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OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF MEDICAL EXAMINERS
DOCKET NO. H83-5083

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF CHESTER SMITH, D.C. LICENSE NO. 1498 TO PRACTICE CHIROPRACTIC IN THE STATE OF NEW JERSEY	Administrative Action FINAL DECISION

This matter was opened to the New Jersey State Board of Medical Examiners by way of Complaint filed May 10, 1983 and Amended Complaint filed July 25, 1983 before the Board by the Attorney General of New Jersey by Douglas J. Harper, Deputy Attorney General. Respondent is charged in Count I of the Amended Complaint with rendering unconscionably high and excessive bills for performing chiropractic services during four house calls to patient Albert Alwill on July 19, 1980 ($130); Sunday, July 20, 1980 ($260); July 21, 1980 ($130); and July 22, 1980 ($130). The rendering of such a bill and demand for payment through the patient's third-party insurance carrier was alleged to constitute the use or employment of dishonesty, fraud, deception, misrepresentation and false promise,

all in violation of N.J.S.A. 45:1-21(b); gross malpractice in violation of N.J.S.A. 45:1-21(c); and professional misconduct, N.J.S.A. 45:1-21(e).

Count II charges the rendering of an excessive and unconscionable fee bill of $90 to patient Kathleen Walton through her insurance carrier for services rendered on October 24, 1981. This conduct was alleged to constitute violation of each of the above laws and in addition, violation of N.J.A.C. 13:35-6.19(b), the Board's rule prohibiting the charging of excessive fees. Count III charges that on October 25, 1981 (Sunday) respondent made an unnecessary house call to Walton, performed services for some 10 minutes, and charged an unconscionably high and excessive fee of $180, citing all of the laws and the rule above. Count IV alleges that the demand for a fee for unnecessary and unrequested services provided to patient Walton constitutes violation of N.J.S.A. 45:1-21(b), (c) and (e). Complainant asks this Board to impose disciplinary sanctions, assess civil penalties and costs, and order the reformation of the bills rendered to patients Alwill and Walton.

Respondent, residing and practicing at 995 Littleton Road, Parsippany, New Jersey 07054 is represented by Anthony J. Macri, Esq., and has filed an answer claiming either no knowledge of the events underlying the charges or denying the pertinent allegations. The hearing was twice adjourned at the instance of respondent's

attorney and full hearing conducted by the Board of Medical Examiners, finally took place November 9, 1983 and December 14, 1983. All documents marked into evidence are set forth on the Exhibit List attached. At the conclusion of the hearing, which was conducted in open public session, the Board deliberated in closed session and made findings of fact and conclusions of law on the testimony and exhibits. By way of summarizing motion, the Board announced on the public record its decision on the merits, finding respondent guilty of the following: N.J.S.A. 45:1-21(e) as to Count I; 45:1-21(b) and (e) and N.J.A.C. 13:35-6.19(b) as to Count II; N.J.S.A. 45:1-21(b) and (e) and the same rule as to Count III; and 45:1-21(b) and (e) as to Count IV.

Respondent was offered the opportunity to speak in mitigation of penalty. The Board then deliberated in closed session and thereafter announced on the record sanctions respecting Dr. Smith's license and various monetary assessments. Following are the findings of fact and conclusions of law which lead the Board to impose the Order set forth below.

Mrs. Kathleen Walton was presented as the State's first witness. She testified as follows: she sought the services of Dr. Smith at his office on October 24, 1981 for treatment of a back problem which was then causing her severe pain. She testified that she asked Dr. Smith what he would charge for his services and that Dr. Smith responded by saying that the insurance company would pay.

He never quoted a specific fee to her. He suggested that she call him later the same day if she was still in pain, as he would be attending a meeting in her neighborhood that evening. Although she had driven herself to his office that morning, she accepted his suggestion that she arrange for someone else to drive her home after the treatment. Later that day she did call Dr. Smith and indicated that she was still in considerable pain. He offered to come to her home that evening to render additional chiropractic services. He did arrive at her home later that evening, bringing along his wife. Mrs. Smith estimated that Dr. Smith was in her home on that Saturday evening for approximately 15 minutes and that he performed a chiropractic adjustment on her back while she lay on her living room floor as instructed. He told her he would come again the next day, Sunday, October 25. By the next morning, however, she was able to walk and generally felt much better. She telephoned Dr. Smith to tell him so and to inform him that he should not come to her home that day. She testified that, nevertheless, Dr. Smith did come to her home that Sunday morning with his wife and daughter, informing her that the family was on its way to the Poconos anyway. He rendered chiropractic services to her, again after instructing her to lie on the floor, and left after approximately 10 minutes. Mrs. Walton was specifically asked if she remembered Dr. Smith bringing along any kind of special equipment to her home. She recalled only the instruction to lie on the floor and that the doctor used "blocks"; she does not believe he brought

