

Massage Clinic
Massage Therapist, Mr B

A Report by the
Deputy Health and Disability Commissioner

(Case 20HDC01182)

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Executive summary

1. This report highlights the importance of obtaining informed consent for massage treatment to sensitive areas and for massage therapists to meet professional and ethical standards under the Code.

Findings

2. A massage therapist did not communicate adequately with a client and did not provide her with the information she was entitled to. He did not specifically mention his intention to massage her breasts and abdomen and seek her consent to this. A client cannot give consent without first being adequately informed as to the proposed massage sites. It is not sufficient to assume that a client has given informed consent because the client does not object to specific actions. The massage therapist failed to inform the woman adequately and, accordingly, breached Right 6(1) of the Code. It follows that the woman was not able to give informed consent and, accordingly, the massage therapist also breached Right 7(1) of the Code.
3. The massage did not meet accepted standards. The massage clinic had employee rules which state that under no circumstances should therapists touch the sensitive parts of the client's body, including the front chest and inner thighs.
4. Although we have been unable to gain confirmation that the massage therapist was aware of these rules it was inappropriate for the massage therapist to massage the woman's breasts, and unacceptable to expose her breasts and abdomen without first warning her that this was his intention and obtaining her prior consent. Accordingly, it was found that the massage therapist did not meet professional and ethical standards and breached Right 4(2) of the Code. The massage therapist also did not take adequate steps to protect, maintain, or respect Ms A's privacy and, accordingly, breached Right 1(2) of the Code.

Recommendations

5. The Deputy Commissioner recommended that the massage therapist apologise to the woman and consider registering with Massage New Zealand to obtain peer support and professional development particularly on acceptable standards of client care, practice, and ethics.
6. The Deputy Commissioner recommended that the clinic apologise to the woman; prominently display the Code of Rights and a complaint process; develop a client registration form for completion before a massage; implement a robust system for ensuring completion of the forms (and audit staff compliance over a three-month period); develop a policy outlining what a relaxation massage entails; encourage and support staff to register with Massage New Zealand; provide all members of staff with an anonymised version of this report; and ensure their employee rules which state that under no circumstances should therapists touch the sensitive parts of the client's body, including the front chest and inner thighs are adhered to. The Deputy Commissioner recommended that every client is provided with clean and freshly laundered draping and bed linen, and that an audit of one massage a

week over three months is undertaken by an appropriate person recommended by Massage New Zealand to ensure that appropriate standards of hygiene are being maintained.

Complaint and investigation

7. The Health and Disability Commissioner (HDC) received a complaint from Ms A about the services provided to her by Mr B at the massage clinic (the clinic). The following issues were identified for investigation:
 - *Whether the clinic provided Ms A with an appropriate standard of care in June 2020.*
 - *Whether Mr B provided Ms A with an appropriate standard of care in June 2020.*
 8. This report is the opinion of Deputy Health and Disability Commissioner Deborah James, and is made in accordance with the power delegated to her by the Commissioner.
 9. The parties directly involved in the investigation were:

Ms A	Consumer
Mr B	Provider/massage therapist
Massage clinic	Provider/massage clinic
 10. Further information was received from the New Zealand Police.
 11. Independent expert advice was obtained from a massage therapist, Mr Barry Vautier (Appendix A).
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Information gathered during investigation

Introduction

12. This report considers the appropriateness of a massage Mr B provided to Ms A at the clinic on 21 June 2020, including whether informed consent was obtained.

New Zealand Police investigation

13. On 5 July 2020, Ms A provided a statement to the New Zealand Police (NZ Police) outlining her concerns about a massage she received from Mr B at the clinic. On 12 August 2020, NZ Police interviewed Mr B as part of an indecent assault investigation. NZ Police told HDC that there was sufficient evidence to proceed to prosecution. As Ms A did not want to endure a court process, NZ Police issued Mr B with a warning. The NZ Police file was forwarded to HDC.

Massage clinic

14. The clinic is located in a shopping mall and offers relaxing massage. The clinic told HDC that massage shops in large shopping malls in New Zealand are operated in a disciplined manner and have formed their own unique business models, and are recognised and appreciated by consumers.

Mr B

15. Mr B told NZ Police that around 2005 he trained as a physiotherapist for three years, in his country of origin, and after completing his training he worked for four or five years.
16. Mr B has been employed as a massage therapist at the clinic since December 2014. Mr B is not a member of, or affiliated with, any relevant professional association.

21 June 2020*Full body massage*

17. On 21 June 2020, Ms A had a 60-minute relaxation full body massage at the clinic.
18. The clinic told HDC that a full body massage includes massage of the head, neck, shoulders, arms, back, and legs, but does not include the front part of the body (the chest or the abdomen). Mr B told NZ Police that when he provides a full body massage, he starts by massaging the client's upper back, then the lower back, and then the lower part of the body.
19. Mr B stated to NZ Police that before carrying out a whole body massage, some clients may provide him with instructions. For example, a client may ask him to massage only their back or not massage their legs. Mr B said that if the client has no specific instructions, then "it is technically agreed" that he massages the client's whole body because that is what they have paid for.
20. Mr B told NZ Police that some clients make it clear that they do not want their breasts massaged, and other clients specifically ask for their breasts to be massaged. Mr B told NZ Police that he massages clients' breasts "in accordance with the different age of the clients", but he provided no explanation of what he meant by this.
21. Mr B explained that he does not massage a client's breasts if they leave their bra on. NZ Police enquired whether, as a matter of course when undertaking a full body massage, he massages women's breasts and the breast area if they are not wearing a bra. Mr B responded that before he massages a woman's breasts he asks beforehand, or asks the client, "do you require me to do the massage".
22. Mr B told NZ Police that massaging female clients has the "function of health care" to "increase circulation", and there are a lot of acupuncture or pressure points to massage. Mr B said that when he massages the chest area or breast he massages around the breast.
23. Mr B told NZ Police that massaging the chest area takes about five to ten minutes, and that after massaging the chest area he massages the stomach area.

