

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

Case No. 20-5181PL

vs.

DEVIN TRIPLETT, L.M.T.,

Respondent.

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RECOMMENDED ORDER

This case came before Administrative Law Judge Brian A. Newman of the Division of Administrative Hearings (“DOAH”) for final hearing by Zoom conference on January 25, 2021.

APPEARANCES

For Petitioner: Alyssa Ward, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Devin K. Triplett, pro se  
264 Tavestock Loop  
Winter Springs, Florida 32708

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent failed to appropriately drape a client as charged in the Administrative Complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On June 21, 2019, the Department of Health (Department) filed an Administrative Complaint before the Board of Massage Therapy (Board) against Devin Triplett, L.M.T. (Respondent). Respondent was charged with failing to appropriately drape a client in violation of Florida Administrative Code Rule 64B7-30.001(5) (the “rule”), and violating section 480.046(1)(i), Florida Statutes (the “statute”), through a violation of the rule.<sup>1</sup> Specifically, the Department alleges that “Respondent undraped one-half of A.M.’s body from her shoulder to her toes, exposing A.M.’s buttocks.” The Department did not charge Respondent with sexual misconduct or any other wrongful act other than “exposing A.M.’s buttocks” when the sheet was removed from half of her body. Respondent timely filed an Election of Rights disputing the material allegations of the Administrative Complaint.

On November 30, 2020, the Department transmitted the Administrative Complaint and Election of Rights to DOAH for assignment of an administrative law judge to conduct the requested hearing.

The final hearing was held on January 25, 2021, by Zoom conference as scheduled.

At the hearing, the Department presented the live testimony of massage client A.M. The Department also offered the deposition testimony of Faith Buhler, L.M.T., an expert in massage therapy. The Department’s Exhibits 1, 3, and 4 through 6 were admitted. Respondent presented the live testimony of Christina Delk and Andrew Swart. Respondent’s Exhibit 1 was admitted.

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<sup>1</sup> All references to statutes and rules are to the 2018 version unless otherwise indicated.

Prior to the hearing, the Department filed a motion in limine seeking to prevent Ms. Delk and Mr. Swart from offering testimony as to Respondent's character. The undersigned announced at the beginning of the hearing that the Department's motion in limine was denied, without prejudice. The Department was invited to object to any improper character testimony offered by Ms. Delk and Mr. Swart when they testified, but it did not do so. The Department renewed its motion in limine at the conclusion of the hearing, after Ms. Delk and Mr. Swart testified. The undersigned denied the renewed motion as moot because the witnesses had already testified, without objection from the Department, and had been excused.

A one-volume Transcript of the hearing was filed on February 15, 2021. Both parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department of Health is the state agency charged with regulating the practice of massage therapy within the state of Florida, pursuant to section 20.43, and chapters 456 and 480, Florida Statutes.

2. At all times material to this matter, Respondent was licensed as a massage therapist, Florida license number MA 91037.

3. On December 15, 2018, Respondent provided a massage to client A.M. at a spa located in Orlando, Florida. Respondent was an employee of the spa when he provided the massage to A.M.

4. At the beginning of the massage session, A.M. lay face down on the massage table and was covered with a thin white sheet. According to A.M., Respondent removed the sheet from half of her body as she lay face down. A.M. described the sheet removal as follows:

The draping was removed from one half of my body from my shoulders to my feet, uncovering one

whole side of my body, including my buttocks and my underwear was exposed.

Though ambiguous, the most reasonable inference from this testimony is that A.M. was wearing underwear underneath the sheet, and that after the sheet was removed from half of her body, one side of her buttocks was no longer covered by the sheet but was covered by her underwear. There was no testimony or other evidence offered that described A.M.'s underwear. Accordingly, the evidence does not establish with any certainty whether any portion of A.M.'s buttocks was completely uncovered or bare after the sheet was removed from half of her body.

5. A.M. testified that Respondent did not ask her permission to remove the sheet from half of her body, and that she did not say anything to Respondent about the manner in which she was draped. After the 50-minute massage was over, A.M. left the spa and called her husband and told him what had occurred. She asked her husband to complain to the spa. The spa offered A.M. another massage at no charge, but she declined the offer.

6. Respondent testified that he had no independent recollection of client A.M. or the massage services that he provided to her on December 15, 2018. Nevertheless, Respondent denied that he removed the sheet from half of A.M.'s body because that was not his routine practice.

7. Respondent offered photographs from one of his massage therapy textbooks showing four examples of "professional draping" methods in the face-down (prone) position. One of the photographs shows a female client draped with a sheet covering half of her body. The client in this photograph is not wearing any underwear, leaving half of her bare buttocks completely uncovered.<sup>2</sup> Thus, even if it was not Respondent's routine practice to drape

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<sup>2</sup> Although Respondent was taught that it is acceptable to drape a client with half of the body uncovered by a sheet or any undergarment, draping a client in this manner would violate the rule "unless the client gives specific informed consent to be undraped." Fla. Admin. Code R. 64B7-30.001(5).

clients with only half their body covered by a sheet, he was taught it is acceptable to do so.

8. The Department presented testimony from Faith Buhler, L.M.T., an expert in massage therapy. Ms. Buhler testified that the standard of care for massage therapy requires massage therapists to drape clients in conformance with the rule. But the rule itself adequately defines the standard of care for draping massage clients under the circumstances at issue here, rendering expert testimony on the subject unnecessary in this case. Accordingly, Ms. Buhler's expert testimony is not probative and has not been adopted for this reason.

