

Secretary of State  
**NOTICE OF PROPOSED RULEMAKING HEARING**  
A Statement of Need and Fiscal Impact accompanies this form.

Oregon Board of Chiropractic Examiners Chapter 811  
Agency and Division Administrative Rules Chapter Number

Dave McTeague, Executive Director 3218 Pringle Rd. SE, Suite 150, Salem, OR 97302-6311 (503) 378-5816  
Rules Coordinator Address Telephone

July 24, 2008 9:30 a.m. OBCE Administrative Office, Large Upstairs Conf. Rm, 3218 Pringle Rd. SE, Salem, OR 97302  
Hearing Date Time Location

Dave McTeague, Executive Director  
Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request? Yes No

**RULE CAPTION**

Add unprofessional conduct language to Certified Chiropractic Assistants rule.

Not more than 15 words that reasonably identify the subject matter of the agency's intended action.

**RULEMAKING ACTION**

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND: 811-010-0110

REPEAL:

RENUMBER:

AMEND & RENUMBER:

ORS 684  
Stat. Auth.

Other Authority

ORS 684.  
Stats. Implemented

**RULE SUMMARY**

The current unprofessional conduct language in ORS 684 may be construed to pertain only to chiropractic physicians. This amendment writes similar language on unprofessional conduct into the CCA administrative rule.

A public rulemaking hearing may be requested in writing by 10 or more people, or by an association with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the *Oregon Bulletin* or 28 days from the date Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the *Oregon Bulletin* at least 14 days before the hearing.

The agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing the negative economic impact of the rule on business.

July 24, 2008

**Last Day for Public Comment**  
Last day to submit written comments to the Rules Coordinator

Signature

Dave McTeague, OBCE Executive Director

Printed name Date

\*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday upon which the deadline is 5:00 pm the preceding workday.  
ARC 920-2005

Secretary of State  
**STATEMENT OF NEED AND FISCAL IMPACT**  
A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Oregon Board of Chiropractic Examiners  
Agency and Division

Chapter 811  
Administrative Rules Chapter Number

**In the Matter of:**

**Amendment of Rule:** 811-010-0110 Certified Chiropractic Assistants

**Rule Caption:** Add unprofessional conduct language to Certified Chiropractic Assistants rule.

**Statutory Authority:** ORS 684

**Other Authority:**

**Stats. Implemented:** ORS 684

**Need for the Rule(s):**

811-010-0110: The current unprofessional conduct language in ORS 684 may be construed to pertain only to chiropractic physicians. This amendment writes similar language on unprofessional conduct into the CCA administrative rule.

**Documents Relied Upon, and where they are available:**

Oregon Administrative Rules 811.

**Fiscal and Economic Impact, including Statement of Cost of Compliance:** There is no fiscal impact.

**How were small businesses involved in the development of this rule?** A public notice is being sent to the OBCE's public notice mailing list.

**Administrative Rule Advisory Committee consulted?:** The OBCE Rules Advisory Committee was consulted on May 1<sup>st</sup> and will meet again on July 8<sup>th</sup>.

\_\_\_\_\_  
Authorized Signer

Dave McTeague, OBCE Executive Director  
Printed name

\_\_\_\_\_  
Date

**Rules Advisory Committee Meeting**  
(Teleconference and attendees)

Date: July 8, 2008 meeting

Time: 10:00 a.m. to 12:00 p.m.

Place: Wilsonville Holiday Inn

Attendees: Drs. Joyce McClure, chair, Craig Johnson, Neil McMahon, and attorney (member) Mike Smith, Chris Clark, Michelle Waggoner, Michael Miller and Chuck Simpson. Dave McTeague-staff.

By telephone: James Aungst, John Collins, Sharron Fuchs, Gregg Helms, Brent Smith, Richard Hews, Kevin Holzapfel, Chris Osterlitz, Mike Megehee

**Agenda**

**1. CCAs dating patients & unprofessional conduct language**

Dr. McClure opened the committee meeting by briefly explaining the last meeting ended in something of an impasse. She reviewed the 3 CCA boundary cases and that the NCMIC monograph said the legal standard is the CCA reflects back on to the doctor. She said this issues were how great is the power differential for CCAs/Pts and what is the time frame in which a CCA might be free to engage in a relationship with a patient? She suggested RAC review Dr. Foreman's draft language.

Dr. Fuchs said the rules for DCs and CCAs should be the same and consistent. She pointed out that student DCs can be hired as CCAs and asked if they would be able to legally date patients?

Dr. Helms said the prohibition on "dating" violates the 1<sup>st</sup> amendment Federal Constitution.

Dr. McClure reminded the RAC OBCE's mission is to protect the public, stakeholders, patients. Etc.

Mike Smith said (1)(b) was too vague. (Engaging in conduct with a current patient that exploits the trust, knowledge, emotions or influence derived from the professional relationship.)

Dr. Collins: Agrees with Dr. Helms "you are not alone" and asks what's the problem identified? Is it Can CAs date patients? He said his CCAs have a very limited relationship with pts. He said in today's environment the patients have all the power and chiropractors are overburdened with regulation. He suggests a policy approach, instead of administrative rule.

Dr. Hews said CCAs are a representative of the chiropractic clinic and profession. In his office CCAs sign a statement that they understand their obligations.

Dr. Osterlitz requested language that the CCA/patient relationship be ended before there is any personal relationship, need to create a separation, which solves a lot of problems. He said the power differential between CCA and patient may be minimal, but that it could also be strong.

Dr. Smith said the responsibility falls on the DC, and the problem may be a DC who is not properly supervising a CCA who is a bad apple.

Dr. Waggoner stated she worked as a CCA for some time before she became a DC. She doesn't see the CCA as having much influence over patients.

Dr. McClure asked Mike Smith if a rule would protect the DC from unprofessional CCA behavior?

Mike Smith said a rule would be a tool for the DC. He noted that some CCAs are more training in deep massage and more intimate work with patients. He noted that when a relationship goes south, the problems could occur.

Dr. McMahon said that he has four CCAs, two over 50 years old, and that they know everybody in their community. He said CCAs are not the same as doctors.

Dr. Fuchs agrees CCAs are not as powerful as doctors, but there still is concern. She said one insurance carrier said perhaps CCAs should have their own malpractice insurance.

Dr. Johnson said more chiropractic clinics don't have clear CCA policies. He indicated he is now willing to accept a rule in some form.

Dr. Clark asked what rules the PT assistants and LMTS have?

Dr. Megehee made motion to the effect that some rule is needed. There was a general agreement, (Dr. Helms later clarified he was a No on this.)

Mike Smith asked Should a CCA be required to disclose any relationship between a patient and a DC?

Dr. McClure liked that concept, said puts the responsibility onto the DC.

Dr. Megehee asked, Do we all agree the CCA role has lesser weight than a doctor in the patient relationship?

Dr. Fuchs disagrees, says there's still a significant risk.

Dr. Helms made the following motions, "These issues should be resolved by the chiropractic office (clinic)." He further stated an office policy should govern and any violations could be prosecuted by a District Attorney's office. After restating the motion several times a recount of the vote was made. Voting yes: Drs. Helms, Smith, Hews, and Holzapfel. Voting No: Drs.

Miller, Fuchs, McMahon, MeGehee, Mike Smith, Michelle Waggoner, Clark and Johnson.  
Motion fails.

Dr. Megehee said we need to put responsibility onto the CA for his/her actions.

Michael Smith made another motion: "Moves that a rule be adopted regarding the CCAs and the patient relationship" Dr. Clark seconded.

Dr. Aungst said he favored some rule.

Dr. Johnson suggested removing this language from section (1)(b) "Engaging in conduct with a current patient that exploits the trust, knowledge, emotions or influence derived from the professional relationship." This was removed by general agreement.

Dr. Fuchs said CCAs should not date patients.

Dr. Waggoner said that's not realistic in Oregon.

The committee then turned to the draft rule and made the following recommendations (as several members were leaving the meeting and signing off). Dr. McClure requested this draft be sent around by email and further comments solicited from committee members, which could perhaps refine the rule further.

Dr. McClure requested the draft language be shared immediately with RAC members so discussion could be continued by email or other communication.

Dave McTeague pointed out there is a public hearing scheduled on this issue before the OBCE at 9:30 a.m. on July 24<sup>th</sup> at the board offices in Salem.

**Rules Advisory Committee proposed draft  
July 8, 2008**

**Certified Chiropractic Assistants**

**811-010-0110** (1) Ancillary personnel authorized by ORS 684.155(c) shall be known as Certified Chiropractic Assistants.

(2) Certified Chiropractic Assistants may be ~~certified~~ **licensed** upon compliance with the following standards and procedures:

(a) The Certified Chiropractic Assistant shall successfully complete a Board approved training course offered by an association, college or otherwise approved vendor. The initial training course shall be at least six hours in length, four hours of which must be in physiotherapy, electrotherapy and hydrotherapy and must have been completed within the 12 months preceding the application date;

(b) The applicant shall complete an application form and an open book examination supplied by the Board;

(c) If an applicant has a certificate or license from another state and adequate documentation of training, the Board may waive the requirement for the initial training course; and

(d) A person initially ~~certified~~ **licensed** between March 1st and May 31st is exempt from the continuing education requirement for renewal.

(3) The training course verification form, completed application form, completed examination, and fees in the following amounts shall be submitted to the Board:

(a) Application fee - \$25;

(b) Examination fee - \$35; and

(c) Certification fee - \$50.

(4) The applicant shall be at least 18 years of age.

(5) The Certified Chiropractic Assistant shall not perform electrotherapy, hydrotherapy, or physiotherapy until he or she receives a ~~certificiate~~ **license** from the Board.

(6) A Certified Chiropractic Assistant shall be directly supervised by the Chiropractor at all times. The supervising Chiropractor must be on the premises.

(7) The scope of practice does not include performing physical examinations, taking initial histories, taking X-rays, interpretation of postural screening, doing manual muscle testing or performing osseous adjustments or manipulations.

(8) Certified Chiropractic Assistants shall report to the Board, in writing, his/her mailing address and place of employment. Notification of a change of mailing address or place of employment must be made within 10 days of the change.

(9) On or before each June 1, the Board of Examiners shall send the renewal notice to the Certified Chiropractic Assistant at the last known mailing address.

(10) On or before each August 1 the Certified Chiropractic Assistant shall mail to the Board of Examiners the renewal form with the following:

(a) Renewal fee of \$50; and

**Rules Advisory Committee proposed draft  
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(b) Evidence of successful completion of six hours of Board approved continuing education during the 12 months preceding. No continuing education hours may be carried over into the next renewal year.

