



LOUISIANA BOARD OF MASSAGE THERAPY

BOBBY JINDAL

GOVERNOR

IN RE:

Docket No: 11-15-01

Timothy Fischer

Louisiana Board of Massage Therapy

OPINION AND ORDER

This matter involving Timothy Fischer (“Respondent”) came before the Louisiana Board of Massage Therapy (“Board”) for hearing on November 13, 2015, pursuant to written notice, at which time a quorum of the Board was present. Appearances at hearing:

John “Jack” Miller, complaint counsel for the Board.

Jeffrey Wale, general counsel for Board.

A. JURISDICTION

Jurisdiction for the hearing is vested pursuant to La. R.S. 37:3563.

B. BACKGROUND AND MATTERS AT ISSUE

On May 29, 2015, the Louisiana Board of Massage Therapy received a written complaint about Respondent Timothy Fischer. The complaint noted that while giving a massage, Respondent touched a client in inappropriate areas and admitted to this in writing. A written and signed letter by the Respondent stated he exposed the client’s chest, massaged the client’s chest, exposed the groin of the client, and worked the inside of the leg. When the client said she felt the massage was too personal at that point, he stopped and stepped out of the room.

The issues for the Board to determine in this matter were whether the Respondent’s actions constituted cause for which the Board may order suspension or revocation of the Respondent Establishment’s license or a lesser sanction as deemed appropriate and whether the Respondent Establishment’s actions were in violation of the following provisions:

I. LAC 46:XLIV §901 “Code of Ethics”:

A. A massage therapist shall:

12. refrain, under all circumstances, from initiating or engaging in any romantic or sexual conduct, sexual activities, or sexual behavior involving a client, even if the client attempts to pursue a sexual relationship.

II. LAC 46:XLIV §3101 Prohibition of Sexual Activity

C. No massage therapist shall engage in sexual activity with a current client of the therapist.

E. As used in this Rule and §5301 of this Part:

a. sexual activity—includes: b. the purposeful touching of the genitals of another person and the purposeful erotic stimulation of the anus, the male or female nipple, or the female breast, whether through draping or clothing, ... and whether by instrumental manipulation, touching with the hands, or other bodily contact;

III. LAC 46:XLIV §5301. Unprofessional Conduct

A. The following acts shall constitute misconduct in the practice of massage therapy or incorrect practice of massage for which disciplinary penalties may be imposed:

1. conviction or a plea of guilty in any jurisdiction, regardless of adjudication, of a crime directly relating to the practice of massage or to the ability to practice massage. Any plea of "nolo contendere" shall be considered a conviction for purposes of this rule; including pleas of guilty, nolo contendere and pleas under La. C.Cr.P. Article 893 and 894;

4. engaging in or attempting or offering to engage a client in sexual activity, including any genital contact, as provided under §3101 of this Part;

IV. LAC 46:XLIV §2501: Safety and Sanitary Requirements

B. Draping. Each massage establishment shall maintain a sufficient supply of clean towels, gowns or sheets, for the purpose of covering each client during a massage. Before beginning a massage, each massage therapist shall explain to the client expected draping techniques and provide the client a clean drape for that purpose. At all times during a massage session, reasonable efforts must be made to keep covered the gluteal cleft and genitalia for male clients and the breasts, the gluteal cleft, and genitalia for female clients. The board may establish a protocol for any variation from the above described draping procedures.

V. La. R.S. 37:3563: Grounds for discipline

B. Any person who has been convicted of, entered a plea of nolo contendere to, or received deferred adjudication in connection with any criminal offense involving sexual misconduct shall be ineligible for licensure as a massage therapist.

C. The board shall revoke the license of any person who is convicted of, enters a plea of nolo contendere to, or receives deferred adjudication in connection with any criminal offense involving sexual misconduct or prostitution.

D. Any person who has been convicted of, entered a plea of nolo contendere to, or received deferred adjudication in connection with any criminal offense involving sexual misconduct or prostitution shall be ineligible for licensure as an owner or operator of a massage establishment. The board shall revoke the license of any person if the board determines that the establishment is a sexually oriented business, as defined in R.S. 37:3558(C), or that a crime or offense involving prostitution or other sexual offenses and resulting in a conviction, to which a plea of nolo contendere was entered or deferred adjudication was received,

C. APPLICABLE STATUTES AND RULES AND REGULATIONS

The laws governing massage therapists in Louisiana can be found at La. R.S. 37:3551 through La. R.S. 37:3567, and LAC 46:XLV§101 through LAC 46:XLV§6101. Specific consideration was given by the Board to the following statutes, rules and regulations:

