

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
DENTISTRY,)
)
Petitioner,)
)
vs.) Case No. 04-0045PL
)
JACK SABAN, D.D.S.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings. The first session of the final hearing was held on May 18, 2004, by means of a video teleconference between sites in Tallahassee and Fort Lauderdale, Florida. The second, and last, session of the final hearing was held on October 19, 2004, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Deirdre A. Farrington, Esquire
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For Respondent: Max R. Price, Esquire
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STATEMENT OF THE ISSUES

This is a license discipline case in which the Petitioner seeks to take disciplinary action against the Respondent, a licensed dentist, on the basis of alleged violations of paragraphs (m) and (x) of Section 466.028(1), Florida Statutes. The alleged violations are set forth in a two-count Amended Administrative Complaint.

PRELIMINARY STATEMENT

The alleged violation of paragraph (m) is based on allegations that the Respondent's records of his treatment of Patient A.S. are deficient in several particulars, primarily by reason of failure to include required information in the records. The alleged violation of paragraph (x) is based on allegations that the Respondent is guilty of incompetence or negligence by reason of his alleged failure to meet the minimum standards of performance in diagnosis and treatment when he was treating Patient A.S.

The violations alleged in the Amended Administrative Complaint were disputed by Respondent, and he requested an evidentiary hearing. In due course, the case was forwarded to the Division of Administrative Hearings to conduct an evidentiary hearing.

At the final hearing on May 18 and on October 19, 2004, the Petitioner presented the live testimony of two expert witnesses.

The Petitioner also offered 18 exhibits. Petitioner's Exhibits 1 through 16 were received in evidence. Petitioner's Exhibits 17 and 18 were rejected.

Respondent testified on his own behalf and also presented the live testimony of one expert witness. The Respondent also offered four numbered exhibits, all of which were received in evidence.¹

Further, during the course of the final hearing requests were made for official recognition of specified documents, which requests were granted.

The transcript of the second session of the final hearing was filed with the Division of Administrative Hearings on November 3, 2004. The parties requested, and were allowed, 30 days from the date of the filing of the transcript within which to file their proposed recommended orders. Both parties filed timely Proposed Recommended Orders containing proposed Findings of Fact and Conclusions of Law. The post-hearing submissions of the parties have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

Stipulated facts²

1. The Respondent, Jack Saban, D.D.S., is now, and was at all material times, licensed as a dentist in the State of Florida, having been issued license number DN 8257. The

Respondent's address of record is 150 North University Drive, Suite 100, Plantation, Florida. The Respondent is not board-certified in any specialty.

2. The Respondent provided dental care to Patient A.S. from April 3, 2000, to August 6, 2001. On or about June 14, 2001, Patient A.S., then a 41-year-old female, presented to Respondent for emergency treatment of severe pain in her tooth number 31, a lower right molar. On or about June 14, 2001, the Respondent began root canal therapy on Patient A.S.'s tooth number 31.

3. The Respondent was able to treat the distal canal of Patient A.S.'s tooth number 31, but he could not enter the mesial canals of that tooth and he referred Patient A.S. to a specialist.

4. On or about June 22, 2001, Patient A.S. returned to the Respondent for treatment, and the Respondent again attempted to enter the mesial canals by drilling on Patient A.S.'s tooth number 31.

Facts based on evidence at the final hearing

5. On June 14, 2001, Patient A.S. presented to the Respondent's office experiencing severe pain in a lower right molar, tooth number 31. On that date the Respondent began root canal therapy on tooth number 31. The Respondent was able to treat the distal canal of tooth number 31, but he could not

enter the two mesial canals. The Respondent's drilling produced bleeding, which he noted as "mesio-lingual canal pulpitis." The Respondent believed that the subject tooth was hypercalcified; that is, that it contained excess dental tissue that closed off the root canals. During the treatment session on June 14, 2001, the Respondent sealed tooth number 31 with a temporary filling. Because of the secondary and tertiary reparative dentin which resulted from previous treatment of Patient A.S.'s tooth number 31, the Respondent believed the required endodontics were beyond his skill.³ Accordingly, the Respondent referred Patient A.S. to a specialist in endodontics.