along any type of table. She identified R-1 in Evidence, her written comment on a preprinted form Dr. Smith had given her, in which she stated that she felt improved after the treatment. She later received two additional treatments from Dr. Smith: in the office next day, Monday, October 26, and later in the week on October 31, 1983. Well after this time, she received a bill for $455, including $90 for his home visit on October 24 and $180 for the visit on Sunday. Mrs. Walton indicated that she then called several persons and made inquiries about the usual range of chiropractors' fees. When she was informed that the fees charged were excessive, she proceeded to submit a complaint to the New Jersey State Board of Medical Examiners. (See, in this connection, Laws of 1983, c. 248, codifying the common law qualified privilege attaching to citizen reports made to the Board.)

During cross-examination, Mrs. Walton described the painful physical problem that had caused her to seek the services of Dr. Smith, and her concern because she had intended to start a new job the following week which would require her to travel to another state. She reiterated the course of treatments she had received from Dr. Smith (whose name she had selected from a telephone directory) and his insistence on coming to her home Sunday despite her calling him to say she was better and did not need the visit. She testified that when he appeared at the door, she felt she had to let him in and that she had to then submit to his treatment. She noted that she first was made aware of the specific fees incurred

for the services rendered when she finally received a direct bill from Dr. Smith. When she directed her insurance company not to pay the bill and refused to pay it herself, Dr. Smith sued her in Small Claims Court. When that suit was dismissed without prejudice, she informed the Board that he commenced another suit against her for "libel" seeking one million dollars in damages.

The second patient, Mr. Albert Alwill, had been subpoenaed by the prosecuting deputy to testify. He sent a message that he was having car trouble and did not appear.

The prosecuting deputy then called Dr. Smith as a witness to identify the Walton and Alwill patient records. The records were admitted and marked into evidence without objection.

Robert Kovacs, D.C. was sworn. Dr. Kovacs presented as background for his expert testimony his educational experience, nature of professional practice in this State, and various offices he has held in chiropractic societies and organizations. As shown in his curriculum vita, C-7 in Evidence, this experience includes the following: 20 years in private practice; past chairman and present member of the American Chiropractic Association Commission on Insurance; past president of a county chiropractic society; past chairman of A.C.A. Peer Review Section; lecturer and instructor in peer review, and guest lecturer on the faculty of New York Chiropractic College. He has also served on the Union County Comprehensive Health Planning Committee and as a consultant to several health care insurance carriers. We are satisfied that his background

has provided him an unusually extensive opportunity to see the range of chiropractic services offered in this State and elsewhere; the type of patient records prepared by chiropractors to manage appropriate treatment for their patients and to document their services; as well as the range of fees deemed by reputable chiropractors to be justifiable for their services. For the past 11 years Dr. Kovacs has been the Chairman of the Peer Review Committee of the New Jersey Chiropractic Society. He testified that he is aware of the usual and customary fees charged for chiropractic services at this date as well as during the periods 1980 and 1981 referred to in the Complaint.

Asked to comment on the description of Walton's treatment and the patient records, Dr. Kovacs found nothing extraordinary about her complaint or about the treatment rendered. There was nothing "heroic" involved, and he expressed the opinion that in late 1981 the usual fee for an office visit was $15-20; for a house call, a doubling of that fee would have been reasonable, as it makes allowance for the presumptively more difficult treatment situation necessitating the house call, and for the doctor's time and travel costs. He said it is not and was not then customary to double the fee charged on a "Saturday" for a "Sunday" home visit, and he found the fees billed by Dr. Smith to be excessive and unconscionable.

Dr. Kovacs further testified that he had reviewed the bills and patient records for Albert Alwill at the time that his

Peer Review Committee had been asked to consider it. He stated that during July 1980, the usual and customary fee for a chiropractic office visit was $15-20, and the usual fashion for computing a home visit would be twice the amount of an office visit. It was his opinion that the fees charged to Albert Alwill ($130 for each of three home visits plus $260 for a Sunday home visit) were excessive to the point of being unconscionable. Dr. Kovacs stated that a reasonable charge to Mr. Alwill for a home visit would have been between $40-50 for each visit.

