

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

On March 26, 1996, the Complaint Committee of the Board of Dentistry provided to the undersigned Administrative Law Judge a number of files concerning the Respondent, Dr. Gary Jacobson. Dr. Jacobson replied to the filing by letter and briefs submitted on March 29, 1996.

Thomas C. Vasaly, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, represents the Complaint Committee of the Minnesota Board of Dentistry. Debra H. Mande, Esq. and Ronald S. Rosenbaum, Esq., of the firm of Tilton and Rosenbaum PLLP, 101 East Fifth Street, Suite 2220, St. Paul, Minnesota 55101-1808, represent the Respondent, Dr. Gary L. Jacobson. The record, with respect to this *in camera* inspection, closed on March 29, 1996.

Based upon the *in camera* inspection, the prior argument filed by the parties, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

The Respondent's motion to compel production of the documents submitted for *in camera* inspection is hereby DENIED.

Dated this 3rd day of April, 1996.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

On January 29, 1996, the Respondent filed a motion to compel production of certain documents which have been withheld by the Complaint Committee generally on the grounds of privilege. In an Order dated March 19, 1996, Administrative Law Judge Barbara L. Neilson required the Complaint Committee to supplement its second amended list of withheld documents by noting the name of the author and addressee of each document and generally describing the nature of each document. She then required submission of the documents not yet produced to the undersigned Administrative Law Judge by March 26, 1996. This Administrative Law Judge was then directed to "determine whether the documents are protected by the work product doctrine or the attorney-client or agency deliberative privileges, whether the documents contain confidential or not public information relating to other individuals, whether purely factual material reasonably can be separated without compromising privileged or confidential portions of documents, and whether the Respondent has made a sufficient showing of substantial need and undue hardship to obtain access to the requested information."

The Administrative Law Judge has made a careful examination of each document submitted and reviewed the motions and arguments filed by the parties in this matter. Based upon that examination, it is appropriate that the motion to produce be denied.

In the course of this review, the Administrative Law Judge recognized the general rule that work product prepared in anticipation of litigation is not discoverable unless a party shows substantial need and undue hardship. Minn. R. Civ. P. 26.02(c). The protection extends to a party's agents as well as materials prepared by an attorney. Furthermore, where the material consists of mental impressions, conclusions, opinions or legal theories, it is appropriate to recognize a virtually absolute privilege. Minn. R. Civ. P. 26.02(c); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. 1986). In addition, the attorney-client privilege applies to communications between the Attorney General's office and the Complaint Committee and its staff. Under Minn. Stat. § 595.02, subd. 1(b), attorney advice to a client or communication by the client to an attorney is protected from disclosure. Additionally, an agency deliberative or intra-governmental memoranda privilege has been recognized in case law in order to promote the policy of frank expression and discussion among government officials charged with policy making and decision making. *Kaiser Aluminum & Chemical Corp. v. U.S.*, 157 F.Supp. 939 (Ct. Cl. 1958); *Carl Zeiss Stifting v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318, 324-25 (D.D.C.) affirmed 384 F.2d 979 (D.C. Cir. 1966) *cert. denied*, 389 U.S. 952 (1967). Generally, under this doctrine, facts are not privileged while advice or opinions are. It is appropriate to balance the need of the requesting party against the need for protection of the deliberative process with an agency. The issue of relevancy was also considered. Generally, a matter is relevant or has probative value if it would logically tend to prove or disprove a material fact in issue. *Boland v. Morrill*, 270 Minn. 86, 132

N.W.2d 711, 710 (1965). However, even if the information is inadmissible at trial, it may be discoverable if it appears reasonably calculated to lead to admissible evidence. Minn. R. Civ. P. 26.02(a).

The Complaint Committee submitted three types of files concerning the Respondent. It submitted material from 16 active files which are files dealing with complaints which led to this contested case proceeding. Pursuant to an October 26, 1995 Order by Judge Neilson, the Committee has turned over the complaints and investigative reports from these files which the Committee's expert witnesses have reviewed. It claims that the remaining material is privileged, either as work product or under the attorney-client or agency deliberative privilege. Based upon a review of these documents, it appears that any material with probative value has already been produced by the Complaint Committee. These documents consist mostly of transmittal letters accompanied by recommendations, but without factual material. Accordingly, they are properly protected as work product, specifically, the mental impressions of an attorney or representative of an attorney. Some of the memos are from an assistant attorney general to investigators which are protected as attorney-client advice. Some of the memorandums are memorandums between staff or staff and the Complaint Committee board members which are properly protected under the agency deliberative or intra-governmental privilege. Specifically, there is nothing in this material which would suggest that the Complaint Committee's motive in this proceeding is based upon the Respondent's "holistic" approach to dentistry.

Additionally, the Complaint Committee has submitted portions of 14 closed or inactive files for an *in camera* review. These files do not refer to the patients described in the Notice of Hearing in this contested case proceeding. In Orders dated October 26 and November 2, 1995, Judge Neilson ordered the Complaint Committee to provide Respondent with copies of these files except for privileged materials, which the Committee did on November 9, 1995. The materials produced consisted mostly of complaints and investigative reports. A careful review of the closed and inactive files shows that they are appropriately protected by either the work product, attorney-client or intra-governmental agency privilege. The bulk of the materials is complaint forms or transmittal forms with little content of any kind a number of "priority evaluation sheets". A number of the files are communications from board staff to the board or from an assistant attorney general to the board staff. They are generally conclusory rather than factual. Some discuss strategy in connection with the matters involved. A good number of the memos are from the assistant attorney general to investigators providing directions to them or from an investigator to the special assistant attorney general. There are a few factual summaries in these files. They precede conclusions or mental impressions. The material is usually mixed with opinion and is, in any event, irrelevant to this contested case. It is the conclusion of the Administrative Law Judge that this material would have little probative value for the Respondent.

It is also apparent, based upon a review of the record, that the Respondent has not demonstrated a specific need for the materials sufficient to overcome the privileges in question as required by the case law and Minn. Rule 1400.6700, subp. 2. Therefore, it appropriate to deny the motion for production of the documents submitted for inspection.

G.A.B.