Communication prior to the massage

24. Ms A told NZ Police that Mr B did not ask her what areas of her body she wanted massaged.
25. The clinic told HDC that there is no consultation record, and Ms A did not fill out any forms.
26. Mr B told NZ Police that the massage took place on a weekend, and it was quite busy and he did not talk to Ms A about anything before the massage. NZ Police asked Mr B whether there was any documentation, such as a form that clients can complete and circle areas that they either want or do not want massaged, and Mr B said that there was no such documentation.
27. Mr B also told NZ Police that there was no communication between himself and Ms A except for him asking her to take off her clothes and shoes and leave her underwear on. Ms A's account is consistent with this.
28. Ms A and Mr B both told NZ Police that the only clothing she had on during the massage was her underpants. Mr B told NZ Police that he thought Ms A seemed quite familiar with the process because she went in and took off her clothes.

Communication throughout the massage

29. Ms A told NZ Police that Mr B barely spoke to her throughout the massage.
30. Mr B told NZ Police that when massaging each part of Ms A's body, he would ask her, "Is that okay?" Mr B stated to NZ Police that by asking Ms A "is that okay" he was asking whether the massage and the strength of the massage stroke used was satisfactory.

Draping and massage of back

31. Ms A told NZ Police that she lay on the bed face down and covered herself with the large white bathroom-type towel that was provided. Mr B told NZ Police that he "went in and started doing the job".
32. Ms A told NZ Police that at some point at the beginning of the massage, Mr B rearranged the towel on her and started the massage at her neck and worked his way down her back to the top of her buttock cheeks. Ms A explained that at this point Mr B had moved the towel down to the top of her underwear, and at that point her entire back was exposed.
33. Ms A stated that Mr B folded the towel in half, moved it over half of her upper body (exposing the lower section of her body), and massaged her legs. Ms A told NZ Police that she knew that this was not what usually happens, and she thought it was "a bit odd".
34. Mr B told NZ Police that he massaged Ms A's thighs, lower legs, and buttocks.
35. Mr B told NZ Police that he found draping difficult, as towels often slip and because oil can stain the towels.

Massage of Ms A's front

36. Ms A told NZ Police that she turned over and initially the towel was covering her up to approximately her bra line.

37. Mr B told NZ Police that after he finished Ms A's back, he asked her whether she wanted to "do the front", and she said she "wanted it", then she turned over. Mr B told NZ Police that the massaging of Ms A's front was entirely consented by her because it was not possible for him to turn Ms A around.
38. Mr B told NZ Police that he lifted up her towel to continue the massage, and he asked her, "Is that okay?" Mr B said that Ms A replied "okay", and she did not resist or decline.
39. Ms A told NZ Police that Mr B first massaged the front side of her neck, then her pectoral muscles, and then proceeded to massage her chest area. Ms A stated that Mr B then massaged the top of her breasts and then down the side of her breasts. She said that she thought this "was really off". Ms A stated that at this point, Mr B had moved the towel down, and her breasts were completely exposed.
40. Ms A told NZ Police that Mr B then massaged around her breasts, and that when he did this, he stood at the top of her head looking down towards her feet. She explained that he massaged down the side of her breasts, then made a circle underneath her breasts, and his fingers came up between her breasts (from her breastbone to the top of her chest) and, at that point, the palms of his hands made contact with her nipples. Ms A told NZ Police that he massaged around her breasts a couple of times, and that the contact with her nipples happened once. Ms A said that the contact Mr B made with her nipples was the part of the massage that she found most inappropriate, and that she felt had "crossed the line" and had made her feel "gross". Mr B told NZ Police that he did not touch Ms A's nipples.
41. Mr B told NZ Police that during the massage Ms A was lying on the table with her breasts fully exposed. He said that Ms A consented to having her breasts massaged, and consented when he lifted up the towel to carry out the breast massage. NZ Police enquired how Ms A gave consent, and Mr B said that it was when he said "are you okay" and Ms A responded "okay". Mr B also said that he could not clearly remember how he expressed it, but that Ms A definitely did not decline. In response to the provisional decision, Ms A told HDC that Mr B did not ask her if she was "okay".
42. Mr B further said to NZ Police that as Ms A was an adult, if she minded him massaging her breasts she would have told him on the spot, but she did not express any concerns.
43. Ms A said that she never asked for, or agreed to have, Mr B touch her breasts, and she found it completely inappropriate.
44. I note the advice from my massage therapy adviser that "often a client may feel vulnerable on the massage table simply by being in a powerless horizontal position and by possibly being disrobed of some clothing. This position of vulnerability and relative powerlessness may mean a client is unable to verbalise their distress."

Massage of abdomen and front of legs

45. Ms A told NZ Police that after massaging her breasts, Mr B turned away (she thinks to get some more oil), and she pulled the towel back up as she felt really uncomfortable.

46. Ms A explained that when Mr B came back, she was lying on her back with the towel covering her up to her chest. Ms A said that Mr B then folded the towel back down and massaged her upper abdomen just under her breasts. Mr B then folded the towel back up over her breasts, exposed her lower body, and massaged her lower stomach area. He then massaged the fronts of her legs. Ms A could not recall where the towel was located whilst Mr B was massaging her legs.
47. Mr B stated to NZ Police that when he was massaging Ms A's abdomen, she did not say anything or express any concerns.
48. At the end of the massage, Mr B left the room and Ms A got up and got dressed and left. Ms A said that she felt completely violated as she walked out.

Subsequent events

49. On 25 June 2020, Ms A wrote to the clinic outlining her concerns about the massage. The clinic owner telephoned Ms A on 3 July 2020 and confirmed that a whole body massage did not include massaging clients' breasts.
50. Mr B sent a text message to Ms A on 4 July 2020, and said that a whole body massage usually included a breast massage and that clients could tell the therapist which body parts they did not want massaged, otherwise the therapist would do the massage as normal. Mr B stated that there had been "no unethical behaviour".
51. The clinic owner told HDC that after this incident, he instructed Mr B that he could no longer massage female clients.

Further information

Documentation

52. The clinic provided HDC with a copy of its client registration form, but said that most of their clients do not cooperate by filling it out. The clinic stated to HDC that as it provides relaxing massages, many clients come to the store and the massage is just a "dispensable consumption", and some new clients are so busy that they do not even wait for five minutes and go to other massage shops.

