

COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF EXAMINERS OF PSYCHOLOGY
AGENCY CASE NO. 00-05
ADMINISTRATIVE ACTION NO. 00-KBEP-0425

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COMMONWEALTH OF KENTUCKY
BOARD OF EXAMINERS OF PSYCHOLOGY COMPLAINANT

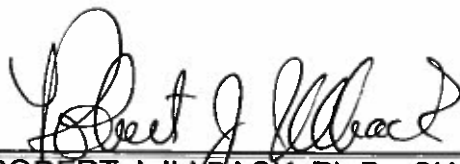
vs. **FINAL ORDER**

ELMER C. MAGGARD, Ph.D.
Licensed Psychologist No. 0350 RESPONDENT

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The Kentucky Board of Examiners of Psychology has considered the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Panel, and the Respondent's Exceptions to the Proposed of the Findings of Fact, Conclusions of Law, and Recommended Order. The Board also has thoroughly reviewed and discussed the evidentiary record, consisting of testimony and exhibits introduced at the hearing. Based on the materials and evidentiary record considered, reviewed and discussed, the Kentucky Board of Examiners of Psychology HEREBY ADOPTS and AFFIRMS the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Panel as its Final Order.

SO ORDERED this 8th day of April, 2002.



ROBERT J. ILBACK, Ph.D., CHAIRMAN
KENTUCKY BOARD OF EXAMINERS OF PSYCHOLOGY

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COMPLAINANT

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

ELMER C. MAGGARD, Ph.D.
Licensed Psychologist No. 0350

RESPONDENT

* * * * *

This matter came on for hearing before the Hearing Panel ("the Panel") of the Kentucky Board of Examiners of Psychology ("the Board") on May 29, 30, and 31, 2001, June 26, 2001, and February 22, 2002. The Hearing Panel concluded its deliberations on March 4, 2002.

The following Board members constituted the Hearing Panel: Jane F. Brake, Ph.D., Tracy D. Eells, Ph.D., Lea J. Perritt, Ph.D., and Ruth W. Bauman. All of the Hearing Panel members were present on all of the days of the hearing, except for June 26, 2001, when none of the Panel members was present.

On all the days the hearing was held, the Complainant was present by and through its party representative, Joseph E. Willett, Ph.D., and was represented by counsel, Mark Brengelman, Assistant Attorney General. The Respondent, Elmer C. Maggard, Ph.D., and his counsel, J. Fox DeMoisey, were present on all days of the hearing, except February 22, 2002, when, through inadvertence, they both failed to appear.

The hearing was conducted by Michael Head, Hearing Officer, Division of Administrative Hearings, Office of the Attorney General.

The issue in this case is whether the Respondent's license to practice psychology in the Commonwealth of Kentucky should be sanctioned based on alleged violations of KRS 319.082(1)(c), (d), and (f), 201 KAR 26:145 § 3(5), and 201 KAR 26:145 § 4(2), all as set forth in the Formal Complaint issued by the Board on August 24, 2000.

During its deliberations on May 31, 2001, after completion of the proof, the Panel directed the Hearing Officer to obtain from Dr. Maggard his original office notes and records concerning the treatment of [REDACTED]. The Hearing Panel also directed the Hearing Officer to obtain the copies of Dr. Maggard's office notes and records that Dr. Maggard furnished to [REDACTED], to prepare [REDACTED] to provide expert testimony on Dr. Maggard's behalf at the hearing in this case. The Hearing Panel requested that all of these offices notes and records be submitted into evidence for their consideration.

The office notes and records in Dr. Maggard's and [REDACTED] possession were received on June 26, 2001, and placed under seal pending resolution of Dr. Maggard's appeal of the Hearing Panel's action. Relief was not granted to Dr. Maggard in his appeal¹ and the office notes and records were entered into the evidentiary record on February 22, 2002, at which time the Hearing Panel resumed its deliberations. Both

¹ Although Dr. Maggard's appeal is not yet final, the Franklin Circuit Court in Franklin Circuit Court Action No. 00-CI-01279 denied his Petition for a Stay of the Hearing Panel's action, and the Court of Appeals in Court of Appeals Appeal No. 2002-CA-000371-MR denied his Motion for Emergency Relief.

parties declined the opportunity to provide further testimony or exhibits in response to the additional evidence put into the record.

