

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF DENTISTRY

In the Matter of
Gary L. Jacobson, D.D.S
License No. D6977

RULING REGARDING COMPLAINT
COMMITTEE'S MOTION FOR
PROTECTIVE ORDER AND
RESPONDENT'S MOTION FOR
DISCLOSURE

The above matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing dated September 15, 1995. Thomas C. Vasaly, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, has appeared on behalf of the Complaint Committee of the Minnesota Board of Dentistry (hereinafter referred to as "the Committee"). William L. Tilton and Ronald S. Rosenbaum, Attorneys at Law, Tilton & Rosenbaum, 101 East Fifth Street, Suite 2220, St. Paul, Minnesota 55101, have appeared on behalf of the Respondent, Gary L. Jacobson.

On September 18, 1995, the Committee filed a motion in which it sought entry of a protective order in this matter and also sought approval to take certain depositions to preserve the testimony of witnesses. On October 3, 1995, the Respondent filed a memorandum noting that he opposed paragraphs 1-3 of the Committee's motion but did not object to paragraphs 4-6. On October 3, 1995, the Respondent also filed his own motion seeking immediate disclosure of certain documents and other information. The record with respect to the motions closed on October 6, 1995, when the last submission of the parties was received.

Based upon all of the files, records, and proceedings herein, IT IS HEREBY ORDERED as follows:

1. The pleadings, hearings, and the orders and report issued by the Administrative Law Judge in this matter shall be public, provided that patient and complainant identities are protected. For purposes of this Order, the term "pleadings" shall include but not be limited to the Notice of and Order for Hearing, motions, and responses to motions. To the extent possible, the parties and their attorneys shall refer to patients by number rather than by name.

2. Pleadings, exhibits and deposition transcripts that identify patients or complainants shall be marked "not public data" at the top of the initial page and shall be filed in a sealed envelope bearing the following notation: "This envelope, filed in this case by [name of party], contains nonpublic information and is not to be opened or the contents thereof reviewed except by the Administrative Law Judge." Such pleadings, exhibits, or

deposition transcripts may be reviewed by members of the public only if the patients or complainants provide written consent to such disclosure or if the names of patients and complainants and identifying information are first redacted.

3. Portions of the hearings may be closed to the extent necessary to protect the identities of patients and complainants.

4. Within ten working days of the date of this Order, the Committee shall provide the Respondent copies of Board files concerning complaints filed against him which are closed or inactive, including the names of complainants and patients, and copies of the documents reviewed by the Committee's expert witnesses, including investigation reports and complaints identifying patients and complainants. The information to be disclosed by the Committee shall include any and all complaints, whether oral or written, made within the last thirteen years concerning the Respondent and any and all investigative data, whether oral or written, collected within the last thirteen years concerning the Respondent. "Investigative data" includes all written, reported, pictorial, or graphic matter, however, produced or reproduced, in the possession or control of the Board, including, but not limited to, all records collected, correspondence, notes, journals, formal and informal books of record and account, reports, memoranda, computer data, tape recordings, and transcriptions. The Committee may charge the Respondent the actual costs of copying in accordance with the Minnesota Government Data Practices Act.

5. Within ten working days of the date of this Order, the parties shall disclose to each other all information and statements described in Minn. R. 1400.6700, subp. 1. All witnesses unknown at the time of disclosure shall be disclosed as soon as they become known.

6. The parties, their attorneys, and persons retained by them or acting in their behalf shall not publicly disclose patient records, investigative reports, the identities of complainants or patients, or documents containing the identities of complainants or patients, without the express written consent of the complainant or patient. Such information may be used only for purposes of this litigation. The parties and their attorneys may disclose such information to investigators and witnesses as necessary to adequately prepare for the hearing in this matter. Before showing or disclosing any protected data or information declared to be confidential or any information contained therein to any investigator or witness, counsel shall first give a copy of this Order to such person and obtain from such person a written acknowledgment that he or she has read this Order and is fully familiar with its provisions and written consent to abide by and be bound by this Order. Each attorney bears full responsibility for compliance with this Order by persons to whom he or she has disclosed nonpublic information.