(11) Continuing education programs may be comprised of subjects that are pertinent to clinical practices of chiropractic. Continuing education must meet the criteria outlined in OAR 811-015-0025 sections (8), (9) and (10), excluding the requirement for the evaluation form in subsection (10)(a).

(12) The failure, neglect or refusal of any person holding a certificate to show compliance with subsection (10)(a) and (b) of this rule shall cause the certificate to automatically expire August 1 and the Certified Chiropractic Assistant must reapply.

(13) The Certified Chiropractic Assistant's ~~certificate~~ **license** shall be displayed at all times in the Chiropractic Physician's office during the Certified Chiropractic Assistant's employment.

(14) The Board may refuse to grant a ~~certificate~~ **license** to any applicant, may suspend or revoke a ~~certificate~~ **license**, or may impose upon an applicant for **certification** ~~license~~ or Certified Chiropractic Assistant a civil penalty not to exceed \$1,000 upon finding of any of the following:

(a) Cause, which is defined as, but not limited to, failure to follow directions, unprofessional or dishonorable conduct, injuring a patient, or unlawful disclosure of patient information. The supervising Chiropractic Physician is required to notify the Board, in writing, of any dismissal of a Certified Chiropractic Assistant for cause within ten days. The Board shall determine if there is cause for action and shall be governed by the rules of the Board adopted pursuant to ORS Chapter 183;

~~(b) Fraud or misrepresentation in applying for or procuring certification, or certification renewal; (same language below)~~

~~(e)~~ **(b)** Conviction of a misdemeanor involving moral turpitude or a felony; or

~~(d)~~ **(c)** Failure to notify the Board of a change of location of employment as required by these rules.

(15) The service of the Certified Chiropractic Assistant is the direct responsibility of the licensed Chiropractic Physician. Violations may be grounds for disciplinary action against the Chiropractic Physician under ORS 684.100(9).

**(16) Unprofessional or dishonorable conduct is defined as: any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable Certified Chiropractic Assistant practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a Certified Chiropractic Assistant:**

**(a) Engaging in any conduct or verbal behavior with or towards a patient on the clinic premises that may reasonably be interpreted as sexual, seductive, sexually demeaning or romantic (also see ORS 684.100).**

**(b) Use of protected or privileged information obtained from the patient to the detriment of the patient.**

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(c) Failing to disclose to the supervising chiropractic physician the existence of a romantic or sexual relationship with a current patient regardless of when the relationship started. The Certified Chiropractic Assistant is required to inform the supervising chiropractic physician so appropriate measures can be taken by the supervising chiropractic physician to protect the patient.

- (17) ~~Charging fees for unnecessary services;~~
- (18) Practicing outside the scope of the practice of a Certified Chiropractic Assistant in Oregon;
- (19) Charging a patient for services not rendered;
- (20) Intentionally causing physical or emotional injury to a patient;
- (21) Directly or indirectly engaging in threatening, dishonest, or misleading fee collection techniques;
- (22) Soliciting or borrowing money from patients;
- (23) Possessing, obtaining, attempting to obtain, furnishing, or prescribing controlled drugs to any person, including self, except as directed by a person authorized by law to prescribe drugs; illegally using or dispensing controlled drugs;
- (24) Aiding, abetting, or assisting an individual to violate any law, rule or regulation intended to guide the conduct of Certified Chiropractic Assistants or other health care providers; or
- (25) Violating the rights of privacy or confidentiality of the patient unless required by law to disclose such information;
- (26) Perpetrating fraud upon patients or third party payors, relating to the practice of chiropractic;
- (27) Using any controlled or illegal substance or intoxicating liquor to the extent that such use impacts the ability to safely conduct the practice of a Certified Chiropractic Assistant;
- (28) Practicing as a Certified Chiropractic Assistant without a current Oregon license;
- (29) Allowing another person to use one's Certified Chiropractic Assistant Certification for any purpose;
- (30) Resorting to fraud, misrepresentation, or deceit in applying for or taking the license exam or obtaining a license or renewal thereof;
- (31) Impersonating any applicant or acting as a proxy for the applicant in any Certified Chiropractic Assistant license examination;
- (32) Disclosing the contents of the licensure examination or soliciting, accepting, or compiling information regarding the contents of the examination before, during, or after its administration;
- (33) Failing to provide the Board with any documents requested by the Board;
- (34) Failing to fully cooperate with the Board during the course of an investigation, including but not limited to, waiver of confidentiality privileges, except attorney-client privilege;
- (35) Claiming any academic degree not actually conferred or awarded;
- (36) Disobeying a final order of the Board; and



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**(37) Splitting fees or giving or receiving a commission in the referral of patients for services.**

**(38) Receiving a suspension or revocation by another state of a certificate or license for a Certified Chiropractic Assistant, or other license, based upon acts by the Certified Chiropractic Assistant or applicant that describes acts similar to this section. A certified copy of the record of suspension or revocation of the state making that is conclusive evidence thereof.**

**From:** "Michael Smith" <msmith@gattilaw.com>  
**To:** "Dave MCTEAGUE" <Dave.Mcteague@state.or.us>, <CBJDMJ@aol.com>, <mcmahonchiro@aol.com>, <PATITAMI@aol.com>, <spbkchiro@aol.com>, <drdan@beesonchiropractic.com>, <backtohealth@charterinternet.com>, <robalbert@clipper.net>, <vsaboe@comcast.net>, <jocelynk@drkirkonline.com>, <spiney@foxclinic.net>, <mttam377@msn.com>, <connect@pacifier.com>, <sharronf@tdcinjurylaw.com>, <iuyi@webtv.net>, <Mwaggoner@wschiro.edu>, <bjornsons@yahoo.com>  
**Date:** 7/9/2008 3:42:52 PM  
**Subject:** Michael G. Smith's response to request for response re: Proposed Rule

Here are some possible changes/additions to the Proposed Rule I submit for consideration. I'm not sure we should limit prohibited sexual conduct to just that confined to the "premises" of the clinic. That almost sounds like it would be completely permissible in almost all cases for a C.A. to engage in sexual behavior toward or with a current patient as long as it's at least a few feet away from the front door. Many C.A.'s transport patients, care may be given at a booth at a fairground, or a screening in a school lobby. A patient may run into a C.A. at the grocery store, and it would be natural for the two to discuss how the patient is doing (Seriously, can you imagine this conversation as the two chit-chat while choosing the perfect avocados at Fred Meyer: "How's your low back pain doing since I rubbed it yesterday at the clinic. . . Boy your breasts sure do look a lot more delightful in that t-shirt than they in that drab gown Dr. Ethical has you wear at the clinic. . . See you tomorrow at the clinic.") In reading some of the Final Orders issued by the Board recently, does anyone doubt such a conversation might take place? Does a health care provider's duties toward a patient evaporate if the provider and the patient run into each other in the produce section of a supermarket or the beer garden at the October Fest? I don't think we can get around the reality that a C.A. is a licensed health care provider.

Also, I throw out the additional language in part (c) almost with an apology. It seems to me that there is a fundamental difference between a C.A. participating in the care of a longtime boyfriend/girlfriend/spouse and a sexual/romantic relationship that develops after the patient/healthcare provider relationship has been established, or more ominously, a relationship that develops incident to care being rendered and perhaps because of the physical and emotional intimacy as well as disparity in power inherent in the C.A./patient relationship. It appears to me that the latter is the danger zone we are attempting to regulate.

I'm also not sure how to set forth what appropriate measures should be/may be/ought to be/must be instituted by the supervising chiropractic physician, or whether we even agreed on certain mandatory measures or whether they were to be simply "advisory." It seems like the committee did not want to absolutely prohibit relationships between C.A.'s and patients but to regulate them to insure the patient's well-being is protected by the C.A., the chiropractic physician, and the Board. I'm not sure how we craft the rule without placing a newly articulated

affirmative legal duty upon the supervising chiropractor to do something in response to the disclosure or discovery of a relationship (whatever it is the Board decides the doctor must or should do in the face of a C.A./patient personal relationship). Then again, that's going to place additional affirmative legal obligations and duties upon each physician which may be quite unpopular with some doctors. I don't see how we get there without placing an additional burden upon the doctor, because, after all, it is the doctor who will be sued in the event the C.A./patient relationship turns unpleasant/abusive. Also, whether we spell it out or not, I don't think we can escape the reality that the physician is going to have affirmative obligations in any case, because the doctor is responsible for both the patients and for the actions and inactions of employees. I also concede it might not be appropriate to list what must/should be done by the physician in the C.A. rule. Perhaps that ought to be added to a rule that applies only to doctors by way of reference.

The more I look at this whole perceived problem, the more it seems like a circular can of worms. Perhaps the solution is to mandate a Chinese Wall unless the relationship preexisted the physician-patient relationship or the C.A.'s employment (or unless there is a marriage or civil union). It does seem to keep getting more complicated in my mind the more I look at it. Maybe the tremendous difficulty in crafting language that fully and fairly sets forth what is permitted and what is prohibited is the reason that other Boards have simply thrown their hands in the air and flatly prohibited any and all relationships (that certainly solves the problem of ambiguity, but it also is not what we were requested to come up with). Anyway, I throw the bold language out there for consideration/improvement/rejection. I remain confident that we can come up with language that accomplishes what the Board wants (assuming the Board truly wants a rule that does not prohibit any and all romantic/sexual relationships between C.A.'s and patients).

As an aside and as an attorney, regardless of whether there is specific rule or not, I would strongly advise any physician whose C.A. (or any employee) is involved romantically or sexually with a patient who is neither a spouse or a "civilly unioned" to create an absolute Chinese Wall around the C.A./employee with regards to that patient and the patient's protected health information. If the relationship goes south (and statistics say most do), the physician will never be able to defend him/herself unless such a wall is created and unless the doctor has charted his/her discussion with the patient regarding the doctor's concerns, worries, and reasons for not permitting the C.A. to continue to provide health care. I don't think the doctor (at least now) is either obligated to fire the employee or send the patient down the road (which in some towns could be more than several miles away). But anyone who is permitting a relationship without a Chinese wall now is playing with matches. When's the last time anyone saw a romantic/sexual relationship terminate where one or the other individual didn't accuse the other of emotional injustices if not atrocities?

