

# The Grey Zone

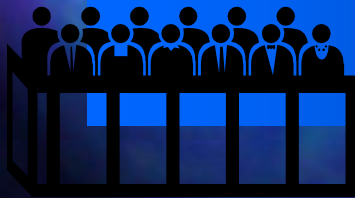
aka

**I DUNNO, WHADDA YA THINK**

Marc M. Gamerman, D.C.

Dale Atkinson, J.D.

Kevin B. Earle



# The Grey Zone

- Purpose: Take you out of your comfort zone
- How to work through gut busters and retain relationships
- **Interactive** – please share how your statutes/regulations may affect your decision

# The Grey Zone

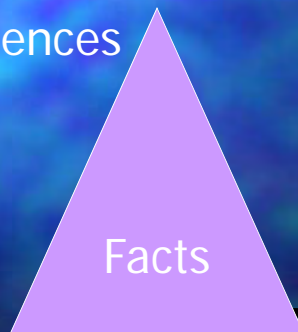
No abstaining !!!



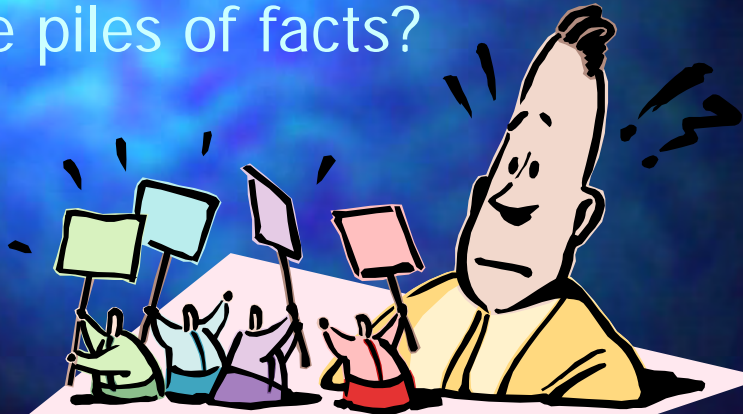
Our job in regulation:  
make grey into  
black & white

# The Facts

Board members process  
case facts through their  
life experiences



What happens when cases  
**don't** break down into neat  
little piles of facts?



## Burden of Proof

Beyond a reasonable doubt

vs.

Preponderance of evidence

vs.

Clear and convincing



## Case #1: The Complaint

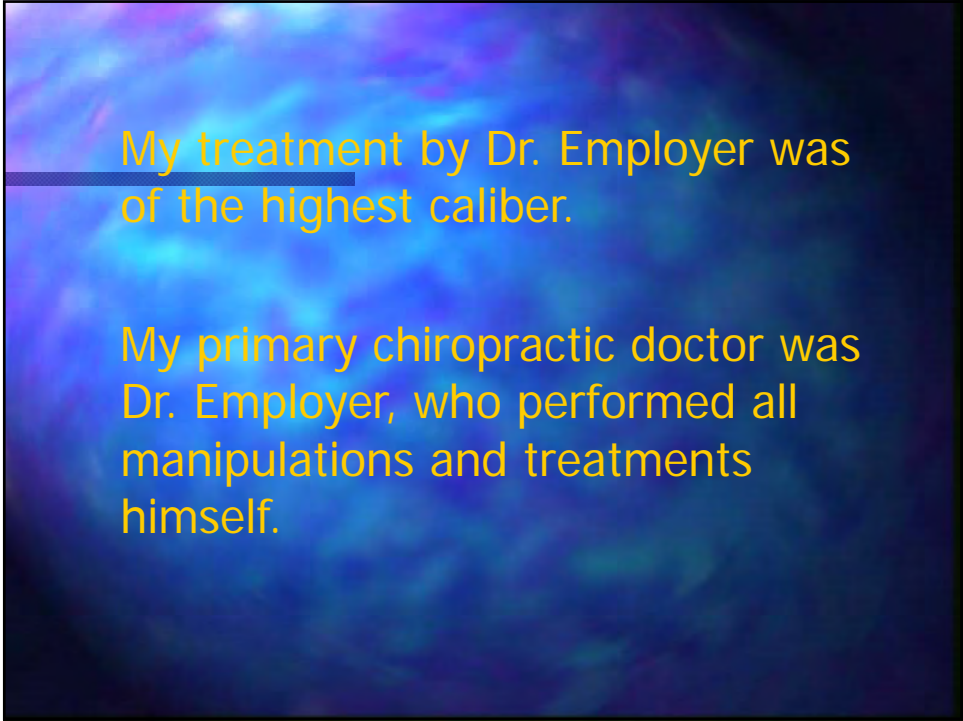
I came to Dr. Otherguy because I lost strength in my arm due to a neck problem.