After consideration of the entire record, the Hearing Panel RECOMMENDS that the Board suspend Elmer C. Maggard's license to practice psychology in the Commonwealth of Kentucky for a period of one year, with probation and conditions for a period of one year, and FURTHER RECOMMENDS that it fine Dr. Maggard \$6,000, all as set forth in more detail hereafter.

FINDINGS OF FACT

1. This case concerns a report issued by Respondent, Elmer C. Maggard, Ph.D., on December 8, 1998, entitled "Summary of Clinical Assessment." Hearing Exhibit 1. The report concerns a child, _____ who had filed suit against a dentist, _____, for treatment she received from _____ in July 1996.

2. On or about the fall of 1998, the parents of _____ filed a lawsuit against _____ alleging mistreatment of _____ during _____ provision of dental services to the child.

3. At the time of the alleged mistreatment, _____ was approximately 17 months old.

4. During the course of the lawsuit, on or about October 8, 1998, _____, the attorney for _____ in the lawsuit against _____, requested that the Dr. Maggard perform a consultative, forensic evaluation of _____.

5. Dr. Maggard says he suggested that he treat the child because she was not in treatment at the time, that he prepare a summary of his clinical assessment

rather than a forensic examination report, and that attorney [redacted] obtain a forensic assessment from another psychologist if Dr. Maggard's clinical assessment was insufficient. Dr. Maggard says attorney [redacted] agreed to this arrangement.

6. Dr. Maggard saw [redacted] and her parents in his office on two dates, October 14 and 28, 1998.

7. Dr. Maggard did not have contact with [redacted] on her first visit to his office, but instead, met with her mother. He observed [redacted] only for a brief period of time during her second visit to his office.

8. The Respondent sent the Summary of Clinical Assessment to attorney White on or about December 8, 1998.

9. In the Summary of Clinical Assessment, Dr. Maggard says, "The child's parents served as the sole informants about [redacted] current functioning and history. Medical records from the office of [redacted] and dental records from the office of [redacted] were available for review."

10. In the Summary of Clinical Assessment, Dr. Maggard makes the following statements:

- a. The child has been emotionally and developmentally injured by the trauma she experienced during dental treatment to extract two of her front teeth.
- b. In addition to her anxiety she exhibits aggression and anger consistent with the nature of the injury as it was described by her mother.
- c. This type of early trauma causes permanent psychological injury and can have pervasive consequences for subsequent social and emotional development.
- d. For a child [redacted] age, the effects of such trauma can even affect character structure.
- e. Ongoing treatment with [redacted] and her family, possibly over a number of years, probably will be necessary to manage the generalized behavioral and emotional consequences of the child's

psychological injury. She could require professional help into her mid-to-late adolescence.

11. There is no indication in Dr. Maggard's Summary of Clinical Assessment that he questioned whether [redacted] mother's statements concerning her daughter were motivated by secondary gain or by her own anxiety, or whether the child's statements to her mother, if she made them, had been influenced by her mother's statements to her.

12. Further, in the Summary of Clinical Assessment Dr. Maggard says, "Though over two years have elapsed since the injury, there is sufficient memory and focused emotional reactivity to enable the child to benefit from desensitization and deconditioning of her anxiety and anger responses to dental offices and practitioners." Dr. Maggard did not indicate in his Summary of Clinical Assessment or his testimony the basis for his conclusion that [redacted] possessed her own memories of events that occurred two years previously when she was 18 months old.

13. Dr. Maggard did not have direct and substantial professional contact with [redacted] and did not make a formal assessment of [redacted] during her two visits to his office.

14. Thus, Dr. Maggard's statements in the Summary of Clinical Assessment were not supported by direct and substantial professional contact with [redacted].

15. Although it disagreed with him, the Panel acknowledged Dr. Maggard's position that the psychotherapist privilege covered his [redacted] office notes and records prevented him from using those notes and records to substantiate his defense. The Hearing Panel sought to determine for itself whether the contents of Dr. Maggard's office notes and records were inconsistent with its finding of a lack of direct and

substantial professional contact between Dr. Maggard and [REDACTED]. The Hearing Panel directed the Hearing Officer to use available legal methods to obtain for its review Dr. Maggard's office notes and records concerning [REDACTED].

16. Dr. Maggard's [REDACTED] office notes and records were obtained, entered into the record, and reviewed by the Hearing Panel. Dr. Maggard's office notes and records do not contain any credible evidence that he had direct and substantial professional contact with [REDACTED] during her two office visits. Dr. Maggard's notes and records contain a written summary that he prepared on June 25, 2001, of his examination of [REDACTED] on October 29, 1998. This record indicates contact with [REDACTED] on that date.

