patient P and her fiancé also created a website about respondent being a cult leader. Her fiancé also sent letters to members of the women's group alleging that respondent was running a cult. Patient P filed a civil lawsuit against respondent which is pending.

12. Patient P believes that she had been indoctrinated into respondent's teachings after she first met him in 2003, for over a 10-year period, and nothing that she did was voluntary. He was 26 years older than her. She states that he led her to believe that she needed his guidance to open sexually with a "secret teaching of women from his lineage." She believes that other women in his groups were also indoctrinated because of his many discussions about sexual unfulfillment. Periodically, respondent and Patient P would go out to dinner, and he made her "feel special." Patient P testified that she was forced to submit to respondent's sexual demands because he told her that it was special training. However, Patient P was later evasive in her testimony when asked if respondent had physically forced her to have sex.

Also, at hearing, Patient P admitted that she cashed a third-party check for $1,400, which was meant to pay for a rental space of respondent. She explained that, "I had just gotten out of the group and I felt I should cash the check that was a small portion of the $55,000 [fees from monthly classes, training and rent] because of the damage and trauma that I went through in 2013."

13. According to investigator Arnautovic, this investigation was unusual and she had never had one like it before. Respondent and Patient P agreed that they had sex, but they differed on the dates, where and how. Arnautovic stated that Patient P told her that she had told a roommate that she had sex with respondent. However, when interviewed the roommate said that he never heard this from Patient P and never saw respondent act inappropriately. Patient P also told Arnautovic to contact a female patient that also had sex with respondent. However, the other female patient denied having sex with respondent. Also, Patient P admitted to Arnautovic that at one point she was upset that respondent was not paying attention to her.

14. Respondent contends that Patient P is not credible because she has "ulterior motives to destroy" him as demonstrated through the attack website she created, her travelling to Germany to talk to his future in-laws, her stealing the check and her filing of a civil lawsuit. Notwithstanding Patient P's credibility, respondent's admissions to Arnautovic establish, at a minimum, that he engaged in prohibited sexual conduct with Patient P while she was his patient in 2009.

Expert Testimony

15. Barbara Berger has been a licensed acupuncturist since 1982. She has served as an expert witness for the Board at several hearings. Berger attended the Academy of Chinese Acupuncture in Colombo, Sri Lanka, and she has had articles published in *Acupuncture Today*. Berger reviewed the investigation report and the Accusation in this case.

16. Berger opined on the standard of practice for an acupuncturist. According to Berger, the acupuncturist-patient relationship does not end at the completion of each acupuncture session and it is an ongoing relationship. She also opined that if an

acupuncturist wishes to terminate the relationship with a patient, the acupuncturist should discuss it with the patient, document the discussion in the treatment records, and refer the patient to another acupuncturist. According to Berger, there are professional boundaries between a doctor and patient and it is the doctor's responsibility to maintain and enforce those boundaries because an acupuncturist is in a position of power and a patient is in a vulnerable position.

17. Berger reviewed respondent's treatment records for Patient P which showed that she had acupuncture treatment in November 2009, no acupuncture treatments in 2010, and the treatments resumed in January 2011. Berger opined that this demonstrates that the acupuncturist-patient relationship did not end, but was ongoing. Regarding the sexual interactions between respondent and Patient P, Berger believes that respondent did not stop Patient P from initiating the sex and allowed the sexual conduct to occur which is unprofessional conduct. In addition, respondent was aware of the vulnerabilities of Patient P, because the treatment records document that she was depressed and had emotional issues. He should have stopped the relationship before it got to the point of sexual conduct. Also, Berger opined that once any sexual activity had occurred between respondent and Patient P, then respondent should have terminated the acupuncturist-patient relationship.

18. Respondent contends that the expert witness's opinions should be disregarded because he was following the guidelines regarding sexual conduct with patients as set forth in the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM). The NCCAOM guidelines state that an acupuncturist should not engage in a sexual relationship with a former patient unless a period of six months has elapsed since the date the professional relationship ended. Respondent states that Patient P had no acupuncture treatments in 2010, and she was not his patient at the time of the sexual conduct in 2010, therefore, there is no violation of the NCCAOM guidelines.

However, Berger testified that California is one of three states that has its own Board and California licensees are obligated to follow California law (not the NCCAOM guidelines) which prohibits sexual relations with a patient. Berger concluded that respondent's sexual relations with Patient P constituted a departure from the standard of practice for an acupuncturist in California and amounted to unprofessional conduct. Berger's opinions are persuasive and were not rebutted at hearing. Therefore, the acupuncturist-patient relationship continued through 2010, and Patient P was respondent's patient when he had sexual relations with her in 2010.