He insisted on adjusting my lower back also – but consistently used too much force.

This has caused a hip impingement that has taken me 6 months to get accurately diagnosed and treated.

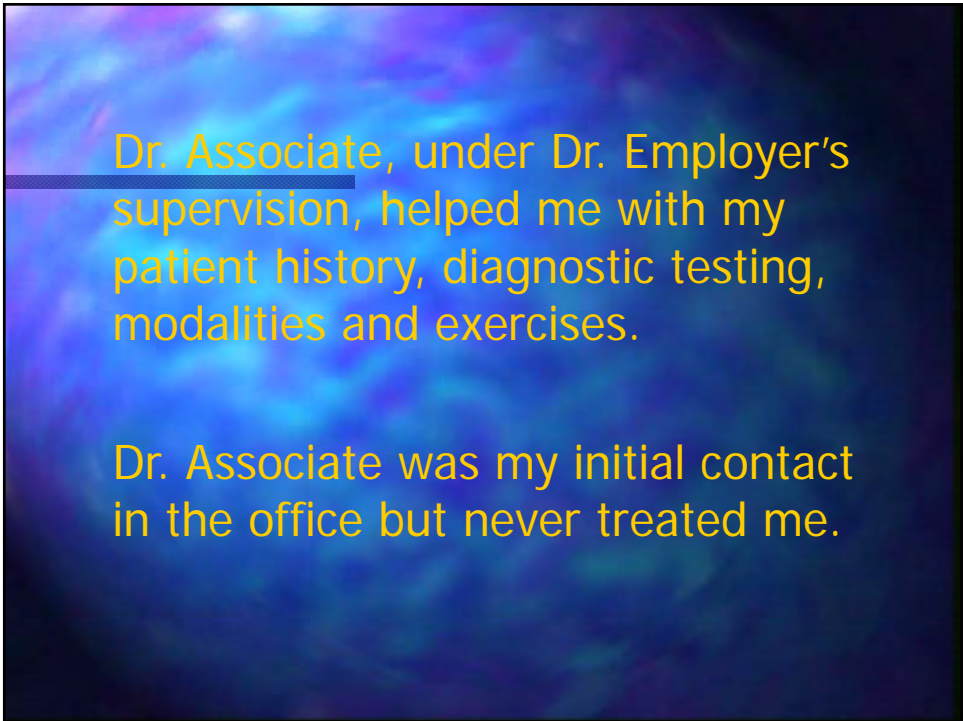
THEN I went to Dr. Employer with the injury to my right hip.





My treatment by Dr. Employer was of the highest caliber.

My primary chiropractic doctor was Dr. Employer, who performed all manipulations and treatments himself.



Dr. Associate, under Dr. Employer's supervision, helped me with my patient history, diagnostic testing, modalities and exercises.

Dr. Associate was my initial contact in the office but never treated me.

I received the highest quality of service and professionalism from the staff of Dr. Employer and Dr. Associate.

I would not hesitate to visit them again or recommend them to anyone.

Sincerely,  
Mr. Concerned Patient

## What would you do?

1. Dismiss Case
2. Investigate Dr. Otherguy
3. Investigate Dr. Employer & Dr. Associate

# What did we find out?

## Investigation of Dr. Otherguy:

- Good records
- Followed standard of care
- Appears to be disgruntled patient, case dismissed



# What did we find out?

## Investigation of Dr. Employer:

- 10 years practice without complaints
- Teaches seminars throughout country

## Investigation of Dr. Associate:

- Not licensed in this state
- But licensed in two other states

## QUIRK

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Drs. Employer and Associate helped Mr. Concerned Patient write letter against Dr. Otherguy.

