BEFORE THE BOARD OF CHIROPRACTIC
OF THE STATE OF IOWA

IN THE MATTER OF:	) CASE NO. 06-049
	) DIA NO. 07DPHCB002
LEE G. NELSON, D.C.	)
	) FINDINGS OF FACT,
	) CONCLUSIONS OF LAW,
RESPONDENT	) DECISION AND ORDER

On August 28, 2007, the Iowa Board of Chiropractic (Board) filed a Notice of Hearing and Statement of Charges against Lee G. Nelson, D.C., (Respondent) alleging that Respondent violated Iowa Code sections 151.9(3) and (8); 147.55(3) and (8); 272C.10(3) and (8)(2003) and 645 IAC 45.2(3) and 45.2(28)"b" by engaging in unethical conduct or in practice that is harmful or detrimental to the public.

The initial hearing date was continued at the Respondent's request. The hearing was held on January 9, 2008 at 9:00 a.m. at the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. Respondent appeared and was represented by attorney Paul J. Bieber. Assistant Attorney Generals Julie Bussanmas and Theresa O'Connell Weeg represented the state of Iowa.

The following Board members presided at the hearing: Steven Kraus, D.C., Chairperson; Kathleen Doohen, D.C.; Michael Powell, D.C.; Rodney Rebarcak, D.C.; Dr. John Calisesi, D.C.; and Karen Whalen, public member. The hearing was closed to the public, at Respondent's request, pursuant to Iowa Code section 272C.6(1). The hearing was recorded by a certified court reporter. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing and was instructed to prepare the Board's Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

THE RECORD

The record includes the Notice of Hearing and Statement of Charges; Order Continuing Hearing; the testimony of the witnesses; State Exhibits 1-22 (see exhibit index for description); Written testimony of Respondent and attached Respondent Exhibits 1-85 (red binder, see index for

description); Respondent Exhibits 86-121(black binder, see index for description of 86-118; 119 is a floor plan of the office; 120 is the deposition of Patient #2; 121 is the deposition of Patient #3; 122 is a videotape made by Patient #1-short version).

FINDINGS OF FACT

1. On October 7, 1982, Respondent was issued license number 04883 to practice chiropractic in the state of Iowa. The Respondent's license is current through June 30, 2008. Respondent has been self-employed as a chiropractor in Davenport, Iowa for 25 years. Respondent employs his wife as his office manager and has one other employee. The office has a reception area, waiting area, offices, and three treatment rooms. The treatment rooms do not have doors, and staff frequently passes by the treatment rooms to reach the office where insurance files are stored. At all times relevant to the Statement of Charges, Respondent was alone with patients during treatment. At the current time, either Respondent's wife or his other employee is present as a chaperone when he treats female patients. (Testimony of Respondent; Cheryl Nelson; State Exhibit 12; Respondent Exhibits 3; 119)

Patient #1

2. On November 14, 2006, Patient #1 filed a complaint with the Board alleging that Respondent had made improper advances toward her during several visits to his office. Patient #1 enclosed a video tape that she had made of her last appointments. At the Board's request, an investigator with the Department of Inspections and Appeals (DIA) conducted interviews of Respondent, Patient #1, and three additional female patients (hereinafter, Patient #2, Patient #3, and Patient #4). The patients' records were subpoenaed. (State Exhibits 3-5; Testimony of Patient #1)

3. Respondent treated Patient #1 on 190 occasions over a twenty year period from September 13, 1985 through May 17, 2005. During this time, Patient #1 had several manual labor jobs that caused her neck or back pain. Patient #1 was always fully clothed during her treatments. Patient #1 trusted Respondent and was pleased with the treatment that

he provided[1] until late in 2004, when Respondent made her uncomfortable by sliding his hand along or around her waist. Respondent had never done this before, and Patient #1 wondered whether it had really happened and whether it was a legitimate part of her treatment. Patient #1 told her husband about her concerns but decided to give Respondent the benefit of the doubt since it had never happened before. However, Patient #1 did not return to Respondent for a period of months.[2] (Testimony of Patient #1; State Exhibits 3, 6, 9; Respondent Exhibits 86, 100, 103)

