

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. 09-1044PL
)
GAIL PATRICIA BRACK, PH.D.,)
L.M.F.T., L.M.H.C.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 27, 2009, in Fort Myers, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick L. Butler, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: (No appearance)

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsections 491.009(1)(r) and 491.009(1)(u), Florida Statutes (2003),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On May 11, 2006, Petitioner, Department of Health (Department), filed a four-count Administrative Complaint before the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (Board), alleging that Respondent Gail Brack, Ph.D., L.M.F.T., L.M.H.C. (Dr. Brack), violated Subsections 491.009(1)(r) and 491.009(1)(u), Florida Statutes, by failing to maintain in confidence a communication made by a patient or client in the context of professional services and by failing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance. Dr. Brack requested an administrative hearing by Election of Rights, which was executed on April 24, 2008.

On February 26, 2009, the Department forwarded the case to the Division of Administrative Hearings for assignment to an Administrative Law Judge to conduct the final hearing.

On April 17, 2009, the Department filed Petitioner's Notice of Official Recognition, requesting that official recognition be taken of Sections 491.009 and 491.0147, Florida Statutes. The request was granted by Order Taking Official Recognition dated April 21, 2009.

The final hearing was scheduled to commence at 9:00 a.m. on April 27, 2009, and notice was provided to the parties. At

9:00 a.m. on the hearing date, Dr. Brack failed to appear. The commencement of the final hearing was delayed until 9:20 a.m. in order to give Dr. Brack an opportunity to appear. Neither Dr. Brack nor any representative for Dr. Brack appeared at the final hearing.

At the final hearing, the Department called J.S. and Elizabeth A. Harvey, Ph.D., as its witnesses. Petitioner's Exhibits 1 through 8 were admitted in evidence.

On April 29, 2009, the Department filed Petitioner's Post Hearing Motion for Official Recognition, requesting that official recognition be taken of Florida Administrative Code Rule 64B4-5.001. The request was granted by Order Granting Post Hearing Motion for Official Recognition dated April 30, 2009.

The Transcript of the final hearing was filed on May 18, 2009. The Department filed its Proposed Recommended Order on May 28, 2009. As of the date of this Recommended Order, Dr. Brack has failed to file any post-hearing submittal. The Department's Proposed Recommended Order has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, Dr. Brack was licensed as a marriage and family therapist, License No. MT 1690, and as a mental health counselor, License No. MH 5526.

2. In 2000, Dr. Brack was hired as a marriage counselor for J.S. and his wife M.M.S. During this time, Dr. Brack also served as an individual counselor for M.M.S. At times during the marriage counseling, J.S. met with Dr. Brack without M.M.S. being present. J.S. discontinued the joint marriage counseling in 2001. Dr. Brack continued as an individual counselor for M.M.S. and M.S., the son of J.S. and M.M.S.

3. Dr. Brack continued to counsel with M.S. until 2003. J.S. met with Dr. Brack, M.M.S., and M.S. on September 24, 2003, to discuss issues involving M.S. J.S. had to leave the session early to take M.S. to another appointment. J.S. and M.M.S. were splitting the cost of counseling for M.S. When J.S. left the meeting, M.M.S. was still in session with Dr. Brack. J.S. thought that M.M.S. would pay Dr. Brack, and he would reimburse M.M.S. for his share. M.M.S. did not pay Dr. Brack on September 24, 2003.

4. On October 1, 2003, Dr. Brack sent an e-mail to J.S., requesting that he pay for the session on September 24, 2003. The e-mail contained many inappropriate remarks such as discussing her fee arrangement with another counselor and discussing a broken water pipe in her office and the problems she was having with the insurance companies about the responsibility for the damages. Dr. Brack made inappropriate statements such as, "I realize that you are not working right

now, but I know that you do have a sizeable savings account, so I would appreciate your bringing me this payment." She also bemoaned her having to pay for the water damage while the insurance companies argued and stated: "Needless to say, it is not a good time for me to carry you, as well." Dr. Brack's diatribe was unnecessary and unprofessional. The proper course of conduct under the circumstances simply would be to send J.S. a statement for the counseling session.

5. J.S. and M.M.S. were unable to settle their differences and were divorced some time prior to March 2004. M.M.S. was awarded primary custody of M.S. An issue arose concerning whether M.M.S. should be allowed to take M.S. and move out of Florida. Litigation ensued on that issue.