With respect to the constitutionality of the proposed rule, I disagree strongly that there are constitutional problems, as long as the rule

fairly gives notice of what is and is not prohibited. The State clearly has the right to legislate in this area. Additionally, while it might be true that any rule might possibly be held unconstitutional "as applied" to a C.A. in Paris, Oregon (population 6) where every single resident has been/is a patient at the sole clinic in town, that does not mean that the rule is or would be unconstitutional in Corvallis. There is actually some published authority regarding those very issues with other professions (the poor bachelor country doctor who can't date anyone, because he has treated every eligible woman within a day's ride at one time or another).

"Unprofessional conduct shall include, but not be limited to, the following acts [by] a Certified Chiropractic Assistant:

(a) Engaging in any conduct or verbal behavior with or towards a patient [delete limitation to clinic premises] that may reasonably be interpreted as sexual, seductive, sexually demeaning or romantic (also see ORS 684.100).

(b) Use [or disclosure] of protected or privileged information [of] the patient to the detriment of the patient.

(c) Failing to disclose to the supervising chiropractic physician the existence of a romantic or sexual relationship with a current patient regardless of when the relationship started. The Certified Chiropractic Assistant is required to inform the supervising chiropractic physician [of any such relationship,] so appropriate measures can be [are?] taken by the supervising chiropractic physician to protect [the well-being and best interests of] the patient. ["Appropriate measures" include but are not limited to: preventing the Certified Chiropractic Assistant from continuing to participate in the administration of health care to the patient (unless the relationship existed prior to ?); consulting with, counseling, advising, and/or giving notice to the patient regarding boundary issue concerns, restricting access to the patient's protected health information, and/or taking other appropriate steps to ensure that the chiropractic physician's and the Certified Chiropractic Assistant's ethical, professional, and fiduciary duties to the patient are not jeopardized nor compromised by the relationship.] [Or something to that effect].

Best Regards, Michael G. Smith.

Michael Smith additional comments, July 9, 2008

Or how about (1) A general prohibition against sexual/romantic conduct toward patients (as already written); (2) an affirmative duty to disclose by the C.A. to the chiropractor of any relationship (as already written); and (3) a Chinese Wall (or the medical equivalent as we define it) unless the relationship pre-existed the C.A.'s employment or the physician-patient relationship; and (4) An affirmative duty upon the chiropractor to both create and maintain the Chinese Wall and to advise/document with the patient the reasons for the Chinese Wall.  
Mike.

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(assuming the Board truly wants a rule that does not prohibit any and all romantic/sexual relationships between C.A.'s and patients).

As an aside and as an attorney, regardless of whether there is specific rule or not, I would strongly advise any physician whose C.A. (or any employee) is involved romantically or sexually with a patient who is neither a spouse or a "civilly unioned" to create an absolute Chinese Wall around the C.A./employee with regards to that patient and the patient's protected health information. If the relationship goes south (and statistic say most do), the physician will never be able to defend him/herself unless such a wall is created and unless the doctor has charted his/her discussion with the patient regarding the doctor's concerns, worries, and reasons for not permitting the C.A. to continue to provide health care. I don't think the doctor (at least now) is either obligated to fire the employee or send the patient down the road (which in some towns could be more than several miles away). But anyone who is permitting a relationship without a chinese wall now is playing with matches. When's the last time anyone saw a romantic/sexual relationship terminate where one or the other individual didn't accuse the other of emotional injustices if not atrocities?

With respect to the constitutionality of the proposed rule, I disagree strongly that there are constitutional problems, as long as the rule fairly gives notice of what is and is not prohibited. The State clearly has the right to legislate in this area. Additionally, while it might be true that any rule might possibly be held unconstitutional "as applied" to a C.A. in Paris, Oregon (population 6) where every single resident has been/is a patient at the sole clinic in town, that does not mean that the rule is or would be unconstitutional in Corvallis. There is actually some published authority regarding those very issues with other professions (the poor bachelor country doctor who can't date anyone, because he has treated every eligible woman within a day's ride at one time or another).

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(c) Failing to disclose to the supervising chiropractic physician the existence of a romantic or sexual relationship with a

current patient regardless of when the relationship started. The Certified Chiropractic Assistant is required to inform the supervising chiropractic physician [of any such relationship,] so appropriate measures can be [are?] taken by the supervising chiropractic physician to protect [the well-being and best interests of] the patient. ["Appropriate measures" include but are not limited to: preventing the Certified Chiropractic Assistant from continuing to participate in the administration of health care to the patient (unless the relationship existed prior to ?); consulting with, counseling, advising, and/or giving notice to the patient regarding boundary issue concerns, restricting access to the patient's protected health information, and/or taking other appropriate steps to ensure that the chiropractic physician's and the Certified Chiropractic Assistant's ethical, professional, and fiduciary duties to the patient are not jeopardized nor compromised by the relationship.] [Or something to that effect].

Best Regards, Michael G. Smith.

July 7, 2008

To: Administrative Rules Advisory Committee (by email & fax to those w/o email)

Fr: Dave McTeague, Executive Director



Re: CCA boundary cases

I have identified three CCA boundary cases.

In June 2008, Jorge Torres CCA received a Letter of Reprimand for touching and kissing a patient.

In 2007, Cheri Berry's CCA licensed was revoked, one of the findings was an inappropriate relationship with a patient.

In 2001 there was a patient complaint against a CCA alleging he placed her hands on his testicles during a treatment session. This patient had only seen female CCAs prior to this. The male CCA said it was a Shiatsu stretch and patient misunderstood. The patient was very upset and also contacted county sheriff's office. The case was closed with a finding of Insufficient Evidence (I.E.).

Attached are the two final orders.

Also attached is a recent review of other CCA cases for the OBCE.

The Administrative Rules Advisory Committee will meet on Tuesday, July 8, 2008 10:00 a.m. to 11:30 p.m., at the Wilsonville Chamber of Commerce (behind Frye's), 29600 SW Park Place. Follow signs to the Korean War Memorial from I-5 and exit 283.

OBCE board member Joyce McClure DC will be chairing this meeting.

Telephone access is also available for this meeting by calling the

\* Toll Free Dial In Number: (888)808-8526

\* Participant Code: 936215

Good morning everyone!  
I look forward to seeing/hearing all of you tomorrow.

Please will everyone make sure they have re-read the comments/suggestions submitted by the field prior to our meeting?

Specifically, there was some proposed language submitted by Dave Foreman DC as well as comments by Drs. Olsen, Helms, Simpson and Guerrero.

You also received a booklet from NCMIC, the malpractice carrier, regarding Professional Boundaries for DCs. Particularly, we might wish to consider the section "Legal Implications for Sexual Misconduct" beginning on p. 24. While this is written for DCs, let's consider whether there are relevant considerations for CAs. Much is made of the fact that, as a regulatory board, the OBCE must protect the public. However, we also must protect all of our stakeholders, and the CA, as a licensee, also is a stakeholder. Because actions of a CA are the direct responsibility of the DC, by extension, we protect the DC's right to the enjoyment of practice and livelihood.

Let's see if we can strike a fair balance between personal responsibility/autonomy and the clear description of the appropriate boundary created in the delivery of professional healthcare services.

I have asked our executive director, Dave McTeague, if he will provide us with a summary of relevant CA boundary complaints over the prior 10 years so that we may understand the practical aspects of this language.

We meet from 10-11:30 am in Wilsonville at the Chamber of Commerce:  
29600 SW Park Place.

Thanks!

Joyce McClure DC





3.

On May 20, 2008, the Board sent the Proposed Notice of Discipline to last known address. The Notice was also later served by email. In that Notice, Licensee was told to request a hearing within 30 days. Licensee failed to request a hearing within the time permitted. Licensee further communicated that he was not going to request a hearing and would accept the sanction. Licensee confirmed to the Board that he received the Notice via email communication. The Licensee is now in default.

#### Conclusions of Law

4.

The Board finds that the Licensee is in default and that Licensee's conduct as described herein constitutes unprofessional conduct. Licensee's practice, as described above, constitutes violations of ORS 684.100 (1)(g)(A); and OAR 811-035-0015(1)(b)-(e) and OAR 811-010-0110(14)(a).

#### Order

5.

Due to the aforementioned violations, the OBCE is issuing a Letter of Reprimand to Licensee.

Dated this June 30, 2008.

BOARD OF CHIROPRACTIC EXAMINERS  
State of Oregon

By:



Dave McTeague  
Executive Director

A party is entitled to judicial review of the Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of State Court Administrator, Supreme Court Building, Salem, Oregon 97310. ORS 183.482 requires that an appeal is requested by filing a petition in the Court of Appeals within 60 days following the date the order upon which the petition is based is served.

\*\*\*\*\*

BEFORE THE  
BOARD OF CHIROPRACTIC EXAMINERS  
STATE OF OREGON

In the Matter of  
Cheri Barry, CCA

)  
) Case # 2006-1053, 2006-1057  
)  
)  
) **FINAL DEFAULT ORDER**  
) **REVOCAION OF CERTIFICATE**

The Oregon Board of Chiropractic Examiners (hereafter "Board" or "OBCE") is the state agency responsible for licensing, regulating and disciplining chiropractic physicians and certified chiropractic assistants in the State of Oregon. Cheri Barry (hereafter "CCA"), is a licensed certified chiropractic assistant in Oregon. The Board revokes the certificate of the above Licensee on the following basis:

FINDINGS OF FACT

1.

On October 18, 2005 the OBCE received CCA's renewal for her certification as a certified chiropractic assistant in Oregon. On question five of the application where Licensee was asked if she had ever been arrested or charged with a violation, misdemeanor or felony, Applicant responded no.

2.

On question 7 of the renewal where it asks if they have ever been convicted of, pled guilty, or no contest to any offense, misdemeanor or felony which could have resulted in imprisonment, Applicant responded no.

3.

Board staff followed up and found that Licensee had been arrested on July 19, 1991 for aggravated theft in the first degree. She was indicted in 1992 and pled no contest on September 25, 1997. She was put on probation, required to serve 10 sanctions units in the jail and ordered to pay \$18,325.00 in restitution. The aggravated theft charge was a felony. Clearly when responding to the questions in the renewal form, Licensee knew she had a felony conviction and arrest.

4.

The Board also had a separate complaint filed in September 2006 indicating that Licensee had released private patient information of one patient to a former employee and had released private patient information on one patient to another. In addition, the complaint stated that

Licensee had a romantic relationship with yet a different patient. Licensee left employment within 10 days after the complaint was filed with the Board.

5.

Investigation into this complaint showed that Patient 1 was a patient of Chiropractic Physician 1 where Licensee worked for many years. She learned that Licensee made unauthorized disclosure of her protected health information to another patient, Patient 2. Patient 2 is a friend of Patient 1 but knowing her information was provided to another patient without her authorization upset Patient 1 greatly. Patient 1 worried about the potential of identity theft.