4. Patient #1 returned to Respondent's office on May 2, 2005 with complaints of pain in her neck, mid back, shoulders, and lower back. Respondent treated Patient #1 on May 2, May 6, May 9, and May 17, 2005. At the end of the appointments on May 2nd and May 6th, Respondent wrapped his arms around Patient #1's waist/hip area as she was getting ready to leave the treatment room. Patient #1 continued to question whether this touching was appropriate and decided to take a video camera with her to record her next visit.

During her May 9, 2005 appointment, Patient #1 propped the video camera on her open purse, which was on a chair inside the treatment room. She did not tell Respondent that she was videotaping. The dates appearing on the videotape are inaccurate due to a camera programming error. The videotapes are dated May 10 and May 18, 2005 but were actually recorded on May 9 and May 17, 2005. Patient #1's explanations for the date errors were credible and consistent with Respondent's records of when the visits occurred. The Board did not believe Respondent's claim that Patient #1 had somehow manipulated the video tape recordings to make them more incriminating. (Testimony of

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[1] Respondent also treated Patient #1's two sons. Respondent and his wife suggest that Patient #1 may have filed her complaint, in part, because she was angry that Respondent's wife sent her son's unpaid $20.00 bill to collection. The Board was not persuaded that the billing issue had any relevance to the patient's complaint. (Testimony of Patient #1; Respondent; Cheryl Nelson; Respondent Exhibits 89-95)

[2] Patient #1 was uncertain of the dates. The patient records reveal that Respondent treated Patient #1 on December 3, 2004 for dull, aching and throbbing pain in the low back of the right side. Respondent documented his future treatment plan as chiropractic adjustments two times a week, but there are no further documented visits until May 2, 2005. (State Exhibit 6; Respondent Exhibit 100).

Patient #1; Respondent; State Exhibits 4, 5, 6, 9; Respondent Exhibits 86, 87, 122)

a. During the office visit on May 9, 2005, Respondent inappropriately slid his hand across Patient #1's abdomen while she was sitting on a table for an adjustment. Respondent attempted to explain to the Board why he touched Patient #1 in this manner, but the explanation was neither plausible nor credible. In addition, as Patient #1 was leaving the treatment room, Respondent put both hands on her waist. There was no therapeutic purpose for Respondent to slide his hand over Patient #1's abdomen while she was sitting on the treatment table or to put his hands on Patient #1's waist when she was leaving the room.

b. During the office visit on May 17, 2005, Respondent came up behind Patient #1 as she was getting ready to leave the treatment room and wrapped his arms around her, putting one hand under her jacket in the area of her breast and the other hand around her waist and then hugged or squeezed her. This touching occurred after the treatment was completed and did not have a therapeutic purpose. The videotape clearly shows Respondent placing one hand under Patient #1's jacket in the area of her breast. Although the patient's jacket covers Respondent's hand, Respondent's forearm was in visible physical contact with Patient #1's breast.

5. Patient #1 received a deferred judgment for a 1988 drug offense and has a 1995 misdemeanor theft conviction, but this criminal history did not diminish the credibility of her testimony at the hearing. (Testimony of Patient #1; Respondent Exhibits 86; 96)

6. On June 20, 2006, Patient #1 filed a civil lawsuit in Scott County District Court alleging, in part, that Respondent abused his therapeutic position by making sexually inappropriate and unwelcome advances to her, with the intent to cause and result in insulting and offensive bodily contact. Patient #1 alleged that she suffered physical and mental pain and claimed damages exceeding $5,000. Patient #1's attorney offered to settle the lawsuit for $50,000. The lawsuit went to a jury trial and on or about October 2, 2007, the jury returned a verdict finding that Respondent did commit a battery on Patient #1 but further finding that the battery was not the proximate

cause of any damages. (State Exhibits 13, 14; Respondent Exhibits 20-26, 115, 116; Testimony of Patient #1; Respondent)