Towels and drapes

53. Mr B told NZ Police that it was not possible to use a fresh towel for each client, and they would change them if there were stains on the towels. Mr B said that towels and bed covers were changed at the end of each day, and the clinic owner washed them at the end of each day.
54. The clinic stated to HDC that the massage towels at the clinic are changed after every client, but the large towels used as an auxiliary cover over the client's own clothes are changed every day.

Training

55. The clinic told HDC that when a new staff member starts work at the clinic, they are provided with formal training to clarify their responsibilities. The clinic told NZ Police that Mr B had

received training that he must have a client's consent to massage any of their sensitive areas. The clinic later told HDC that staff are forbidden to massage the sensitive parts of clients.

56. The clinic told HDC that since 2011 it has provided staff members with a copy of the employee rules, which state:
- Commuting on time.
 - Always treat guests politely.
 - Listen to the needs of clients.
 - Explain the massage items patiently before starting.
 - Respect and protect the privacy of clients, and the curtains need to be tightened.
 - Always keep the store clean and hygienic.
 - Respect the beliefs and special needs of clients from certain ethnic groups.
 - Filling out the client registration form and keep the record.
 - Under no circumstances should you touch the sensitive parts of the client's body, including the front chest and inner thighs.
57. The clinic told HDC that Mr B was aware of these employee rules. Mr B did not respond to HDC's requests for confirmation regarding whether he was aware of the rules.

Responses to provisional opinion

58. Ms A, Mr B, and the clinic were given the opportunity to respond to the relevant sections of the provisional opinion.
59. Mr B and the clinic did not provide any further comments on the provisional opinion.
60. Where relevant, Ms A's comments have been incorporated into this report. Ms A said that she was disappointed that nothing had changed in Mr B's practice, and that it was very frustrating that Mr B was still employed by the clinic. Ms A stated that the unprofessional nature and behaviour of the clinic is not satisfactory for the massage profession.

Opinion: Mr B

Introduction

61. On 21 June 2020, Ms A visited the clinic for a 60-minute relaxation full body massage. The massage was undertaken by Mr B. The clinic told HDC that the full body massage includes the head, neck, shoulders, arms, back, and legs, but does not include the front part of the body (the chest or the abdomen). It is not disputed that during the massage, Ms A's breasts and abdomen were massaged.

Informed consent

62. Mr B told HDC that he considered that Ms A consented to the massage of her breasts and abdomen because she turned around and there was no resistance or decline when he asked her questions such as “is it okay” or “are you okay”.

63. My massage therapy advisor, Mr Barry Vautier, advised:

“[Mr B] seemed to assume that as she had consented to a full body relaxation massage, that it would include massage of the abdomen and breasts. The big departure from care is this assumption and lack of informed consent with his client by clarifying what body parts she wanted massaged or not.”

64. I agree. The employee rules stated that under no circumstances should therapists touch the sensitive parts of the client’s body. Even allowing for the possibility that Mr B communicated with Ms A as outlined above, it is insufficient. In my view, a reasonable person in Ms A’s position would expect to be explicitly asked to consent to the massage of sensitive areas such as the breasts and abdomen.

Communication during massage

65. Ms A stated that during the massage, Mr B barely spoke to her. In the evidence submitted to HDC, Mr B states that he would ask questions such as “do you require me to do the massage?” or “is that okay?” prior to carrying out a massage around any specific area, including the breasts and abdomen. Ms A stated that when Mr B was massaging her breasts, she thought that it was “really off” and, after it finished, she pulled the towel back up as she felt really uncomfortable.

66. Mr Vautier advised:

“Often a client may feel vulnerable on the massage table simply by being in a powerless horizontal position and by possibly being disrobed of some clothing. This position of vulnerability and relative powerlessness may mean a client is unable to verbalise their distress.”

67. Mr Vautier noted that Mr B seemed unaware of Ms A’s distress of having her breasts and abdomen exposed and massaged, and missed non-verbal cues. Mr Vautier also concluded that Mr B seems to have failed to maintain open communication throughout the massage.

68. I agree. In an intimate setting such as a full body massage, where the consumer is in a highly vulnerable position, a massage therapist must have due regard and heightened awareness of discomfort. This is particularly the case where sensitive areas are being massaged. I am concerned by Mr B’s lack of communication with Ms A during the massage to ensure that he was able to respond to her distress or discomfort.

Standard of massage

69. Ms A told HDC that on one occasion Mr B’s palms made contact with her nipples. Mr B denies touching Ms A’s nipples. It is often difficult to make a factual finding when the parties involved give conflicting accounts of events and there is an absence of other evidence.

However, I consider that Mr B has demonstrated a casual attitude towards inappropriate touching during massages, and this casts doubt on the veracity of his evidence. For this reason, I am satisfied that it is more likely than not that Mr B touched Ms A's nipples.

70. I have other concerns about the standard of Mr B's massage. First, as mentioned above, both parties agree that Mr B massaged Ms A's breasts and abdomen. Secondly, Ms A stated that her breasts were fully exposed whilst he massaged them. Mr B cited practical difficulties around ensuring adequate draping.
71. Mr Vautier commented that it is rare for a male to massage female breasts. There is a high risk of the male practitioner being misinterpreted around their intention. Mr Vautier noted that massaging of breasts would not normally be carried out with a relaxation massage.
72. Mr Vautier advised that the massage "does not fit in the standard of care and accepted practice of professional massage in New Zealand". In particular, Mr B failed to document Ms A's needs and potential medical conditions, he exposed Ms A's breasts, and Mr B's draping technique was inadequate.
73. I agree. I am left with the impression that Mr B's massage was unprofessional and lacking in respect of Ms A's privacy.

Conclusion

74. In relation to Mr B massaging Ms A's breasts and abdomen, I find that Mr B did not provide Ms A with the information to which she was entitled. Accordingly, I find that Mr B breached Right 6(1)¹ of the Code of Health and Disability Services Consumers' Rights (the Code). It follows that because Ms A was not given the information she was entitled to receive, she was not in a position to make an informed choice or give informed consent to the massage of her breasts and abdomen. Therefore, I also find that Mr B breached Right 7(1)² of the Code.
75. Mr B's massage of Ms A also did not meet accepted standards. The clinic had employee rules which include that under no circumstances should therapists touch the sensitive parts of the client's body, including the front chest and inner thighs. It was inappropriate to massage her breasts and nipples, and unacceptable to expose her breasts and abdomen without warning her that this was his intention and obtaining her prior consent. Accordingly, Mr B did not meet professional and ethical standards and breached Right 4(2)³ of the Code.
76. In carrying out the massage, Mr B also did not take adequate steps to protect, maintain, or respect Ms A's privacy. Accordingly, I find that Mr B breached Right 1(2)⁴ of the Code.