During cross-examination by Mr. Macri, Dr. Kovacs stated that he does not work for any private insurance carriers but is the Chairman of the Peer Review Committee of the New Jersey Chiropractic Society and functions as a consultant in that respect. Dr. Kovacs responded to further questioning by confirming that in October of 1981 he continued to be in private practice and charged $20 for an office visit, which generally took 15 to 20 minutes. He conceded that he judged Dr. Smith's fees to be excessive without specifically knowing the amount of time Dr. Smith spent with the two patients in question. However, he asserted that this was not relevant as there is only so much that a chiropractor can do during a given treatment and the spending of more time with a patient would not be productive and therefore should not be billed. He estimated a half hour to be the outer limit of a treatment visit.

Asked hypothetically whether treatment of a nucleus pulposa (a herniated disc) would require special effort, Dr. Kovacs

observed that the records of neither patient Walton nor Alwill showed any such problem. He stated that, in any event, a herniated disc is a problem requiring orthopedic care, and the most a chiropractor could do for a patient with this condition would be to manipulate it to control the pain. Such a maneuver would not likely take more than 30 minutes and an hour would be unusual.

Dr. Smith later testified on his own behalf that he believed Mrs. Walton had a potential herniated disc. He asserts that after spending a prolonged period of time caring for her in his office Saturday morning, she was still in such pain that she needed to call her father to drive her home. He further claims that she telephoned him later on Saturday and asked him to make a house call, and that he told her his fee for this in advance. He testified that he did go to her house, bringing a table, and that he spent at least 30 minutes with her. He claims that he did not go to any meeting that night. As for the Sunday visit, he claims Mrs. Walton phoned him and told him she was still in pain and wanted another house call. He says he agreed to go, and denies that he told her he was on his way to Pennsylvania, although he admits that he has relatives there whom he does visit, and further admits that his wife and daughter might have been with him that day. He says he quoted to her a fee of $65 per hour and "double time on Sunday" and urged her to come to the office instead, but she refused. He acknowledges that the very next day, Monday, she did go to his office for another treatment, as well as on the

following Saturday, when she terminated treatment with him. He offers as R-1 in Evidence a copy of forms which Mrs. Walton had earlier identified, in which she says she felt improved after the treatments.

Our review of Dr. Smith's records for Kathleen Walton shows a form entitled "Chiropractic Physical Orthopedic, Neurological Examination," a listing of common tests including space for analysis of range of motion tests, muscle assessment tests, and "ortho-nuerolegic tests" [sic], and other forms of examination. C-5a, b and c in Evidence. There is no entry at all in the section for causation or genesis of the accident or injury or the duration of it. Some tests have notations indicating the tests were performed; others have no entries. The muscle test is crossed out and marked "To [sic] much pain." The progress notes page, C-5d in Evidence, states for the visit of October 24, 1981 x-ray $40, physical examination $25 and "chiropractic treatment, extended care 2 x $60." A second entry for 10/24 is marked only "house call 1 & 1/2 hours $90." The entry for 10/25/81 is "house call Sunday 2 x $180." The next two entries are dated 10/26 and 10/31/81 for $30 each, but there is no indication at all of the services rendered.

As for patient Alwill, Dr. Smith testified that the patient phoned saying that he was on the floor and couldn't move. Dr. Smith says he brought his table and drove 30 miles to Alwill's house and determined that the man had a "category 3" problem, meaning "the nucleus pulposa was affected" and "the sacral base goes

anterior." He claims that he remembers the first visit on July 19, 1980 vividly because it was very hot and he perspired while working on the man for a prolonged period of time. Dr. Smith states that he could not tell if the man actually had a herniated disc, but tried to put it back into place. He says he told this patient his fee in advance, and spent even more time than he billed, at least two hours with the patient alone, plus travel time which he billed portal-to-portal. He states that the next day, he made another house call to Alwill because the patient still couldn't move, although Dr. Smith "would rather be in church," and again stayed at least two hours. House calls were again made on July 21 and 22 because the patient allegedly could not walk until Tuesday, the 23rd. Again, he spent more than two hours on each visit. He speculates that if he had not gone to Alwill's house, the patient's disc might well have ruptured. He did not see the patient at all after these four house calls, and presumably does not know whether the patient ever had a herniated disc.

