

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF DENTISTRY

In the Matter of Mohamed El Deeb, D.D.S.
License No. D9508

**ORDER REGARDING
RESPONDENT'S MOTION TO
DISMISS AND MOTION TO
COMPEL AND COMMITTEE'S
MOTION TO MODIFY SCHEDULE**

The above matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Prehearing Conference and Hearing issued on May 1, 2006, and an Amended Notice and Order for Hearing issued on November 15, 2006.

On December 18, 2006, the Complaint Review Committee of the Board of Dentistry (the "Committee" or "CRC") filed a motion for an order modifying the second prehearing order in order to allow the Committee sufficient time to conduct discovery into the fraud allegations made in its Amended Notice and Order for Hearing and to obtain reports from Respondent's experts as well as depose them. On January 3, 2007, the Respondent filed a memorandum in opposition to the Committee's Amended Notice of Hearing and motion to modify the second prehearing order. On January 8, 2007, the CRC filed a reply brief with respect to its motion to modify the second prehearing order. A conference call was held with counsel on January 12, 2007, at which time the hearing that was scheduled for March 5-7, 2007, was indefinitely continued, along with the motion, witness, and exhibit deadlines set forth in the Second Prehearing Order, and the discovery deadline was extended beyond the January 15, 2007, deadline. Discovery was permitted to be ongoing pending further determination. A further motion briefing schedule was also established during the telephone conference call.

On January 3, 2007, the Respondent filed a motion to compel discovery and supporting memorandum. On January 25, 2007, the Committee filed a memorandum in opposition to the Respondent's motion to compel. On February 2, 2007, the Respondent filed a reply memorandum in support of his motion to compel.

On January 26, 2007, the Respondent filed a motion to dismiss the substandard care and up-coding allegations contained in the Committee's Amended Notice of Hearing, and a supporting memorandum. On February 7, 2007, the Committee filed a response in opposition to the Respondent's motion to dismiss. On February 12, 2007, the Respondent filed a reply brief with respect to the motion to dismiss.

On January 26, 2007, the Committee filed a motion to compel production of the November 2006 settlement agreement reached between Respondent and Delta Dental Plan. On February 2, 2007, Respondent filed a response in opposition to the Committee's motion to compel. By letter dated February 7, 2007, the Committee withdrew its motion to compel. Accordingly, that motion is not addressed in this ruling.

Oral argument was heard with respect to the pending motions on February 15, 2007. The Respondent filed an additional letter brief on February 20, 2007, and the Committee filed an additional letter brief on February 23, 2007. By letters dated February 26, 2007, and March 5, 2007, Dr. El Deeb's requests to submit further argument were denied, and the record with respect to the motions closed.

Appearances: Sebastian Stewart, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, MN 55101-2131, appeared on behalf of the Committee. Richard A. Lind and Sara J. Lathrop, Attorneys at Law, Lind, Jensen, Sullivan & Peterson, P.A., 150 South Fifth Street, Suite 1700, Minneapolis, MN 55402-4217, appeared on behalf of the Respondent, Mohamed El Deeb, D.D.S.

Based upon the files, record, and proceedings in this matter, and for the reasons set forth in the attached Memorandum,

IT IS HEREBY ORDERED as follows:

1. The Respondent's motion to compel discovery is hereby DENIED.
2. The Respondent's motion to dismiss the substandard care and up-coding allegations contained in the Amended Notice of Hearing is hereby DENIED.
3. By April 13, 2007, counsel for the Committee shall provide the Respondent with any notes or other documents pertaining to any complaint received by the Board concerning the Respondent in September 2006, with the identity of the complainant redacted.
4. All discovery in this matter shall be completed by June 1, 2007.
5. Any additional motions in this matter shall be filed by June 8, 2007.
6. By June 15, 2007, counsel shall exchange proposed exhibit and witness lists. The witness list shall contain a brief description of the anticipated testimony of each witness and clarify which witnesses are providing fact testimony and which witnesses are providing expert testimony. In accordance with Minn. Rules 1400.6950, subp. 2, any party objecting to the foundation for any written exhibit must notify both the offering party and the Administrative Law Judge in writing at least two working days before the hearing, or the foundation objection shall be deemed waived.