¹ Right 6(1) states: "Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive."

² Right 7(1) states: "Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent, except where any enactment, or the common law, or any other provision of this Code provides otherwise."

³ Right 4(2) states: "Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards."

⁴ Right 1(2) states: "Every consumer has the right to have his or her privacy respected."

Opinion: Clinic — adverse comment

Hygiene

77. Mr B told NZ Police that the bedcovers and the towels used for draping were reused by different clients during the day. The clinic told HDC that the massage cloths were changed for every client, but the large towel used as an auxiliary cover over the client's clothes was changed every day. Since HDC's investigation, the clinic has changed from using large towels that were washed every day, to using disposable massage sheets.
78. Mr Vautier advised that re-using towels and bedcovers is a risk to client health, owing to possible disease contamination. He said that clean draping must be applied and changed with every client to avoid cross-infection of disease, and for client comfort and professionalism. Mr Vautier also advised that all table and bolster (cushioning) surfaces should be fully covered and changed for each new client, and that the clinic should also be tidy and hygienic, as towels may be placed on surfaces prior to a massage.
79. Mr Vautier said that Mr B's repeated use of draping from one client to another was a serious breach of hygiene and disease control measures. Mr Vautier stated: "This would be considered a very serious breach of good practice."
80. The massage took place on 21 June 2020, two weeks into New Zealand moving into Alert Level One. I acknowledge Mr Vautier's comment that hygiene was especially important given the COVID-19 pandemic in New Zealand in 2020. I also acknowledge that the clinic has changed its practice, and now uses disposable massage sheets. I remind the clinic of the importance of ensuring that a new towel is used for each client, and that the clinic maintain appropriate hygiene practices.

Full body massage

81. There is conflicting evidence about whether the clinic allows its staff to carry out massages of sensitive areas. The clinic told HDC that staff are "forbidden" to do that, but also told NZ Police that informed consent must be obtained prior to massaging these areas. The clinic also told HDC that Mr B was aware of the rule that the front chest is an area not to be touched; however, in his text messages to Ms A, Mr B stated that a whole body massage includes the breasts.
82. The above does not paint a clear picture of what the protocols and procedures were around the massaging of consumers' sensitive areas, or that the clinic had communicated clear expectations of what was expected of staff in this regard. I have set out my recommendations below for the clinic to ensure consistency in the understanding of its staff regarding the clinic's position on massaging sensitive areas.

Documentation

83. The clinic told HDC that it has client registration forms, but most of its clients do not want to complete the form. The clinic explained that some new clients will not wait for five minutes, and they either give up or go to other massage shops, since there are many massage shops in a shopping mall. The clinic told HDC that in Ms A's case there are no consultation records, and Ms A did not fill in any forms.

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84. NZ Police asked Mr B whether there was any documentation such as a form that clients could complete and circle areas that they either wanted or did not want massaged, and Mr B told NZ Police that there was no such documentation.
85. Mr Vautier advised that the lack of documentation means that the safety of clients is a concern, as the clinic does not obtain medical information about whether clients are safe to massage. In addition, there is no ability to track changes in the client from one massage to another.
86. I agree with this advice. Although there are client registration forms at the clinic, it appears that the forms are not completed routinely. The forms provide a valuable prompt for staff, and a tool for consumers to relay important information and requests to the therapists. While I acknowledge that it is up to individual therapists to ensure that they give appropriate information and obtain consumers' informed consent, and that staff cannot force consumers to complete the forms if they do not wish to, I remind the clinic of the value such forms add to the informed consent process and the quality of care its service provides. If consumers are unwilling to complete the form, then staff could quickly go through the information with the consumer verbally, to ensure that important information is exchanged. I have recommended that the clinic implement a more robust system for ensuring completion of the forms, and audit staff compliance over a three-month period.
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Changes made

87. The clinic has changed from using large towels that were washed every day, to using disposable massage sheets.
88. Mr B has not made any changes to his practice.
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Recommendations

89. I recommend that Mr B:
- a) Provide a written apology to Ms A for his breaches of the Code. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms A.
 - b) Consider registering with Massage New Zealand to obtain peer support and professional development particularly on acceptable standards of client care, practice, and ethics. Mr B is to report back to HDC on this consideration within three weeks of the date of this report.

90. I recommend that the clinic:
- a) Provide a written apology to Ms A for the deficiencies identified in this report. The apology is to be sent to HDC within three weeks of the date of this report, for forwarding to Ms A.
 - b) Ensure that the Code of Rights and a process for clients to make complaints are prominently displayed at the clinic. Evidence of this should be provided to HDC within three weeks of the date of this report.
 - c) Develop a registration form for clients to complete before a massage and circle areas that they either want or do not want to be massaged, and provide evidence of this to HDC within three months of the date of this report.
 - d) Implement a more robust system for ensuring completion of the forms, and audit staff compliance over a three-month period. The clinic should provide evidence of this to HDC within three months of the date of this report.
 - e) Develop a policy outlining what a relaxation massage entails (e.g., which body parts are massaged), and provide HDC with a copy of the policy and evidence that all staff have read the policy, within six months of the date of this report.
 - f) Encourage and support staff to register with Massage New Zealand to obtain peer support and professional development.
 - g) Provide all members of staff with an anonymised version of this report and ensure their employee rules, which state that under no circumstances should therapists touch the sensitive parts of the client's body, including the front chest and inner thighs, are adhered to. The clinic is to provide evidence to HDC that this has occurred within three months of the date of this report.
 - h) Ensure that clean and freshly laundered draping and bed linen is always used for every client. An audit of one massage a week provided over three months is to be undertaken by an appropriate person recommended by Massage New Zealand to ensure that appropriate standards of hygiene are being maintained. A report of the findings is to be provided to HDC within six months of the date of this report.
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Follow-up actions