7. After she filed her lawsuit, Patient #1 discovered the Board's website on the internet and decided to file a complaint with the Board. When the Board's investigator obtained the documents and court file from Patient #1's lawsuit, he saw the names of three additional women on the witness list: Patient #2, Patient #3, and Patient #4. The investigator contacted Patient #1 to ask about the witnesses. She told the investigator that all three were former patients of Respondent and had terminated his services because of inappropriate touching or sexual advances. Patient #1 disclosed that Patient #2 is her sister and Patient #3 and Patient #4 are acquaintances. (State Exhibits 5; 13; Testimony of Patient #1)

Patient #2

8. Patient #2 was Respondent's patient for approximately twelve years from July 1991 until July 14, 2003. Patient #2 independently sought chiropractic care from Respondent and was not referred to him by her sister. Patient #2 was always fully clothed during her treatments. For many years, Patient #2 was very satisfied with Respondent's services, but started to become uncomfortable in 2003 when she felt Respondent's forearm and hand brush or slide against her breast as he helped her off the treatment table. Respondent had never done anything before to make Patient #2 feel uncomfortable, although he occasionally hugged her good-bye. At first she thought the touching was accidental, but after it occurred several times, Patient #2 stopped going to Respondent for chiropractic services.[3]

Patient #2 never told Respondent that he made her feel uncomfortable. Patient #2 told her boyfriend at the time, and he told her to stop going to Respondent, but she did not tell anyone in her family, although she knew that her

[3] Patient #2's insurance did not cover her last appointment with Respondent, and she eventually paid for this appointment in January 2004. On August 1, 2003, Patient #2 became eligible for Medicaid in Illinois, where she resided. It is entirely possible that insurance was also a significant factor in the patient's decision to stop seeing Respondent after July 14, 2003. In November 2003, Patient #2 started seeing an Illinois chiropractor. (Testimony of Patient #2; Respondent Exhibits 108-111)

sister was still Respondent's patient. In 2005, Patient #1 told Patient #2 what had happened to her in Respondent's office and showed Patient #2 the videotape she had made. Patient #2 then told Patient #1 that she had a "couple of uncomfortable situations with him too." Patient #2 agreed to testify in her sister's civil case and went to court the day of the jury trial but was never called as a witness. (Testimony of Patient #2; State Exhibits 3, 7, 10; Respondent Exhibits 101; 120)

9. Patient #2 bears no ill will toward Respondent and never considered filing her own complaint or lawsuit against him. She described her own experiences with Respondent as "less aggressive" than what she saw in her sister's videotape. Patient #2's criminal history did not diminish the credibility of her testimony. (Testimony of Patient #2; State Exhibit 10; Respondent Exhibit 113)

Patient #3

10. Respondent treated Patient #3 sporadically from July 1997 through October 2004. Patient #3 had been very satisfied with Respondent's services and thought he was very nice until two incidents caused her to stop going to him for treatment. (Testimony of Patient #3; State Exhibits 8; 11; Respondent Exhibits 102)

a. According to the patient records, on October 12, 2004, Respondent treated Patient #3 for sharp and throbbing pain in her lower back and recommended future chiropractic adjustments two times a week. After Respondent completed the treatment, Patient #3 was getting ready to leave, and Respondent was standing behind her. Respondent rubbed her shoulders a little, asked how she was doing, and then reached around like he was going to hug her and grabbed both of her breasts and pulled her back into him. Respondent was wearing her coat at the time and Respondent's hands were over the top of her coat. Patient #3 reports that she was shocked and upset but in the back of her mind, wondered if Respondent had really grabbed her breasts. Patient #3 told her boyfriend that she thought Respondent had grabbed her breasts but she wasn't sure. (Testimony of Patient #3; State Exhibits 8, 11; Respondent Exhibit 121)

b. On October 21, 2004, Patient #3 returned to Respondent for treatment. At the end of the appointment as