Even assuming that respondent were allowed to follow the NCCAOM guidelines, the evidence did not establish a lapse of six months between the last acupuncture treatment session in November 2009 and the incidents of sexual conduct in 2010. Furthermore, the treatment records do not reflect that respondent terminated the professional relationship after November 2009. There is insufficient evidence to support respondent's contentions that he complied with the NCCAOM guidelines.

Respondent's evidence

19. Respondent has no record of prior disciplinary action before the Board. He provided no other evidence of mitigation or rehabilitation. Respondent declined to answer questions at hearing, asserting his Fifth Amendment right against self-incrimination.

Analysis

20. At hearing, respondent contended that the incident in 2009 (which occurred when she was a patient), was a brief incidence of oral sex and should not be considered as "sexual relations" because Patient P initiated the encounter and respondent said no.

Even if Patient P initiated the sexual conduct, this does not abrogate respondent's responsibilities as a treating acupuncturist and to maintain professional boundaries. A board can impose discipline for engaging in allegedly consensual sexual relations with a former female patient. (*Green v. Bd. of Dental Examiners* (1996) 47 Cal.App.4th 786, 789, 795-803.) One reason to proscribe doctor-patient sexual activity is the potential for deception by the doctor, the doctor may use his status to induce the patient's consent to sexual activity, or the doctor's medical judgment may be compromised by his sexual interest in the patient. (*Id.* at p. 802, citing *Gromis v. Medical Bd.* (1992) 8 Cal.App.4th 589, 597-598.) Here, the facts establish that respondent and Patient P were in a consensual sexual relationship.

Costs

21. The Board certifies that costs in the amount of $12,981.50, were incurred in connection with the investigation by the Division of Investigation of the Department of Consumer Affairs. The Board certifies that costs in the amount of $15,157.50, were incurred in connection with the prosecution of this Accusation by the Attorney General's Office. The total costs incurred are $28,138.

22. Respondent objects to the costs. Respondent contends that Patient P unnecessarily extended the scope of the investigation by frequently contacting the investigator and telling her to interview different women in the group and patients of respondent. However, respondent provided no evidence to support his contention. Complainant's costs are found to be reasonable.

LEGAL CONCLUSIONS

1. The standard of proof applied in this proceeding is clear and convincing evidence to a reasonable certainty.

2. Under Business and Professions Code section 726, subdivision (a),[2] 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 the healing arts, including an acupuncturist. The Board may take disciplinary action against an acupuncturist who engages in unprofessional conduct. (§ 4955.)

3. Cause exists to take disciplinary action against respondent's acupuncturist license pursuant to section 726, subdivision (a), for unprofessional conduct for having sexual relations with a patient, by reason of the matters set forth in Findings 4 through 13.

4. Cause exists to take disciplinary action against respondent's acupuncturist license pursuant to section 4955, for unprofessional conduct, by reason of the matters set forth in Findings 4 through 13.

Disciplinary considerations

5. Cause for discipline having been established, the issue is what is the appropriate level of discipline. It is respondent's burden to establish that he is sufficiently rehabilitated from his unprofessional misconduct so that he can be trusted to practice safely as an acupuncturist.

Respondent engaged in consensual sexual relations with his patient. Respondent's conduct is a reflection of a lack of sound professional judgment, especially since he was treating the patient for emotional issues and he was aware of her vulnerabilities. In mitigation, respondent has no record of prior disciplinary action and he has been licensed for over 24 years. Also, this appears to be an isolated incidence, as no other patients have made similar allegations to the Board against respondent. However, his ability to function independently is in doubt as a result of his questionable judgment involving a female patient. Nevertheless, it is determined that revocation of respondent's acupuncturist license is not required and that the public can be adequately protected by monitoring respondent and placing a restriction on his treating female patients. After considering all of the evidence, it is determined that a stayed revocation with a five-year term of probation is the appropriate discipline in this case.

Costs

6. Business and Professions Code section 125.3, provides that respondent may be ordered to pay the Board "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The Board's certification of the actual costs constitutes prima facie evidence of the reasonable costs. The costs of $28,138, as set forth in Finding 21 were established by such a certification.

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[2] All statutory references are to the Business and Professions Code, unless otherwise noted.