La. R.S. 37:3555: Powers and Duties of the Board

A. The board shall:

- (1) Regulate the practice of massage and bodywork in Louisiana by licensing massage therapists who meet the state's minimum standards of education. Among its functions, the board promulgates rules and regulations, issues and renews professional and establishment licenses, collects and assesses fees pursuant to R.S. 37:3562, inspects, investigates, and disciplines licensees, including both individuals and establishments, who violate the law, and imposes fines and penalties.
- (2) Perform inspections and investigate persons who may be engaging in practices which violate provisions of this Chapter and impose fines and penalties.
- (3) Maintain a complete record going back for a period of at least five years of all licensed massage therapists and annually prepare a roster of the names and addresses of all such licensees. A copy of this roster shall be made available to any person requesting it, upon payment of a fee set by the board in an amount sufficient to cover the costs of its publication and distribution.
- (4) Adopt and revise rules and regulations pursuant to the Administrative Procedure Act for the purpose of administering the provisions of this Chapter.
- (5) Issue declaratory rulings interpreting the scope of practice of massage therapy, as that term is further defined in R.S. 37:3552(10).

B. The board may:

- (1) Accept or deny entrance of any applicant applying for licensure.
- (2) Establish continuing education requirements for license renewal.

La. R.S. 37:3563: Grounds for discipline

A. The board may suspend, revoke, or refuse to issue or renew a license after notice and opportunity for hearing pursuant to the Administrative Procedure Act, upon proof of any of the following:

- (1) Obtaining a license by means of fraud, misrepresentation, or concealment of material facts, including making false statements on an application or other document required by the board.
- (2) Selling, bartering, or offering to sell or barter a license.
- (3) Engaging in unprofessional conduct that has endangered or that is likely to endanger the health, welfare, or safety of the public, as further defined by rules of the board.
- (4) Conviction of a felony, unless such conviction was reversed on appeal.
- (5) Conviction of any crime arising out of or connected with the practice of massage therapy, unless such conviction was reversed on appeal.
- (6) Violating or aiding and abetting in the violation of any provisions of this Chapter or the rules and regulations promulgated hereunder.
- (7) Failing to comply with license or renewal requirements.

B. Any person who has been convicted of, entered a plea of nolo contendere to, or received deferred adjudication in connection with any criminal offense involving sexual misconduct shall be ineligible for licensure as a massage therapist.

C. The board shall revoke the license of any person who is convicted of, enters a plea of nolo contendere to, or receives deferred adjudication in connection with any criminal offense involving sexual misconduct or prostitution.

D. Any person who has been convicted of, entered a plea of nolo contendere to, or received deferred adjudication in connection with any criminal offense involving sexual misconduct or prostitution shall be ineligible for licensure as an owner or operator of a massage establishment. The board shall revoke the license of any person if the board determines that the establishment is a sexually oriented business, as defined in R.S. 37:3558(C), or that a crime or offense involving prostitution or other sexual offenses and resulting in a conviction, to which a plea of nolo contendere was entered or deferred adjudication was received, has occurred on the premises of the establishment since the date of the most recent license renewal.

LAC 46:XLIV §901: Code of Ethics

A. A massage therapist shall:

12. refrain, under all circumstances, from initiating or engaging in any romantic or sexual conduct, sexual activities, or sexual behavior involving a client, even if the client attempts to pursue a sexual relationship.

LAC 46: XLIV §3101: Prohibition of Sexual Activity

C. No massage therapist shall engage in sexual activity with a current client of the therapist.

E. As used in this Rule and §5301 of this Part:

a. sexual activity—includes: b. the purposeful touching of the genitals of another person and the purposeful erotic stimulation of the anus, the male or female nipple, or the female breast, whether through draping or clothing, ... and whether by instrumental manipulation, touching with the hands, or other bodily contact;

LAC 46:XLIV §5301: Unprofessional Conduct

A. The following acts shall constitute misconduct in the practice of massage therapy or incorrect practice of massage for which disciplinary penalties may be imposed:

1. conviction or a plea of guilty in any jurisdiction, regardless of adjudication, of a crime directly relating to the practice of massage or to the ability to practice massage. Any plea of "nolo contendere" shall be considered a conviction for purposes of this rule; including pleas of guilty, nolo contendere and pleas under La. C.Cr.P. Article 893 and 894;

4. engaging in or attempting or offering to engage a client in sexual activity, including any genital contact, as provided under §3101 of this Part;

LAC 46:XLIV §5501: Guidelines for Disciplinary Actions

A. When the board finds that an applicant or licensee whom it regulates has committed any of the prohibited acts set forth in the statutes or rules, the board may impose appropriate penalties within the ranges recommended in the following disciplinary guidelines.

B. Penalties imposed by the board pursuant to this Section may be imposed in combination or individually, and are as follows:

1. refusal to license an applicant; revocation or suspension of license;

2. issuance of a reprimand or censure;

3. imposition of an administrative fine not to exceed \$1,000 for each count or separate offense.

C. The provisions of this Section are not intended and shall not be construed to limit the ability of the board to informally dispose of disciplinary actions by agreement.

D. The provisions of this Section are not intended and shall not be construed to limit the ability of the board to pursue collateral, civil or criminal actions when appropriate.