6. By June 25, 2007, counsel shall notify the Administrative Law Judge whether they will require the services of a court reporter at the hearing.
7. The hearing in this matter shall be held on July 9 - 12, 2007, commencing at 9:30 a.m. each day in the courtrooms of the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota.
8. The parties shall appear at the hearing with at least three copies of each exhibit. Exhibits shall be premarked.

Dated: April 2, 2007

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Respondent's Motion to Dismiss

With respect to the Respondent's Motion to Dismiss, the following facts appear to be undisputed. Prior to the end of 2003, the Board received one or more complaints alleging that the Respondent had provided improper care to patients and had engaged in improper billing practices (including upcoding, or the incorrect coding of procedures performed by the dentist to codes associated with higher costs). The Board initiated its complaint-resolution process, which included a conference with Respondent on October 10, 2003. The Respondent and the Board's Complaint Committee ultimately entered into an Agreement for Corrective Action ("the Agreement") resolving issues that arose out of the investigation. The Agreement was signed by the Respondent on January 8, 2004, and the Executive Director of the Board on behalf of the Complaint Committee on January 21, 2004.¹

The Agreement specified that "[t]he Committee concludes that the practices described below constitute violations of Minnesota Rules 3100.9600 for purposes of this Agreement only. Licensee agrees that the practices described below would constitute violations of Minnesota Rules 3100.9600 if proven by the Committee, but agrees to enter into this Agreement for Corrective Action for purposes of settlement."² That rule sets forth various record-keeping requirements that apply to dentists.³ The facts

¹ Respondent's Memorandum in Support of Motion to Dismiss, Ex. 13; Board Response to Motion to Dismiss, Exhibit 1.

² Board Response to Motion to Dismiss, Exhibit 1.

³ Minn. R. 3100.9600 requires, among other things, that dentists maintain dental records on each patient that contain the patient's name, address, date of birth, emergency telephone numbers, insurance information and (if applicable) the name of the patient's parent or guardian; the patient's stated oral health care reasons for visiting the dentist; and sufficient dental and medical history to support the recommended treatment plan. If a clinical examination is performed, the rule requires that dental records

identified in the Agreement related to the Respondent's alleged failure to document that there was a potential for implant failure on one patient when the patient was experiencing pain and inflammation in March 2001; failure to indicate in records of another patient on June 11, 2001, whether the patient had a chronic or acute infection; failure to discuss pre-medicating a patient who had a heart murmur with prophylactic antibiotics prior to performing oral surgery on an unspecified date; and incorrect billing of three other patients and/or their third-party payors on unspecified dates using an oral surgery procedure code that was upcoded from the actual surgical services rendered to the patients.⁴ The Agreement stated that the Committee had concluded that the described practices "constitute violations of Minnesota Rules 3100.9600 for purposes of this Agreement only" and that the Licensee agreed that the described practices "would constitute violations of Minnesota Rules 3100.9600 if proven by the Committee, but agrees to enter into this Agreement for Corrective Action for purposes of settlement."⁵

As part of the Agreement, the Respondent agreed to complete certain specified coursework involving decision-making, risk management, and recordkeeping; provide the Committee with a copy of his infection control manuals for review; provide the Committee with reports on pre-medication guidelines and changes in his practice relating to infection control and safety and sanitary conditions; and pass the Minnesota jurisprudence examination with a score of at least 90 percent.⁶ The Agreement included the following provisions:

Upon Licensee's satisfactory completion of the corrective action referenced in paragraph 3 above, the Committee agrees to dismiss the complaint(s) concerning the matters referenced in paragraph 2. The Committee shall be the sole judge of satisfactory completion. If, after dismissal, the Committee receives additional complaints alleging conduct similar to that referenced in paragraph 2, the Committee may reconsider the dismissed complaint(s).

If Licensee fails to complete the corrective action satisfactorily, or if the Committee receives additional complaints alleging conduct similar to that referenced in paragraph 2, the Committee may, at its discretion, reopen the investigation and proceed according to Minnesota Statutes chapter 150A (the Board's practice act) and Minnesota Statutes chapters 214 and 14. Licensee agrees that failure to complete this corrective action

also include a record of existing oral health care status, any radiographs used, and any other diagnostic aids used. Dental records are also required to include a diagnosis, a treatment plan (except for routine dental care), a notation that treatment options and prognosis, benefits, and risks have been discussed with the patient and the patient has consented to the treatment chosen; and a chronology of the patient's progress. The rule further requires that records be retained for specified lengths of time and that records be transferred regardless of the status of the patient's account.