91. Mr B will be referred to the Director of Proceedings in accordance with section 45(2)(f) of the Health and Disability Commissioner Act 1994 for the purpose of deciding whether any proceedings should be taken.
92. A copy of this report with details identifying the parties removed, except the expert who advised on this case, will be sent to Massage New Zealand and placed on the Health and Disability Commissioner website, www.hdc.org.nz, for educational purposes.
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Addendum

93. The Director of Proceedings decided to take proceedings against Mr B.

Appendix A: Independent clinical advice to the Commissioner

The following expert advice was obtained from massage therapist Barry Vautier:

“Statement of qualification: Barry Vautier has over 30 years’ private practice in the massage industry in New Zealand. He qualified as a naturopath in 1990 and as a massage therapist in 1994. He holds a bachelor’s degree in health studies in massage from the New Zealand College of Massage and is a life member of Massage New Zealand (MNZ). He has held posts as education officer and president of massage associations. Barry has contributed to massage educational standards of practice in New Zealand and has been an educator of massage and health science for over 25 years. He is conversant with many styles of body therapy and massage techniques having been committed to ongoing professional development throughout his career.

Advice for the Health & Disability Commissioner Complaint:

I have compiled the following advice on professional standards and/or accepted practices in relation to whether the care provided to [Ms A] by [Mr B] was within acceptable standards of massage practice in New Zealand. I have drawn on the standards of the massage industry in New Zealand. These standards are set out in the New Zealand Qualifications Authority (NZQA) for certificate, diploma and degree levels of training, and in massage schools’ training documentation. The massage scope of practice of the NZQA certificate/diploma level of training is the application of relaxation massage to healthy individuals.

[Mr B] claims to hold a three-year long physiotherapy qualification as per his verbal claim in his police interview on page 33, but no translated documentary evidence of this has been forwarded.

Background of the complaint.

[Ms A] complained about the conduct of massage therapist [Mr B] during a full body massage she received at [the clinic] on 21 June 2020. [Ms A] received a massage from [Mr B] during which he allegedly massaged her breasts and nipples. [The owner and manager of the clinic] stated that breasts are not included in a whole-body massage but [Mr B] appears to confirm in emails included in the police files and in the police report that he touched these areas.

Claims.

- [The clinic owner] confirmed with [Mr B] that he massaged the breasts but not the nipples.
- [Ms A] says [Mr B] massaged her breasts and nipples.
- [Ms A] states that she did not give consent for her breasts to be touched or massaged. I have given advice whether the service provided to [Ms A] by [Mr B] was reasonable in the circumstances and why.

Comments have been made on:

1. Whether the massage as described by [Ms A] was within acceptable standards.
2. Whether the massage of the breasts and nipples is an acceptable part of a full body massage.
3. Whether it is usual practice for a massage therapist to get specific consent in advance to touch a female's breast and nipples.
4. Whether the process of covering described by [Ms A] was within acceptable standards.
5. Whether a massage therapist should communicate with a client during the massage regarding the strokes used.
6. Whether it is appropriate to re-use towels and bed covers throughout the day for different clients and only launder them at the end of the day.
7. What information if any should be collected and recorded regarding clients' medical or other information.
8. Any other matters in this case you consider warrant comment. For each of the above questions, advice has been given on
 - a. What is the standard of care/accepted practice?
 - b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?
 - c. How would it be viewed by your peers?
 - d. Recommendations for improvement that may help to prevent a similar occurrence in the future.

I have drawn on the various massage educational sources of industry standards of practice along with the Massage New Zealand (MNZ) code of ethics and standards of practice.

Documents.

(These public documents are attached separately.) The following broad categories have been considered:

- Initial assessment and history taking for new and returning clients.
- Information and consent processes adopted for new and returning clients.
- Draping of clients.
- Application of massage and documentation of sessions.
- Other points for consideration including interpersonal skills, client privacy, practice and personal hygiene, practitioner education, client safety, professionalism and legal requirements.

Comment: 1. Whether the massage as described by [Ms A] was within acceptable standards

a. Standard of care/accepted practice.

The massage as described by [Ms A] does not fit in the standard of care and accepted practice of professional massage in New Zealand. The main points of contention are:

- [Mr B] did not obtain informed consent for massaging [Ms A's] breasts.
- [Mr B] failed to document her needs and potential medical conditions.
- [Mr B] touched and/or massaged [Ms A's] nipples according to her. He denied this in the police report.
- [Mr B] left [Ms A's] breasts exposed whilst massaging her legs whilst face up (supine) as reported by [Ms A].
- The draping technique was inadequate for client safety and dignity as reported by [Ms A] in her police statement.
- The draping was used for previous clients and thus a risk to client health due to possible disease contamination as reported by [Mr B] and his manager [the clinic owner].

[Mr B] massaged [Ms A's] stomach without clear consent according to [Ms A]. Massaging the stomach is an area of sensitivity for many people and great care needs to be taken to obtain informed consent and get adequate feedback during the application of strokes.

- [Mr B] seems to have failed to maintain open communication throughout the massage and ensure ongoing informed consent. This is a stated requirement and breach of the MNZ code of ethics.

It's not clear from the evidence provided that [Mr B]:

- Clearly introduced himself.
- Explained his scope of practice prior to the massage once goals were set.
- Established with the client body areas not to be touched. (This seems to be an area of disagreement between the two parties pertaining to massaging the breast and nipples.)
- Explained to [Ms A] the protocol around the practitioner leaving the room for the client to undress and dress in privacy and knocking on the door before re-entering the treatment room.
- Established client-based goals for this session including areas to be treated, pressure, duration, based on the requirements of the client.
- Conferred with client around the type of treatment they want and sets goals for the treatment including areas to be treated; depth, speed, duration and possible outcome.