6. On June 15, 2001, Patient A.S. presented at the office of the endodontist (Dr. Green) to whom the Respondent had referred her, but she did not see Dr. Green. Later that same day, Patient A.S. presented to another endodontist, Dr. Kaplan. On that occasion, Dr. Kaplan performed a clinical examination and made an x-ray of the subject tooth. On the basis of the examination and the x-ray, Dr. Kaplan concluded that the floor of the pulp chamber of Patient A.S.'s tooth number 31 was very thin and was perhaps even perforated. Dr. Kaplan discussed his conclusions with Patient A.S. and discussed treatment possibilities with her, but Dr. Kaplan did not perform any treatment.

7. On June 18, 2001, the Respondent spoke with Dr. Kaplan. Dr. Kaplan told him that Patient A.S.'s tooth number 31 was near perforation or was perforated, and that the patient had chosen not to be treated by Dr. Kaplan.

8. On June 22, 2001, Patient A.S. returned to the Respondent's office with her husband and requested that the Respondent treat her tooth number 31. With Patient A.S.'s husband present, the Respondent discussed the treatment options which had previously been explained to the patient by Dr. Kaplan, and also reviewed the risks associated with treatment of the subject tooth. Patient A.S. and her husband insisted that the Respondent complete the root canal therapy on tooth number 31. Against his better judgment, the Respondent yielded to their requests and embarked upon further endodontic treatment of the subject tooth. During the Respondent's attempt to access the hypercalcified mesial canals, a perforation occurred in the furcation area.⁴ The Respondent again urged Patient A.S. and her husband to seek endodontic treatment of her tooth number 31 from an endodontic specialist.

9. Instead of seeking treatment by an endodontic specialist, Patient A.S. returned to the Respondent's office on June 29, 2001, and again implored him to continue treating the subject tooth. On June 29, 2001, the distal canal was sealed, but entry into the mesial canals was not possible.

10. On July 13, 2001, Patient A.S. again presented at the Respondent's office, and again he attempted to treat her tooth number 31. On that date, one last unsuccessful effort was made to enter the mesial canals. Each time Patient A.S. requested that the Respondent treat her tooth number 31, the Respondent recommended that she seek treatment from an endodontic specialist.

11. The Respondent did not at any time advise Patient A.S. that he had perforated her tooth number 31. The Respondent's records of his treatment of Patient A.S. do not contain any mention of a perforation of the subject tooth prior to the notations on August 6, 2001, regarding the Respondent's conversation with Dr. Baker in which Dr. Baker told the Respondent that Patient A.S.'s tooth number 31 was perforated.

12. When a dentist perforates a patient's tooth, the dentist should promptly inform the patient of the perforation, should promptly note in the treatment records that a perforation occurred, and should promptly refer the patient to a specialist to initiate reparative measures.

CONCLUSIONS OF LAW

General matters

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding pursuant to Sections 120.569, 120.57(1), and 456.073(5), Florida Statutes.

14. The Petitioner is the state agency charged with regulating the practice of dentistry pursuant to Section 20.43, Florida Statutes, Chapter 456, Florida Statutes, and Chapter 466, Florida Statutes.

15. Where the revocation or suspension of a dentist's license is sought, proof greater than a mere preponderance of the evidence must be submitted before the Board of Dentistry (Board) may take punitive action against a licensed dentist. Clear and convincing evidence of the dentist's guilt is required. § 458.331(3), Fla. Stat. See also Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); Nair v. Department of Business and Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995); Pic N' Save v. Department of Business Regulation, 601 So. 2d 245 (Fla. 1st DCA 1992); Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992); Newberry v. Florida Department of Law Enforcement, 585 So. 2d 500 (Fla. 3d DCA 1991); Pascale v. Department of Insurance, 525 So. 2d 922 (Fla. 3d DCA 1988);

§ 458.331(3), Fla. Stat.; § 120.57(1)(h), Fla. Stat. ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.")