6. Dr. Brack wrote a letter to M.M.S.'s attorney, John Lonergan, dated March 11, 2004. In the letter, Dr. Brack revealed information concerning J.S. that had been communicated to her during the marriage counseling sessions. Such communications include statements made by J.S. to Dr. Brack during the counseling sessions, disclosure of mental health diagnoses for J.S., disclosure of mental health treatment for J.S., and disclosure of suicidal ideations by J.S.

7. In the March 11, 2004, letter, Dr. Brack wrote that J.S. had been "trying a myriad of psychotropic medications in extremely high doses and combinations"; when, in fact, J.S. had

been on only one medication in a low dosage for about six months.

8. Dr. Brack was aware that J.S. was protecting his privacy relating to his psychiatric treatments when she wrote the March 11, 2004, letter. She stated in the letter that she had requested J.S. to sign a release form to allow her access to his psychiatric records, but J.S. had steadfastly refused to sign a release.

9. J.S. was not copied with the letter by Dr. Brack; he received a copy of the letter from an attorney a couple of weeks after the letter had been written.

10. An attorney representing M.M.S. scheduled Dr. Brack's deposition for May 13, 2004. When J.S. learned that Dr. Brack was going to be deposed, he wrote a letter dated May 12, 2004, to Dr. Brack and advised her that he was asserting his psychotherapist-patient privilege as well as for M.S. and was directing her not to disclose any information during the deposition relating to the scope of their professional relationship. Additionally, he advised Dr. Brack that he felt that she had violated his trust and confidence in writing the March 11, 2004, letter to Mr. Lonergan.

11. Dr. Brack appeared for her deposition as scheduled on May 13, 2004. At the time of the deposition, Dr. Brack knew that J.S. was asserting psychotherapist-patient confidentiality

for himself and for M.S. During the deposition, Dr. Brack acknowledged that she had a psychotherapist-patient relationship with J.S.

12. At the deposition, Dr. Brack indicated that she was not sure which statutes governed her professional licensure. During the deposition, Dr. Brack stated that she was not sure she was asserting the psychotherapist-patient privilege, but then asserted a partial privilege. An attorney at the deposition conducted a voir dire of Dr. Brack regarding the nature and extent of the privilege. Dr. Brack stated that she was acting under a statutory waiver when there is a clear and immediate probability of physical harm to the patient or client. She stated, however, that she believed that there was an immediate potential and then that there was a probability of physical harm. Dr. Brack was unable to articulate at the deposition her basis for making such a determination and could not tell for how long the probability existed.

13. Dr. Brack indicated in the deposition that she had advised M.M.S. and J.S. about the probability of physical harm to M.S. by J.S., but that she had not informed law enforcement or the Department of Children and Family Services. The proper course of action for a similarly-situated professional when there is an immediate probability of physical harm would be to call the abuse hotline, report the danger to the Department of

Children and Family Services or advise a person in a position of authority who could do something to prevent such action from occurring. It was not proper to report potential harm to J.S., who was the person whom she felt would inflict the harm.

14. Near the end of the deposition, Dr. Brack asserted the psychotherapist-patient privilege.

15. At no time did J.S. sign a release allowing Dr. Brack to reveal any communications between J.S. and Dr. Brack that occurred during the marriage counseling sessions except a partial waiver to release records to Dr. Robert Silver, a court-appointed evaluator. At no time did J.S. give Dr. Brack permission to disclose communications made during the marriage counseling sessions to anyone other than to Dr. Silver.

CONCLUSIONS OF LAW

16. 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. (2008).

17. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

18. The Department has alleged that Dr. Brack violated Subsections 491.009(1)(r) and 491.009(1)(u), Florida Statutes, which provide:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(r) Failing 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, registered intern, or certificateholder is not qualified by training or experience.

* * *

(u) Failure of the licensee, registered intern, or certificateholder to maintain in confidence a communication made by a patient or client in the context of such services, except as provided in s. 491.0147.

19. Section 491.047, Florida Statutes, provides:

Any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential. This secrecy may be waived under the following conditions:

(1) When the person licensed or certified under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.

(2) When the patient or client agrees to the waiver, in writing, or, when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.

