

Effective August 24, 2004



Protecting, maintaining and improving the health of all Minnesotans

August 23, 2004

Mr. Alan James Smeby

Re: MDH File Number: OCAP-200343

Dear Mr. Smeby:

Based on my review of facts and law in this matter, I have determined to revoke your right to provide Unlicensed Complementary and Alternative Health Care services, which includes massage therapy, as you have engaged in prohibited conduct as defined in Minnesota Statutes, section 146A.08, subd. 1 (a) conviction of a crime reasonably related to engaging in complementary and alternative health care practices; (c) failure to self-report (d) engaging in sexual contact with a client or former client or engaging in contact that may be reasonably interpreted by a client as sexual; (f) conduct likely to deceive, defraud, or harm the public or demonstrating a willful or careless disregard for the health, welfare, or safety of a client; and, (g) undertaking or continuing a professional relationship with a client in which the objectivity of the practitioner would be impaired. This action is authorized pursuant to Minnesota Statutes, section 146A.09, subd. 1.

You have the right to challenge this decision in a contested-case hearing as provided under Minnesota Statutes, chapter 14. Requests for a hearing should be made in writing and include specific grounds for challenging the Department's decision. If you wish to request a hearing, please send, deliver, or fax a written request, within 30 days of your receipt of this letter, to:

Susan Winkelmann, Investigations and Enforcement Manager
Minnesota Department of Health
85 East Seventh Place, Suite 300, P.O. Box 64882
Saint Paul, MN 55164-0882 (Fax: 651/282-3839)

If you have any questions about this matter, please contact Susan Winkelmann at 651/282-5623.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Giese".

David J. Giese, Director
Health Policy, Information and Compliance Monitoring Division
Minnesota Department of Health
85 East Seventh Place, Suite 300, P.O. Box 64882
Saint Paul, MN 55164-0882

cc: Susan Winkelmann, Manager of the Investigations and Enforcement Unit

OFFICE OF UNLICENSED COMPLEMENTARY AND ALTERNATIVE HEALTH CARE
PRACTICE - HEALTH OCCUPATIONS PROGRAM
MINNESOTA DEPARTMENT OF HEALTH

Re: in the matter of Alan James Smeby

AUTHORITY AND LEGAL REQUIREMENTS

1. Minnesota Statutes, section 146A.09, subd. 1, provides that the Office of Unlicensed Complementary and Alternative Health Care Practice (hereinafter "OCAP") within the Minnesota Department of Health (hereinafter "Department") has the authority to revoke, suspend, censure, reprimand or impose limitations or conditions on an unlicensed complementary and alternative health care practitioner when there is a violation of law as defined in Minnesota Statutes, section 146.08, subd.1.
2. Minnesota Statutes, section 146A.08, subd. 1, defines the following as prohibited conduct and grounds for disciplinary action: (a) conviction of a crime, including a finding or verdict of guilt, an admission of guilt, or no contest plea, in any court in Minnesota or any other jurisdiction in the United States reasonably related to engaging in complementary an alternative health care practices; (c) failure to comply with self reporting requirements; (d) engaging in sexual contact with a client or former client or engaging in contact that may be reasonably interpreted by a client as sexual; (f) conduct likely to deceive, defraud, or harm the public or demonstrating a willful or careless disregard for the health, welfare, or safety of a client; (g) undertaking or continuing a professional relationship with a client in which the objectivity of the practitioner would be impaired.

FACTS

1. During all times herein, Practitioner has been, and is subject to, the jurisdiction of the Department because Practitioner engaged in activities specified in Minnesota Statutes, section 148A.01, subd. 4, (a)(17), specifically, bodywork, massage, and massage therapy.
2. On October 23, 2001, Practitioner telephoned the Department requesting information about the OCAP law. This information was mailed to the Practitioner on October 24, 2001.
3. On December 16, 2002, in Goodhue County Court, City of Red Wing, MN, Practitioner pled guilty to two counts of Criminal Sexual Conduct in the fifth-degree, and entered an Alford plea on a third and separate count of Criminal Sexual Conduct in the fifth-degree. Fifth-degree criminal sexual conduct means Practitioner intentionally engaged in non-consensual sexual contact and it is a gross misdemeanor.
4. The established facts of Count I are as follows: On or about November 15, 2001, Practitioner provided massage therapy at his home in Red Wing, MN to Client 1.

During the massage, Practitioner had contact with the breasts of Client 1. Practitioner agreed this contact with Client 1 was with sexual and aggressive intent.

5. The facts of Count II are as follows: On October 16, 2001, Practitioner provided massage therapy to Client 2 at his home in Red Wing, MN. During the massage therapy session Practitioner had contact with the breast area of Client 2. Practitioner agreed that this contact was done with sexual and aggressive intent.
6. Practitioner entered an Alford plea on Count III. Client 3 alleged Practitioner had sexual contact with her during a massage class at the Red Wing Technical College. Practitioner agreed that a reasonable jury would convict him of fifth-degree criminal sexual conduct based on the information presented by Client 3.
7. With regard to Counts I and II, and for the purposes of massage therapy practice, Practitioner agreed that Clients 1 and 2 were clients of his massage therapy.
8. Based upon testimony and the plea petition, the Court accepted Practitioner's pleas and adjudicated him guilty of three counts of Criminal Sexual Conduct in the fifth-degree, Minnesota Statutes 609.3451 subd. 1(1), on December 16, 2002.
9. Practitioner did not self-report to the Department that he was charged with, and convicted of, Criminal Sexual Conduct in the fifth-degree.

VIOLATIONS

1. Practitioner violated Minnesota Statutes, section 146A.08, subd. 1 (a) conviction of a crime, including a finding or verdict of guilt, an admission of guilt, or no contest plea, in any court in Minnesota or any other jurisdiction in the United States reasonably related to engaging in complementary or alternative health care practices; (c) failure to comply with self-reporting requirements; (d) engaging in sexual contact with a client, or former client, or engaging in contact that may be reasonably interpreted by a client as sexual; (f) conduct likely to deceive, defraud, or harm the public or demonstrating a willful or careless disregard for the health, welfare, or safety of a client; (q) undertaking or continuing a professional relationship with a client in which the objectivity of the practitioner would be impaired.

DETERMINATION

1. Practitioner's right to provide Complementary and Alternative Health Care should be revoked.