17. The Hearing Panel does not find the June 25, 2001, record credible. Besides the fact that it was written almost three years after the office visit, it also was written after the completion of the first three days of the hearing and immediately prior to the Hearing Panel, by orders of the Hearing Officer, obtaining Dr. Maggard's notes and records. At the time this record was prepared, Dr. Maggard knew the Hearing Panel was concerned with the extent of his contact with [REDACTED]. This record is the only evidence in Dr. Maggard's notes and records that indicates he had direct and substantial professional contact with [REDACTED] on either visit to his office. The contact documented in the June 25, 2001, record is not reflected in any other contemporaneous office note or record prepared by Dr. Maggard. None of the contacts with [REDACTED] recited in the June 25, 2001, record are reflected in the Summary of Clinical Assessment. Thus, the circumstances of the preparation of the record, and the

lack of any other corroborating evidence, make the June 21, 2001, record untrustworthy.

18. The office notes of the [redacted] family physician, [redacted] —copies of which notes covering the period March 18, 1996, to February 16, 1998, were included in Dr. Maggard's office notes and records—do not indicate mother complained to [redacted] about [redacted] alleged anxiety from dental surgery.

19. The Hearing Panel's finding regarding Dr. Maggard's lack of direct and substantial professional contact with [redacted] during her visits to his office on October 14 and 28, 1998, remained unchanged after its review of Dr. Maggard's office notes and records concerning [redacted].

20. Although Dr. Maggard characterized his report as a Summary of Clinical Assessment, he knew or should have known it would be used as a forensic assessment report. According to Dr. Maggard's own testimony, he accepted the [redacted] referral from her attorney, an attorney from whom he had accepted numerous prior referrals to provide a forensic assessment report. He was initially contacted to provide a forensic assessment report, and he knew about the pending litigation with [redacted]. For all these reasons, Dr. Maggard knew or should have known how his report was going to be used by [redacted] attorney.

21. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to [redacted] are not supported by peer-review psychological literature.

22. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to _____, and his statements about the treatment that _____ condition required, are false and misleading because he did not have direct and substantial professional contact with _____ and did not formally assess her, because his statements are unsupported by peer-review psychological literature, because Dr. Maggard did not question _____ mother's motivation in providing information to him, and because he knew or should have known how his report was going to be used by _____ attorney.

23. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to _____, and his statements about the treatment that _____ condition required, are unfair to _____ and to her insurance company, both of whom would have reviewed Dr. Maggard's Summary of Clinical Assessment in evaluating whether to settle the suit against _____, and unfair to _____, whose future mental health could be affected by Dr. Maggard's treatment recommendations.

24. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to _____, and his statements about the treatment that _____ condition required, were negligent because they were not supported by direct and substantial professional contact with _____ or by formal assessment of her, and because they were false and misleading.

25. Dr. Maggard's statements in the Summary of Clinical Assessment about permanent or long-term injury to _____, and his statements about the treatment that _____ condition required, constitute formal professional opinions which he

rendered without direct and substantial professional contact with, or a formal assessment of,

26. Dr. Maggard and _____, through her parents, entered into an assignment of proceeds to pay for Dr. Maggard's past and future treatment of _____

27. There was insufficient evidence to believe that the assignment of proceeds between Dr. Maggard and _____ impaired Dr. Maggard's objectivity when he prepared the Summary of Clinical Assessment.

28. Neither party objected to the notice they received of the charges and the hearing dates in this matter.

CONCLUSIONS OF LAW

1. Pursuant to KRS Chapter 319, the Kentucky Board of Examiners of Psychology has jurisdiction to hear and decide this matter.

2. Neither party having objected to the notice they received of the charges or the hearing dates in this matter, all such objections are waived.

3. The Board's authority to sanction a credential holder is governed by KRS 319.082(1), which provides in pertinent part:

The board may suspend, revoke, or refuse to issue or renew a license or certificate, or may accept an assurance of voluntary compliance, restrict, or place a licensee or certificate holder on probation, upon proof that the licensee or certificate holder has:

- (c) Committed any unfair, false, misleading, or deceptive act or practice;
- (d) Been incompetent or negligent in the practice of psychology;
- (f) Violated any state statute or administrative regulation governing the practice of psychology.

4. Pursuant to 201 KAR 26:145 § 3(5), "A credential holder rendering a formal professional opinion of a person shall not do so without direct and substantial professional contact with or a formal assessment of that person."

