

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
CLINICAL SOCIAL WORK, MARRIAGE)
AND FAMILY THERAPY, AND MENTAL)
HEALTH COUNSELING,)
)
Petitioner,)
)
vs.) Case No. 04-1896PL
)
ROSEMARY WOLFF, L.M.H.C.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 17 through 19, 2004, an administrative hearing in this case was held in Stuart, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ellen M. Simon, Esquire
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Tallahassee, Florida 32399-3265

For Respondent: William N. Swift, Esquire
William N. Swift, Attorney at Law
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STATEMENT OF THE ISSUE

The issue in the case is whether the allegations of the Administrative Complaint (as limited by the Notice of Limitation

of Issues dated June 15, 2004) are correct, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated March 1, 2004, the Department of Health (Petitioner) alleged that Rosemary Wolff (Respondent) violated certain Florida Statutes related to the provision of mental health services. The Respondent disputed the allegations and requested a formal administrative hearing. The Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled the hearing for August 2 through 5, 2004. By motions of the Respondent, the hearing was thrice continued and rescheduled.

By Notice of Limitation of Issues filed on June 15, 2004, the Petitioner advised that there would be no evidence presented as to paragraph 19 in Count One of the Administrative Complaint and that no evidence would be presented as to Count Two.

A Joint-Prehearing Stipulation was filed on August 31, 2004.

The case was transferred to the undersigned on November 15, 2004.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1-5 admitted into evidence. The Respondent testified on her own behalf, presented

the testimony of four witnesses, and had Exhibits numbered 1-4 admitted into evidence.

Volume One of the hearing transcript was filed on December 6, 2004. Volumes Two and Three were mistakenly delivered to the Martin County Courthouse and were subsequently filed on December 17, 2004. Both parties filed Proposed Recommended Orders.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a licensed mental health counselor, holding Florida license number ME 5853.

2. In approximately July 2001, the Respondent began to counsel a five-year-old female, allegedly the victim of sexual abuse by an uncle, the brother of the child's mother. The Respondent believed, based on information provided by the father, that the uncle resided with the child's mother. The child's father had custody of the child, and the mother had some type of visitation rights.

3. In approximately November of 2001, the Respondent began counseling the child's father and his girlfriend for various family-related issues. Towards the end of 2001 or early 2002, the father and his girlfriend married.

4. Although the Respondent testified at the hearing that the couple "seemed to have plenty of money to do certain

things," including personal care and entertainment expenses, she apparently believed, based on what she was told by the couple, that they had financial difficulties.

5. The couple resided in a home owned by the child's father. Apparently based solely on the couple's representations, the Respondent believed that the father was in arrears on house payments. One of the issues addressed in counseling was the father's concern that, were he to lose his house, the child would be returned to the mother's custody, where the uncle resided.

6. Also apparently based solely on the couple's representations, the Respondent believed that the couple wanted to purchase a new house and that they needed \$7,000 to buy the house.

7. In March of 2002, the Respondent loaned the couple \$7,000. The couple repaid within a few weeks a total of \$9,000 to the Respondent.

8. At the time of the \$7,000 loan, the clients owed to the Respondent a balance of approximately \$3,200 in unpaid professional fees related to therapeutic services provided to them by the Respondent.

9. The Petitioner asserts that the \$9,000 repaid to the Respondent included interest charges of \$2,000. Petitioner's Exhibit number one is a copy of a document dated March 20, 2002,

and apparently notarized on March 21, 2002. The document appears to require that the couple repay to the Respondent by not later than May 16, 2002, a principal amount of \$7,000 plus \$2,000 in "interest" for a total of \$9,000. The genesis of the document is unclear.

10. At the hearing, the wife testified that the document memorialized the agreement between the Respondent and the couple. The Respondent testified that she did not require preparation or execution of any loan documentation.

11. The Respondent testified that the funds received from the couple included repayment of the loan plus payment of \$2,000 towards the unpaid professional fees.

12. Based on the candor and demeanor of the witnesses at the hearing, the Respondent's testimony as to the basis for the payment of the \$2,000 is credited.

13. Subsequent to the loan and repayment transactions, the therapeutic situation deteriorated between the Respondent and the couple, particularly as to the wife, who began to believe that the Respondent was romantically involved with the husband. The therapeutic relationship between the couple and the Respondent dissolved acrimoniously within a few months after the loan.

14. At the hearing, the Petitioner presented the expert testimony of Dr. Owen Wunderman, a Florida-licensed mental

health counselor, and Dr. Andrew Wenger, a Florida-licensed psychologist. Both testified as to the Florida Statutes and as to ethical standards adopted by the American Counseling Association (ACA) applicable to the fact situation at issue in this proceeding.

15. The Respondent presented the expert testimony Dr. Barbara Herlihy, a professor at the University of New Orleans and a licensed professional counselor in Louisiana and Texas. Dr. Herlihy has been involved with the adoption of the existing ACA standards and has written texts related to the issue of dual relationships in counseling situations.

