

BEFORE THE NEW MEXICO MASSAGE THERAPY BOARD

IN THE MATTER OF:)
)
DON K. SMITH, LMT) **CASE NO. 10-11-06**
LICENSE NO. 0863)
Respondent.)

FINAL DECISION AND ORDER

THIS MATTER came before a quorum of the New Mexico Massage Therapy Board (“Board”) on November 27, 2012 at the Regulation and Licensing Department Hearing Room #1, 2550 Cerrillos, Santa Fe, NM 87505. The board members familiarized themselves with the record, including the Hearing Officer’s Report, and voted with member Elizabeth Harris abstaining, to adopt the Hearing Officer’s Report as revised below.

FINDINGS OF FACT

1. Complainant Martha Leonard Wong (“Ms. Leonard” or “Complainant”) has suffered from severe oral mandibular dystonia making her unable to close her mouth. Mr. Blanschen, a Naturopath, suggested she see an ‘old-time osteopath’ or an ‘old school osteopath’ for her condition and referred her to Respondent, Don Smith, whom he described as an “outstanding osteopath”.
2. Sometime in September 2010, Complainant called Dr. Smith’s office to make an appointment. Complainant had never gone to an osteopath before seeing Respondent. She thought osteopaths worked the muscular/skeletal system to make subtle adjustment to correct underlying conditions. She understood osteopaths got many years of training at medical schools.
3. Ms. Leonard called Respondent “doctor” and he did not correct her; she asked him whether he preferred to be called “Dr.” or by his first name “Don” and he said Don. At the end of the visit, Respondent told Ms. Leonard that he could definitely heal her. Ms. Leonard got

- very excited and wanted to keep on seeing him, but expressed concern about her long drive from Albuquerque. Respondent offered to refer Ms. Leonard to another physician.
4. Respondent never told Ms. Leonard that he was a massage therapist. During Ms. Leonard's treatment, Respondent leaned on the table while treating her, gave her advice of a psychological nature, called her "patient" instead of client, moved too fast in trying to relieve her discomfort/pain while using advanced techniques without adequately explaining the process to the client, and made claims "that he could definitely heal her."
 5. Complainant's daughter, Mia Terrazas, testified that her mother called her right after seeing Respondent and told her about her visit to a doctor of osteopathic medicine who said he could heal her.
 6. Ms. Terrazas called Respondent who admitted he only had a massage therapy license, but that he knew a lot more than an osteopathic doctor having more hands-on experience. Respondent first told Ms. Terrazas he was a physician, a doctor of osteopathy, and that he had gone to medical school. He then recanted that statement.
 7. Respondent designed his business/appointment card. Respondent's LMT license number does not appear on the card as Respondent was not aware of that Board requirement. The card had a trademark "Osteokinetics" on it and an explanation on the back about Respondent's approach to massage therapy. EX 2.
 8. About six years ago, Respondent began having hearing problems. The hearing problem is aggravated by stress and affects Respondent's understanding of words. At the hearing, however, Respondent did not exhibit much difficulty in understanding prosecutor's questions; Respondent answered the questions posed correctly. The alleged problem with hearing and cognition was more pronounced when Respondent's attorney, who also has a hearing problem, began questioning Respondent.
 9. Respondent is aware that he has been misrepresented by some as an osteopathic doctor or a "DO". Respondent is aware that some people have been misled regarding the nature of his practice during the past 35 years, and he tried to correct that.
 10. The Osteopathic Board issued a Notice of Contemplated Action against Respondent. Ex 1
 11. Three letters from the American Osteopathic Association expressing concern about Respondent representing himself as a Doctor of Osteopathy were introduced as evidence and

admitted. Respondent had read the one addressed to the Oriental Association of New Mexico. EX 4A, 4B, 4C.

