

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF DENTISTRY,)
)
Petitioner,)
)
vs.) Case No. 07-1746PL
)
JEFFREY SIEGEL, D.D.S.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida, on July 17, 2007.

APPEARANCES

For Petitioner: Wayne Mitchell, Esquire
Department of Health
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Tallahassee, Florida 32399-3265

For Respondent: Dominick J. Graziano, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of failing to practice dentistry in accordance with the applicable standard of performance and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint filed February 28, 2005, Petitioner alleged that Respondent treated C. J. from June 23, 1999, through August 15, 2002. The Administrative Complaint alleges that C. J. visited Respondent's office on September 26, 2002, but he did not treat her on that date.

The Administrative Complaint alleges that, on July 10, 2002, Respondent performed a scale and root plane of the lower left quadrant of C. J.'s mouth. He also allegedly debrided the lower left quadrant with irrigation using Peridex®.

The Administrative Complaint alleges that, on July 17, 2002, Respondent prepared teeth numbers 14, 18, and 19 for eventual crown placement, took impressions, and placed temporary crowns. He also allegedly scaled and root planed the upper left quadrant by using irrigation with Peridex®.

The Administrative Complaint alleges that, on July 23, 2002, Respondent performed a scale and root plane of the lower right quadrant of C. J.'s mouth with irrigation using Peridex®. He also allegedly prepared teeth numbers 3 and 30 for eventual permanent crown placement, took impressions, and placed temporary crowns. Respondent allegedly removed the temporary crowns on teeth number 18 and 19, made adjustments, and cemented the temporary crowns back into place after irrigating with Peridex®.

The Administrative Complaint alleges that, on or about August 15, 2002, Respondent cemented the permanent crowns on teeth numbers 3, 14, 18, 19, and 30.

The Administrative Complaint alleges that full radiographs revealed defective crown restorations of teeth numbers 3, 14, and 18. These crowns allegedly exhibited open margins, as disclosed in the periapical and bitewing radiographic view, evidence of a clinical result below the minimum standard of care. The Administrative Complaint alleges that the appropriate clinical procedure is to check marginal integrity clinically and radiographically prior to cementing the restorations.

The Administrative Complaint alleges that Respondent performed periodontal treatments on C. J. on July 12 and 23, 2002. During the office visits on these dates, Respondent allegedly took final impressions for fixed prosthetics for C. J. The Administrative Complaint alleges that Respondent did not meet the applicable standard of care because he performed periodontal treatment on the same day that he took the impressions for fixed prosthetics, which precluded the achievement of proper tissue resolution and periodontal health prior to the taking of the impressions.

The Administrative Complaint alleges that Section 466.028(1)(x), Florida Statutes, states that the Board of Dentistry may impose discipline if a dentist is guilty of dental

malpractice or incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience.

The Administrative Complaint states that Respondent failed to meet the minimum applicable standard of performance: 1) by performing defective crown restoration on teeth numbers 3, 14, and 18, as evidenced by the open margins at the distal area of each restored crown; 2) by breaching proper clinical procedure by failing to check marginal integrity clinically and radiographically prior to cementing the restorations; and 3) by performing periodontal treatments and taking final impressions for fixed prosthetics on the same visits, thus not allowing the healing of tissue and recovery of periodontal health prior to taking the final impressions.

At the hearing, Petitioner called two witnesses and offered into evidence ten exhibits: Petitioner Exhibits 1-10. Respondent called two witnesses and offered into evidence three exhibits: Respondent Exhibits 1-3. All exhibits were admitted except Petitioner Exhibits 4, 9, and 10, which were proffered.

The court reporter filed the transcript on July 30, 2007. The parties filed their Proposed Recommended Orders by August 9, 2007.

Two evidentiary disputes arose after the hearing. On August 6, 2007, Respondent filed a Motion to Strike Proffered [sic] Testimony of Miguel Montilla, D.D.S. and Boca Dental Records. On August 7, 2007, Petitioner filed its Response to Respondent's Motion to Strike Proffered Testimony of Miguel Montilla, D.D.S. and Boca Dental Records. These are Petitioner Exhibits 9 and 10, which were accepted as a proffer only after the Administrative Law Judge sustained Respondent's evidentiary objections to these documents. For this reason, Respondent's motion to strike is denied.