Dr. Smith offered into evidence as R-3 an affidavit prepared by his attorney and signed in the name of Albert Alwill dated September 19, 1983. (That is two months prior to the first hearing date in this matter when Mr. Alwill failed to appear on duly served subpoena.) The affiant does not list the actual fees billed to him, but states that he agreed to them. Finally, Dr. Smith offers as R-4 in Evidence a package of original letters from 12 chiropractors all supporting his billing or his billing method,

although almost none indicate any awareness of the actual fees he charged; several indicate that they do not make house calls; and others say they charge lower fees than he does. Dr. Smith did not offer any explanation of why he had not requested any of these persons to attend the hearing to testify on his behalf. All of the above were admitted into evidence despite the lack of foundation or clear reliability thereof, on the ground that an administrative agency may admit into evidence any material relevant to the issues, with the weight to be accorded each to be determined subsequently.

In response to these unsworn hearsay statements offered by respondent, D.A.G. Harper offered into evidence as C-6 the ten original Peer Review Committee worksheets previously authenticated by Dr. Kovacs dealing with patient Alwill, all of which found Dr. Smith's bills to be excessive for the services rendered.

Reviewing C-2a, b and c, the patient record for Alwill, we note that it bears no initial visit date. There is no indication of prior history other than "chronic low back" or any account by the patient of precipitating events or activities in which he was engaged when, as Dr. Smith wrote, he was "injured 7/16 got worse 7/18--7/19 couldn't walk." His occupation is not shown, nor who treated him previously for this "chronic back" or how or why. No notation appears on any of the test lists other than comments adjoining the "muscles" section. The progress notes' page lists nothing more than: "7/19/80 house call chiro treatment $130; 7/20

house call Sunday 2 x $260; 7/21 house call chiro treatment $130; 7/22 house call chiro treatment $130." C-1 in Evidence, the insurance claim form, lists as a diagnosis "acute chronic lumbar radiculitis," but the data on the patient record, while consistent with that analysis, is scanty indeed and does not address or support the 4 days of treatment for which he billed.

Dr. Smith testified that he has been in private practice since 1976. He said he does not recall ever having discussed his fee range or basis for billing with other chiropractors until he was served with this complaint and does not know if other chiropractors charge differently. During 1980-81, it was his custom to charge $25-30 for an in-office patient visit; he also says he charged $60 per hour. (We note that the former is consistent with the other evidence before the Board. However we observe that an "hourly rate" has many ramifications and is not necessarily simply another way of arriving at the same calculations.) Dr. Smith states that he charged both Walton and Alwill $60 per hour including portal-to-portal time, and twice that amount for Sunday. He agreed that the services rendered to these patients did not take him away from his office patients, as these calls were not made during regular office hours. Instead, he says he charged them extra <u>because</u> it was not a regular office day and did so "to discourage house calls." Questioned as to his current ability to recollect how much time he actually spent with Alwill in 1980 and Walton in 1981, since he says he has seen 40-50 patients per week since that time, he responded that he

knows because he writes it down. He then admitted that it is written nowhere on the Alwill record and it is handwritten on the typed Walton insurance claim form only because his charges had already been questioned by the insurance carrier.

Dr. Smith offers as primary defenses: (1) he calculates his fees on an hourly basis rather than per patient visit or per type of service; (2) he believes he is entitled to charge for health care services as a chiropractor the same range of fee that he or others could command for their services on an hourly basis as expert witnesses in malpractice litigation; (3) he states that he informed both patients of his fees in advance and that each agreed to same; (4) he had no notice from the Board of Medical Examiners that his fees might be improper; (5) the Board has no authority to conduct this hearing; rather, it must be conducted by the Office of Administrative Law. This last claim is so frivolous in light of the express language of N.J.S.A. 52:14F-8(b) that it will not be addressed further.

After considering the testimony and reviewing all of the documents, we make the following findings of fact. Dr. Smith has been a licensed chiropractor in this State since 1976. We find that Mrs. Walton sought his services on October 24, 1981. She was in considerable pain but not so much that she could not drive herself to his office. We are entirely satisfied as to Mrs. Walton's credibility in recounting her several encounters with Dr. Smith. In particular, we believe her testimony that she inquired about his

