

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

ORDER REGARDING COMPLAINT
COMMITTEE'S MOTION TO SET
TRIAL DATE AND AMEND
DISCOVERY DEADLINE

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson on the motion of the Complaint Committee of the Board of Dentistry to set a trial date and amend the discovery deadline. Thomas C. Vasaly, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of the Complaint Committee of the Board of Dentistry ("the Committee"). Ronald S. Rosenbaum and Deborah H. Mande, Attorneys at Law, Tilton & Rosenbaum, P.L.L.P., 2220 American Bank Building, 101 East Fifth Street, St. Paul, Minnesota 55101-1808, appeared on behalf of the Respondent, Gary L. Jacobson, D.D.S. The record with respect to the motion closed on May 22, 1996.

Based upon all of the files, records, and proceedings herein, and for the reasons discussed in the attached Memorandum, IT IS HEREBY ORDERED that the Committee's Motion is DENIED.

Dated this _____ day of June, 1996.

s/ Barbara L. Neilson _____
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

On April 22, 1996, the Administrative Law Judge issued an Order denying the Respondent's motion to dismiss the Supplemental and Amended Notice of and Order for Hearing filed by the Committee in this matter. Although the Committee was, pursuant to that Order, granted leave to file its Supplemental and Amended Notice of Hearing, the previously-set discovery deadline of July 17, 1996, was extended by two months to September 17, 1996, in order to provide Dr. Jacobson with an opportunity to conduct discovery with respect to the Committee's additional claims and prepare his response to those claims. No hearing date has yet been set in this case. The status of the parties'

discovery efforts and the scheduling of the hearing will be discussed during the Prehearing Conference on Monday, June 24, 1996.

In the motion currently at issue in this case, the Committee seeks an order from the Administrative Law Judge immediately scheduling this matter for a four-week hearing to commence between August 15 and October 1, 1996, and amending the April 22, 1996, Prehearing Order to provide that the discovery deadline is July 17, 1996. The Motion is made on the grounds that Dr. Jacobson is allegedly continuing to "fraudulently extract patients' teeth, and patients will be unnecessarily harmed if the hearing is delayed." The Committee alleges that, over the past seventeen months, it has gathered evidence that Dr. Jacobson has a "consistent practice of extracting root-treated teeth" by "falsely tell[ing] patients that teeth that have received root canal treatment are poisonous" and "then extract[ing] the teeth and plac[ing] expensive bridgework." Committee's Memorandum in Support of Motion at 1. The Committee further contends that the scope of Dr. Jacobson's conduct in this regard has become more apparent in recent months and that, during the period from November 17, 1995, to January 19, 1996, four additional patients of Dr. Jacobson have filed complaints against him with the Board of Dentistry. The Committee also indicates that, in response to discovery requests, Dr. Jacobson has indicated that he has extracted a total of 53 root-treated teeth from a total of 29 patients during the period from July 5, 1995, through March 31, 1996. The Committee also contends that Dr. Jacobson does not need additional time to prepare for hearing in this matter and that he is not proceeding diligently with discovery, but is simply engaging in "arguments over irrelevant and privileged discovery materials." Committee's Memorandum in Support of Motion at 3.

With its motion papers, the Committee filed the affidavits of three former patients of Dr. Jacobson which support the Committee's allegations that Dr. Jacobson has told his patients that root canal teeth can be toxic, have harmful health effects, or can cause problems if done incorrectly. One of these patients also alleges that she was not offered any option other than extraction. The Committee also filed an affidavit of Mahmoud E. ElDeeb, Associate Professor and Director of the Division of Endodontics of the University of Minnesota Dental School and a Diplomate of the American Board of Endodontics. In his affidavit, Dr. ElDeeb attests that the "theory of focal infection" positing that root canal treated teeth may leak toxins into the body is "erroneous," "based on flawed experiments," and "has been thoroughly disproven by modern medical and dental researchers," and is not taught as a valid theory by a single dental school in the United States. Affidavit of Mahmoud E. ElDeeb, ¶¶ 2, 4, 5. Dr. ElDeeb further indicates in his affidavit that "[e]xtensive research and clinical experience has demonstrated that root canal or endodontic therapy is safe and effective and has no relationship to infections in other parts of the body" and that "the current philosophy and teaching in all U.S. dental schools" is that "teeth appropriately treated with modern conventional root canal procedures and materials have one of the highest success rates in dentistry, prevent unnecessary loss of teeth and lead to healthy, functional and esthetic dentition." *Id.* at ¶ 5.