Patient #3 was getting ready to leave, Respondent reached from behind, grabbed both of her breasts, and pulled her back to hug her. Patient #3 immediately left the office and stopped going to Respondent after this second incident. At the time, Patient #3 told her boyfriend and a girlfriend what had happened to her but did not confront Respondent and did not file a complaint or press charges. (Testimony of Patient #3; State Exhibits 8, 11; Respondent Exhibit 121)

11. Patient #3's teenage daughter is a close friend of Patient #1's adult son, who did not live with Patient #1. While Patient #3 and Patient #1 were childhood acquaintances and grew up in the same neighborhood, they had not spent time together in twenty years. Patient #1's son told Patient #3 and her daughter that Respondent had inappropriately touched his mother, and Patient #3 decided to call Patient #1 and tell her what happened to her. Patient #1 asked Patient #3 if she would be willing to testify in court. Patient #3 agreed and went to court on the day of the jury trial but was never called as a witness. (Testimony of Patient #3; Patient #1; State Exhibits 8, 11; Respondent Exhibits 57; 86)

12. Patient #3 has a misdemeanor record that includes criminal mischief in April 2004, disorderly conduct in May 2005, and some driving related offenses. However, Patient #3's criminal record did not diminish the credibility of her testimony at the hearing. (Testimony of Patient #3; Respondent Exhibit 107)

Patient #4

13. Patient #4 is an acquaintance of Patient #1 and a former patient of Respondent. Respondent treated Patient #4 from 1991 until August 1996. Patient #4 told Patient #1 and the Board's investigator that she stopped going to Respondent because he touched her inappropriately on a couple of occasions and made inappropriate comments. The only evidence supporting these allegations is the investigator's hearsay report of Patient #4's interview. Patient #4 has a lengthy criminal history. The record does not include a transcript of her interview, the investigator did not testify, and Patient #4 did not testify at the hearing. The investigator's report is insufficient evidence to support a finding that Respondent touched Patient #4

inappropriately. (State Exhibit 5; Respondent Exhibits 46, 57; 86; 102; 49-56)

CONCLUSIONS OF LAW

Iowa Code section 151.9(3) and (8)(2003) provide, in relevant part:

> **151.9 Revocation or suspension of license.**
> A entry to practice as a chiropractor may be revoked or suspended when the licensee is guilty of the following acts or offenses:
> ...
> 3. ...engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
> ...
> 8. Willful or repeated violations of the provisions of this Act.

Accord, Iowa Code sections 147.55(3),(8) and 272C.10(3),(8)(2003).

Pursuant to its authority under Iowa Code chapter 272C, the Board has promulgated the following relevant rules:

> **645-45.2(272C) Grounds for discipline.** The board may impose any of the disciplinary sanctions set forth in rule 45.3 (147,272C) when the board determines that the licensee is guilty of the following acts or offenses:
> ...
> **45.2(3)**...or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
> ...
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> **45.2(28)** Unethical conduct. In accordance with Iowa Code section 147.55(3), behavior (i.e., acts, knowledge, and practices) which constitutes unethical conduct may include, but need not be limited to, the following:
> ...
> *b.* Improper sexual contact with, or making suggestive, lewd, lascivious or improper remarks or advances to a patient, client, or coworker.