fee and that he evaded her question with a response assuring her that she need not be concerned because the insurance company would pay for the bill; that he suggested she phone him later that Saturday to tell him how she felt because he was going to be in her neighborhood anyway, on his way to a meeting, and would come to see her if she needed him. Although the actual need for a house call Saturday night is not free of doubt, we are satisfied that Mrs. Walton did call and did accept his offer for the house call in the factual circumstances of his availability in the neighborhood. Dr. Smith did come to her house, along with his wife, at a time when he was not seeing other patients but was on his way to another affair in the area. He did perform some manipulations on Mrs. Walton's back. However, we find that he performed same not on a special table brought by him but while she lay, as directed, on her living room floor. We further find that the chiropractic problem that he attended here was not unusual nor did it require skill above and beyond that which is usual in the profession. With respect to the fee charged for the Saturday house call, while we will not make an affirmative finding that any particular fee is proper*, we can and do accept the testimony of Dr. Kovacs that at that time a fee in the range of twice the usual office patient visit fee (not an hourly fee) of $15-20 was reasonable value for usual chiropractic services outside the office. As for the Sunday, October 25 visit, we find

* Specifically, we do not make any finding that the "usual and customary fee" in the parlance of insurance companies, is a "proper" fee.

that Mrs. Walton did telephone Dr. Smith to tell him that she was better and that he should not come to her house. We find further that notwithstanding this, he persisted in coming to the house, bringing his wife and child, since his primary reason for being in the area was that he was en route to a family occasion that day. We find that he exploited this opportunity by performing "house call services" that were not only not requested, but actively discouraged by Mrs. Walton. He compounded this impropriety by later sending her a bill charging at his super "Sunday rate."

The Board finds that, in marked contrast to Mrs. Walton, Dr. Smith was not a credible witness, and his answers were often evasive. On those occasions when he offered a specific answer, it was with respect to matters which, in the course of professional practice, are usually documented in the patient's medical record; his records do not support his testimony. Further, although his attorney at one point began to question him hypothetically regarding "special equipment" and special services, at no time did Dr. Smith testify as to any unusual equipment or special skills utilized by him on Mrs. Walton or Mr. Alwill. Nor can we infer any such special services from his inadequate patient records.

With respect to the treatment accorded to patient Alwill, while we give some weight to his affidavit indicating agreement to the fee, we are troubled by his failure to respond to a duly served subpoena, especially since the vaguely worded affidavit was prepared by defense counsel. In any event, we hold that a simple agreement

by a patient to pay a certain fee is not dispositive or binding on this Board with respect to the propriety of a fee which is determined by knowledgeable professionals to be clearly unreasonable and unconscionable. Furthermore, the patient record prepared for Alwill by Dr. Smith is inadequate to support billing for services at the rate shown here. Although Dr. Smith testified that on each of the four consecutive days of house calls the patient needed over two hours of chiropractic care and could not even walk, we note the anomaly of not a single follow-up office visit thereafter.

With regard to the time spent, we accept as accurate and dispositive Dr. Kovacs' testimony that chiropractic manipulation, where appropriate, is usually performed in 15-30 minutes. Time exceeding that is not in fact chiropractically productive. Obviously, time spent "visiting" the person after the treatment is not billable time. In any event, we accept Dr. Kovacs' observation that a reasonable fee range for a house call at that time could be twice the usual office visit fee, and would not have exceeded $40-50 even if on a weekend or holiday, and that this increase over the usual office fee already includes compensation for the factors of distance and personal inconvenience to the doctor. It is unacceptable for a health care professional to demand a special "Sunday" and holiday fee. We give little, if any, weight to the variety of views expressed in R-4, the package of unsworn letters solicited by respondent from several private practitioners in light of the varying or unstated foundations for their views. The significance

of their opinions is at the least neutralized by the opposing views of the ten members of the Peer Review Committee. Further, the opinion of the one writer who appeared to know the fees charged in the present case was not persuasive when compared with Dr. Kovacs' testimony.

The Board's rule prohibiting excessive fees was first adopted on October 1, 1981.* The rule prohibits a licensee from charging an excessive fee for services. Section (b) of the rule states that: "A fee is excessive when, after a review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the fee is so high as to be manifestly unconscionable or overreaching under the circumstances." Section (c) sets forth significant factors in assessing the appropriateness of the fee in any given circumstances.** These factors are equally

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* It was then designated as N.J.A.C. 13:35-6.19. In the recodification process concluded on August 17, 1983, it was re-adopted as N.J.A.C. 13:35-6.11. Its provisions were unchanged.