⁴ *Id.* at ¶¶ 2(a)-(d).

⁵ *Id.* at ¶ 2.

⁶ *Id.* at ¶ 3.

satisfactorily is failure to cooperate under Minn. R. 3100.6350 and may subject Licensee to disciplinary action by the Board.⁷

During 2004, the Board received additional informal complaints concerning alleged substandard care and upcoding of services by the Respondent, as well as other matters. Two of these informal complaints were received on or about January 21, 2004, the date that the Agreement was finalized, and others were received later.⁸ It appears that at least some of these allegations were made by persons who were employees of Respondent.⁹ Based on these allegations, the Committee decided on March 1, 2004, to open a complaint and forward it to the Office of the Attorney General for investigation. The allegations in the complaint included impairment, auxiliary misuse, substandard care, and unprofessional conduct.¹⁰ While that investigation was pending, the Committee determined that the Respondent had fully complied with the requirements of the Agreement and dismissed the prior complaint against the Respondent. The dismissal was effective on June 28, 2005.¹¹

In the course of the Board's more recent investigation, a dispute between Respondent and Delta Dental Plan of Minnesota came to the Board's attention. The dispute resulted in claims of fraud and breach of contract, set out in a civil complaint dated April 22, 2005, and filed in Hennepin County District Court.¹² Delta Dental's litigation with the Respondent was later settled and the civil complaint was dismissed on November 13, 2006.¹³

The Committee ultimately issued a Notice of and Order for Hearing initiating the present contested case proceeding on May 1, 2006, alleging that the Respondent had engaged in substandard oral surgery on dates in 2002-2004 involving nine patients, and had placed Hemaderm, a product it alleged had not been approved by the U.S. Food and Drug Administration for use in the oral cavity, in extraction sites of at least 89 patients during a seven-month period in 2003-2004. The Committee issued an Amended Notice of and Order for Hearing in this matter on November 15, 2006, which deleted the allegation concerning the use of Hemaderm and added an allegation that the Respondent "perpetrated fraud relating to the practice of dentistry upon his patients, Delta Dental of Minnesota, and other third-party payors when he billed them for services that were different than those actually rendered." The Committee further alleged that this misconduct occurred as a result of oral surgery performed by the Respondent to extract teeth on certain patients during the period of 2001-2005, and that, according to patient dental and billing histories during that time, the Respondent billed his patients and/or Delta Dental of Minnesota using an oral surgery procedure code that was upcoded from the actual surgical services he rendered to the patients.

⁷ *Id.* at ¶¶ 4-5.

⁸ See Exs. 14-20.

⁹ Lathrop Affidavit attached to Respondent's Memorandum in Support of Motion to Dismiss, Exs. 20, 27.

¹⁰ Lathrop Affidavit, Exs. 19-21.

¹¹ Lathrop Affidavit, Ex. 25.

¹² Lathrop Affidavit, Ex. 23.

¹³ Lathrop Affidavit, Ex. 24.

While the Amended Notice did not detail each of the patients involved in the upcoding claim, the Committee contended during oral argument that it had identified to the Respondent the patients at issue with respect to that claim. Counsel for the Committee confirmed during oral argument that none of the patients involved in either the substandard care or the upcoding claims contained in the Amended Notice of and Order for Hearing are the same as those involved in the Agreement.

In his motion to dismiss, the Respondent argues that the new upcoding claim contained in the Amended Notice of Hearing should be dismissed in part because he received “late notice” of the Committee’s claims. For “late notice” to constitute a basis for dismissal of the upcoding allegations, there must be some demonstration that the Respondent has been prejudiced by the Committee’s delay in asserting the charges. Here, the Respondent has made no showing that any witness or evidence is unavailable now that would have been available with prior notice of the amended claims. Since no showing of prejudice has been made, the Respondent’s motion to dismiss the upcoding claim due to late notice is denied.