16. "'[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

17. When the Board seeks to take punitive action against a dentist, such action may be based only upon those offenses specifically alleged in the administrative complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Chrysler v. Department of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Arpayoglou v. Department of Professional Regulation, 603 So. 2d 8 (Fla. 1st DCA 1992); Willner v. Department of Professional Regulation, Board of

Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1992); Celaya v. Department of Professional Regulation, Board of Medicine, 560 So. 2d 383, 384 (Fla. 3d DCA 1990); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

18. Furthermore, in determining whether Section 466.028(1), Florida Statutes, has been violated in the manner charged in the Amended Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

Fairly new legislation

19. By operation of legislation enacted during the 2003 session of the Florida Legislature, effective September 15, 2003, "[t]he determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by the board . . . and is not

a finding of fact to be determined by an administrative law judge." See Chapter 2003-416, Laws of Florida, at Section 20 (amending Section 456.073(5), Florida Statutes (2002)). There does not yet appear to be any decisional guidance from any of the Florida appellate courts, as to what extent, if any, the above-quoted amendment requires any changes in the manner in which hearings before the Division of Administrative Hearings should be conducted, or requires any changes in the content of the recommended orders prepared by the DOAH administrative law judges. By their conduct at hearing both parties seemed to be of the view that the above-quoted statutory amendments did not change the nature of the evidence to be offered in cases of this nature, because both parties requested, and were granted, the opportunity to offer expert witness testimony on the subject matter of whether Respondent "has violated the laws and rules regulating the profession," as well as on the subject matter of what constitutes the "reasonable standard of care."

20. The Proposed Recommended Orders submitted by the parties do not suggest that the above-quoted statutory language requires any changes to the nature of the content that has customarily been included in recommended orders in cases of this nature. Because the amendments appear to address matters of procedure rather than matters of substance, the amendments appear to be applicable to cases pending as of the effective

date of the law that created the amendments.⁵ See Basel v. McFarland & Sons, Inc., 815 So. 2d 687 (Fla. 5th DCA 2002), in which the court noted at page 692: "In the absence of clear legislative intent, a law affecting substantive rights is presumed to apply prospectively only while procedural or remedial statutes are presumed to operate retrospectively. See Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985)." See also Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc., 683 So. 2d 609 (Fla. 1st DCA 1996).

21. The language of the subject amendments to Section 456.073(5), Florida Statutes (2002), is sufficiently broad for it to be interpreted and applied in more than one way. And some of the possible interpretations and applications might at some future date provide a basis for modification of the manner in which administrative hearings in such cases are conducted. But such possible interpretations and applications are merely possibilities; they are not certainties. Therefore, unless and until there is some authoritative interpretation or implementation of the subject amendments directing otherwise, the most prudent course appears to be for the DOAH administrative law judges to continue to receive evidence and to continue to make "determinations" (by findings of fact or by conclusions of law) as to what constitutes the "reasonable standard of care" and as to whether a licensee "has violated the

laws and rules regulating the profession"; especially in cases like this one in which both parties requested such a course of action by the administrative law judge.⁶

The specific statutes, rules, and charges

22. At the time of the events that form the basis for the charges in this case, paragraphs (m) and (x) of Section 466.028(1), Florida Statutes, authorized the Board to revoke, suspend, or otherwise discipline the license of a dentist for reasons that included the following:

(m) Failing to keep written dental records and medical history records justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results, and X rays, if taken.

(x) Being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including, but not limited to, the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience or being guilty of dental malpractice. For purposes of this paragraph, it shall be legally presumed that a dentist is not guilty of incompetence or negligence by declining to treat an individual if, in the dentist's professional judgment, the dentist or a member of her or his clinical staff is not qualified by training and experience, or the dentist's treatment facility is not clinically satisfactory or properly equipped to treat the unique characteristics and

health status of the dental patient, provided the dentist refers the patient to a qualified dentist or facility for appropriate treatment. As used in this paragraph, "dental malpractice" includes, but is not limited to, three or more claims within the previous 5-year period which resulted in indemnity being paid, or any single indemnity paid in excess of \$25,000 in a judgment or settlement, as a result of negligent conduct on the part of the dentist.