** "(c) Factors which may be considered in determining whether a fee is excessive include, but are not limited to, the following:

1. The time and effort required;
2. The novelty and difficulty of the procedure or treatment;
3. The skill required to perform the procedure or treatment properly;
4. The likelihood, if apparent to the patient, that the proper treatment of the patient will preclude the licensee from remuneration from other sources;
5. Any requirements or conditions imposed by the patient or by the circumstances;
6. The nature and length of the professional relationship with the patient;
7. The experience, reputation and ability of the licensee performing the services;
8. The nature and circumstances under which services are provided. Unless services are provided during an emergency or other circumstances where opportunity, custom and practice will preclude discussion prior to the rendition of such services, the licensee shall, in advance of providing services, specify or discuss and agree with the patient, the fee or basis for determination of the fee to be charged."

applicable to cases arising prior to the express statements in the rule, as they are all based upon common sense, or are fundamental to the therapist-patient relationship, or derived from the special prerogatives and responsibilities inherent in an activity regulated by the State and permitted only to those having demonstrated the good character and professional training required by law. Failure to observe these strictures subjects the licensee to sanction for professional misconduct, a disciplinary category expressly added by the Legislature in 1978. With privilege must go responsibility.

In most professions, a standard range of fees will develop, which in the usual course makes allowance for the factors of costly education and development of special skills, the usual range of human complaints being presented for treatment, and the usual length of time needed to adequately address those problems. A set fee is not imposed by this agency; but out of the tradition of cumulative private practice encounters and drawing on the experience of fellow practitioners, some consensus of reasonable fees emerges. These ranges are based upon factors long known to practitioners. Most of those factors are set forth in the Board's rule. It will readily be seen that the rule has elements common to the rules of professional responsibility applied to other licensed professions, such as law. See, for example, Disciplinary Rule 2-106 for attorneys.

Applying the factors set forth in the rule to the treatment of Walton and Alwill, the Board* finds that the time spent by Dr. Smith with Ms. Walton on each house call was in fact no more than 10-15 minutes, which is also the usual time required for the treatment he gave. And while Mr. Alwill was not available to indicate the amount of time actually spent with him on the 4 housecalls, we find that neither the accepted standards of practice nor any information in Dr. Smith's records supports his contention that he spent 2 hours with the patient each time. We therefore find that, again, no more than the usual 10-15 minutes was the more probable amount of professional time expended. As we noted above, the evidence before us indicates that no unusual effort or skill was required for either of these patients. It was admitted that Dr. Smith lost no time from his other patients in order to see Walton and Alwill at home. There was no special professional relationship antecedent to his care of Mrs. Walton, who found his name in the telephone directory, and Dr. Smith mentioned nothing at all about his relationship with Mr. Alwill. In both cases, respondent claimed to have given advance notice of his housecall fee, but we have already found this to be untrue as to Mrs. Walton. It thus appears that the only special fee factor in both these cases was the urgent and incapacitating condition of

* Robert E. McCutcheon, D.C., recused himself from all consideration and deliberation on this case, noting that he might have had prior contact with the matter while a member of the Peer Review Committee. Assistance as rendered to the Board by Lawrence Rosenberg, D.C., of the Board's Chiropractic Advisory Committee, pursuant to N.J.S.A. 45:9-1.

the patients that necessitated a housecall instead of an office visit. In the absence of more comprehensive information about Alwill, we will accept Dr. Smith's testimony that the 4 housecalls were chiropractically needed. As for Mrs. Walton, we found that only the Saturday evening housecall was supportable. The remaining issue then is whether Dr. Smith's charges for those housecalls was excessive and unconscionable, and we are satisfied by at least a preponderance of the credible evidence that they were.

CONCLUSIONS OF LAW

The status of licensure as a health care professional means that one has demonstrated achievement of at least a certain minimum standard of specialized education, training and skill in a highly regulated form of work. It is highly regulated because of the inherent risks to the public health, safety and welfare of medical care or of chiropractic which is less than competent. Because much time, effort and expense has been necessary to attain that stage of competence, a practitioner has reasonable expectations of recompense: both monetary--because he/she performs work which most others cannot skillfully do, and honorary--because the licensee is granted and occupies a position of public trust. The license prerequisites have never stood alone; they have always been accompanied by the requirement of good moral character (as a

physician licensed by the Medical Board since 1894; as a licensed chiropractor, since the first licensing Act of 1920). No matter how diminished certain older concepts may be in today's commercialized world, that phrase of good character must still retain the concept of integrity and fair dealing. It must exclude overreaching: taking advantage of those persons who, desperate in the immediacy of their pain, do not know that there may be a simple, well understood cause and a routine treatment. That which is well understood and manageable by the average professional does not become priceable as a luxury simply because it is not known to lay persons. Some sense of balance is essential.