On August 6, 2007, Petitioner filed its Notice of Filing Redacted Reports of Robert W. Shippee, D.D.S. On August 7, 2007, Respondent filed his Motion to Strike Redacted Reports of Robert W. Shippee, D.D.S. The motion complains that Petitioner was to have redacted the portions of the expert witness's report that discussed matters outside of the four corners of the Administrative Complaint, but Petitioner failed to provide Respondent a copy of the proposed redacted report for examination and comment prior to filing it. At the hearing, the Administrative Law Judge accepted an unredacted version of Petitioner Exhibit 8, which is the exhibit at issue in the motion to strike. At this point, it is necessary to reject the late-filed exhibit and rely on the exhibit filed at the hearing, understanding that its admission does not enlarge the issues

raised in the Administrative Complaint. For this reason, Respondent's motion to strike is granted.

FINDINGS OF FACT

1. Respondent has been licensed to practice dentistry in Florida since 1984. He practices prosthodontics in a general dentistry practice. Respondent has been disciplined three times.

2. Pursuant to a stipulation, in which Respondent neither admitted nor denied the underlying allegations, Respondent agreed to a reprimand, two years' probation, 30 hours of continuing education in endodontics, 30 hours of continuing education in crown and bridge work, 15 hours of continuing education in risk management, and \$6000 in costs, as reflected by a Final Order entered November 2, 1995. The underlying Administrative Complaint alleged that Respondent had failed to meet the minimum standard of performance by failing to take post-operative radiographs following a root canal and had failed to keep adequate dental records.

3. Pursuant to a stipulation, in which Respondent neither admitted nor denied the underlying allegations, Respondent agreed to a reprimand, one year's probation, 15 hours of continuing education in removable prosthodontics, and \$1500 in costs, as reflected by a Final Order entered April 1, 1997. The underlying Administrative Complaint alleged that Respondent had

failed to meet the minimum standard of performance in preparing and fitting dentures.

4. Pursuant to a stipulation, in which Respondent admitted the underlying allegations, Respondent agreed to an administrative fine of \$3000, 14 hours of continuing education in crown and bridge work, and \$926.53 in costs, as reflected by a Final Order entered July 27, 2000. The underlying Administrative Complaint alleged that Respondent had failed to meet the minimum standard of performance in fitting a bridge and crown.

5. C. J. underwent a course of treatment with Respondent during the summer of 2002 after taking her son to Respondent for dental work for a couple of years. As a patient, C. J. first visited Respondent on June 23, 1999, complaining of bleeding gums and nocturnal teeth grinding. After examination, Respondent advised C. J. that her dental health was poor and recommended a course of periodontal treatment that would cost nearly \$5000. C. J. declined to commence treatment at that time due to a lack of funds.

6. C. J. next saw Respondent on July 9, 2001. At this time, she was complaining of pain in her jaw joint, which clicked and popped on movement. Respondent discussed with C. J. her ongoing dental needs, and C. J. said that she understood

that she needed to undergo treatment. However, she could still not afford to start extensive dental work, so she did not do so.

7. By the summer of 2002, C. J. realized that her dental health required treatment at this time, so she borrowed some money from a family member in order to undergo the dental work. A teacher, C. J. wanted to complete the treatment during the summer while she was not teaching, although the record does not indicate whether this desire drove the treatment schedule.

8. Initially, C. J. visited Respondent in the summer of 2002 for treatment due to pain in tooth number 31. Respondent referred her to an oral surgeon, who extracted the tooth, but an ensuing secondary infection necessitated treatment by C. J.'s primary care physician. This process consumed the first half of the summer.

9. The treatment that is the subject of this case took place over a five-week span in July and August 2002. On July 10, Respondent prepared two treatment plans for C. J. One plan included crowns for teeth numbers 3, 14, 18, 19, and 30. (The other plan called for porcelain laminate veneers, which are not at issue in this case.)

10. One of the three claims stated in the Administrative Complaint states that Respondent left defective margins after completing crown restorations of three teeth. A margin is where the crown meets the tooth structure. Margins must be continuous

to promote dental health. The discontinuities in open or defective margins may create a space or ledge where debris can accumulate and cause decay or a roughened surface that may continually irritate surrounding gum tissue.

11. According to Petitioner's expert witness, Dr. Robert W. Shippee, an open margin exists when the gap exceeds 50-150 microns. According to Dr. Ronald M. Fisher, an open margin exists when the gap exceeds 120 microns, "maybe a little more." When he examined C. J., Dr. Fisher used an explorer whose width permitted him to detect open margins of 100 microns or more. Radiography does not reveal lingual and buccal margins, but does reveal medial and distal margins. Distal margins, which are located on the tooth surface aligned toward the back, are also revealed clinically by floss or explorers.