(3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed or certified

under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

20. In Count One of the Administrative Complaint, the Department alleges that Dr. Brack "violated Section 491.009(1)(u) by failing to maintain in confidence communications made by JS as a patient or client in the context of such services, in a letter dated March 11, 2004, to the attorney representing MMS, in the absence of any exception as provided by in Section 491.0147, Florida Statutes (2003)." The Department has established by clear and convincing evidence that Dr. Brack violated Subsection 491.009(1)(u), Florida Statutes. In a letter dated March 11, 2004, she revealed information about J.S. to the attorney representing M.M.S. The information was gained through her psychotherapist relationship with J.S. during the marriage counseling and during counseling sessions concerning M.S. The evidence did not establish that, at the time information was revealed, there was a clear and immediate probability of physical harm to M.S. or to M.M.S.

21. In Count Two of the Administrative Complaint, the Department alleges that Dr. Brack "violated Section 491.009(1)(u) by failing to maintain in confidence communications made by JS and his son MS as patients or clients in the context of such services, during a May 13, 2004,

deposition by the attorney representing MMS, in the absence of any exception as provided in Section 491.0147, Florida Statutes (2003)." During the deposition of Dr. Brack on May 13, 2004, Dr. Brack revealed that there was a psychotherapist-patient relationship with J.S. No evidence was presented to establish that, at the time the disclosure was made, there was a clear immediate probability of physical harm to M.S. The Department established by clear and convincing evidence that Dr. Brack violated Subsection 491.009(1)(u), Florida Statutes.

22. In Count Three of the Administrative Complaint, the Department alleges that Dr. Brack "violated Section 491.009(1)(r), Florida Statutes (2003), [by] failing to meet the minimum standards of performance in professional activities by demonstrating during a deposition that she did not know when and how to assert or waive therapist-client privilege to protect the confidentiality of her patients or clients." As a minimum, a psychotherapist should know when and how to assert the psychotherapist-patient privilege. In her May 13, 2004, deposition, it was clear that Dr. Brack did not fully understand the psychotherapist-patient privilege and when it should be invoked. The Department has established by clear and convincing evidence that Dr. Brack violated Subsection 491.009(1)(r), Florida Statutes.

23. In Count Four of the Administrative Complaint, the Department alleges that Dr. Brack "violated Section 491.009(1)(r), Florida Statutes (2003), [by] failing to meet the minimum standards of performance in professional activities by failing to maintain boundaries with regard to the information she provided to JS and about JS." The Department has established by clear and convincing evidence that Dr. Brack violated Subsection 491.009(1)(r), Florida Statutes. She crossed the boundaries of professional propriety by disclosing her financial woes to J.S. and by remarking that J.S. had a sizeable savings account from which he could make his payment. Such comments were inappropriate.

24. The disciplinary guidelines for the Board are found in Florida Administrative Code Rule 64B4-5.001, which provides a range of penalties for violations of Subsections 491.009(1)(r) and 491.009(1)(u), Florida Statutes. The penalty for a violation of Subsection 491.009(1)(r), Florida Statutes, ranges from a minimum of a \$250 administrative fine and reprimand to a maximum of a \$1,000 administrative fine and probation. The penalty for a violation of Subsection 491.009(1)(u), Florida Statutes, ranges from a minimum of a \$1,000 administrative fine and reprimand to a \$1,000 administrative fine and probation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Dr. Brack violated Subsection 491.009(1)(u), Florida Statutes, as alleged in Counts One and Two of the Administrative Complaint and Subsection 491.009(1)(r), Florida Statutes, as alleged in Counts Three and Four of the Administrative Complaint; issuing a reprimand for all four violations; imposing an administrative fine of \$1,000 for the violation in Count One; imposing an administrative fine of \$1,000 for the violation in Count Two; imposing an administrative fine of \$500 for the violation in Count Three; imposing an administrative fine of \$500 for the violation in Count Four; and requiring Dr. Brack to complete 40 hours of continuing education in courses on the laws, rules, and ethics applicable to marriage and family therapy and mental health counseling in a manner to be determined by the Board.

DONE AND ENTERED this 17th day of June, 2009, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 2009.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2003 version.

COPIES FURNISHED:

Patrick L. Butler, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Gail Patricia Brack, Ph.D.
2618 Tamiami Trail North, PMB 702
Naples, Florida 34103

Josefina M. Tamayo, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1701

Susan Foster, Executive Director
Board of Clinical Social Work, Marriage and
Family Therapy, and Mental Health Counseling
Department of Health
4052 Bald Cypress Way, Bin C-08
Tallahassee, Florida 32399-1701

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.