- Explained to the client what to expect from the treatment.
- Whether he gave clear instructions as to what clothing to remove as necessary for the treatment.
- Whether he got informed consent from the client about clothing removal.
- Whether [Ms A] was advised to leave her underwear ON ('knickers', briefs, underpants, jock straps). The reason for this is to ensure a client's dignity, provide a foundation to tuck draping into, and to help protect the client and practitioner against possible allegations of sexual misconduct. 'Bras' may be removed/unfastened with the client's consent. In this case [Ms A] removed her Bra and lay prone (face down) on the table but when in supine (face up) her breasts were not draped and she was left exposed. Both parties agreed she did have 'briefs' on although it seems [Mr B] failed to tuck draping into her underwear.
- During the treatment whether she was consulted around pressure for any changes of stroke, depth, speed or location on the body to ensure their safety and treatment needs are met. The practitioner should establish a feedback system where the client is in control over the pressure, speed and type of treatment given. Regularly conferring with the client during the treatment around depth (pressure), speed, and comfort gives confidence and a sense of safety for the client. Explanations should be given to the client about what to expect next in the treatment, as the practitioner moves from one area of the body to another. The client should be made aware of what strokes are being performed and why. Explanations should be given to the client if there is a variation to the goals of the treatment and gaining consent to vary them. For example, extending the treatment beyond or shorter than the agreed time.

It's unknown if [Mr B] demonstrated the following:

- Professional presentation: Self hygiene principles. Appropriate and clean clothing. Clean and short fingernails. Unobtrusive body odours and breath.

Also in question was [Mr B's] ability to:

- Be effective with communication and language skills:
- Apply language supportive to the client and the profession including: Clear verbal instructions throughout the treatment. Check that a client understands the instructions. Check for client comfort throughout the treatment. Respond to the client's verbal and non-verbal feedback — Considering changes of skin temperature, colour, body tension, relaxation, body movements, breathing patterns, facial responses, and general body language.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

It's not clear if [Mr B] asked [Ms A] for consent about body areas to be massaged or not. There may have been verbal consent and instructions given but these are not recorded.

This is a contentious issue as there may be a difference of opinion as to whether adequate verbal consent was established for body areas that were not to be touched. [Mr B] seemed to assume that as she had consented to a full body relaxation massage, that it would include massage of the abdomen and breasts. The big departure from care is this assumption and lack of informed consent with his client by clarifying what body parts she wanted massaged or not.

c. How would this be regarded by your peers?

This lack of informed consent would be regarded by peers as a breach of ethical standards and a serious lapse in good practice.

d. Recommendation.

That [the clinic] and [Mr B] receives further education around the ethical, legal and standards of massage practice as applied by professionally trained relaxation massage therapists in New Zealand. This includes documentation on an intake form on what areas should be massaged or not, even if the massage is a 'relaxation massage'. The following points, two and three, are commented on together.

2. Whether the massage of the breasts and nipples is an acceptable part of a full body massage.

3. Whether it is usual practice for a massage therapist to get specific consent in advance to touch a female's breast and nipples

a. Standard of care/accepted practice.

The standard of care in the MNZ code of ethics and standards of practice is not specific around massaging breasts as a part of a full body massage. Some clients may be comfortable with having their breasts massaged especially if there is some clear clinical reason such as breast tenderness or for lymphatic drainage. Men are usually comfortable with having their chests (breasts) exposed and massaged. Whatever the gender, specific informed consent should be obtained prior to massaging breasts. It's important to confer with the client during a breast massage to ensure client comfort and dignity. Other reasons to massage the chest area is to:

1. address specific muscles underlying the breasts such as pectoralis major. This can be performed with good draping so as not to expose the breasts.
2. address acupressure (acupuncture) points on the chest area. This however can also be performed through draping or light clothing. The nipples are generally considered an erogenous zone and like the genitals should not be touched or massaged. This applies to all genders. Massage of the breast is not a typical regimen for a relaxation massage. In some circumstances this may be acceptable with very clear informed consent from the client. If breast massage is sought by the client, typically the other breast not massaged at the time would normally be covered with draping. The abdomen would also be covered and the draping tucked/pinned under the armpit and body of the client. The nipples are considered erogenous zones of the body and are considered as non-touch areas of the body along with the genitalia.

[Mr B] failed in the police evidence to explain his rationale for massaging [Ms A's] breasts other than there are acupuncture points there. No explanation was given as to why he might massage acupuncture points with [Ms A].

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

Massaging the breasts across gender is particularly risky due to the possibility of it being considered a sexual assault. Nonconsensual breast massage may be considered an invasion of personal privacy. It is rare for a male to massage female breasts for this reason. There is a high risk to a male practitioner being misinterpreted around their intention. At times a massage therapist may massage the pectoralis muscle underlying the breasts but this is done with informed consent and close monitoring of depth and speed of stroke and for specific therapeutic effect. If a massage is considering acupressure (or acupuncture) points in the upper chest area this should be clearly verbalized to a client as to the reason and what effects the client may experience both during and after a treatment. This would not normally be done along with a relaxation massage. In this case [Mr B] failed in his duty of care of his client to clearly obtain informed consent for breast massage. [Ms A's] breasts were also left exposed while he massaged her legs in supine (facing up) which is a serious breach of conduct. Massaging or touching the nipples is considered a serious breach of care of a client and as such would evoke censure if it came to the attention of Massage New Zealand or in some cases legal authorities. In some cases, touching the nipples may be considered sexual assault of a client.

In this case [Mr B] may have failed in his duty of care. He denies touching [Ms A's] nipples but she is adamant he did. Often a client may feel vulnerable on the massage table simply by being in a powerless horizontal position and by possibly being disrobed of some clothing. This position of vulnerability and relative powerlessness may mean a client is unable to verbalise their distress. This may have occurred with [Ms A] in her experience with [Mr B]. They may not realise until much later that they have felt assaulted. This is why it is particularly important for informed consent both prior and during the application of massage strokes. Informed consent means the client is told about what is going to happen next in the massage such as a body location of stroke type, and then asked if it is alright to proceed. The client is informed so they have a choice about what happens to their body and thus feel empowered and safe.

c. How would this be regarded by your peers?

Massaging the nipples would be considered a serious breach of conduct and care for a client. This is taught in massage schools in New Zealand as a non-touch area. Massaging the breasts without informed consent is also considered a breach of ethical standards in the massage industry. In this event [Mr B] also left the breasts exposed while he massaged [Ms A's] legs and later wiped the oil off her breasts again without informed consent. This is considered a serious breach of privacy and ethical conduct which contravenes the MNZ code of ethics. [Ms A] probably felt unsafe and afterwards complained to [the clinic] who reimbursed her massage cost. Still unsatisfied with their explanations she pursued the matter with the Police.

d. Recommendations.