The Respondent further contends that the upcoding allegations should be dismissed because the Board did not follow its typical procedures as set forth on its webpage in investigating and presenting those allegations to the Respondent (such as advising the dentist that a complaint was filed and convening a conference with the dentist in order to provide him an opportunity to respond). The section of the Minnesota Administrative Procedure Act pertaining to the Notice of Hearing initiating a contested case proceeding specifies the general rule that the Notice “shall state the time, place and issues involved” but acknowledges that “if, by reason of the nature of the case, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto.”¹⁴ Moreover, the OAH rules governing contested case proceedings afford an agency the right to file and serve an amended notice of and order for hearing “at any time prior to the start of the evidentiary hearing” provided that, “should the amended notice and order raise new issues or allegations, the parties shall have a reasonable time to prepare to meet the new issues or allegations if requested.” Amendments may also be made after the hearing begins with the approval of the Administrative Law Judge.¹⁵ In appropriate situations, then, it is evident that amendments may be made to the Notice of Hearing to conform the agency’s allegations to facts uncovered in the course of discovery.

In the present case, a Notice of Hearing was already pending alleging substandard care by the Respondent, following the typical procedures employed by the Committee. The Committee added the billing fraud allegations before the commencement of the hearing and there is ample time before the hearing to conduct discovery regarding this new claim. Because these allegations apparently were raised in the Respondent’s lawsuit with Delta Dental, it is likely that the Respondent already is

¹⁴ Minn. Stat. § 14.58.

¹⁵ Minn. R. 1400.5600, subp. 5.

familiar with these claims. It is efficient and consistent with notions of judicial economy to handle the Committee's entire case against the Respondent in a single proceeding rather than requiring the parties to incur the time and expense of multiple hearings. A substantial delay has been ordered in the hearing date, and it does not appear that the Respondent is contending that he needs more time to prepare to meet the new allegations. In any event, the Committee indicated that it would not object to modification of the schedule if the Respondent needed more time to prepare for the hearing. Accordingly, the Administrative Law Judge that the Committee has proper authority to amend the Notice of Hearing to include the upcoding allegations.¹⁶

Finally, the Respondent contends that both the substandard care and upcoding allegations should be dismissed because "the Board previously considered the allegations and entered into a consent order with [the Respondent] with regard to those claims."¹⁷ The Respondent argues that the same allegations were considered in the Agreement and asserts that the doctrines of *res judicata* and collateral estoppel require dismissal of the entire contested case proceeding. In response, the Committee argues that neither doctrine applies to the Respondent's situation.

The doctrine of *res judicata* prevents parties from raising any claim in a subsequent case that was or could have been litigated in an earlier case. In a recent decision, the Minnesota Supreme Court set out the elements of the doctrine as follows:

Res judicata operates as an absolute bar to a subsequent claim when: (1) the earlier claim involved the same claim for relief; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Res judicata* applies to all claims actually litigated as well as to all claims that could have been litigated in the earlier proceeding.¹⁸

In an earlier decision, the Minnesota Supreme Court further explained, "Identity of subject matter does not establish that two claims are the same cause of action. . . . [I]f the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action."¹⁹ The

¹⁶ During oral argument, counsel for the Committee indicated that the Respondent had been provided with detailed information concerning the specific billing charges that are at issue in connection with the upcoding allegations. If that is not the case, the Committee shall clarify the allegations contained in the Amended Notice of Hearing, upon request by the Respondent, by explicitly identifying the particular patients whose records are the basis of the new upcoding charges as well as the specific instances in which the Committee contends billing fraud occurred.

¹⁷ Respondent's Memorandum of January 3, 2007, at 5.

¹⁸ *State of Minnesota v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001) (citations and footnote omitted). The Court further noted, "Our use of the term 'res judicata' in this opinion is consistent with the recent practice of this court in that it specifically refers to claim preclusion. . . . In the past, however, we have referred to res judicata as an umbrella doctrine encompassing the principles of: (1) claim preclusion, also known as estoppel by judgment or 'merger or bar'; and (2) issue preclusion, also known as collateral estoppel or estoppel by verdict." *Id.* at 326 n.1 (citations omitted).

¹⁹ *Care Institute, Inc. – Roseville v. County of Ramsey*, 612 N.W.2d 443, 447 (Minn. 2000) (citations omitted).