## What would you do?

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1. Prosecute Dr. Employer
2. Prosecute Dr. Associate
3. Prosecute Dr. Employer AND Dr. Associate



## Discussion

Does your jurisdiction allow you to prosecute an unlicensed provider?

Can you recommend criminal prosecution?

Misdemeanor vs. felony

## QUIRK

Dr. Associate claims to have made a phone call to the Board of Examiners and spoke to someone with a Southern accent who said that he could work under the supervision of a licensed DC.

## QUIRK

At time of unsubstantiated phone call there was a turnover of board staff.

A temp and executive director were released.

## What would you do?

1. Adopt board policy to give NO advice over the phone, tell callers to refer to the statute and contact their own legal counsel
2. Appoint 1 representative of the board staff to field telephone inquiries
3. Appoint 1 board member to field telephone queries

## What actually happened

Board transitioned to new Executive Director who handles all telephone queries, contacts board members if unsure of answer

## Back to the case

Dr. Employer claims to have let Dr. Associate work for him based on the telephone advice Dr. Associate received from the board.

Dr. Employer did not actually follow-up himself.

Dr. Associate is licensed in two other states.

## Discussion

Do you trust board staff?

Staff transition issues

Define "customer service"

## MORE QUIRKS

Board attendance: Was a quorum present?

Past Board of Examiners presidents served as expert witnesses for defense and prosecution



## MORE QUIRKS

Conflict resolution conference  
steered by defense counsel

Dr. Employer paid out \$120,000 in  
legal fees

## What would you do?

### Sanction options for Dr. Employer

1. Dismiss the case
2. Nonpublic order – Letter of Admonition / Education
3. License suspension and monetary penalty

# What would you do?

## Sanction options for Dr. Associate

1. Dismiss the case, give Dr. Associate a license
2. Refer Dr. Associate for criminal prosecution for practicing without a license

# What actually happened?

\$10,000 fine

Community service



Provided unlicensed Dr. Associate with a license in this jurisdiction



## Was this right?

- What if the attendance at the meeting had been different?
- What if the past board presidents did not testify – did their credibility affect the decision?



## Was this right?

- No one was "hurt"
- \$120,000 + spent by DC, plus board prosecution expenses –  
when and where do we spend our limited resources?

# The Grey Zone

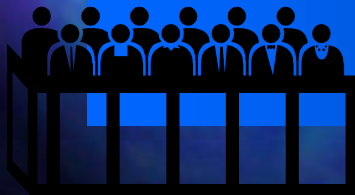
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Continued...

## Case #2: The Patient says...

Both my husband and I were seeing Dr. Helpful for our chiropractic care, following our auto accident in September.

My marriage was beginning to fall apart, and Dr. Helpful was SO kind.



I really felt like I could talk to him about my marriage issues. He knew my husband because he was also treating him.

He really understood me.

He was very affirming – he told me how beautiful I am and how nice I look.



Of course, I spent a lot of time before my appointments working on my appearance to please him.

My adjustments took on a whole new meaning, with more focus on my buttocks and breasts – I know he had often had an erection while he was adjusting me from behind.

Our encounters became more romantic, with kissing on the cheek and lips occurring during our weekly sessions.