5. Pursuant to 201 KAR 26:145 § 4(2)(a), "The credential holder shall not undertake or continue a professional relationship with a client if the objectivity or competency of the credential holder is impaired because of the credential holder's present or previous familial, social, sexual, emotional, financial, supervisory, administrative, or legal relationship with the client or a relevant person associated with or related to the client."

6. Based on the foregoing findings of fact, in preparing the Summary of Clinical Assessment and providing it to _____ attorneys in the _____ case, Dr. Maggard violated KRS 319.082(1)(c) by committing an unfair, false, and misleading act or practice.

7. Based on the foregoing findings of fact, in preparing the Summary of Clinical Assessment and providing it to _____ attorneys in the _____ case, Dr. Maggard violated KRS 319.082(1)(d), by practicing psychology in a negligent manner.

8. Based on the foregoing findings of fact, in preparing the Summary of Clinical Assessment and providing it to _____ attorneys in the _____ case, Dr. Maggard violated KRS 319.082(1)(f), by rendering a formal professional opinion without direct and substantial professional contact with or a formal assessment of

, in violation of 201 KAR 26:145 § 3(5).

9. Based on the foregoing findings of fact, Dr. Maggard did not violate 201 KAR 26:145 § 4(2)(a).

10. Based on the clear violation of the standards of the practice of psychology, his failure to acknowledge that he committed any violation, and his false testimony as reflected by, and also in, his own notes, Dr. Maggard should pay the maximum monetary penalty of \$2,000 for each violation.

11. Based on his violations of the standards of the practice of psychology, Dr. Maggard's license to practice psychology should be suspended for one year, but the suspension should be probated for one year according to the terms permitted by 201 KAR 26:171. Further, during Dr. Maggard's period of probation, all of his clinical and forensic assessments that are or may be provided to an attorney should be reviewed by his supervising psychologist. Further, during Dr. Maggard's period of probation, he should not provide expert testimony in any legal proceeding.

12. Based on his violations of the standards of the practice of psychology, Dr. Maggard should pay the costs of this proceeding as permitted by 201 KAR 26:140 § 2.

RECOMMENDED ORDER

Based upon the foregoing findings of fact and conclusions of law, the Hearing Panel of the Kentucky Board of Examiners of Psychology hereby **RECOMMENDS** that the Board Order:

1. That the license of the Respondent, Elmer C. Maggard, Ph.D., is suspended for one year.

2. That the Board suspend its enforcement of the suspension of the license of the Respondent by placing the Respondent on probation for one year.

3. That during the one-year probation period, the Respondent, Elmer C. Maggard:

- a. Shall be supervised by a licensed psychologist appointed by the Board and according to the terms of 201 KAR 26:171;
- b. Shall not supervise certified psychologists, licensed psychological associates, or students.
- c. Shall have all psychological assessments reviewed by his supervising psychologist before they are provided to a patient or an attorney.
- d. Shall immediately notify his supervising psychologist if any of his records are released directly to a patient.
- e. Shall not provide any expert psychological opinion that will be used in a legal proceeding, or that a reasonable psychologist would understand might be used in a legal proceeding, unless ordered by a court to do so, in which case, he shall make reasonable efforts to be excused from providing such an expert psychological opinion.

4. That Respondent, Elmer C. Maggard, shall pay a monetary penalty in the amount of \$6,000.

5. That Respondent, Elmer C. Maggard, shall pay all costs of these disciplinary proceedings as allowed by 201 KAR 26:140 § 2.

**NOTICE TO PARTIES OF EXCEPTION
AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4):

a copy of the [Hearing Panel's] recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

Pursuant to KRS 13B.120(2):

the agency head may accept this recommended order and adopt it as the agency's final order, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the [Hearing Panel] for further proceedings as appropriate.

Pursuant to KRS 13B.120(4):

the agency head shall render a final order in an administrative hearing within ninety (90) days after the [Hearing Panel] submits a recommended order to the agency head, unless the matter is remanded to the hearing officer for further proceedings.

Pursuant to KRS 13B.140:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean that summons must be served when filing an appeal petition in the Circuit Court.

SO RECOMMENDED this 19th day of March, 2002.

Jane F. Brake, PhD

JANE F. BRAKE, PH.D., CHAIRPERSON
HEARING PANEL
BOARD OF EXAMINERS OF PSYCHOLOGY