Court has also noted that “[a] claim or cause of action is ‘a group of operative facts giving rise to one or more bases for suing.’ Therefore, the focus of res judicata is whether the second claim ‘arises out of the same set of *factual circumstances*.’”²⁰ As a result, “*the facts* surrounding the occurrence which constitutes the cause of action—not the legal theory upon which [plaintiff] chose to frame his complaint—must be identical in both actions to trigger res judicata.”²¹ The typical test for evaluating whether a former judgment bars a subsequent action “is to inquire whether the same evidence will sustain both actions.”²²

There is no dispute that the parties to the Agreement are the same as the parties in the present contested case proceeding, satisfying the second element for application of the doctrine of *res judicata*. However, there is a dispute about whether or not the other elements are satisfied. Respondent maintains that the dismissal of the complaint(s) underlying the Agreement constitutes a final adjudication of the same cause of action presented in the current proceeding. The Committee asserts that the earlier claim did not involve the same claim for relief, there was not a final judgment on the merits, and it did not have a full and fair opportunity to litigate the matter.

The Committee has asserted that the care and billing issues involved in this proceeding relate to different patients from those identified in the Agreement, and the Respondent has not offered any evidence to the contrary. Under the circumstances, the Administrative Law Judge concludes that the present case does not involve the same claim for relief as the Agreement, and the dismissal of the complaint(s) underlying the Agreement based upon the Respondent’s satisfactory performance of the corrective action that was incorporated in the Agreement has no *res judicata* effect in this proceeding. As a threshold matter, it appears that the focus of the Agreement was on recordkeeping deficiencies, and not on substandard care or upcoding allegations. Moreover, even if the complaint(s) underlying the Agreement did assert substandard care and upcoding allegations, those allegations related to other patients and billing situations than are involved in the present case. Issues pertaining to whether a particular patient has received appropriate care are necessarily specific to the facts surrounding that patient’s treatment. Each patient requires individual assessment, and what is appropriate care for one may well differ from what is appropriate care for another. Similarly, issues pertaining to whether a particular patient was appropriately billed for dental services that were actually provided will depend on an analysis of what services that specific patient received, and what is appropriately billed for one patient may not be appropriately billed for another. It is evident that this is not a situation in which the same evidence would sustain both actions. Since the Committee has clarified that the patients involved in the substandard care and upcoding allegations reflected in

²⁰ *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (emphasis in original), quoting *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002), and *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978).

²¹ *Hauschildt* at 840, quoting *Meagher ex rel. Pension Plan v. Board of Trustees*, 921 F. Supp. 161, 167 (S.D.N.Y. 1995) (emphasis in original).

²² *Hauschildt*, 686 N.W.2d at 840-41, quoting *McMenomy v. Ryden*, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967).

the Amended Notice of Hearing are different from those identified in the Agreement, there is no showing that the same cause of action is presented in this matter.

The fourth element necessary for a showing of *res judicata* is absent as well, since the Committee lacked the opportunity to litigate the issues involved in the current contested case proceeding in the prior complaint investigation proceeding. The mere fact that the Committee or Board may have been in the process of investigating allegations involving the patients at issue in the current matter after the Agreement was signed and before the dismissal occurred, or may have been aware of the dispute between the Respondent and Delta Dental during that time, does not change the fact that the violations alleged in the current contested case proceeding were not involved in the resolution of the complaint(s) underlying the Agreement. Because the first and fourth elements for application of the doctrine of *res judicata* therefore are lacking, the Committee is not barred by *res judicata* from proceeding with the present contested case proceeding.

The Administrative Law Judge also concludes that the related doctrine of collateral estoppel does not apply in the present case. Collateral estoppel precludes re-litigation of issues decided in a prior adjudication. For collateral estoppel to apply, the following factors must be present:

- (1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication;
- (2) the issue must have been necessary to the agency adjudication and properly before the agency;
- (3) the agency determination must be a final adjudication subject to judicial review;
- (4) the estopped party must have been a party or in privity with a party to the prior agency determination; and
- (5) the estopped party must have been given a full and fair opportunity to be heard on the adjudicated issue.²³

Respondent maintains that all of the issues involved in the current contested case proceeding are precluded because the same issues were dismissed under the terms of the Agreement. However, as discussed above, the actual patients involved in the current proceeding who allegedly received substandard care or were allegedly the victims of upcoding are different from those who were involved in the Agreement. Moreover, the overarching issue of whether violations of statute or rule exist in the current case must turn on the particular facts and circumstances that apply to each patient, and that determination is not affected by the fact that the parties entered into an Agreement for Corrective Action in the past with respect to allegations relating to other patients. The Agreement did not contain a general release of all claims preceding its