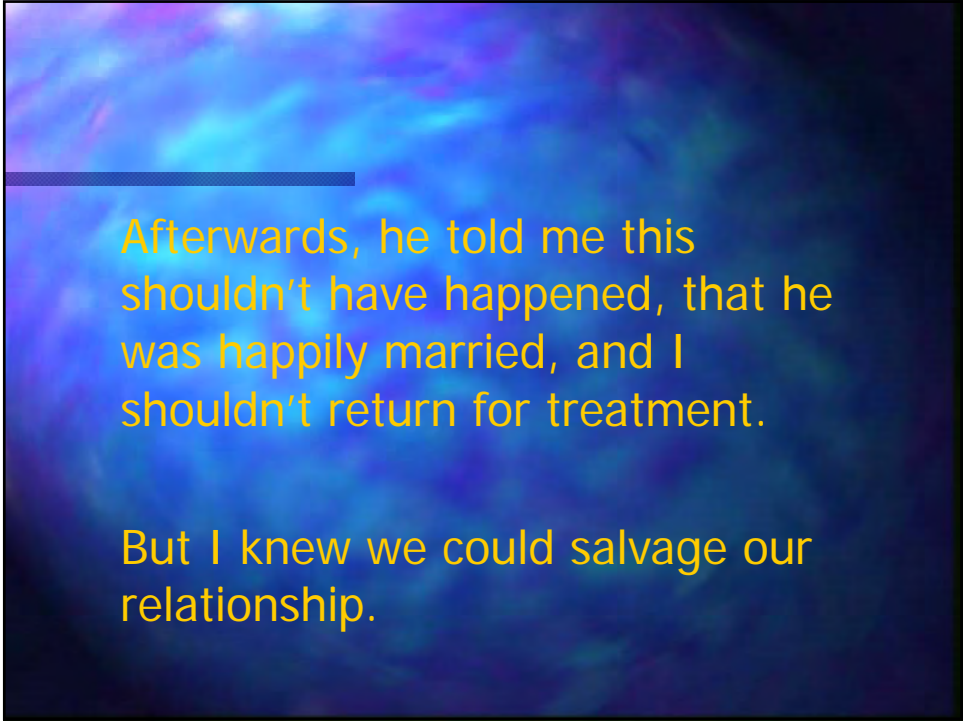
We moved my appointment to 6:30 AM so there wouldn't be so many people around.



By May, I knew we were in love  
with each other.

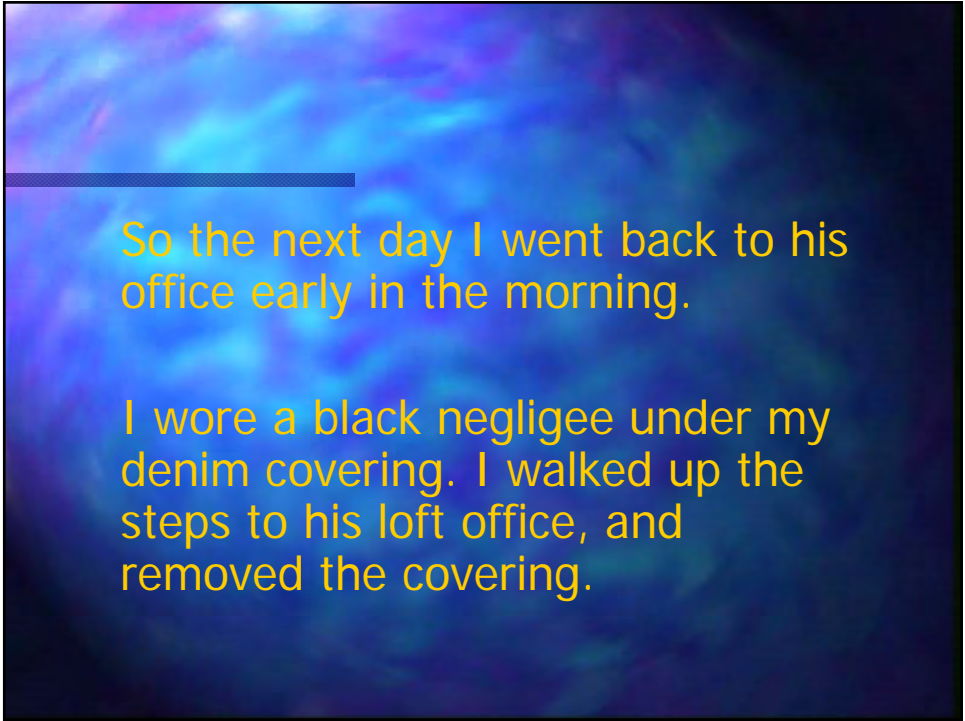
I wanted to do something to show  
him how I felt about our  
relationship.

So we went into the locked  
bathroom in the office, and I  
performed oral sex on him.



Afterwards, he told me this  
shouldn't have happened, that he  
was happily married, and I  
shouldn't return for treatment.

But I knew we could salvage our  
relationship.



So the next day I went back to his  
office early in the morning.

I wore a black negligee under my  
denim covering. I walked up the  
steps to his loft office, and  
removed the covering.





He rebuked me for coming to the office and sent me away.

That's when I knew I should file a complaint with the state dept. of health. Doctors shouldn't be able to do things like this to patients.