Patient 2 has also been treated with Chiropractic Physician 1 for many years. Patient 2 said he and Licensee "hit it off" and they began to date sometime in early 2006. Patient 2 said that Chiropractic Physician 1 was not aware that he and Licensee were dating until the events in question occurred. Licensee moved into Patient 2's home in June 2006 and borrowed \$3000 from him. Licensee divulged private patient information of other patients in the practice to Patient 2 while she lived with him. Licensee divulged private patient information to Patient 2 about Patient 1. Licensee still owes Patient 2 the sum of \$2600 for the money she loaded from him.

6.

On March 22, 2007, a Notice of Proposed Revocation of Certificate was served on Licensee via certified mail. On March 23, 2007 a return receipt certified notification was received by the Board. The sixty days in which to request a hearing expired on May 21, 2007. Licensee has not requested a hearing and is in default.

#### CONCLUSIONS OF LAW

7.

The Board finds that the acts and conduct of Licensee in her renewal and responses to such, are cause to revoke the certificate. The misrepresentations in the responses to questions regarding criminal convictions is evidence of fraud or misrepresentation in applying for or procuring a certificate; in violation of OAR 811-010-0110(14)(b). In addition, the Board may also revoke or deny a certificate for conviction of a misdemeanor involving moral turpitude or a felony pursuant to OAR 811-010-0110(14)(c). The Board finds that a felony conviction for aggravated theft is a crime involving moral turpitude.

The Board also finds that the conduct of Licensee while employed with Chiropractic Physician 1 to be in violation of ORS 684.100(1)(g)(A), (1)(d), OAR 811-035-0015(1)(b), (8), (11), 811-010-0110(1)(a) and (c). (Sexual relationship with a patient, divulging confidential information of patient's to others, borrowing money from a patient and unprofessional conduct)

ORDER

8.

Based on the above findings of fact and conclusions of law, the Board hereby revokes the certificate issued to Licensee from this date forward. Licensee may no longer practice as a Certified Chiropractic Assistant in the State of Oregon. This is effective upon final order signature.

DATED this 23<sup>rd</sup> day of May 2007.

**BOARD OF CHIROPRACTIC EXAMINERS**  
State of Oregon

Original Signatures on file  
at the OBCE Office  
By: \_\_\_\_\_  
Dave McTeague, Executive Director  
Oregon Board of Chiropractic Examiners

A party is entitled to judicial review of the Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of State Court Administrator, Supreme Court Building, Salem, Oregon 97310. ORS 183.482 requires that an appeal is requested by filing a petition in the Court of Appeals within 60 days following the date the order upon which the petition is based is served.

## CCA cases & Consistency in Disciplinary Actions

March 3, 2008

To: Board of Chiropractic Examiners  
Fr: Dave McTeague, Executive Director  
Re: CCA cases & Consistency in Disciplinary Actions

Board members,

This is a case review of certified chiropractic assistant cases for the last five years, with excerpts from their final orders. Most of these are Applicants, however a few were licensed CCAs. From my review and memory the criteria in use by the Board include in rough order of importance:

### Criteria and considerations:

1. Severity of offense or conviction
2. Truthfulness or lack thereof in responses to the Board
3. Nexus between offense and CCA duties in a chiropractic clinic
4. Evidence of rehabilitation or subsequent responsible behavior
5. Whether currently employed by a DC who is supportive of the applicant
6. Time elapsed since offense was committed

Per your request I have grouped this list by sanctions and severity so you can view violations within each category.

### CCA Final Actions Matrix

#### Revocation

**Cheri Barry CCA. Revocation of CCA license for failure to report her felony conviction for aggravated theft on her license renewal form, unauthorized disclosure of patient health information, borrowing money from a patient, and engaging in a sexual relationship with a patient.** Violations of ORS 684.100(1)(g)(A), (1)(d), OAR 811-035-0015(1)(b), (8), (11), 811-010-0110(1)(a) and (c). Final Order by Default. (5/23/2007)

#### **Denial of License**

**Brandy Enright, CCA applicant. Denial of license for Theft 2 misdemeanor conviction and untruthful answers on application.** Violation of OAR 811-010-0110(14)(c). Final Order by Default. (2/1/2007) The investigation also found that on November 23, 1999, Applicant was arrested for driving while intoxicated and that matter was diverted through the courts. Applicant was not truthful in her responses on the application and failed to provide adequate explanation to the Board.

**Sara Jane Charpentier, CCA Applicant.** Final Order by Default, Denial of License. Applicant made misrepresentations in responses to questions regarding criminal convictions in violation of OAR 811-010-0110(14)(b) and (c) . (2/22/2006)

**Teresa Faber, CCA Applicant.** Final Order by Default. Denial of CCA license. Violations of OAR 811-010-0110(14)(b) for misrepresentations in responses to questions regarding criminal arrests and convictions. Applicant provided a handwritten statement that she had an altercation with a café waitress and had thrown some food on the ground when the waitress refused to refund her money. That resulted in the police citing her with a violation for disorderly conduct in 2004. Investigation determined Applicant had been arrested and charged for possession of a controlled substance in 1984. Subsequently Applicant was convicted of a Class B felony of controlled substances in December, 1984. That conviction involved a large amount of marijuana being grown on property in the custody of Applicant. When an explanation was requested from Applicant as to why she responded "no" to question 5 and 7 in regards to the controlled substance issue, Applicant stated that she thought it was "automatically expunged" after two years and complying with the court requirements. Applicant was not truthful in her responses on the application and failed to provide adequate explanation to the Board. (10/3/2005)

**George Meridith, CCA Applicant.** Final Order by Default. Denial of CCA license. Violations of OAR 811-010-0110(14)(b) for misrepresentations in responses to questions regarding criminal arrests and convictions. (10/7/2005) Applicant provided that in 1981 he had been arrested for second degree burglary for stealing a ladder after an evening of drinking. That resulted in the police citing him with petty theft and second degree burglary. Follow-up investigation revealed that Applicant had been arrested and charged for Harassment and Assault 4, an A misdemeanor in 1999. Applicant did not divulge this in his explanation attached to his application that arrest or charge. When inquiries of Applicant were requested, Applicant provided an explanation that he believed his Assault 4 was set aside and the matter was no longer on his record. Documents obtained during investigation indicate that Applicant was arrested and charged with Harassment and Assault 4 and subsequently entered a Deferred Sentencing Program during which time he took participated in treatment to address his recent alcohol and domestic violence issues, all information pertinent to this application. Applicant was not truthful in his responses on the application and failed to provide adequate explanation to the Board.

**Melissa Sue Heskett, CCA Applicant.** Final Order by Default. Denial of CCA license. Violations of OAR 811-010-0110(14)(b) for misrepresentations in responses to questions regarding criminal arrests and convictions. (12/8/2005) In the attached explanation for that response, Applicant was arrested in 2000 for furnishing alcohol to minors and in 2002 she was arrested for a misdemeanor theft charge at J.C. Penny's. She blamed the alcohol charge on a babysitter inviting over another friend who decided to go through the liquor cabinet at her home. She explained the theft charge involving her friend who worked at J.C. Penny's was going to give her a family discount. She stated that she didn't pay attention when the items were rang up and didn't notice the receipt had some items that she purchased voided on there, yet the items were still in her bag. However, review of the documents during investigation revealed the police report indicates that Applicant admitted to the police that both women had agreed to steal the items by only ringing up a few items and taking the rest. The explanation provided by Applicant for both arrests were inconsistent with the investigation documents.

**James Gabrielson, CCA Applicant.** Denial of CCA license for misrepresentations on application and for unprofessional conduct (drug dealing) related to revocation of applicant's Oregon chiropractic license in 1990. (2/18/2004)

**G. Lane Jones, CCA Applicant.** Final Order by Default, Denial of CCA license for violation of OAR 811-010-0110 (5). The Board found applicant knowingly provided patient treatments without a valid CCA certificate. (3-26-2003)

## Probation

**Celia Hartung, CCA applicant.** Two years probation, UAs, and standard notification provisions, for felony conviction for possession with attempt to distribute marijuana. Applicant served 10 months in prison and is currently on Federal probation. Strongly supported by family and DC and probation officer. (11/30/2007) (newly licensed)

## **Letter of Reprimand and \$250 Civil Penalty**

**Samantha Kennedy CCA.,** Final Order by Default. Letter of Reprimand and \$250 Civil Penalty, Licensee admitted to four instances where she provided massage without the supervision and the on site presence of a chiropractic physician and practiced massage without a license. Violations of OAR 811-010-0110 (6) and (15) and ORS 684.100(1)(g)(A). (11/9/2006) (CCA license expired 7/31/2006)

## **Civil Penalty Only**

**Kelly Sutton, CCA.** \$250 Civil Penalty. Licensee signed affidavit attesting to completion of six hours of continuing education. Licensee sent a letter of explanation to the OBCE stating that she had sent in her renewal forms before she actually attended the CE class. The class she was scheduled to attend was subsequently cancelled. Violation of OAR 811-010-0110(14)(b) for falsifying an affidavit and violation of 811-010-0110 (10)(b) not completing the required amount of CE for renewal. Licensee agrees to submit all original verifications of attendance showing completion of at least six hours of continuing education with her 2005 license renewal fee and affidavit. (12/30/2004) (license expired 7/31/2005, 8/26/05 Rec'd notice that Kelly is no longer employed with Gary Blair, DC)

## Standard notification provisions, condition on license

**Theresa Stein, CCA applicant.** Standard notification provisions and two UAs in first year. In 2004, Applicant had been reported to the State for drug use which resulted in custody issues with her children. As a result of that, she was required to be in a drug program for over a one year period and successfully completed it receiving a certification. (has active license)

**Kim MacQuarrie, CCA applicant.** Standard notification provisions: to inform current and prospective chiropractic employers of her disciplinary action as a Physical Therapy Assistant. Consent Agreement. (10/24/07) (has active license)

**Jeanne Harrington, CCA applicant.** Standard notification provisions: In 1989 (when she was 18 years old) she was arrested for burglary and forgery and subsequently served community service and provided restitution for these incidents. Applicant states she has reformed and now "a different person." (has active license)

**David Wichman, CCA applicant.** Standard notification provisions: arrested four years prior for an assault in the second degree and plead guilty to the same. Applicant provided information that he met all court



obligations and was in compliance with all probation requirements. Investigation of this matter showed that Applicant had plead guilty to an assault 4, misdemeanor on September 2, 2003 in Marion County Court in case number 02C54661. (has active license)