²³ *Graham v. Special School Dist. No. 1*, 472 N.W.2d 114, 115-16 (Minn. 1991) (citations omitted).

effective date. To the contrary, the parties expressly limited the effect of the Agreement by noting in paragraph 2 that, "The Committee concludes that the practices described below constitute violations of Minnesota Rules 3100.9600 for purposes of this Agreement only. Licensee agrees that the practices described below would constitute violations of Minnesota Rules 3100.9600 if proven by the Committee, but agrees to enter into this Agreement for Corrective Action for purposes of settlement."²⁴ Under these circumstances, there is no proper basis for estopping the Committee from pursuing issues of substandard care and upcoding involving different patients, even if the Respondent engaged in similar actions in the past with respect to other patients and those matters were resolved in the Agreement.

Because it is clear that some of the essential elements required for a showing of *res judicata* or collateral estoppel are lacking here, there is no need to reach the parties' remaining arguments relating to the effect of Minn. Stat. § 214.103, subd. 6, and whether or not the earlier dismissal constituted a "judgment on the merits" or was reached as a result of "litigation" for purposes of the other elements of these doctrines.

Respondent's Motion to Compel

During the motion argument on February 15, 2007, the parties indicated that they had been able to resolve several areas of disagreement that were raised in the Respondent's original motion to compel, including disputes relating to review of the file of the expert witness, disclosure of prior cases in which the expert has been involved during the past five years, discovery of additional documents obtained from the expert, and identification of documents supporting the upcoding claim. The Committee stated that it had provided lists to the Respondent derived from the Delta Dental information identifying over 100 different patients involved in the upcoding claim. The Respondent had not yet reviewed those lists at the time of the motion argument and indicated that it would notify the Administrative Law Judge if it feels the lists do not provide adequate notice of the Committee's claims. The Committee also indicated that it will rely on two witnesses from Delta Dental and their experts regarding the upcoding claim and would disclose whether these witnesses are fact or expert witnesses by the following week. The Committee does not anticipate calling any other witnesses regarding the upcoding claim.

The Committee has provided the Respondent with copies of the complaints received by the Board that underlie the pending contested case proceeding, but has redacted the names of the individuals who filed the complaints. The Respondent requested that the Committee indicate whether or not an additional person filed a complaint in September 2006 regarding the upcoding claim and, if so, disclose that complaint and the identity of the complainant as well. Counsel for the Committee responded that he did not believe that a written complaint was filed in September 2006, but the Administrative Law Judge directed counsel for the Committee to determine whether or not notes were taken of an oral complaint and, if so, provide those notes to

²⁴ Board Response to Motion to Dismiss, Exhibit 1.

the Respondent. The Committee indicated that it does not intend to call that individual as a witness at the hearing.

The only remaining issue with respect to the Motion to Compel filed by the Respondents has to do with whether the Committee should be compelled to disclose the identity of the individuals who filed complaints with the Board that led to the investigation and, ultimately, to the filing of the Notice of Hearing and Amended Notice of Hearing. The Respondent asserts that the complainants involved in the standard of care complaints are disgruntled former employees, one of whom was terminated for theft by the Respondent and was criminally prosecuted. He argues that he is entitled to verification of their identity because this information will establish their bias and lack of credibility. The Committee objects to the disclosure of complainants' identities with the exception of the one complainant who it intends to call as a witness at the hearing. It argues that the identities of the others are irrelevant to the issue of whether the Respondent provided substandard care or engaged in billing fraud. The Committee further asserts that disclosure would violate the Minnesota Government Data Practices Act and have a chilling effect on the willingness of individuals to lodge complaints.