In his Memorandum in Opposition to the Committee's Motion, the Respondent argues that the situation regarding Dr. Jacobson's extraction of root-treated teeth is no different now than it was in July 1995 when counsel for the Committee first wrote a letter to

counsel for Dr. Jacobson addressing this subject. The Respondent contends that he has made at last three offers to try to work out a compromise on this issue and that the Committee has "repeatedly failed to discuss the matter in good faith." Respondent's Memorandum in Opposition to Motion at 3. Dr. Jacobson further contends that the issue of whether extraction of root-treated teeth is appropriate is "scientifically debatable." Finally, the Respondent asserts that he is in the process of having his experts review the documents, x-rays, and other evidence associated with the case and needs the time set by the Administrative Law Judge for discovery in order to adequately prepare for the hearing.

The Respondent's memorandum in opposition to the motion was accompanied by several affidavits,² including that of Dr. Jacobson and that of Schuyler H. Van Gorden, D.D.S. In his affidavit, Dr. Jacobson states that there is "a significant amount of literature" on the subject of the effects of root canal therapy on people's general health, and cites two sources. Affidavit of Gary L. Jacobson, ¶ 2. Dr. Jacobson indicates that he has "seen anecdotal evidence of patients' health improving after removal of RCT [root canal treated] teeth" in his own practice and that, "[w]hile [he] strongly believe[s] that RCT teeth can be harmful to the general health of patients, [he does] not actively encourage patients to have asymptomatic teeth removed." *Id.*, ¶ 3. He asserts that "[m]any patients who are aware of the ill effects of RCT teeth on their health have come to [him] over the past few years requesting that such teeth be removed." *Id.* He states that he tells patients with infections and abscesses that root canal therapy is a possible option, gives them a brochure published by the American Association of Endodontists explaining root canals, tells them that he does not perform root canals because he is opposed to doing root canal therapy, and suggests that they see an endodontist if they are interested in having a root canal. *Id.*, ¶ 4. He further attests that every RCT tooth that he has extracted since January 1995 has been biopsied by a reputable oral pathologist and that the biopsies have revealed in all cases that aseptic osteonecrosis was present, but does not explain the significance of this finding. *Id.*, ¶ 7. The Affidavit of Dr. Van Gorden states that "[l]iterature and research exist which support the focal infection theory," attaches a bibliography from a publication by George E. Meinig, D.D.S., F.A.C.D., and states Dr. Van Gorden's opinion that "extraction of an asymptomatic tooth by a dentist at the request of a patient does not violate the standard of care" but "is an event which occurs every day." Affidavit of Schuyler H. Van Gorden, D.D.S., at ¶¶ 2-3.

The two-month extension to the previously scheduled discovery deadline was granted in order to provide the Respondent a full and ample opportunity to conduct discovery with respect to the additional claims raised by the Committee in its Supplemental and Amended Notice of Hearing and prepare his response to those claims. Although the Committee has raised serious concerns in its motion, those concerns do not, in the view of the Administrative Law Judge, warrant shortening the discovery period or requiring that the hearing be held in August or September. The parties have presented conflicting evidence concerning Dr. Jacobson's current practice and whether there is or is not scientific support for extraction of root-treated teeth. Although the Committee has acknowledged that the allegations dealing with unnecessary extractions began to surface in December of 1994 and it is evident that counsel for the Committee raised the issue with Dr. Jacobson's attorneys at least as early as July of 1995, the Committee did not file the Notice of and

Order for Hearing in this matter until September 15, 1995, or its current motion until May 16, 1996. The Committee's assertions of urgency are not supported by this history. Moreover, it appears that there are other alternative measures available to guard against alleged public harm without cutting short the Respondent's right to conduct discovery and prepare for hearing. Dr. Jacobson apparently has been willing to enter into a formal agreement with the Committee that he will provide patients requesting extraction of root-treated teeth with ADA position papers regarding root canals, tell them that he is in the minority on the issue, inform them of their right to consult with an endodontist or other dental professional, and require them to sign consent forms prior to any extraction. The Board also has the authority to temporarily suspend Dr. Jacobson's license if it determines that his continued practice would create an imminent risk of harm to others. Minn. Stat. § 150A.08. subd. 8 (1994).

Under these circumstances, it is not appropriate to amend the discovery deadline or set an August or September hearing date in this matter. Accordingly, the Committee's motion has been denied.

B.L.N.

² In accordance with the Committee's request, Ms. Mande's affidavit and the attachments thereto have been marked "not public data" and placed in a sealed envelope because certain of the attachments disclose patient identities.