The case of *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. The *Zuckerman* factors have been considered. A reduction of the investigation and enforcement costs is not warranted. The Board is authorized to recover the reasonable costs of investigation and enforcement in the amount of $28,138, from respondent.

ORDER

IT IS HEREBY ORDERED that acupuncturist license number AC4412 issued to respondent Michael John Guen is revoked. However, the revocation is stayed and respondent is placed on probation for five years on the following conditions:

1. Actual Suspension

   As part of the probation, respondent is suspended from the practice of acupuncture for 30 days beginning with the effective date of this decision.

2. Psychological Evaluation

   Within 90 days of the effective date of this decision and on a periodic basis thereafter as may be required by the Board or its designee, respondent shall undergo a psychological evaluation (and psychological testing, if deemed necessary) by a Board appointed California licensed psychologist. The Board shall receive a current DSM-V diagnosis and a written report regarding respondent's judgment and/or ability to function independently as an acupuncturist with safety to the public, and whatever other information the Board deems relevant to the case. Respondent shall execute a release authorizing the evaluator to release all information to the Board. The completed evaluation is the sole property of the Board.

   If the Board concludes from the results of the evaluation that respondent is unable to practice independently and safely, he shall immediately cease practice and shall not resume practice until notified by the Board. If the Board concludes from the results of the evaluation that respondent would benefit from ongoing psychotherapy, respondent shall comply with the Board's directives in that regard.

   Respondent shall pay all costs associated with the psychological evaluation. Failure to pay costs will be considered a violation of the probation order.

3. Practice Monitor

Within 90 days of the effective date of this decision, respondent shall submit to the Board for its prior approval, the name and qualifications of one or more California licensed acupuncturists whose license is clear (no record of complaints) and current and who has agreed to serve as a practice monitor. Once approved, the monitor shall submit to the Board a plan by which respondent's practice shall be monitored. The monitor's education and experience shall be in the same field of practice as that of respondent.. The monitor shall submit written reports to the Board on a quarterly basis verifying that monitoring has taken place and providing an evaluation of respondent's performance. It shall be respondent's responsibility to assure that the required reports are filed in a timely fashion. The respondent shall provide access to the monitor of respondent's fiscal and client records and shall be permitted to make direct contact with patients. Further, the monitor shall have no prior business, professional, personal or other relationship with respondent. Respondent shall execute a release authorizing the monitor to divulge any information that the Board may request.

Respondent shall notify all current and potential patients of any term or condition of probation which will affect their treatment or the confidentiality of their records (such as this condition which requires a practice monitor). Such notification shall be signed by each patient prior to continuing or commencing treatment.

If the monitor quits or is otherwise no longer available, respondent shall not practice until a new monitor has been approved by the Board. All costs of monitoring shall be borne by respondent. Monitoring shall consist of at least one hour per week of individual face to face meetings.

4. Restriction of Female Patient Population

Respondent shall not treat female patients without the presence of another person. Within 30 days from the effective date of this decision, respondent shall submit to the Board, for prior approval, a plan to implement this restriction. Respondent shall submit proof satisfactory to the Board of compliance with this term of probation.

Respondent shall notify all current and prospective patients of the restricted ability to perform any acupuncture procedure on females by posting a written notification visible to all patients before they receive any acupuncture treatment. Respondent shall submit documentation which provides satisfactory evidence of compliance with this term of probation.

5. Coursework

Respondent shall take and successfully complete not less than twenty (20) semester units or thirty (30) quarter units of coursework in the following area(s): ethics and sexual boundaries/harassment. All coursework shall be taken at the graduate level at a school approved by the Board. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all coursework must be completed within the first 3 years of probation. The required coursework must be in addition to any continuing education courses that may be required for license renewal.

Within 90 days of the effective date of this decision, respondent shall submit a plan for the Board's prior approval for meeting the educational requirements. All costs of the coursework shall be borne by respondent.

6. Obey All Laws

Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by respondent to the Board in writing within seventy-two (72) hours of occurrence.

7. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

8. Surveillance Program

Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

9. Interview with the Board or Its Designee

Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

10. Changes of Employment

Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

11. Tolling for Out-of-State Practice or Residence

In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

12. Employment and Supervision of Trainees

Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisorial relationship in existence on the effective date of this probation.

13. Cost Recovery

Respondent shall pay to the Board its costs of investigation and enforcement in the amount of $28,138.

14. Violation of Probation

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

15. Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

DATED: March 25, 2016

DocuSigned by:
Regina Brown
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REGINA BROWN
Administrative Law Judge
Office of Administrative Hearings