E. In determining whether an applicant who has a criminal history should be permitted to apply to be licensed or renew a license, the complaint investigation officer (CIO), designated under §5901 of this Part, shall be authorized to make an initial decision as to whether a conviction of a non-violent crime by an applicant, which conviction is less than

five years old, is sufficiently related to the practice of massage therapy so as to require the application or renewal to be presented to the board for approval. If the CIO makes a determination that the criminal activity involved is clearly not related to the ability to engage in the practice of massage therapy, the CIO may approve the applicant to continue with the application or renewal process. The CIO shall submit a report to the board as to those applicants who have been approved under this procedure.

LAC 46:XLIV §6101. Formal Disciplinary Hearings

A. Formal Disciplinary Hearings

1. The board shall also be authorized to conduct formal disciplinary hearings.
2. The hearing shall be held before the board only after the involved licensee and/or applicant is given at least 30 days notice by registered or certified mail. The content of the notice, as well as the conduct of the hearings, shall be governed by R.S. 49:955, being further provided that the licensee be advised of the right to be represented by legal counsel. The board shall arrange for a court reporter to make an accurate recording of all testimony presented at the hearing. Any person bringing a complaint waives the privilege of confidentiality for purposes of the hearing.

LAC 46:XLIV §2501: Safety and Sanitary Requirements

B. Draping. Each massage establishment shall maintain a sufficient supply of clean towels, gowns or sheets, for the purpose of covering each client during a massage. Before beginning a massage, each massage therapist shall explain to the client expected draping techniques and provide the client a clean drape for that purpose. At all times during a massage session, reasonable efforts must be made to keep covered the gluteal cleft and genitalia for male clients and the breasts, the gluteal cleft, and genitalia for female clients. The board may establish a protocol for any variation from the above described draping procedures.

D. FINDINGS OF FACT

On May 29, 2015, the Louisiana Board of Massage Therapy received a written complaint about Respondent Timothy Fischer. The complaint noted that while giving a massage, Respondent touched a client in inappropriate areas and admitted to this in writing. A written and signed letter by the Respondent stated he exposed the client's chest, massaged the client's chest, exposed the groin of the client, and worked the inside of the leg. When the client said she felt the massage was too personal at that point, he stopped and stepped out of the room.

On June 2, 2015, the Board mailed Respondent a letter informing him of this complaint and that he had the ability to respond to the complaint by doing so in writing to the Board.

On June 8, 2015, Linda Fischer signed receipt of the letter addressed to Timothy Fischer.

On July 22, 2015, Respondent appeared in court in St. Tammany Parish and entered a plea of not guilty to a charge of Massage with Sexual Conduct.

On September 17, 2015, the Board mailed Respondent a letter informing him that he was in violation of the Board rules Title 46, Chapter 25 §2501(B) and possibly the Code of Ethics, rule Title 46, Chapter 9 § 901(12). The Board also mailed him a Notice of Hearing, informing him of the date, time, and location of the hearing. The letter served as formal notice of the hearing and advised him that he had the right to be represented by an attorney at the hearing.

On September 21, 2015, Respondent signed receipt of the letter and Notice of Hearing mailed to him.

Respondent did not appear before the Board's hearing on November 13, 2015 nor did he send any information to the Board regarding his response.

The Board noted that Respondent's own written and signed letter acknowledged he had violated the Board's draping rule found in Title 46, Chapter 25 §2501(B) by removing a client's draping.

E. CONCLUSIONS OF LAW

Removing a client's draping is a violation of Board Rule Title 46, Chapter 25 §2501(B).

The Board may conduct an administrative hearing as long as the licensee has been given 30 days notice by registered or certified mail. LAC 46:XLIV §6101.

The Board has the authority to revoke or suspend a license and impose administrative fines of not more than \$1,000. LAC 46:XLIV §5501.

F. DECISION

The purpose of the Louisiana Board of Massage Therapy is to regulate massage therapy in the State of Louisiana. The Board is charged with licensing therapists, issuing and renewing establishment licenses, inspecting, investigating, and disciplining licensees and establishments, and imposing fines and penalties under La. R.S. 37:3555.

This matter came before the Board on November 13, 2015. After hearing all evidence presented, the Board found that Respondent failed to comply with Board Rule Title 46, Chapter 25 §2501(B). The Board weighed all evidence presented by complaint counsel, as Respondent Establishment failed to appear despite adequate notice.

Considering the law, pleadings, evidence, and arguments of counsel and for the reasons set forth above:

IT IS ORDERED, ADJUDGED, AND DECREED that the license of Respondent Timothy Fischer is suspended for six (6) months.

G. APPEAL RIGHTS

Appeals of this decision may be made pursuant to La. R.S. 49:964-965, in accordance with LAC 46:XLIV §6101.

Signed this 10th day of December, 2015, Mandeville, Louisiana.


Linda Strickland, Chair
Louisiana Board of Massage Therapy