12. On July 10, Respondent's hygienist scaled and root planed the teeth in the lower left quadrant. She performed a debridement of the lower left quadrant with irrigation using Peridex®. Respondent did not see C. J. during this visit.

13. On July 17, Respondent took impressions of teeth numbers 14, 18, and 19 in order to prepare crowns for these teeth. Tooth number 14 is in the upper left quadrant, and teeth numbers 18 and 19 are in the lower left quadrant. Mixing the adhesive Durelon™ with Vaseline petroleum jelly, so as to reduce the adhesive force of this dental cement, Respondent fitted

C. J. with temporary plastic crowns, noting that teeth numbers 14 and 19 had such deep decay that they might require root canals. Following this work, the hygienist scaled and root planed the teeth in the upper left quadrant and irrigated with Peridex®.

14. On July 23, the hygienist scaled and root planed the teeth in the lower right quadrant and irrigated with Peridex®. Following this work, Respondent examined C. J., who complained of pain at teeth numbers 17 and 18, so Respondent removed these temporary crowns, adjusted at least one of them, and recemented them with Durelon™ and Vaseline petroleum jelly. His notes raise the question whether tooth number 18, as well, might require a root canal. During the same visit, Respondent took impressions of teeth numbers 3 and 30 in order to prepare crowns for these teeth. These teeth are in the upper right and lower right quadrants, respectively.

15. On July 24, Respondent's hygienist scaled and root planed the teeth in the upper right quadrant and irrigated with Peridex®. C. J. reported that she was still feeling pain in the area of tooth number 17. (The dental records misreport this as tooth number 32, but C. J. did not have tooth number 32.) Respondent did not see C. J. during this visit.

16. On August 15, Respondent fitted C. J. with porcelain-fused-to-metal crowns on teeth numbers 3, 14, 18, 19, and 30.

Respondent cemented these with Durelon™, but without the Vaseline petroleum jelly. Respondent checked the crowns with an explorer and was concerned about the margins. He directed his staff to perform X-rays of the subject teeth, but, after trying five times, C. J.'s gag reflex prevented staff from taking the exposures. The dental records state that Respondent needs to take this X-ray and check the margins next visit.

17. It is unclear why, but there were no more visits. C. J. visited the office on August 26 to speak with the receptionist about certain charges, but she was not examined or treated by Respondent. C. J. claims that no one in the office gave her another appointment, but her recollection of events, now five years past, was understandably imperfect. Clearly, there had been some problems with charges, and the school year had resumed. On these facts, it is impossible to hold Respondent responsible for the absence of a follow-up visit.

18. Dr. Shippee and Dr. Fisher agree on three things. First, the dental work in this case was not of high quality. Second, the margin left on tooth number 14 does not meet the applicable standard of performance imposed upon dentists, if Respondent had completed treatment of the tooth. Third, it is not always below the standard of performance for a dentist to cement a permanent crown and later find a defective margin, as long as the dentist corrects his work.

19. It is relatively easy to resolve the claim in the Administrative Complaint involving the sequence of periodontal treatment and the taking of impressions. At the hearing, Dr. Shippee admitted that it is not necessarily a departure from the applicable standard of performance for a dentist to take impressions and perform periodontal treatments, such as scaling and planing, on the same visit. He testified that this was acceptable practice if the dentist could still record the shape of the tooth accurately.

20. The Administrative Complaint does not clearly identify the teeth to which this claim applies. The sequence of periodontal treatment and the taking of impressions is as follows: July 10--treatment of lower left quadrant; July 17--impressions of teeth numbers 14 (upper left quadrant), 18 (lower left quadrant), and 19 (lower left quadrant) followed by treatment of upper left quadrant; July 23--treatment of lower right quadrant followed by impressions of teeth numbers 3 (upper right quadrant) and 30 (lower right quadrant); and July 24--treatment of upper right quadrant.

21. Thus, the only impressions taken after periodontal treatment are the impressions of teeth numbers 18 and 19, which followed their periodontal work by a week, and tooth number 30, which took place a few minutes after its periodontal work. Dr. Shippee misread the dental records when, in his report dated

May 20, 2006 (Petitioner Exhibit 6), he complained about the performance of scaling and root planing on tooth number 14 on the same day that Respondent took an impression of this tooth. He assumed that Respondent's hygienist had worked on the tooth before Respondent did, but this is not the order shown in the dental records. (The order in which information is recorded in the records reveals the order in which Respondent or the hygienist performed services, when both persons worked on C. J. on the same day.) Dr. Shippee's concern about trying to take a good impression of a tooth amidst the bleeding associated with scaling and planing is thus misplaced, at least as to tooth number 14.