## What would you do?

Is this case an emergency?  
Should an emergency suspension order be initiated immediately?

1. YES
2. NO

## Doctor Helpful says...

She is very disturbed and unstable.

I didn't do anything wrong.

None of this happened.

There are no witnesses.

## The Process

- State determines case meets standard for legal sufficiency
- Investigation commences
- Goes to board's probable cause panel
- 1 count of sexual misconduct violation is filed in an administrative complaint

## Doctor Helpful disagrees

- He takes the case to the state's division of administrative hearings for a formal hearing.
- He says there are disputed issues of material facts.

## Therapist is deposed

- Dr. Helpful's attorney deposes Ms. Patient's mental health counselor.
- Issues of Ms. Patient's medical and mental health and drug history are disclosed.
- The deposition is made part of the case record.

## QUIRKS

Ms. Patient allows her therapist to disclose SOME of her mental health picture.

She is being treated for an emotional disorder whereby she has an unusual attachment to men, and often believes they are in love with her.

Marriage issues compound the picture.

## What would you do?

Would you allow the deposition of the mental health care provider to be made part of the record provided to the board?

1. YES
2. NO



## The case drags on...

Dr. Helpful's attorney asks for continuances so he can attend to personal matters. Because of the board's limited meeting schedules, this adds **3 months** to the process.

Prosecution argues this forces an undue hardship on Ms. Patient, and undermines the public interest.

## QUIRK

Dr. Helpful's attorney is former counsel and prosecutor for the Board of Examiners.

## What would you do?

Would you allow the continuances?

1. YES
2. NO

## Discussion

How quickly should cases of this nature be resolved?

Are board members influenced by the credibility of legal counsel or witnesses they know personally?

## QUIRK

The prosecuting attorney gets very emotionally involved in this case due to personal issues in her own life.

## What do you do?

How do you handle the prosecuting attorney?

1. Talk with her and ask her to cool it or get out
2. Talk with the AG's office and have them handle it
3. Carry on and realize sometimes these cases are hard on people

## The ALJ rules

The Administrative Law Judge is convinced that Dr. Helpful did engage in unprofessional conduct of a sexual nature with Ms. Patient.



He orders a **4 month suspension**. The ruling now goes to the board for review and approval.

## The Board reviews the case

The board reviews over 650 pages of information.

Ms. Patient asks to testify before the board.





## What would you do?

Would you allow Ms. Patient to testify before the board?

1. YES
2. NO

## QUIRK

After testifying, Ms. Patient remains in the hearing room for the rest of the day.

Her mannerisms are unusual, and she appears disturbed.

## The Board Rules

After 6 hours of deliberations, the board decides to **uphold the 4 month suspension**, but issues a STAY.



The board adds monetary fine and successful completion of NBCE ethics & boundaries exam, also a monitor to be present with all patients for 3 years.

## What would you do?

1. Agree with the board's decision
2. Be tougher on Dr. Helpful
3. Be more lenient with Dr. Helpful

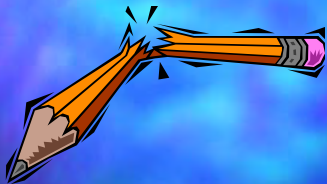
## But it's not over yet...

The board continues to be affected by the presence and conduct of Ms. Patient.

Was she the perfect victim for a perpetrator because of her emotional disabilities, **or** did she imagine all this?



## Back on the agenda

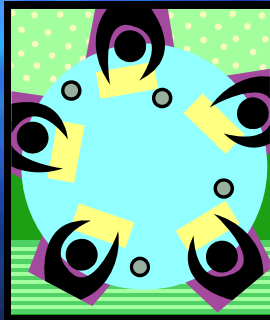


Board members are genuinely disturbed about the case.

The board places the case on the agenda for the next meeting for possible reconsideration.

## What would you do?

1. It's OK to revisit a case like this
2. Once a decision is made, it's over



## Discussion

Should there be guidelines for reconsideration of cases?



The State's legal fees are already in excess of \$40,000, not counting staff / board time. Does your board have the authority to recoup some or all of your expenses?





## Was this right?

Should the board's limited resources affect cases like this?

Did Dr. Helpful really do this?



Wanna peel your case next year?