That [Mr B] does not massage a person's breasts without clear prior consent (which is also documented). If he is to massage the chest area he should confer clearly with his clients prior to and during the massage to ensure comfort and safety. I recommend [Mr B] gets additional mentoring training and mentoring. He should never massage nipples as these are considered erogenous zones.

[Mr B] and [the clinic] needs to have further education around the norms and scope of massage in New Zealand. I would strongly recommend their staff have more training in the areas of communication, informed consent and draping. (Covered next)

4. Whether the process of covering described by [Ms A] was within acceptable standards.

a. What is the standard of care/accepted practice

Draping (covering) should be done with client dignity and privacy and should adhere to the following four main principles:

- 1) Provide warmth to the client
- 2) Provide dignity to the client
- 3) Define the area being massaged. The rest of the body should be covered and the draping/covering tucked into underwear or clothing.
- 4) Massage strokes should not be performed under draping or clothing. The practitioner should
 - Give clear instructions about positioning, cushioning and meeting the client's needs for privacy and comfort in prone, supine or side lying.
 - Give clear explanations and instructions about draping to ensure that private areas of the body were securely covered for their dignity.
 - Check for comfort and support when using bolsters/pillows.
 - Provide clear instructions if repositioning (e.g., from prone to supine). This includes considerations of client safety, guidance during the maneuver, and adhering to draping considerations such that client's unclothed body parts (e.g., chest) were not exposed to the practitioner.
 - Tuck draping adequately under her trunk and pinned by her arms so as not to expose breasts.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

Departure from care was of concern when draping [Ms A]. [Mr B] exposed her breasts and stomach without consent. Usually breasts are not massaged, however underlying the breasts are the pectoral muscles which are frequently addressed by massage therapists. This requires secure draping and typically only the upper pectoral muscles are massaged. Informed consent would have addressed this issue if [Mr B] was

intending to massage these muscles or apply acupressure techniques. The draping as applied to covering [Ms A] for massaging breasts and abdomen was unacceptable according to the evidence given by [Ms A]. Good draping principles would mean tucking and pinning the draping around a client's trunk when massaging the upper chest area. The nipples should not be exposed when massaging the upper pectoral muscles. The stomach would normally be covered at his point. If the stomach is massaged the breasts should be covered and the draping tucked either under the client's arms or under both the arms and trunk, and only the abdominal area exposed for massage. The draping is also securely tucked in the underwear to clearly define the area to be massaged. The exception to this is with men who by consent may be comfortable with exposing both the abdominal and chest area simultaneously. Some females may be comfortable with exposing both areas of the breasts and abdomen at the same time but this requires very clear consent and is generally not advisable for a male treating a female due to the increased risk of being accused of sexual misconduct.

c. How would this be regarded by your peers?

This lack of effecting draping (covering) would be regarded by massage industry peers as a serious lapse of industry standards of effective draping for the privacy and dignity of clients.

Recommendations

That [Mr B] learns effective draping techniques as expected by the professional massage industry in New Zealand in order to respect client dignity and privacy.

5. Whether a massage therapist should communicate with a client during the massage regarding the strokes used.

a. What is the standard of care/accepted practice?

Code of practice includes being polite and considerate with clients at all times. A client should feel safe throughout a massage. They should be listened to and respect given to their concerns and preferences. Their requests should be responded to immediately within professional boundaries. Informed consent should be applied from start to finish of any massage to ensure client safety, dignity and respect.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

Of concern with [Mr B's] departure from care was his inability to respond to the client's verbal and non-verbal feedback. He seemed unaware of her distress of having her breasts, nipples and abdomen exposed and massaged, and may be missing non-verbal cues from his clients. His English language skills may have been inadequate.

c. How would it be viewed by your peers?

Well trained massage peers in New Zealand are taught to respect and honour the client's needs. This lapse of communication skills would be considered a serious lapse of professionalism in massage and would find [Mr B's] behavior unacceptable.

d. Recommendations for improvement that may help to prevent a similar occurrence in the future.

That [Mr B] should get some training in effective communication and applied massage language skills. This could potentially be with a mentor from Massage New Zealand or with a counselling professional in the community.

6. Whether it is appropriate to re-use towels and bed covers throughout the day for different clients and only launder them at the end of the day.

a. What is the standard of care/ accepted practice?

General health and hygiene codes of practice include: Clean draping must be applied and changed with every client to avoid cross infection of disease and for client comfort and professionalism. All table and bolster (cushioning) surfaces should be fully covered and changed for each new client. Along with clean draping the clinic should also be tidy and hygienic as towels may be placed on surfaces prior to a massage. Maintaining a high standard of personal hygiene and dress in an appropriate professional manner. The therapist will never knowingly work on a client if they believe the client or themselves can pass on an infection or disease.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

The repeated use of draping by [Mr B] from one client to another, as reported by [Mr B] and his manager [the clinic owner] is a serious breach of hygiene and disease control measures. This is especially important given the pandemic of Covid19 virus infection present in New Zealand in 2020. The massage conducted by [Mr B] on [Ms A] was on the 21st June 2020 just a month after the level 4 alert lockdown in New Zealand. According to the evidence supplied, [the clinic owner] and the other practitioners at this practice knowingly participate in using the same towel across several clients in a day. This is a serious breach of health and safety standards of any health practice in New Zealand and is potentially prosecutable under the Health and Safety Act.

c. How would it be viewed by your peers?

This would be considered a very serious breach of good practice and a breach of health and safety standards under New Zealand law.

d. Recommendations for improvement that may help to prevent a similar occurrence in the future.

[The clinic] should take immediate steps to provide clean draping both on the massage table and over their clients for every new client. They are in breach of health and safety standards for a health practice in New Zealand.

7. What information if any should be collected and recorded regarding clients' medical or other information.

a. What is the standard of care/accepted practice?

Initial assessment and history taking for new clients.