**Stephanie Condreay, CCA applicant.** Standard notification provisions: On February 20, 2004 Applicant was arrested for Theft 2 for stealing clothing from JC Penny's. Court information shows that on March 2, 2004 an indictment was issued for one count of theft in the second degree which is a Class A misdemeanor punishable up to 1 year in jail. On April 4, 2004 Applicant pled guilty and was ordered to pay court assessments, have no contact with the retail store, attend a program on theft and restitution to the victim. On November 21, 2006, the Board issued a Notice of Proposed Application Denial. The applicant requested reconsideration of that order and the Board reconsidered it on January 18, 2007. (has active license: 9/26/07 Rec'd notice that Stephanie is no longer employed at D. Duemling's office. KJE)

**Anita Crawford, CCA Applicant.** Condition on License. Standard notification provisions: misdemeanor convictions in 1999 and 2002 for theft/shoplifting. (has active license)

**Lorie Dawn Lacy, CCA Applicant.** Condition on License. Standard notification provisions: misdemeanor conviction in 1997 for DUII and completed a Diversion Program. At the Board's request, Applicant was interviewed on September 27, 2006 and concluded, "Lacy was fully candid. She took full responsibility for her past and answered questions without reservation." (has active license: 10/17/06 Not employed at initial certification. KJE)

**Debra Montour, CCA Applicant.** Condition on License. Standard notification provisions: misdemeanor conviction in 2005 for theft/shoplifting. She was placed on Court Probation. (license expired 7/31/2007)

**Meghan Holton, CCA Applicant.** Condition on License. Standard notification provisions: On October 11, 2006, the OBCE received Applicant's application which indicated that on January 5, 2005, she was arrested while intoxicated and assaulted two police officers. She said one charge was dropped and on the other she was convicted of a misdemeanor for assault-battery upon a law officer and performed nine days of community service. Applicant states she has got her life together and attended and graduated from massage school and intends to become licensed as both a massage therapist and a chiropractic assistant. Applicant is employed by a chiropractic physician in Portland who has signed her application and verification of employment. (license expired 7/31/2007, KJE confirmed she's no longer working for DC clinic)

**Kimberli Wasson, CCA applicant.** Condition on License. Standard notification provisions: Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose to any and all prospective chiropractic employers that she was charged with possession of a controlled substance, and participated in an accelerated probation which was successfully completed, resulting in dismissal of the charges. (8-15-2005) (License expired 7/31/2006, 2/21/06 Rec'd notice that Kimberli is no longer working for Dr. Scott Lenz.)

**Jason Lutz, CCA applicant.** Condition on License. Standard notification provisions: Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose conviction history to any and all prospective chiropractic employers. (8-15-2005) Class A felony for substance abuse and other offenses in 1996. It is the Board's finding that this record is indicative of a serious offense. Applicant has documented successful completion of group treatment and counseling in an alcohol and drug treatment program. Applicant has previously obtained a license as a Licensed Massage Therapist and currently is associated with a chiropractic clinic in Portland here he plans to also provide other therapies as a CCA. His application was supported by four letters of reference. (has active license)

**Cynthia Martinez, CCA Applicant.,** Condition on License. Standard notification provisions: Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose conviction history to any and all prospective chiropractic employers. (5/21/2004) On December 19, 2003, the OBCE received applicant's

application which indicated that she has been convicted Assault 1 in 1991. Further investigation revealed other convictions for probation violations, and controlled substances between 1988 and 1993. Following investigation Applicant appeared before the Board of Chiropractic Examiners on May 20, 2004 and explained her conviction history. She also explained that she has been through substance abuse treatment, operated her own clothing business for seven years, and is now employed at the Northwood Health Center Chiropractic Clinic. (License expired 7/31/2005).

**Latisha Nicole Henderson, CCA. Condition on License. Standard notification provisions:** Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose conviction history to any and all prospective chiropractic employers. (8-24-2004) In 1997 Applicant had fraudulently obtained an Oregon Identification Card in a false name and used it to cash a check which she found. In addition, when arrested, Applicant had several rocks of crack cocaine in her purse and admitted to the arresting officer she had been using it for the past two years. She entered into a drug treatment program and was not convicted of any drug violations. Applicant was convicted of a felony, Forgery I on 11/5/97. Applicant also has a misdemeanor conviction record for 6/23/99 for misuse of an ID card when she attempted to get an ID card with a fake birth certificate at the Clackamas DMV. On 2/3/04 applicant was convicted of three violations; illegally altering a display plate on a vehicle, improper display of a valid plate sticker and driving uninsured. (License expired 7/31/2007)

**Tracy Nobiletti, CCA Applicant. Condition on License. Standard notification provisions:** Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose conviction history to any and all prospective chiropractic employers. (8/4/2003) She guilty on December 1, 1997 to possession of a controlled substance, was placed on probation for 18 months and had to pay a fine. (License expired 7/31/2004)

**Ross Fitzgerald, CCA Applicant. Condition on License. Standard notification provisions:** Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose conviction history to any and all prospective chiropractic employers. (10/4/2003) Conviction for possession of unlawful controlled substance from an incident in 1987. Court records show applicant was fined \$500 and given a sentence of five-year probation on Feb. 3, 1988 for attempted unlawful possession of a controlled substance. (license expired 7/31/2005)

**Miki Cornilles, CCA Applicant. Condition on License. Standard notification provisions:** Under the provisions of ORS 684.100 (1)(d) and ORS 670.280, licensee must disclose conviction history to any and all prospective chiropractic employers. (10/16/2003) Conviction for attempted unlawful theft and forgery, and aggravated theft on July 10, 2002. Court records show applicant was placed on probation, ordered to pay restitution, and directed to abide by other conditions. (License expired on 7/31/2004.)

**From:** "Charles A. Simpson" <csimpson@easystreet.net>  
**To:** "Michael Smith" <msmith@gattilaw.com>  
**Date:** 7/10/2008 8:12:30 AM  
**Subject:** Re: Michael G. Smith's response to request for response re:  
Proposed Rule

Mike, et.al.,

I appreciate Mike's thoughtful comments regarding "on premises." I said nothing at the RAC meeting (I didn't feel it my place to coment--not being a member of the Committee and all). But the whole issue of dual relationships extends well beyond the walls of the clinic.

In regard to "pre-existing" relationships...I think the current language for DCs applies well to CCAs...that is to say it is a fact of life (we all treat friends and family) and we all go there at our own peril. Stories abound of treating family and having the case "go south" (check out NCMIC). I don't think that we can "regulate" our way around this issue...but encourage policy and ethics to see the inherent problems treating those with whom we have "pre-existing" realtionships (family, friendship, romantic or otherwise).

I'm reminded of an enthsiastic DC who was treating his wife for an MVA and then went to the St Farm office and demanded his check...

C Simpson

Steve Foreman DC <smfdoc@sbcglobal.net 7/9/2008 8:36 AM

Dear Board members,

Thank you for allowing me to comment. It appears that section (c) has the potential to cause problems for both the chiropractor and the board. Section (c) states:

(c) Failing to disclose to the supervising chiropractic physician the existence of a romantic or sexual relationship with a current patient regardless of when the relationship started. The Certified Chiropractic Assistant is required to inform the supervising chiropractic physician so appropriate measures can be taken by the supervising chiropractic physician to protect the patient."

This section only requires the CCA to inform the DC of the behavior and it fails to place any consequences on the CCA for actions they may take. It places the responsibility on the DC and opens them to liability for the actions of the CCA. The term "appropriate measures" implies the board believes some measures are appropriate to take and yet it does not give any indication of what those measures should or should not be. Does this mean the DC should allow the conduct or fire the CCA? Should the DC place a chaperone in the room when the CCA and patient are alone? I think you may see the arguments that may arise. The board may wish to consider the lack of clarity in this area.

Steve Foreman DC

**From:** Steve Foreman <smfdoc@sbcglobal.net>  
**To:** Dave MCTEAGUE <Dave.Mcteague@state.or.us>  
**Date:** 7/9/2008 10:42:34 AM  
**Subject:** Re: Proposed regulation

I would continue to urge consideration of the additional distance education language (see Staff Draft) I offered under the training of the CCA program. The limited parameters I offered would allow the board some discretion in accepting or rejecting proposed distance programs that will surely be offered in the future. The legislature will not be satisfied with the potential of "correspondence courses" with no mechanism for testing or accountability.

proposed language: Board approved distance education or online training courses shall be required to concurrently time and document the student's presence in the course, test the student with randomized test questions on the subject material and allow the student to generate transcripts of their course work;

**Certified Chiropractic Assistants**

(1) Ancillary personnel authorized by ORS 684.155(c) shall be known as Certified Chiropractic Assistants.

(2) Certified Chiropractic Assistants may be certified upon compliance with the following standards and procedures:

(a) The Certified Chiropractic Assistant shall successfully complete a Board approved training course offered by an association, college or otherwise approved vendor. The initial training course shall be at least six hours in length, four hours of which must be in physiotherapy, electrotherapy and hydrotherapy and must have been completed within the 12 months preceding the application date. **Board approved distance education or online training courses shall be required to concurrently time and document the student's presence in the course, test the student with randomized test questions on the subject material and allow the student to generate transcripts of their course work;**

(b) The applicant shall complete an application form and an open book examination supplied by the Board;

(c) If an applicant has a certificate or license from another state and adequate documentation of training, the Board may waive the requirement for the initial training course; and

(d) A person initially certified between March 1st and May 31st is exempt from the continuing education requirement for renewal.

(3) The training course verification form, completed application form, completed examination, and fees in the following amounts shall be submitted to the Board:

(a) Application fee – \$25;

(b) Examination fee – \$35; and

(c) License fee – \$50.

(4) The applicant shall be at least 18 years of age.

(5) The Certified Chiropractic Assistant shall not perform electrotherapy, hydrotherapy, or physiotherapy until he or she receives a license from the Board.

(6) A Certified Chiropractic Assistant shall be directly supervised by the Chiropractor at all times. The supervising Chiropractor must be on the premises.

(7) The scope of practice does not include performing physical examinations, taking initial histories, taking X-rays, interpretation of postural screening, doing manual muscle testing or performing osseous adjustments or manipulations.

(8) Certified Chiropractic Assistants shall report to the Board, in writing, his/her mailing address and place of employment. Notification of a change of mailing address or place of employment must be made within 10 days of the change.

(9) On or before each June 1, the Board of Examiners shall send the renewal notice to the Certified Chiropractic Assistant at the last known mailing address.