23. Florida Administrative Rule 64B5-17.002(1) contains the following pertinent language:

- (1) For the purpose of implementing the provisions of subsection 466.028(1)(m), F.S., a dentist shall maintain written records on each patient which written records shall contain, at a minimum, the following information about the patient:
 - (a) Appropriate medical history;
 - (b) Results of clinical examination and tests conducted, including the identification, or lack thereof, of any oral pathology or diseases;
 - (c) Any radiographs used for the diagnosis or treatment of the patient;
 - (d) Treatment plan proposed by the dentist; and
 - (e) Treatment rendered to the patient.

24. Count One of the Amended Administrative Complaint charges the Respondent with violation of Section 466.028(1)(m), Florida Statutes, by reason of alleged failures in his record keeping, which are described as follows in paragraphs 20, 21, and 22 of the Amended Administrative Complaint:

20. Respondent failed to note in his treatment records that he had perforated Patient A.S.'s tooth no. 31.

21 Respondent failed to note in his treatment records for Patient A.S. any treatment plan proposed for Patient A.S.'s tooth no. 31.

22. Based on the foregoing, Respondent has violated Section 466.028(1)(m), Florida Statutes (2000), as further defined by Rule 64B5-17.002(d) and (e), Florida Administrative Code, by failing to keep written dental records justifying the course of treatment of the patient by failing to note in his treatment records for Patient A.S. the treatment plan proposed by the dentist and treatment rendered to Patient A.S.

25. It is clear that the Respondent "failed to note in his treatment records that he had perforated Patient A.S.'s tooth no. 31." Such a failure is a violation of Section 466.028(1)(m), Florida Statutes, as implemented and interpreted in Florida Administrative Code Rule 64B5-17.002.

26. With regard to the second factual basis for the allegations that the Respondent violated Section 466.028(1)(x), Florida Statutes, it is clear that the Respondent did have a treatment plan for Patient A.S.'s tooth number 31. And while there was some expert witness testimony critical of the sufficiency of that treatment plan, the Respondent is not charged with having an insufficient treatment plan. Rather, he is charged with not having any plan at all. Accordingly, so much of the violation charged in Count One as is based on allegations regarding the treatment plan should be dismissed.

27. Count Two of the Amended Administrative Complaint charges the Respondent with violation of Section 466.028(1)(x), Florida Statutes, by reason of allegations that he was incompetent or negligent in the ways described as follows in paragraphs 25, 27, and 28 of the Amended Administrative Complaint:

25. Respondent attempted to perform root canal therapy on Patient A.S.'s tooth no. 31 even though the required endodontics for tooth no. 31 was beyond his skill.

27. Respondent failed to advise Patient A.S. that he had perforated her tooth.

28. Based on the foregoing, Respondent has violated Section 466.028(1)(x), Florida Statutes (2000), by being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance by the undertaking of treatment for which Respondent was not qualified by training or experience, by failing to advise Patient A.S. of the risk of perforation of the tooth during root canal therapy, and by failing to advise Patient A.S. that he had perforated her tooth no. 31.

28. It is clear that the Respondent "attempted to perform root canal therapy on Patient A.S.'s tooth no. 31 even though the required endodontics for tooth no. 31 was beyond his skill." Such an attempt is a violation of Section 466.028(1)(x), Florida Statutes. It is also clear that the Respondent "failed to advise Patient A.S. that he had perforated her tooth." That

failure is also a violation of Section 466.028(1)(x), Florida Statutes. Both of these failures are acts of negligence within the meaning of Section 446.028(1)(x), Florida Statutes. Accordingly, the Respondent should be found guilty of the violations of Section 446.028(1)(x), Florida Statutes, which are charged in Count Two of the Amended Administrative Complaint.