9. Respondent offered testimony from Ms. Delk, a massage client, and Mr. Swart, a former employer. These witnesses were not present when Respondent massaged A.M. They do not have any first-hand knowledge of any material fact in dispute in this case and their testimony was disregarded for this reason.

10. A.M.'s testimony that only half of her body was covered by a sheet during the massage provided by Respondent on December 15, 2018, is credible and is accepted. But A.M.'s testimony leaves unresolved whether half of her buttocks was completely uncovered during the massage, or whether one side of her buttocks remained covered by her underwear after Respondent removed the sheet from half of her body.

#### CONCLUSIONS OF LAW

11. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). The Department therefore bears the burden of proving the charges against Respondent by clear and convincing evidence. *Fox v. Dep't of Health*, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996)).

12. As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

*In re Henson*, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, “it seems to preclude evidence that is ambiguous.” *Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

13. Respondent may not be found guilty of an offense that was not charged in the Administrative Complaint. *Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005) (administrative complaint charged physician with a failure to create medical records; proof of a failure to retain medical records cannot support a finding of guilt). Furthermore, due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. *See Delk v. Dep’t of Prof’l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

14. The Administrative Complaint charged Respondent with violating the statute and rule by exposing A.M.’s buttocks during the massage; no other body part is mentioned. During opening statements, the Department alleged that Respondent also improperly exposed A.M.’s vagina during the massage, but then acknowledged that no charge was brought against Respondent based upon this allegation. (Tr. 15-16). The Department also confirmed at the outset of the hearing that Respondent was not charged with sexual

misconduct in this case. (Tr. 10-11). For these reasons, this Recommended Order is singularly focused on whether the Department proved that Respondent failed to drape A.M.'s buttocks during the massage in accordance with the rule.

15. Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.” *Griffis v. Fish & Wildlife Conserv. Comm’n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Munch v. Dep’t of Prof’l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *McClung v. Crim. Just. Stds. & Training Comm’n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984).

16. The Department contends that Respondent violated section 480.046(1)(i) (which requires massage therapists to conform to the standard of care), by failing to appropriately drape a client in conformance with rule 64B7-30.001, which provides in pertinent part:

The following acts shall constitute the failure to practice massage therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar massage therapist as being acceptable under similar conditions and circumstances:

\* \* \*

(4) Failure to explain expected draping techniques to a client. As used in this rule, draping means towels, gowns, sheets or clothing.

(5) Failure to appropriately drape a client. Appropriate draping of a client shall include draping of the buttocks and genitalia of all clients, and breasts of female clients, unless the client gives specific informed consent to be undraped.

17. As stated in the rule, “draping” can mean covering by other things besides a sheet; the client’s clothing is also a draping. Underwear is clothing, and as such is considered a draping under the plain language of the rule. Any

other interpretation would violate the requirement that the rule must be construed strictly, most favorably to Respondent. Accordingly, the Department must prove that A.M.'s buttocks was not covered by either a sheet or her underwear at some point during the massage, to prove that Respondent violated the rule.

18. A.M.'s testimony is confusing because of the repeated use of the word "exposed," both in questions to her and her answers. The word "exposed" as used in this context is imprecise; it does not necessarily mean completely uncovered or bare.

19. In fact, Department's counsel used the term "exposed" during the hearing to describe part of A.M.'s body that was covered by her underwear but no sheet. The following exchange took place during the hearing after Department's counsel confirmed that Respondent was not being charged with failing to drape A.M.'s vagina:

THE COURT: Okay. Are you now making the case that he also failed to drape her vaginal area?

MS. WARD: No. We just wanted to add that in there. It will show through the patient's testimony that even though she had underwear on, that it was exposed ... . (Tr. 15).

20. A.M. used similar language during her testimony to describe body parts covered by a sheet:

Q. Okay. And when you were on your back, what was your opinion of the draping?

A. Well, when I had turned on my back, he had - - the draping was very thin. It felt almost like it could have been sheer or see-through. But he had continued to tuck the draping on the inside of my armpits tightly, repeatedly, until it felt like it was nice and snug, which felt like it could have been pressing snugly against my breasts and my nipples and areolas, *exposing* myself to him. (Tr. 35). (emphasis added).



For these reasons, it is unclear whether the word “exposed,” as used multiple times in this case, was intended to mean that a body part was covered by a sheet only, by underwear only, or completely uncovered.

21. The clear and convincing standard requires testimony that is more precise and explicit than the testimony given by A.M. It is possible that A.M. intended to convey that the side of her buttocks was completely uncovered and bare during the massage, but her testimony alone does not establish that fact with the requisite certainty. In fact, the more reasoned inference from A.M.’s testimony is that the side of her buttocks remained covered by her underwear after the sheet was removed by Respondent.

22. The rule, when interpreted in accordance with its plain meaning (and certainly if construed strictly in favor of Respondent as the law requires), equates underwear to drapings because underwear is a form of clothing. Because the Department failed to prove that the side of A.M.’s buttocks was completely uncovered by her underwear at any point during the massage, it has failed to prove that Respondent violated the rule or statute.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Massage Therapy, issue a final order dismissing the Administrative Complaint against Respondent, Devin Triplett, L.M.T.

DONE AND ENTERED this 2nd day of March, 2021, in Tallahassee, Leon County, Florida.



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BRIAN A. NEWMAN  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 2nd day of March, 2021.

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.