Pursuant to Minn. Stat. § 150A.13, subd. 1, and 150A.14, subd. 1, reports made by persons who allege that a licensed dentist is unable to practice with reasonable skill and safety are deemed to be "privileged communications" and "confidential data on individuals" for purposes of the MGDPA (Minn. Stat. § 13.02, subd. 3). The MGDPA further specifies that "data collected by state agencies . . . as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data . . . in the case of data not on individuals and confidential . . . in the case of data on individuals. Any agency . . . may make data classified as confidential or protected nonpublic pursuant to this subdivision accessible to any person, agency or the public if the agency . . . determines that the access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest."²⁵ This section of the MGDPA goes on to state that, during the time when a civil legal action (including an administrative proceeding) is pending, an individual may seek disclosure of data classified as confidential or protected nonpublic and that, in determining whether or not data shall be disclosed, the Judge "shall consider whether the benefit to the person bringing the action or to the public outweighs any harm to the public, the agency, or any person identified in the data."²⁶

The Respondent disputes the Committee's assertion that the information remains confidential or not public in nature after the initiation of a contested case proceeding. Respondent relies on the Minnesota Supreme Court holding in *Westrom v. Minnesota Department of Labor and Industry* to assert that the identities of the complainants may

²⁵ Minn. Stat. § 13.39, subd. 2(a).

²⁶ Minn. Stat. § 13.39, subd. 2a. Although this provision goes on to state that, "The data in dispute shall be examined by the court in camera," it is unnecessary to conduct such a review in this instance because the complaints have already been provided to the Respondent, with only the names of the complainants redacted.

be discovered now that a contested case proceeding has been commenced.²⁷ The documents sought to be disclosed in *Westrom* were not unredacted complaints but rather were orders issued by the Department of Labor and Industry and objections to those orders issued by two construction companies. However, the Respondent maintains that the rationale of the *Westrom* decision requires the Board to release the names of the underlying complainants in the present case now that a contested case proceeding has been initiated.²⁸ He contends that the need for discovery of the identities of the complainants in the present case is analogous to the need for discovery of the names of witnesses in an auto accident case.

The Administrative Law Judge finds that the *Westrom* decision is not dispositive of the discovery dispute in this case. The Minnesota Supreme Court has ruled that the first issue for consideration in deciding whether government data may be discovered is whether the evidence is relevant.²⁹ Matters that are sought to be discovered in administrative proceedings “will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment.”³⁰ Moreover, under the OAH rules that apply to contested case proceedings, the party seeking discovery has the burden of showing that the discovery is needed for the proper presentation of the party’s case.³¹ The Respondent has not

²⁷ 686 N.W.2d 27 (Minn. 2004). In *Westrom*, DOLI conducted an investigation of two construction companies to determine whether the two companies had obtained all compulsory workers’ compensation insurance coverage and ultimately issued orders to each company directing them to obtain insurance and pay a monetary penalty. DOLI later amended these orders, the owners submitted written objections, and DOLI released copies of these amended orders and the objections to the news media. There was no evidence that DOLI had already filed the orders and objections with the OAH as part of a petition commencing an administrative proceeding prior to releasing them to the media. The owners later brought suit against DOLI, arguing that they were entitled to damages under the MGDPA because DOLI had released civil investigative data that were confidential or protected nonpublic data. The district court granted DOLI’s motion for summary judgment based on its conclusion that the orders and objections were public documents and their disclosure was permitted by the MGDPA. The court of appeals reversed, finding that the data was confidential or protected nonpublic data under the MGDPA. The Supreme Court affirmed the court of appeals’ decision reversing the grant of summary judgment and remanded the case for further proceedings. The Court determined that the objections and order were “data collected” by the agency within the meaning of the MGDPA, the agency investigation was active when the orders and objections were released to the media; and the investigation was undertaken for or in anticipation of a an administrative proceeding. The Court’s decision assumed that the orders and objections would have lost their character as protected nonpublic or confidential civil investigative data at the time DOLI commenced the contested case proceeding because they would have become part of the record of that proceeding, but found that there were genuine issues of material fact as to whether the materials were released to the media before DOLI commenced the administrative proceeding.

²⁸ The Respondent asserts that the Court in *Westrom* “held” in unequivocal terms that “documents that may otherwise be considered active civil-investigative data lose their confidential status upon the filing of a contested case with the Office of Administrative Hearing.” Respondent’s Reply Memorandum at 9. While the Court of Appeals cited *Westrom* for this proposition in *In the Matter of GlaxoSmithKline PLC*, 713 N.W.2d 48, 55 (Minn. App. 2006), the quoted language is not contained in the *Westrom* decision.

²⁹ *Erickson v. MacArthur*, 414 N.W.2d 406, 408 (Minn. 1987).