We reject respondent's contention that he can charge whatever he wishes, so long as he informs the patient. Such an assertion fails to recognize that in most (but not all) cases, the sick patient does not know the reasonable value of the medical service to be rendered and trusts the doctor to be announcing a fair fee. While in the present matter, we find that Dr. Smith did not disclose his fee to Mrs. Walton before or even shortly after commencement of his services to her, the affidavit by patient Alwill does purport to have knowingly accepted the fee charged. We hold that even where this has in fact occurred, the fee may be regarded as exorbitant and unconscionable according to the professional testimony before us.

We further reject Dr. Smith's purported comparison between his fee for treatment and his fee for testimony in court. We need not close our eyes to the typical difficulties of both parties to litigation in securing experts to support their views. It is well known that even plaintiffs with meritorious claims often have extraordinary problems finding a physician who will be willing to suffer the problems attendant upon participation in a lawsuit, e.g., the inconvenience and often total disruption of office schedules for reports, interrogatories, depositions, etc., and the unpredictable dates and length of time involved in court appearances. All this, of course, in addition to the open hostility of some peers who feel collectively threatened by a physician who believes he/she recognizes malpractice and is willing to say so on behalf of the plaintiff. Such witnesses may well command fees different from those they would charge in their regular professional work. In short, expert testimony is not a suitable analogy to regular professional work and we reject it as justification for Dr. Smith's excessive fees.

When he suggests that lawyers and certain other licensed professionals charge very high fees, we must confine ourselves to noting that those professionals are licensed either by the New Jersey Supreme Court or by their own licensing boards. When the public makes appropriate complaint, we have no doubt that

those entrusted with the task of regulating those professions in the public interest will fully carry out their responsibilities. The fees this respondent charged for housecalls shocked the conscience of the expert witness and of the professional and lay members of this Board. Dr. Smith's deliberate attendance at and billing for an unnecessary and undesired house call is additionally reprehensible.

Billing an excessive fee is particularly troublesome when the bill is sent directly to a third party insurance carrier who has no personal knowledge of the level of services rendered or, indeed, whether the statement of services rendered accurately reflects what was done. The interposition of another layer of clerical processing inevitably makes the detection of fraud and abuse more difficult and we can assume that those inclined to abuse their privileges are well aware of this and rely upon it to carry out their improper conduct. Since the effect of unwitting payment by insurance carriers of inflated bills inevitably causes that injury to be borne by the public at large, this Board has traditionally regarded insurance abuse as a matter of special concern.

In summary, we find that certain charges in the Complaint have been proved by a preponderance of the credible evidence. In Count I, there are insufficient proofs to support the charges

of misrepresentation and gross malpractice respecting patient Alwill, and those charges are therefore dismissed. We cannot speculate on whether this result would have obtained had he appeared to discuss his treatment and the contents of his affidavit. We do, however, find that the fees for each of the four house calls made to him were unconscionably high, and this constitutes four separate instances of professional misconduct, N.J.S.A. 45:1-21(e). In Count II, wefind that Dr. Smith did perform chiropractic services in a technically acceptable manner for Mrs. Walton and we do not find gross malpractice. We do find that Dr. Smith engaged in misrepresentation and deception both in evading disclosure of his fees even when asked by Mrs. Walton, and in misrepresenting that the fee would be reasonable and conveying the false pretense that it would therefore necessarily be paid by the insurance carrier. We find professional misconduct in that, although the making of the Saturday evening housecall was chiropractically reasonable in the circumstances, the fees charged for the brief visit were grossly excessive and unconscionable in violation of N.J.A.C. 13:35-6.19(b) and thereby also constitute professional misconduct, N.J.S.A. 45:1-21(e).

In Count III, we find grossly excessive and unconscionable respondent's "Saturday and Sunday house call rates" of $90 and $160, especially in light of our finding that the visit did not exceed 10 or 15 minutes, in contrast to respondent's

representations. This constitutes violation of N.J.A.C. 13:35-6.19(b), misrepresentation and deception, N.J.S.A. 45:1-21(b) and professional misconduct, 45:1-21(e). In Count IV, we find that Dr. Smith insisted upon rendering chiropractic services to Mrs. Walton on October 25 (Sunday) at her home although she had contacted him earlier and had expressly told him she was much better and did not want his services at that time. Billing for unnecessary and unrequested services--indeed, services that Mrs. Walton tried to reject--constitutes dishonesty and misrepresentation, gross malpractice and professional misconduct, N.J.S.A. 45:1-21(b), (c) and (e).