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that a final order be issued in this case to the following effect:

(1) Adopting all of the Findings of Fact in this Recommended Order,

(2) Adopting all of the Conclusions of Law in this Recommended Order,

(3) Dismissing the portion of Count One of the Administrative Complaint that is based on allegations regarding the lack of a treatment plan.

(4) Concluding that the Respondent is guilty of a violation of Section 466.028(1)(m), Florida Statutes, by reason of his failure to include in his treatment records that he had perforated the patient's tooth.

(5) Concluding that the Respondent is guilty of the violations of Section 466.028(1)(x), Florida Statutes, charged in Count Two of the Amended Administrative Complaint.

- (6) Imposing the following penalties:⁷
- (a) Administrative fines in the total amount of \$7,500.00;
 - (b) Probation for a period of one year on terms to be determined by the Board of Dentistry; and
 - (c) A requirement that the Respondent attend a course in dental record-keeping.

DONE AND ENTERED this 31st day of January, 2005, in Tallahassee, Leon County, Florida.



MICHAEL M. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2004.

ENDNOTES

1/ There was some post-hearing ambiguity as to whether the Respondent had also offered into evidence the transcripts of three depositions. By Order issued on January 21, 2005, it was concluded that the three deposition transcripts had not been offered in evidence during the hearing. A motion for late offering of the subject transcripts was denied.

2/ The facts set forth in paragraphs 1 through 4 of the Findings of Fact in this Recommended Order were agreed to by the parties in the Joint Pre-Hearing Statement filed on February 26, 2004.

3/ This Finding of Fact is based primarily on the Respondent's admission of request for admission number 10 served on or about June 20, 2003. Absent a motion seeking to be relieved of such an admission, a party is bound by the admission, even though the party may make subsequent assertions inconsistent with the admission.

4/ This finding is based in large part on the Respondent's admission in his undated letter to Investigator McKenna that was received by the investigator in March of 2002. That admission is more persuasive than other testimony suggesting other times and places the perforation might have occurred. Especially lacking in persuasiveness and credibility is the testimony of Robert J. Fish, D.D.S., suggesting that the perforation was caused by Dr. Baker.

5/ The Board of Medicine views the matter otherwise. In its Final Order issued on June 17, 2004, in Department of Health, Board of Medicine v. Robert H. Hunsaker, M.D., DOAH Case No. 03-1954PL, the Board of Medicine, in addressing the legal effect of Section 20 of Chapter 2003-416, Laws of Florida, stated: "The said amendment addresses substantive rights of a licensee rather than matters of procedure. Therefore the amendments to Section 456.073(5), Florida Statutes, are not applicable to the cases at bar." See also the Final Order issued on May 4, 2004, in Department of Health, Board of Medicine v. Thomas Patrick Trevisani, M.D., DOAH Case No.03-1952PL.

6/ Some of my "determinations" as to whether Respondent "has violated the laws and rules regulating the profession" are located in the Findings of Fact portion of this Recommended Order, and other such "determinations" are located in the Conclusions of Law. The ALJ has tried to place such determinations where he believes they belong, taking into consideration both a long history of appellate court guidance on such matters and the legislative amendments discussed in paragraphs 19 through 21 of the Conclusions of Law, above. In any event, the placement of such determinations in one part of the Recommended Order or the other does not appear to be of any great moment, because it is reasonable to expect that the appellate courts will continue to be of the view that, regardless of where placed and regardless of how characterized, a fact will always be a fact and a conclusion of law will always be a conclusion of law.

7/ In the course of formulating the recommended penalties in this case, consideration has been given to the disciplinary

guidelines, including aggravating and mitigating factors, that appear in Florida Administrative Code Rule 64B5-13.005. In this regard a substantial mitigating factor is that there is no allegation nor evidence that the ultimate fate of the subject tooth would have been any different in the absence of the Respondent's efforts.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.