(10) On or before each August 1 the Certified Chiropractic Assistant shall mail to the Board of Examiners the renewal form with the following:

(a) Renewal fee of \$50; and

(b) Evidence of successful completion of six hours of Board approved continuing education during the 12 months preceding. No continuing education hours may be carried over into the next renewal year.

(11) Continuing education programs may be comprised of subjects that are pertinent to clinical practices of chiropractic. Continuing education must meet the criteria outlined in OAR 811-015-0025 sections (8), (9) and (10), excluding the requirement for the evaluation form in subsection (10)(a).

(12) The failure, neglect or refusal of any person holding a license to show compliance with subsection (10)(a) and (b) of this rule shall cause the license to automatically expire August 1 and the Certified Chiropractic Assistant must reapply.

(13) The Certified Chiropractic Assistant's license shall be displayed at all times in the Chiropractic Physician's office during the Certified Chiropractic Assistant's employment.

(14) The Board may refuse to grant a license to any applicant, may suspend or revoke a license, or may impose upon an applicant for certification or Certified Chiropractic Assistant a civil penalty not to exceed \$1,000 upon finding of any of the following:

(a) Cause, which is defined as, but not limited to, failure to follow directions, unprofessional or dishonorable conduct, injuring a patient, or unlawful disclosure of patient information. The supervising Chiropractic Physician is required to notify the Board, in writing, of any dismissal of a Certified Chiropractic Assistant for cause within ten days. The Board shall determine if there is cause for action and shall be governed by the rules of the Board adopted pursuant to ORS Chapter 183;

~~(b) Fraud or misrepresentation in applying for or procuring certification, or certification renewal;~~

(be) Conviction of a misdemeanor involving moral turpitude or a felony; or

(cd) Failure to notify the Board of a change of location of employment as required by these rules.

(15) The service of the Certified Chiropractic Assistant is the direct responsibility of the licensed Chiropractic Physician. Violations may be grounds for disciplinary action against the Chiropractic Physician under ORS 684.100(9).

(16) Unprofessional or dishonorable conduct is defined as:

any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable Certified Chiropractic Assistant practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established.

Unprofessional conduct shall include, but not be limited to, the following acts of a Certified Chiropractic Assistant:

(1)(a) Engaging in any conduct or verbal behavior with or towards a patient **on the clinic premises** that may reasonably be interpreted as sexual, seductive, sexually demeaning or romantic (also see ORS 684.100).

(b) Engaging in conduct with a current patient that exploits the trust, knowledge, emotions or influence derived from the professional relationship. Any relationship with a license holder cannot contaminate the professional relationship.

(2) Charging fees for unnecessary services;

(3) Practicing outside the scope of the practice of a Certified Chiropractic Assistant in Oregon;

(4) Charging a patient for services not rendered;

(5) Intentionally causing physical or emotional injury to a patient;

(6) Directly or indirectly engaging in threatening, dishonest, or misleading fee collection techniques;

(7) Soliciting or borrowing money from patients;

(8) Possessing, obtaining, attempting to obtain, furnishing, or prescribing controlled drugs to any person, including self, except as directed by a person authorized by law to prescribe drugs; illegally using or dispensing controlled drugs;

- (9) Aiding, abetting, or assisting an individual to violate any law, rule or regulation intended to guide the conduct of Certified Chiropractic Assistants or other health care providers; or
- (10) Violating the rights of privacy or confidentiality of the patient unless required by law to disclose such information;
- (11) Perpetrating fraud upon patients or third party payors, relating to the practice of chiropractic;
- (12) Using any controlled or illegal substance or intoxicating liquor to the extent that such use impacts the ability to safely conduct the practice of a Certified Chiropractic Assistant;
- (13) Practicing as a Certified Chiropractic Assistant without a current Oregon license;
- (14) Allowing another person to use one's Certified Chiropractic Assistant Certification for any purpose;
- (15) Resorting to fraud, misrepresentation, or deceit in applying for or taking the license exam or obtaining a license or renewal thereof;
- (16) Impersonating any applicant or acting as a proxy for the applicant in any Certified Chiropractic Assistant license examination;
- (17) Disclosing the contents of the licensure examination or soliciting, accepting, or compiling information regarding the contents of the examination before, during, or after its administration;
- (18) Failing to provide the Board with any documents requested by the Board;
- (19) Failing to fully cooperate with the Board during the course of an investigation, including but not limited to, waiver of confidentiality privileges, except attorney-client privilege;
- (20) Claiming any academic degree not actually conferred or awarded;
- (21) Disobeying a final order of the Board; and
- (22) Splitting fees or giving or receiving a commission in the referral of patients for services.
- (23) Receiving a suspension or revocation by another state of a certificate or license for a Certified Chiropractic Assistant, or other license, based upon acts by the Certified Chiropractic Assistant or applicant Certificate holder that describes acts similar to this



section. A certified copy of the record of suspension or revocation of the state making that is conclusive evidence thereof.

July 7, 2008

To: Administrative Rules Advisory Committee (by email & fax to those w/o email)

Fr: Dave McTeague, Executive Director

Re: CCA boundary cases

I have identified three CCA boundary cases.

In June 2008, Jorge Torres CCA received a Letter of Reprimand for touching and kissing a patient.

In 2007, Cheri Berry's CCA licensed was revoked, one of the findings was an inappropriate relationship with a patient.

In 2001 there was a patient complaint against a CCA alleging he placed her hands on his testicles during a treatment session. This patient had only seen female CCAs prior to this. The male CCA said it was a Shiatsu stretch and patient misunderstood. The patient was very upset and also contacted county sheriff's office. The case was closed with a finding of Insufficient Evidence (I.E.).

Attached are the two final orders.

Also attached is a recent review of other CCA cases for the OBCE.

The Administrative Rules Advisory Committee will meet on Tuesday, July 8, 2008 10:00 a.m. to 11:30 p.m., at the Wilsonville Chamber of Commerce (behind Frye's), 29600 SW Park Place. Follow signs to the Korean War Memorial from I-5 and exit 283.

OBCE board member Joyce McClure DC will be chairing this meeting.

Telephone access is also available for this meeting by calling the

\* Toll Free Dial In Number: (888)808-8526

\* Participant Code: 936215

May 14, 2008

Via email

Oregon Board of Chiropractic Examiners  
3218 Pringle Road SE  
Suite 150  
Salem, Oregon 97302-6311

RE: Unprofessional conduct language in the CCA rule.

Dear Ladies and Gentlemen of the Board;

I read with considerable interest the minutes from the recent meeting of the Board's Rules Advisory Committee (RAC) that was in the "Public Information Packet". I was concerned and alarmed at the opinions expressed and the advise given to the Board concerning dual relationships, specifically dating, between licensees of the Board and patients being treated by them. The general drift of the RAC discussion, as I interpret the minutes, is that the language recommended to be deleted ("...Engaging in any conduct or verbal behavior with or towards a patient that may reasonably be interpreted as sexual, seductive, sexually demeaning or romantic...") is not necessary. I couldn't disagree more.

The OBCE licenses CCAs and is therefore responsible to the public for their scope of practice and their professional behavior. The Board is rightfully expected to protect the public from misdeeds by these licensees. For example, some applicants have been denied licensure because of past inappropriate conduct (theft, fraud, sexual misconduct). Licensed CCAs have been disciplined by the Board. My suspicion is that there are instances of professional misconduct involving inappropriate sexual behavior. It is clear that the OBCE does (or should) have an interest in what CCAs do in the context CCA/patient relationships, sexual misconduct included.

There is a "power differential" between a CCA and a patient. While arguably no as great as between a physician and a patient, it is still there, both directly in a therapist/client context and within the penumbra of the DC's position. The CCA is an agent of the DC and so shares vicariously the same power differential and its issues as between a DC and his patient (whether the CCA or the DC acknowledge it or not). I'd suspect that a court and jury would see the differential as real, despite what CCAs or DCs might think.

DCs may not see it this way and the discussion at the RAC seems to bear this out. Dating patients, when all goes well, is usually not a problem. There are a number of instances of DCs for example marrying patients. However, this is a very risky course of action. If the relationship goes sour, the problems start. The DC is certainly at risk, just ask a malpractice carrier.

My guess is that a patient who becomes aggrieved in the context of a dual relationship with a CCA is going promptly to involve the DC in any legal action. Recognizing that risk might help some DCs understand why this prohibition extended to CCAs is necessary and helpful, over and above the Board's need for public protection.

It seems to me that there is real potential for harm to the public in the CCA/patient context. Boundary violations, "dating," or other dual relationships are the upper part of a very slippery slope. I think a bright line needs to be drawn for everyone, patients, CCAs and DCs. No questions about it. Don't do it.

Sincerely,

Charles A. Simpson, DC, DABCO

**From:** "Elizabeth Olsen" <eao6@comcast.net>  
**To:** "Dave McTeague" <Dave.Mcteague@state.or.us>  
**Date:** 6/23/2008 4:52:18 PM  
**Subject:** Rules language for licensed chiropractic assistants

June 23, 2008

Dear Mr. McTeague,

Thank you for alerting me to the recent discussions regarding inserting specific unprofessional conduct language into the CCA rules.

I have been a continuing education speaker to several groups of medical and chiropractic assistants regarding "Boundaries in the Health Care Setting." Since chiropractic assistants are licensed, have unique and independent responsibilities for patient care and have access to privileged information, I think it is important that the Board have clear rules to communicate the boundaries that protect the potentially vulnerable patient.

The standard should be no less for a chiropractic assistant than it is for others responsible for patient care. Since sexual misconduct has historically been an area of complaint for all licensed professionals, specific language is appropriate for all groups of licensees. Mixing a romantic/sexual relationships (that did not pre-date the professional relationship) with any professional caring-giving relationship creates potential for harm to the (vulnerable) patient who is not viewed as an equal with regard to "power" in the relationship. The potential for abuse is present, including from licensed chiropractic assistants. Their unique access to patients is linked with responsibilities to prioritize patient welfare.

Their relative limited professional role under the supervision of a chiropractor makes it even more imperative the Board have a rule that clarifies for everyone where the boundaries exist. Not having a specifically worded rule leaves the question of romantic/sexual relationships with patients open to interpretation by some who may not understand the obligations of protecting patients in any health care relationship and setting.

Unprofessional or dishonorable conduct or verbal behavior has the potential to harm patients whether the offending professional is a licensed chiropractor,

licensed chiropractic assistant or other professional who is accountable to a licensing Board. It is my opinion that the Board has the responsibility to be clear about boundaries in the language to which licensees are held accountable when questions of misconduct arise. Without clear rules language, the Board cannot adequately do it's job of educating licensees and responding to queries and complaints of misconduct.