The preponderance of the evidence established that Respondent engaged in unethical conduct and practice harmful or detrimental to the public, in violation of Iowa Code sections 151.9(3) and (8), 147.55(3) and (8), 272C.10(3) and (8) and 645 IAC 45.2(3) and (28), when he improperly touched two of his female patients, Patient #1 and Patient #3, during their appointments for chiropractic treatment. The Board found the testimony of these two patients to be more credible than Respondent's denial of any improper touching. Both were relatively long term patients of Respondent and both were very satisfied with the quality of his services until he touched them in an improper manner. The patients have provided reasonably consistent accounts of their experiences in depositions, interviews, and testimony. Moreover, the videotapes of the May 9 and May 17, 2005 appointment clearly show Respondent touching Patient #1 in an improper and unnecessary manner as she is leaving his office. Respondent's attempts to explain why he touched Patient #1 in the manner depicted in the videotape appeared contrived and were not credible.[4]

While the two patients were acquaintances, and while Patient #3 likely would never have come forward if she had not known that someone else had a similar experience, the Board did not believe that the patients colluded to make false claims against Respondent. In addition, the Board was not convinced that either patient made false claims in order to obtain money from Respondent by filing a lawsuit.

There was insufficient evidence to establish that Respondent improperly touched Patient #2 and Patient #4. The Board believed Patient #2 when she testified that she was uncomfortable with the way Respondent touched her during her last appointments with him. However, until Patient #2 spoke to her sister nearly two years later, it appears that she was uncertain whether Respondent had intentionally touched her in an improper manner. In 2003, Patient #2 did not report her concerns about Respondent to her sister, even though she knew that her sister was still Respondent's patient. Patient #2 became convinced that Respondent touched her improperly only after her sister

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[4] At the hearing, Respondent claimed that Patient #1 made advances towards him, including leaning into him during treatment, attempting to kiss him, and falling back into him as he gave her a hug. Respondent never told the investigator that the patient attempted to kiss him. Respondent's claims and defenses were not credible. (Testimony of Respondent; Cheryl Nelson; State Exhibit 12)

told her about her own experience and showed her the videotape. These circumstances make the recollections of Patient #2 insufficiently reliable to support a finding of improper touching. Finally, as previously explained in Finding of Fact #13, there is insufficient reliable evidence in the record to establish that Respondent improperly touched Patient #4.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the license to practice chiropractic in the state of Iowa issued to Lee G. Nelson, D.C., license no. 04883 is hereby placed on **PROBATION** for an indefinite period, subject to the following terms and conditions:

A. Within sixty (60) days, Respondent shall submit to a Board-approved comprehensive evaluation by Gary Schoener, M.Eq., Licensed Psychologist, Walk In Counseling Center, 2421 Chicago Ave. S., Minneapolis, MN 55404, Work: 612/870-0574 or 612/870-0565. Respondent must sign all necessary releases for the Board to release information to Mr. Schoener and for Mr. Schoener to share information with the Board and provide the Board with a written evaluation report and recommendations for treatment. Following the evaluation, Respondent must fully comply with any treatment recommendations made as a result of the evaluation.

B. Throughout the probationary period, Respondent shall have a non-family member chaperone present whenever he provides treatment to a female patient. The chaperone's presence shall be documented in the patient record by the chaperone. Respondent's records shall be subject to random review by a Board designee to verify compliance with the chaperone requirement.

C. Respondent shall file quarterly written reports, no later than March 1, June 1, September 1, and December 1 of each year of probation, verifying his compliance with all terms of probation, including but not limited to compliance with any and all treatment recommendations made by the evaluator and his compliance with the chaperone requirement.

D. Respondent shall appear before the Board upon

Board request and reasonable notice.

E. Failure to fully comply with the terms of probation will result in further disciplinary action.

IT IS FURTHER ORDERED that upon full compliance with all of the terms of this Decision and Order, Respondent may petition the Board to terminate his probationary period.

IT IS FURTHER ORDERED that the Respondent shall pay a $75.00 hearing fee and $343.75 in costs for the court reporter. The $418.75 in hearing fees and costs shall be paid within thirty (30) days of receipt of this decision. The cost of a transcript will be charged to the party requesting it. Iowa Code section 272C.6; 645 IAC 11.23.

This findings of fact, conclusions of law, decision and order is approved by the board on March 11, 2008.