12. Around October 2011, Respondent aware that he was facing some disciplinary action, declined to teach a class to Doctors of Oriental Medicine as many people were under the impression that he was an osteopath.
13. Respondent taught a class six years ago on some esoteric topic “Nostradamus” and someone used the word “osteopath” in the advertisement. Now, if this were to come up, Respondent would correct it.
14. Respondent has no sign in his office, has never advertised, and only conducts business by word of mouth. His massage therapy license is visible.
15. 85% of Respondent’s clients are very educated and are familiar or have a background in bodywork; no one has ever told Respondent that the terms he uses, such as osteokinetics, osteokinesis or osteopathic manipulation were complicated.
16. Respondent was grandfathered as a massage therapist because of his background and experience. He did not have formal schooling in massage therapy.
17. Respondent applied twice to Osteopathy school but was not admitted.
18. In his response to the complaint filed with the Massage Therapy Board Respondent wrote he told Ms. Leonard: “I work like an old-time osteopath. If you would like, I can refer you to a licensed physician in Albuquerque”. At the hearing he testified that he also told Ms. Leonard: “I am not a doctor of osteopathy nor am I a medical doctor”. This statement was left out of the letter, because he was rushing in trying to get the letter out and was emotionally distressed. EX B. Ms. Leonard does not have a hearing problem.
19. Respondent later testified he told Ms. Leonard he could refer her to “a licensed osteopathic physician.”
20. Respondent likens himself to an old-time osteopath, as osteopaths used to get training in manual therapeutics, as distinguished from modern osteopathic doctors who no longer practice a manual technique.
21. At the hearing, Respondent testified that to comply with board regulations, he has now added “LMT no. 863 Osteokinetics Massage Therapy” on his cards, but not on his letterhead as he is awaiting the board’s decision.

22. Respondent had three proceedings against him, one each from the Massage Therapy Board and the Osteopathic Board, and the letter from the AOA.
23. Respondent taught a course in 2002 in Albuquerque at the International School of Oriental Medicine. Respondent provided the information for the brochure but did not write it himself. At the hearing, Respondent testified that the brochure contained misinformation that needed to be corrected. The brochure for the 2011 course was not written by Respondent either; he did not teach the course. EX AG 5.
24. Respondent does not have a teacher's license from the Massage Therapy Board, even though he teaches in schools.

CONCLUSIONS OF LAW

Based on the findings of fact, the Board enters the following conclusions of law:

1. The Board has jurisdiction over Respondent, a licensed massage therapist.
2. Respondent was provided with all due process as required by law.
3. The Board proved by a preponderance of the evidence that Respondent failed to include his LMT License number on his letterhead and business/appointment card in violation of NMSA 1978, Section 61-12C-21 and NMAC 16.7.2.8(E)(4)(a) and (b).
4. The Board proved by a preponderance of the evidence that Respondent did not represent himself as a licensed massage therapist when by his actions he engaged in fraud, deceit or misrepresentation, in violation of NMSA 1978, Section 61-12C-24(B)(1).
5. The Board proved by a preponderance of the evidence that Respondent by his unethical conduct violated the Code of Ethics, NMSA 1978, Section 61-12C-24(B)(6).
6. The Board failed to prove by a preponderance of the evidence that Respondent violated the Code of Professional Conduct, NMAC 16.7.2.8(A)(1).
7. The Board proved by a preponderance of the evidence that Respondent misrepresented directly or by implication his professional qualifications such as type of licensure, education, experience or areas of competence in violation of NMAC 16.7.2.8(E)(2).
8. The Board proved by a preponderance of the evidence that Respondent violated applicable statutes and administrative regulations governing the practice of massage therapy, in violation of NMAC 16.7.2.8(F)(1).
9. The Board proved by a preponderance of the evidence that Respondent lacked familiarity with the code of professional conduct in violation of NMAC 16.7.2.8(G)(1).

10. The Board failed to prove by a preponderance of the evidence that Respondent violated NMAC 16.7.2.8(E)(6)(a).
11. The Board failed to prove by a preponderance of the evidence that Respondent violated NMAC 16.7.2.8(F)(2).
12. The Board failed to prove by a preponderance of the evidence that Respondent violated NMAC 16.7.2.8(G)(2).

ORDER

Based on the findings of fact and conclusions of law, the Board renders this final order:

1. Respondent is ordered to clearly identify himself as a 'licensed massage therapist' by including "LMT and his license number" on all professional/business materials and when interacting with clients;
2. Respondent is ordered to take six contact hours of Continuing Education in Ethics within six months. Respondent will provide proof of compliance to the Board office upon completion. These six contact hours in Ethics are *in addition* to the sixteen contact hours of continuing education (that include a minimum of four hours of ethics) required for license renewal.
3. Respondent is ordered to take the Board's Jurisprudence exam within thirty days and provide proof of compliance to the Board office;
4. Respondent is ordered to pay a \$250.00 fine payable to the Board office by cashier's check within thirty days;
5. The deadlines set out above begin to run ten days from the date of the signed order.
6. This disciplinary action and final decision and order are public records pursuant to the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2011) and will be reported to the appropriate entities as required by law.
7. A person aggrieved by a board's final decision and order may appeal the decision within thirty days pursuant to NMSA 1978, Section 61-1-17 and NMSA 1978, Section 39-3-1.1.

IT IS SO ORDERED.

Dated: 12/03/2012

Kirstie Segarra
KIRSTIE SEGARRA
NM BOARD OF MASSAGE THERAPY