Thank you for communicating my opinion to the Board and Rules Advisory Committee.

Respectfully,  
Elizabeth Olsen, D.C.

**From:** Minga Guerrero DC, OBCE President  
**To:** Rules Advisory Committee  
**Date:** 6/25/2008 6:26:27 PM  
**Subject:** CA dating summary by Dr. Guerrero

RAC committee members, OBCE staff and members;

I'm not able to attend the RAC meeting to discuss this issue with you, but wanted to send my views on the subject. My opinion is formed after working on OBCE committees for 10 yrs and then serving as an OBCE member and attending the Federation of Chiropractic Licensing Boards' meetings for 5 yrs. The FCLB, as you probably know is made up of ALL USA licensing boards, Canadian provinces, and chiropractic representatives from around the world. At those meetings, there has been repeat discussion on this topic. No states, provinces or countries are considering allowing CAs to have romantic relationships with patients. In addition, I've had the honor of attending legislative sessions as well as meeting directly with Senators and Congressmen. My interactions have helped me gain an understanding of what's expected of medical professions from a legislative perspective. From this knowledge base, I am offering the following opinion:

I firmly believe we should adopt language that restricts romantic relationships between CAs and patients. My rationale to adopt language that restricts on premise' romantic relations and 'off premise' conduct between Chiropractic assistants and patients is as follows:

In many ways, the CA shares a power differential similar to the DC. For example, both have equal access to patient's confidential health file. Both have the ability to view the patient's unclothed body during treatment procedures. Both have access to the patient's financial records (which often includes records of bankruptcy, payment history etc) and employment history. Although the doctor has the final say in what treatment to apply; including frequency, duration and diagnostic description; the CA has many opportunities to abuse the power differential.

I do not subscribe to the premise that different classes of CAs should have different rules. I've heard the argument that a CA with front desk only job duties should be exempt from the dating prohibition. That is similar to DCs asking if an IME doctor should not be held to the same rules since they are not offering treatment. Should a DC who only does paper review be allowed to date the patient? Should a DC who testifies as an expert witness but never examines or treats the patient be exempt from dating a patient? The answer is simple. All DCs are held to the same standard. A license is a license is a license. There are no limited CA licenses. For this reason I believe that all CAs should have the same scope allowances.

I also disagree with the assertion that was made saying that in a small town, how can you meet someone as a potential mate if not at your job? The office is not a dating service location. It's ok to fall in love, to realize that you may want to nurture a relationship. If a situation like this

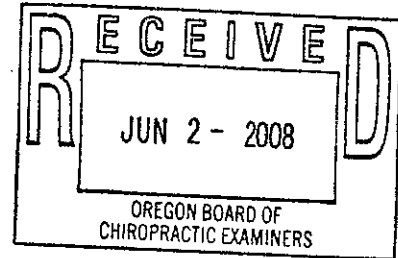
happens, it should be discussed with the employer and the patient should be referred out of the office. Ultimately, we need to protect the public from harm. I like the language that Steve Foreman has suggested. It is simple and easy to understand. I urge the committee to consider it.

Minga Guerrero DC  
OBCE president



Mr. Dave McTeague  
Executive Director, O.B.C.E.  
3218 Pringle Rd. SE, Suite 150  
Salem, Or. 97302-6311

5/30/08



Re: Oregon Administrative Rules

Mr. McTeague,

I am writing you concerning a couple of rules that currently exist in the OAR book for chiropractors that I believe violate the constitution of the United States and that of the State of Oregon. The rules are specifically 811-010-0120 also known as the chiropractic professional corporation and business entity majority ownership rule and 811-035-0015, the unprofessional conduct in the chiropractic profession rule (1)b, d and e.

Regarding the first rule pertaining to business entities or corporations, this rule, by setting limits to the ownership of chiropractic clinics to majority control by a chiropractor, blatantly violates the equal protection clause of the 14<sup>th</sup> amendment and Article 1 section 20 of the Oregon constitution relating to equality of privilege and immunities of the citizens. This rule also amounts to a restraint of trade and is ostensibly *ex post facto*. Article XI section 2 of the Oregon constitution regarding corporations states that there shall be no special laws directed at the formation of corporations.

In the second rule under unprofessional conduct, there is an ostensible violation of the 1<sup>st</sup> amendments guaranty to the right of freedom of association and Article 1 section 26 of the Oregon constitution relating to the assemblage of people. These apparent conflicts are found in (1) (b) limiting a licensee's ability to have a dating or romantic relationship with a current patient or (d) giving the O.B.C.E. the ability to address specific time limits on relationships between a licensee and a current patient and in (e) by denying or limiting consenting citizens choices in their own personal and intimate matters, and since it states that one is in violation of this rule regardless of circumstance, it appears to violate the due process clause contained in the 5<sup>th</sup> amendment.

My concern with this last rule goes beyond the scope of just the OBCE and reaches across the gap to each and every other regulatory board that has enacted similarly illegal rules for their licensees to adhere to, be fined or otherwise wrongly sanctioned by. Please review these rules in light of these concerns with the legal representative from the AG's office and remove them. These rules do not affect me personally but any rule that is in itself illegal is offensive to me. I believe the above rules violate the very purpose of "protecting the public" the OBCE purports to do. I do not believe it is the duty or obligation of the O.B.C.E. to address many of these issues. Infractions of current laws applying to all citizens of this State should really fall on the desk of a district attorney or other law enforcement government body. Excessive and redundant rules inappropriately formed by the O.B.C.E. gives the appearance of power or control issues of the OBCE over its licensees. These individuals the last I checked are citizens of the State of Oregon and these United States and as such are entitled to the rights thereof.

Sincerely,

Gregg W. Helms D.C.

Cc: Attorney General, Hon. Hardy Meyers and members of the Oregon Board of Chiropractic Examiners

HARDY MYERS  
Attorney General



DAVID SCHUMAN  
Deputy Attorney General

**DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION**

July 2, 2008

Dave McTeague  
Executive Director  
Oregon Board of Chiropractic Examiners  
3218 Pringle Road SE Suite 150  
Salem OR 97302-6311

RE: Dr. Helm's letter

Dear Dave:

**THIS DOCUMENT IS A CONFIDENTIAL COMMUNICATION FROM ATTORNEY TO CLIENT. NEITHER THE DOCUMENT NOR ITS CONTENTS SHOULD BE ROUTINELY CIRCULATED BEYOND THE IMMEDIATE ADDRESSES UNLESS COUNSEL IS FIRST CONSULTED. THE DOCUMENT SHOULD NOT BE ATTACHED TO, NOR MADE A PART OF AN AGENDA FOR ANY PUBLIC MEETING, NOR SHOULD IT BE DISCUSSED BY THE PUBLIC BODY INVOLVED IN OPEN SESSION WITHOUT FIRST CONSULTING WITH COUNSEL.**

You asked me to review Dr. Helm's letter to you dated May 30, 2008.

**OAR 811-010-120:**

Dr. Helm's first assertion is that the rule on the chiropractic professional corporations and business entity majority ownership rule (OAR 811-010-0120) violates both the Oregon and United States constitution. More specifically, he alleges it violates the Equal Protection clause.

The controlling principles which guide courts in determining questions of alleged unconstitutional discrimination or class legislation are the same whether it is an alleged violation of the Equal Protection Clause of Amendment XIV to the United States Constitution or if the allegation involves an alleged violation of the privileges and immunities provision in The Oregon Constitution, Article I, section 20. *Plummer v. Donald M. Drake Co.*, 212 Or 430, 437, 320 P3d 245, 248 (1958); *Sch. Dist. 12 v. Wasco County*, 270 Or 622, 529 P2d 386 (1974). Pursuant to this standard, OAR 811-010-0120's alleged violation of Article I, section 20, and Amendment XIV to the United States Constitution will be discussed simultaneously.

The judicial standard in regards to constitutionality of class legislation is that classification is a matter of discretion of the legislature. Additionally courts will not interfere with the legislative

judgment unless the classification is palpably arbitrary. See *State of Oregon v. Pirkey*, 203 Or 697, 281 P2d 698, and *Savage v. Martin*, 161 Or 660, 694, 91 P2d 273.

In the present issue, OAR 811-010-0120 requires that business entities organized to practice chiropractics be majority owned and controlled by Oregon licensed health care professionals. This classification is within the scope of the Board of Chiropractic Examiners (OBCE) rule making authority pursuant to ORS 58.367 which provides:

Except as otherwise provided by law, the regulatory board applicable to each professional service rendered by a professional corporation may establish rules and regulations affecting the corporation and its officers, directors and shareholders that are in addition to the provisions of this chapter.

In addition ORS 684.155(1)(b) which provides:

In addition to any other powers granted by this chapter, the State Board of Chiropractic Examiners may: Adopt necessary and proper rules: to enforce the provisions of this chapter and to exercise general supervision over the practice of chiropractic within this state.

By operating within its statutory scope the OBCE is compliant with ORS 183.400(4)(b), which establishes that agencies may only adopt rules pursuant to statutory authority.

In addition to operating within its legislative authority, OAR 811-010-0120 the OBCE promulgated this rule as a matter of public health and to safeguard the public.

Article XI section 2, in its discussion of corporation formation, explicitly deals with ending legislative authority to form corporations by special laws. Article XI section 2 does not deal with agency authority to regulate professional corporations or businesses formed under an agency's jurisdiction. Rather ORS 58.367 explicitly grants the OBCE the authority to regulate professional corporations. Article XI section 2 is unrelated to the OBCE's regulating authority and it does not limit the OBCE's right to regulate.

#### **OAR 811-035-0015:**

Dr. Helm's second assertion is that the unprofessional conduct rule, specifically, about the prohibition on sexual relationships with patients (OAR 811-035-0015) violates both the Oregon and United States constitution. More specifically, he alleges that it infringes on freedom of association.

Before we discuss the constitutional aspects, the history of this rule may be helpful. In December 1995 the administrative rule regarding sexual relationships between a doctor and their patient was made more explicit. Prior to adding specific language, the Board relied on the general concept of unprofessional conduct vs. a specific rule. At that time, language was added about conduct or verbal behavior that may reasonably be interpreted by the patient as sexual, seductive or demeaning. In 1999 that rule was again updated, further clarifying these issues.

The reasons that the rule was changed were due to large numbers of cases with the OBCE involving sexual boundary crossings by the licensee's and that the protection of the public was at risk. The Board wanted to better protect the public and felt that in order to do that, they should have specific prohibitions on this type of conduct.