16. As identified during the hearing, the ACA standards address the issue of dual relationships as follows:

Avoid when possible. Counselors are aware of their influential positions with respect to clients and they avoid exploiting the trust and dependency of clients. Counselors make every effort to avoid dual relationships with clients that could impair professional judgment or increase the risk of harm to clients. (Examples of such relationships include, but are not limited to, familial, social, financial, business, or other close personal relationships with clients.) When a dual relationship cannot be avoided, counselors take appropriate professional precautions such as informed consent, consultation, supervision, and documentation to ensure that judgment is not impaired and no exploitation occurs.

17. Both Dr. Wunderman and Dr. Wenger testified that by making the \$7,000 loan to her clients, the Respondent entered

into a dual relationship (counselor and creditor) with the couple, and that in doing so, the Respondent failed to meet minimum standards of performance in professional activities when measured against generally prevailing peer performance, as well as violated the ACA standards.

18. Dr. Wunderman testified that there was a meaningful risk of non-repayment of the \$7,000 loan, given that the clients were several thousand dollars in arrears in paying professional fees, thereby increasing the likelihood that the therapist/creditor would have to take legal action against the clients for repayment, an action likely to impair professional judgment or increase the potential risk of harm to the clients, whether or not legal action was actually initiated.

19. Dr. Herlihy testified that she did not regard the fact situation at issue in this case as a dual relationship because she viewed it as a "one-time" short-term loan and that there was no evidence that the counseling relationship between the parties was harmed. Dr. Herlihy testified that she viewed the situation as a "boundary crossing."

20. Dr. Herlihy acknowledged that short of loaning a client a small sum for cab fare, she was unaware of any mental health counselor making a loan to a client such as occurred in this case. She also acknowledged that she was not familiar with

professional performance standards as specifically applied to Florida practitioners.

21. The weight of the evidence establishes that Drs. Wunderman and Wenger are more familiar with the minimum standards of professional performance as measured against generally prevailing peer performance within the State of Florida. The testimony of Dr. Wunderman and Dr. Wenger is credited.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2004).

23. The Petitioner is the state agency charged with the regulation of licensed mental health counselors in the State of Florida. See Chaps. 456 and 491, Fla. Stat. (2002).

24. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is that which is credible, precise, explicit, and lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction,

without hesitancy, as to the truth of the allegations.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

In this case, as to the loan of \$7,000 by the Respondent to the clients, the burden has been met.

25. Subsection 491.009(1)(r), Florida Statutes (2002), provides that the Petitioner may discipline a licensee for "[f]ailing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee . . . is not qualified by training or experience."

26. The evidence establishes that by entering into a dual relationship with clients, the Respondent failed to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance.

27. The ACA standard requires a practitioner to avoid a dual relationship, "when possible." There is no credible evidence that in this case it was not possible to avoid the dual relationship.

28. The Respondent asserts that her analysis of the situation indicated that failing to make the loan could adversely affect the work completed in the therapeutic situation. She testified that she believed the couple had no alternative source of funds, that without the loan the couple

would lose a residence and custody of the child with whom the therapy initially began, and that the couple's financial difficulties would soon resolve.

29. There is no credible evidence that the couple had no alternative source of funds or that the couple was going to be without housing.

30. The Respondent asserts that by the routine practice of permitting clients to owe unpaid professional fees, all practitioners are creditors and involved in dual relationships with clients. It takes little more than common sense to understand that there is a clear difference between a loan made to a client to facilitate the purchase of property and the usual and customary practice of permitting a client to owe a balance due for professional service fees.

31. The ACA standard provides that counselors "make every effort to avoid dual relationships with clients that could impair professional judgment or increase the risk of harm to clients." There is no evidence that the Respondent attempted to obtain information beyond the claims of the couple to support the assumptions upon which she relied in entering into the dual relationship.

32. The evidence further establishes that, even had the Respondent been correct in her assumptions about the financial situation of her clients, the act of loaning funds to purchase

the house was outside the minimum standards of performance in professional activities when measured against generally prevailing peer performance.

33. Further, the ACA standards required that if a dual relationship is unavoidable, a counselor must "take appropriate professional precautions such as informed consent, consultation, supervision, and documentation to ensure that judgment is not impaired and no exploitation occurs." Although the Respondent testified that she discussed the loan and potential therapeutic concerns with the clients, there was apparently no documentation of such discussions. There is no evidence that the Respondent consulted a reputable source to discuss the situation or that any supervision of her decision was sought. There is no credible evidence that the Respondent documented the loan arrangement with the clients.

34. Subsection 456.072(2), Florida Statutes (2002), provides as follows:

(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of \$10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

In determining what action is appropriate, the board, or department when there is no board, must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the practitioner. All costs associated with compliance with orders issued under this subsection are the obligation of the practitioner.

35. Florida Administrative Code Rule 64B4-5.001(1) sets forth disciplinary guidelines to be utilized in determining the appropriate penalty to be assessed in this case. The penalties applicable to a first violation of Subsection 491.009(1)(r), Florida Statutes (2002), range from a fine of \$250 and reprimand to a fine of \$1,000 and probation. There is no evidence that the Respondent has been previously disciplined.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Health enter a final order finding the Respondent has violated Subsection 491.009(1)(r), Florida Statutes (2002), and imposing a fine of \$1,000, a reprimand, and a one-year period of probation.

DONE AND ENTERED this 13th day of January, 2005, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 2005.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.