After announcement of these conclusions of law on the record, respondent was given the opportunity to speak in mitigation of penalty. His attorney spoke on his behalf, again arguing that respondent had had no fee "guidelines" or notice of the impropriety of his conduct, and stressing that both patients had been in dire straits when they first consulted him and both had improved under his care. As noted above, we reject the suggestion that respondent was entitled to have some type of specific fee schedule. He himself notes that he had never discussed the subject with any of his peers, nor had he ever consulted this Board for guidance on the subject. Even if respondent did not himself recognize the impropriety of his earlier conduct, he was surely on notice from the insurance carrier at the time of the Alwill claim, and yet he proceeded to continue his overreaching a year and a half later with the Walton claim. We

take all of the above into consideration, and we consider also the three permissible purposes for a licensing agency to impose sanctions: punishment per se of the offender, possibilities of rehabilitation in the offender, and that result considered again in light of the need to deter other licensees from the wrongful conduct. In this case, the conduct was egregious; there were no circumstances which we regard as mitigating, and the need for deterrence is substantial.

For good cause shown,

IT IS on this 4th day of January 1984

O R D E R E D that pursuant to N.J.S.A. 45:1-25 respondent is assessed a monetary penalty of $500 as to Count I, $500 as to Counts II and III combined, and $1,000 as to Count IV, totalling $2,000. He is also assessed costs of the transcript of hearing November 9, 1983 and December 14, 1983 including attendance of the shorthand reporter*; and it is further

O R D E R E D that his license to practice chiropractic in this State is suspended for one year; said suspension shall be stayed on condition that he shall promptly issue to patients Alwill and Walton a billing statement adjusted to charge no more than a reasonable fee for services reasonably necessary (deleting the Sunday, October 25, 1981 to Mrs. Walton entirely), refunding the excessive fees where already paid by Mr. Alwill or an insurance carrier

* The Board office shall provide to respondent true copies of the vouchers of the reporting service showing these charges, which shall then be incorporated by the Board office into this order.

on his behalf. Proof of adjusted bills and refunds shall be submitted to the Board within 10 days of service of this order on respondent's attorney; and it is further

O R D E R E D that henceforth respondent shall fully discuss with his patients all services to be rendered, and the anticipated fees therefor. Such discussions shall be in advance of the rendering of services. All fees shall be reasonable for the value of the services rendered. Respondent shall henceforth prepare and maintain a proper patient record documenting the services which he performs, including extent of physical examination or any diagnostic tests performed, physical or x-ray findings, diagnosis or analysis, treatment planned, description of the type and location of adjustment given to the patient, results of the adjustments and remarks concerning the patient's progress between office visits.

THIS ORDER IS EFFECTIVE UPON SERVICE.

STATE BOARD OF MEDICAL EXAMINERS

By _____
Edwin H. Albano, M.D.
President

LIST OF EXHIBITS

Marked into evidence were the following:

C-1	Physician's statement submitted by Dr. Smith to Albert Alwill's insurance company, undated, for services 7/19, 7/20, 7/21, and 7/22/80.

Dr. Smith's patient records for Mr. Alwill:

C-2a	Chiropractic physical, orthopedic, neurological examination, undated
C-2b	List of common tests and location for results
C-2c	Progress notes page
C-3	Bill for patient Kathleen Walton dated 2/1/82
C-4	Attending physician's statement submitted by Dr. Smith to Mrs. Walton's insurance company, undated, for services 10/24, 10/25, and 10/26/81
C-5a	Walton chiropractic physical, orthopedic, neurological examination dated 10/24/81
C-5b	List of common tests and location for results
C-5c	Charts for spinal examination, vertebral, and other analysis
C-5(d)	Progress notes page
C-6(a-j)	Peer Review Work Sheets, originals, by 10 chiropractors
C-7	Robert J. Kovacs, D.C., curriculum vita
R-1 Ev.	Walton patient comment sheet with entries dated 10/26/81, 10/31/81
R-3 Ev.	Affidavit of Albert Alwill, dated 9/19/83
R-4	Pkg. of 12 original letters from chiropractors on respondent's behalf