Article I, section 26 of the Oregon Constitution protects individual freedom to engage in three activities these include: "assembling together [...] to consult for their common good," "instructing their Representatives," and "applying to the Legislature for redress of grievances." OrConst Art I § 26. Since no other section of Article I serialized a list of unrelated rights, the structure of this section suggests relatedness among the protected activities. *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 202 Ore App 123, 135, 121 P3d 671,678 (2005) rev. denied *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 2006 Ore LEXIS 593 (OR., June 13, 2006). "The last two rights, instruction of representatives and applying to the legislature for redress of grievances, are unequivocally political. Thus, the section's wording suggests that "assembling together" refers to assembly for deliberation about issues affecting the welfare of the public [...]." *Id.*

Similarly, Amendment I to the United States Constitution guarantees the rights of assembly and petition: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." It has been determined that the federal right to assemble is for the "express purpose of consulting to petition the federal government." *Lahmann*, 202 Ore App at 141 citing *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 118, 21 L. Ed. 394 (1872) (Bradley, J., dissenting); *see also* Jason Mazzone, *Freedom's Associations*, 77 Wash. L. Rev. 639, 742 (2002) (addressing associations protected by the assembly clause and noting "we have largely overlooked [the] political aspect of associations that lay at the core of their treatment in the early Republic.").

The type of assemblage covered by OAR 881-035-0015 (1)(b)(d) and (e) involves romantic relations between a professional licensee and their patient. This type of assemblage does not fit within the scope of assemblage rights protected by Article I, section 26 of the Oregon Constitution or Amendment I to the United States Constitution. The relationship between a professional licensee and their patient does reflect an assemblage to "consult for the common good" or to "petition the federal government.

Additionally, even if one were to scrutinize the relationship between a professional licensee and his or her patient, as it pertains to the inherent expressive assemblage rights which guarantee more individual protections under the First Amendment, OAR 811-035-0015 (1)(b), (d) and (e) would still prove to be constitutional. The Supreme Court has determined that even the application of expressive assemblage rights is not absolute and restrictions "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984).

Dave McTeague  
July 2, 2008  
Page 4

OAR 811-035-0015 (1)(b), (d) and (e) was amended to address professional conduct of chiropractors as a response to the significant number of sexual boundary crossing contested cases that arose in the early 90's. At that time, the legislature felt that it was an appropriate endeavor to discipline that type of behavior and to rid the profession of those types of occurrences. In this sense the rule sets standards of professional conduct specifically addressing a "compelling state interest." That interest is to protect the public and not allow the licensee's to abuse the power they have as a medical professional. The Board's duty to protect the public, it can be argued, it a compelling state interest.

I hope this information helps to address the letter you received from Dr. Helms. If you have any further questions please contact me.

Sincerely,



Lori H. Lindley  
Sr. Assistant Attorney General  
Business Activities Section

LXL:lxl/DOCUMENT3

**Original Staff Draft proposed rule -- same as rule for DCs**

**811-010-0110**

**Certified Chiropractic Assistants**

- (1) Ancillary personnel authorized by ORS 684.155(c) shall be known as Certified Chiropractic Assistants.
- (2) Certified Chiropractic Assistants may be certified upon compliance with the following standards and procedures:
  - (a) The Certified Chiropractic Assistant shall successfully complete a Board approved training course offered by an association, college or otherwise approved vendor. The initial training course shall be at least six hours in length, four hours of which must be in physiotherapy, electrotherapy and hydrotherapy and must have been completed within the 12 months preceding the application date;
  - (b) The applicant shall complete an application form and an open book examination supplied by the Board;
  - (c) If an applicant has a certificate or license from another state and adequate documentation of training, the Board may waive the requirement for the initial training course; and
  - (d) A person initially certified between March 1st and May 31st is exempt from the continuing education requirement for renewal.
- (3) The training course verification form, completed application form, completed examination, and fees in the following amounts shall be submitted to the Board:
  - (a) Application fee – \$25;
  - (b) Examination fee – \$35; and
  - (c) License fee – \$50.
- (4) The applicant shall be at least 18 years of age.
- (5) The Certified Chiropractic Assistant shall not perform electrotherapy, hydrotherapy, or physiotherapy until he or she receives a license from the Board.
- (6) A Certified Chiropractic Assistant shall be directly supervised by the Chiropractor at all times. The supervising Chiropractor must be on the premises.

**Original Staff Draft proposed rule -- same as rule for DCs**

(7) The scope of practice does not include performing physical examinations, taking initial histories, taking X-rays, interpretation of postural screening, doing manual muscle testing or performing osseous adjustments or manipulations.

(8) Certified Chiropractic Assistants shall report to the Board, in writing, his/her mailing address and place of employment. Notification of a change of mailing address or place of employment must be made within 10 days of the change.

(9) On or before each June 1, the Board of Examiners shall send the renewal notice to the Certified Chiropractic Assistant at the last known mailing address.

(10) On or before each August 1 the Certified Chiropractic Assistant shall mail to the Board of Examiners the renewal form with the following:

(a) Renewal fee of \$50; and

(b) Evidence of successful completion of six hours of Board approved continuing education during the 12 months preceding. No continuing education hours may be carried over into the next renewal year.

(11) Continuing education programs may be comprised of subjects that are pertinent to clinical practices of chiropractic. Continuing education must meet the criteria outlined in OAR 811-015-0025 sections (8), (9) and (10), excluding the requirement for the evaluation form in subsection (10)(a).

(12) The failure, neglect or refusal of any person holding a license to show compliance with subsection (10)(a) and (b) of this rule shall cause the license to automatically expire August 1 and the Certified Chiropractic Assistant must reapply.

(13) The Certified Chiropractic Assistant's license shall be displayed at all times in the Chiropractic Physician's office during the Certified Chiropractic Assistant's employment.

(14) The Board may refuse to grant a license to any applicant, may suspend or revoke a license, or may impose upon an applicant for certification or Certified Chiropractic Assistant a civil penalty not to exceed \$1,000 upon finding of any of the following:

(a) Cause, which is defined as, but not limited to, failure to follow directions, unprofessional or dishonorable conduct, injuring a patient, or unlawful disclosure of patient information. The supervising Chiropractic Physician is required to notify the Board, in writing, of any dismissal of a Certified Chiropractic Assistant for cause within ten days. The Board shall determine if there is cause for action and shall be governed by the rules of the Board adopted pursuant to ORS Chapter 183;

~~(b) Fraud or misrepresentation in applying for or procuring certification, or certification renewal;~~

**Original Staff Draft proposed rule -- same as rule for DCs**

(be) Conviction of a misdemeanor involving moral turpitude or a felony; or

(cd) Failure to notify the Board of a change of location of employment as required by these rules.

(15) The service of the Certified Chiropractic Assistant is the direct responsibility of the licensed Chiropractic Physician. Violations may be grounds for disciplinary action against the Chiropractic Physician under ORS 684.100(9).

(16) Unprofessional or dishonorable conduct is defined as:

any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable Certified Chiropractic Assistant practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established.

Unprofessional conduct shall include, but not be limited to, the following acts of a Certified Chiropractic Assistant:

(1)(a) Engaging in any conduct or verbal behavior with or towards a patient that may reasonably be interpreted as sexual, seductive, sexually demeaning or romantic (also see ORS 684.100).

(b) A license holder shall not engage in sexual relations or have a romantic relationship with a current patient unless a consensual sexual relationship or a romantic relationship existed between them before the commencement of the Certified Chiropractic Assistant-patient relationship.

(c) "Sexual relations" means:

(A) Sexual intercourse; or

(B) Any touching of sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the licensee for the purpose of arousing or gratifying the sexual desire of either Certified Chiropractic Assistant or patient.

(d) In determining whether a patient is a current patient, the Board may consider the length of time of the Certified Chiropractic Assistant-patient contact, evidence of termination of the Certified Chiropractic Assistant-patient relationship, the nature of the Certified Chiropractic Assistant-patient relationship, and any other relevant information.

(e) A patient's consent to, initiation of or participation in sexual behavior or involvement with a Certified Chiropractic Assistant does not change the nature of the conduct nor lift the prohibition.

(2) Charging fees for unnecessary services:



**Original Staff Draft proposed rule -- same as rule for DCs**

- (3) Practicing outside the scope of the practice of a Certified Chiropractic Assistant in Oregon;
- (4) Charging a patient for services not rendered;
- (5) Intentionally causing physical or emotional injury to a patient;
- (6) Directly or indirectly engaging in threatening, dishonest, or misleading fee collection techniques;
- (7) Soliciting or borrowing money from patients;
- (8) Possessing, obtaining, attempting to obtain, furnishing, or prescribing controlled drugs to any person, including self, except as directed by a person authorized by law to prescribe drugs; illegally using or dispensing controlled drugs;
- (9) Aiding, abetting, or assisting an individual to violate any law, rule or regulation intended to guide the conduct of Certified Chiropractic Assistants or other health care providers; or
- (10) Violating the rights of privacy or confidentiality of the patient unless required by law to disclose such information;
- (11) Perpetrating fraud upon patients or third party payors, relating to the practice of chiropractic;
- (12) Using any controlled or illegal substance or intoxicating liquor to the extent that such use impacts the ability to safely conduct the practice of a Certified Chiropractic Assistant;
- (13) Practicing as a Certified Chiropractic Assistant without a current Oregon license;
- (14) Allowing another person to use one's Certified Chiropractic Assistant Certification for any purpose;
- (15) Resorting to fraud, misrepresentation, or deceit in applying for or taking the license exam or obtaining a license or renewal thereof;
- (16) Impersonating any applicant or acting as a proxy for the applicant in any Certified Chiropractic Assistant license examination;
- (17) Disclosing the contents of the licensure examination or soliciting, accepting, or compiling information regarding the contents of the examination before, during, or after its administration;
- (18) Failing to provide the Board with any documents requested by the Board;

**Original Staff Draft proposed rule -- same as rule for DCs**

(19) Failing to fully cooperate with the Board during the course of an investigation, including but not limited to, waiver of confidentiality privileges, except attorney-client privilege;

(20) Claiming any academic degree not actually conferred or awarded;

(21) Disobeying a final order of the Board; and

(22) Splitting fees or giving or receiving a commission in the referral of patients for services.

(23) Receiving a suspension or revocation by another state of a certificate or license for a Certified Chiropractic Assistant, or other license, based upon acts by the Certified Chiropractic Assistant or applicant ~~Certificate holder~~ that describes acts similar to this section. A certified copy of the record of suspension or revocation of the state making that is conclusive evidence thereof.