³⁰ Order Regarding Motion to Compel in *In the Matter of the Barberton Rescue Mission, Inc.*, OAH File No. 1-1004-14523-2 (2002), citing G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 9.2 at 146 (1998).

³¹ Minn. R. 1400.6700, subp. 2.

advanced a convincing theory under which the identities of the non-testifying complainants would be needed for proper presentation of his case or would be relevant to the charges brought by the Committee. Absent such a link, the request for discovery of complainants' identities is beyond the scope of proper discovery and must be denied.

Although the Committee's initial investigation of the Respondent apparently was triggered by the filing of complaints, the contested case proceeding initiated by the Committee does not revolve around the factual allegations made in those complaints. The Respondent's attempted analogy to witnesses in an auto accident case is not persuasive here because of this distinction. Despite the contentions of the Respondent to the contrary, the identities and motivations of those who may have brought the Respondent to the attention of Board investigators simply are not relevant where the Committee is not relying upon their testimony to establish violations of law or rule. The Committee has provided the Respondent with copies of the complaints with only the complainants' identities redacted. It has informed the Respondent of the identity of the only complainant who is expected to be a witness in this case, and has confirmed that none of the other complainants will be witnesses or otherwise be relied upon to support the Committee's allegations in this proceeding. The complaints that these persons filed therefore are not the subject of this contested case and the identity of the non-testifying complainants is irrelevant. Because the identities of the non-witness complainants have no relevance in this case, the fact that a contested case has been initiated has no bearing on whether their identities must be released.³²

Expert Witness Issues

The Respondent maintained in his motion to compel that the Board had not provided adequate responses to discovery requests regarding expert testimony that the Board expects to present at hearing. At the motion hearing, the Board and the Respondent indicated that the issues regarding the expert had been resolved. The Department agreed to clarify which of its witnesses will provide fact testimony and which of its witnesses will provide expert testimony.

Respondent's Request for Attorney's Fees

Respondent requested attorney's fees for the cost of pursuing this motion regarding discovery. There is no provision in the licensing statute for attorney's fees. In the absence of such express authority, the Administrative Law Judge is limited to the provisions of the Minnesota Equal Access to Justice Act (Minn. Stat. § 15.471, *et seq.*, "MEAJA"). The MEAJA affords the opportunity to request attorney's fees to a "party" (which is defined somewhat narrowly) who prevails over an agency in a contested case proceeding where the agency position was "not substantially justified."³³ "Substantially

³² In fact, because the Committee will not rely on the testimony of these particular complainants in attempting to prove the violations alleged in the Amended Notice of Hearing, it is arguable that their confidential status under the MGDPA will be retained. Unlike the situation in *Westrom*, it will not be the case that these complaints will become part of the record of the administrative contested case proceeding.

³³ Minn. Stat. § 15.472(a).

justified” is defined as “state's position [having] a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding.”³⁴ An award under the MEAJA cannot be made prior to the conclusion of the contested case proceeding. Therefore, Respondent’s request for attorney’s fees must be denied at this time.

Committee’s Request to Extend Hearing Schedule

In its original motion, the Committee requested that the hearing be continued to July or August. The continuance was requested because the Committee asserted that it needed additional time to address the upcoding issue and obtain the reports and depositions of the Respondent’s experts. Counsel for the Committee also noted that he has several depositions set in February and March and will be out of the country in May, and his co-counsel is leaving his office and will not be able to assist him on the case. In his letter of March 5, 2007, enclosing his calendar, counsel for the Committee asked that the hearing be moved to the September – October 2007 timeframe and stressed that his schedule in another case involving the Board of Veterinary Medicine will include approximately 14 depositions in March and April, five of which are to be held out of town or out of state. The Respondent indicated in response that he is not opposed to a continuance but does not wish to see such a lengthy extension in the hearing schedule. The Respondent argues that the Committee has had years to investigate him, and asserts that the Committee seeks an extension merely because it wishes to conduct “even more of a fishing expedition” to discredit and harass the Respondent.

Under the circumstances, good cause has been shown for a continuance of the hearing until July 9-12, 2007. Adjustments have been made in the discovery, motion, and witness/exhibit identification dates as well.

B. L. N.

³⁴ Minn. Stat. § 15.471, subd. 8.