7. The Committee may take depositions to preserve the testimony of patients 1, 4, 21, 25, and 26, and patient 21's three subsequent treating dentists.

8. The September 7, 1995, deposition to preserve the testimony of patient 7's subsequent treating dentist is approved.

Dated this _____ day of October, 1995.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. R. 1400.7800 (1993), “[i]n the absence of a specific provision mandating or permitting a closed hearing, all contested case hearings are open to the public” The statute governing disciplinary actions against dentists does not specify that such hearings are to be closed. See Minn. Stat. ch. 150A. Moreover, the Minnesota Government Data Practices Act generally mandates that the pleadings and hearings in contested case proceedings initiated by licensing agencies be deemed public. Minn. Stat. § 13.41, subd. 4 (1994), provides in pertinent part as follows:

Licensing agency minutes, application data on licensees, orders for hearing, findings of fact, conclusions of law and specification of the final disciplinary action contained in the record of the disciplinary action are classified as public, pursuant to section 13.02, subdivision 15. The entire record concerning the disciplinary proceeding is public data pursuant to section 13.02, subdivision 15, in those instances where there is a public hearing concerning the disciplinary action. If the licensee and the licensing agency agree to resolve a complaint without a hearing, the agreement and the specific reasons for the agreement are public data. . . .

The same section of the Government Data Practices Act further provides, however, that “active investigative data relating to the investigation of complaints against any licensee” shall be deemed to be confidential and that the following data shall be classified as private:

the identity of complainants who have made reports concerning licensees . . . which appear in inactive complaint data unless the complainant consents to the disclosure; the nature or content of unsubstantiated complaints when the information is not maintained in anticipation of legal action; the identity of patients whose medical records are received by any health licensing agency for purposes of review or in anticipation of a contested matter; inactive investigative data relating to violations of statutes or rules; and the record of any disciplinary proceeding except as limited by subdivision 4.

Minn. Stat. § 13.41, subds. 2(a) and 3 (1994). It thus is evident that the Legislature intended to afford protection to the identities of complainants and patients in both active and inactive matters. Accordingly, the Administrative Law Judge has determined that the identities of such individuals should be protected from disclosure to the general public absent their specific consent.

At the same time, it is apparent (and the Complaint Committee has recognized) that the Respondent requires access to the identities of complainants and patients in order to prepare for and participate in this contested case proceeding. Principles of fairness require limited disclosure to the Respondent of the nonpublic data contained in the Board's records. The limitations on the use and dissemination of the information set forth in the above Order will protect the privacy interests involved and guard against unwarranted disclosure of the identities of the complainants and patients while at the same time recognizing the value of free discussion at the hearing and the Respondent's interest in obtaining this private information. With the redactions and protections noted above, it appears that the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data or the complainants or patients involved. Minn. Stat. § 13.03, subd. 6 (1994).

Finally, the Respondent has been provided access to complaints and investigative data from the past thirteen years. It appears that the Notice of and Order for Hearing refers to treatment going back as far as 1982. The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on or that reasonably could lead to other matter that could bear on any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). Information will be deemed relevant if there is any possible way that it relates to the subject matter of the action, and the definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes. 2 D. Herr & R. Haydock, Minnesota Practice 9 (2d Ed. 1985), citing Detweiler Brothers v. John Graham & Co., 412 F.Supp. 416 (E.D. Wash. 1976), and County of Ramsey v. S.M.F., 298 N.W.2d 40 (Minn. 1980). Thus, information deemed relevant at the discovery stage may not necessarily be admissible evidence at the trial in this matter. Because the requested information may have some bearing, or may reasonably lead to other information that may have some bearing, on the determination of the issues presented in this case, it is appropriate to require that it be produced.

B.L.N.