- Signed consent by the client and practitioner should be obtained to proceed with the massage.
- This should cover medical screening for any medical conditions/injuries/current medical treatment/and medication taken by the client to ascertain that they are safe to massage. This should be documented and kept private.
- Client preferences for style of massage and body part to be massaged should be documented.
- The practitioners should explain their scope of practice and clarify the expectations of the treatment and documenting the client's goals.
- Assessment for possible loss of movement/function should be documented.
- A clear explanation of what clothing to remove and how this is done with dignity, for example by leaving the room while the client undresses and gets on the table.
- Record strokes/techniques applied.
- Record areas (muscles) of the client's body treated.
- Record client's body reactions and feedback of the treatment.
- Document and consider previous or concurrent other treatments or diagnosis.
- Adequately cover any contraindications to the treatment and/or modifications to safely perform the massage.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

There is no written or verbal evidence that [Mr B] provided documentation of any kind. There appears to be a significant departure from the standard of care about information gathering and recording of [Ms A's] preferences, medical history and needs. There seems to be no written records kept at [the clinic] in general as indicated by [Mr B]. This means safety of clients is of concern in terms of gleaning medical information about whether they are safe to massage plus the ability to track changes in the client from one massage to another.

c. How would it be viewed by your peers?

For those trained to the NZQA standard for relaxation massage in New Zealand this would be considered a serious breach of good practice. Normal massage practice is to keep effective client records in a lockable safe place for privacy.

d. Recommendations for improvement that may help to prevent a similar occurrence in the future.

I would recommend [the clinic] and [Mr B] take immediate steps to obtain client records to ensure they are safely massaging clients with possible medical or other conditions. Relying on verbal assessment is not enough especially when having return clients and for when complaints arise. I would recommend [the clinic] practitioners develop a consistent professional language related to assessment and record keeping.

8. Any other matters in this case you consider warrant comment.

a. What is the standard of care/accepted practice?

- Ongoing practitioner education and general professional development with interpersonal skills training should be a part of practice development.
- Client privacy should be maintained in saving client records in keeping with information technology including internet security.
- Are the treatment areas/rooms private and soundproof?
- Massage practitioners are encouraged to have a current 1st Aid certificate.
- Is client safety and professionalism carried out in a non-prejudicial client care including anti-discrimination.
- The Health and Disability Commissioner's Code of Health and Disability Services Consumers' Rights Poster should be displayed in a visible place and pointed out to clients.
- A professional massage practice should have a complaints procedure displayed in a visible place and pointed out to clients.
- A massage practice should display a Code of Ethics at their practice based on a professional association they should ideally belong to (A requirement of MNZ.)
- A massage practice should comply with acts of parliament and local by-laws in New Zealand, including, but not limited to:
 - o The Privacy Act (1993)
 - o Discrimination; Human Rights Act 1993, NZ Bill of Rights Act 1990
 - o The Health & Safety in Employment Act (1992) OSH
 - o Health and Disability Commissioner Act (1994).
 - o Health Practitioners' Competence Assurance Act (2003)
 - o Consumer Guarantees Act (1993)
 - o Employment Relations Act.
 - o Human Rights Act (1993)
 - o The Fair-Trading Act (1986)
 - o Accident and Injury Compensation ACC Act.
 - o Financial records and tax obligations including registering with IRD to collect GST.
 - o Business registration with IRD if wanting to be a limited liability company.
 - o Local body bylaws governing business use from commercial and residential property.
- A practice should have a referral network for sending clients on to another health professional if a client's condition is outside their scope of practice.
- Good professional environmental practices include: adequate temperature, ventilation, lighting, safe and hygienic equipment — massage table, bolsters, pillows, creams/waxes/oils.

b. If there is a departure from the standard of care or accepted practice how significant a departure do you consider this to be?

It's unknown from the evidence provided if [the clinic] and [Mr B] meet the above professional standards. [Mr B] is not a member of Massage New Zealand and it's not known from the report if he belongs to any professional massage or other association in New Zealand.

c. How would it be viewed by your peers?

Transparency and truth are key core values upheld by Massage New Zealand and many other professional bodies in New Zealand. Without this trust in the industry a fair-trading environment is not obtained. My peers regard many massage businesses importing foreign labour, as lacking in effective client care, with ineffective communication skills and transparency of practice.

d. Recommendations for improvement that may help to prevent a similar occurrence in the future.

Universal standards of practice and qualifications need to be applied across New Zealand. Relying on foreign qualifications and practices may fall short of requirements for the New Zealand public in terms of satisfaction and in fairness for the industry. Ideally the industry should be regulated so that standards are more universal. As it currently stands the massage industry in New Zealand is self-regulating which means very few practitioners belong to an association and thus adhere to a common standard and code of practice for best client care. This case is the tip of an iceberg with anecdotal evidence of poor practices in a lot of the massage industry.

Summary of recommendations.

That [Mr B] and [the clinic]:

- o Receives mentoring from a NZQA qualified massage teacher or school and member of Massage New Zealand about clear documentation practices and record taking for 'relaxation massage'.
- o Reviews and apply draping principles and procedures with a NZQA qualified massage teacher.
- o Ensures there is always clean and freshly laundered draping both above and below for every client.
- o Gets some training in effective communication and language skills. This could be with a mentor from MNZ or with a counselling professional in his community.
- o Does not massage a person's breasts without clear prior consent (which should also be documented).
- o Nipples should never be touched or massaged as these are considered erogenous zones and the touch of which may be prone to misinterpretation.

Yours sincerely

Barry Vautier, 15th January 2021

Appendix B: Relevant standards

Massage New Zealand Standards of Practice state:

“All registered MNZ therapists abide by these standards as well as the Code of Ethics which is required to be displayed at all clinic spaces where a registered therapist works.”

The Massage New Zealand Code of Practice states:

“Obtain clients’ informed consent before commencing treatment

...

use appropriate draping to preserve the dignity and modesty of the client

...

inform client during session on what treatment will be provided and continue to monitor and update where required.”

The Massage New Zealand Code of Ethics states:

“— Provide draping and explanations sufficient to meet the client’s needs for comfort and privacy.

...

— Ensure informed client consent has been obtained prior to massage.

...

— Maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed Massage.

...

Practitioners will not:

— Engage in sexual conduct with a client.”