22. The Administrative Complaint implicitly precludes consideration of teeth numbers 18 and 19 because the allegations refer to taking the impressions on the same day as performing the periodontal treatment. Any attempt to prove a departure from the applicable standard of performance as to teeth numbers 18 and 19, for which the impressions were taken one week after treatment, would also have to overcome Dr. Shippee's statement, in his May 20 report, that "at least" one week must separate the scaling and planing from the taking of impressions. Absent any other evidence indicating that the condition of C. J.'s gums prevented Respondent from taking an accurate impression of teeth numbers 18 and 19, Petitioner has failed to prove that the

sequence of procedures as to these teeth failed to meet the applicable standard of performance.

23. As to tooth number 30, Petitioner omitted this tooth from its allegations of defective margins, so, inferentially, the margins on tooth 30 were not defective. Likewise, immediately after discussing the work on tooth number 30, Dr. Shippee's May 20 report finds that the margins on teeth numbers 3, 14, 18, and 19 are defective. Again, inferentially, the margins on tooth 30 were not defective. Most significantly, at hearing, Dr. Shippee testified that Respondent affixed five crowns and four had defective margins. Coupled with the information in his report, Dr. Shippee's testimony implies that tooth number 30 had acceptable margins. As noted above, Dr. Shippee conceded that it was permissible to take an impression following periodontal work, as long as the impression is accurate. It appears that is exactly what transpired as to tooth number 30. Petitioner has failed to prove that the sequence of procedures as to this tooth failed to meet the applicable standard of performance.

24. In his May 20 report, Dr. Shippee misstates that, on July 23, the hygienist scaled and planed the teeth in the upper right quadrant. As noted above and as reflected clearly in the dental records, this work was done on July 24, not July 23. This misreading of the dental records may have contributed to

the focus of Dr. Shippee--and the Administrative Complaint--on tooth number 3, whose margins Dr. Shippee found defective, even though the procedures were performed in the proper order, rather than tooth number 30, whose margins Dr. Shippee found acceptable, even though the procedures were performed in reverse order and only a few minutes apart.

25. It is also relatively easy to resolve the claim that Respondent failed to check marginal integrity clinically and radiographically prior to cementing the crowns. As was the case with the preceding claim, however, this claim itself requires analysis to understand its meaning. First, Dr. Shippee testified at hearing that a dentist meets the applicable standard of performance by checking the margins clinically or radiographically--not both, as alleged in the Administrative Complaint. Second, the Administrative Complaint does not qualify its reference to the cementing of the crowns, which takes place with both the temporary and permanent crowns, but the record reveals that this allegation clearly does not apply to the cementing of temporary crowns. So, this claim raises the questions of whether Respondent clinically or radiographically checked the margins prior to permanently cementing the crowns.

26. Respondent checked the margins clinically, with his explorer, after cementing the porcelain-fused-to-metal crowns into place. He tried to check the margins radiographically, but

the patient's admittedly "very nervous" condition, which produced the gagging reflex, prevented staff from taking x-rays at that time. However, the clinical check revealed to Respondent that he needed to recheck these margins, clinically and radiographically, at a subsequent visit, at which C. J. might better tolerate the necessary X-rays. Respondent could reasonably have expected, at a subsequent visit, C. J. would not gag over the X-rays because she had undergone these x-rays previously in his office.

27. The question in this claim is thus reduced to whether Respondent deviated from the applicable standard of performance by cementing the porcelain-fused-to-metal crowns prior to checking the margins by either means. At the hearing, Dr. Shippee conceded on cross-examination that it was not a departure from the applicable standard of performance for a dentist not to check margins radiographically prior to permanently cementing the crowns into place. He also conceded that it would not be a departure from the applicable standard of performance not to check the margins either way, if the dentist were not using permanent cement.

28. Respondent seized upon this opportunity to claim that his use of Durelon™ revealed an intent to temporarily cement the five crowns in place on August 15. This claim strains credulity. Respondent weakened the Durelon™ with Vaseline

petroleum jelly when applying temporary crowns, and there does not seem to be a category of semi-permanent crowns that would accommodate Respondent's argument that Durelon™ without Vaseline petroleum jelly was not a permanent adhesion. Also, whatever else can be said of Respondent's dentistry, no one can argue with the durability of his cementing. The "temporary" adhesive that he applied on August 15, 2002, remained in place, four years later, when Dr. Shippee examined C. J. The evidence thus establishes that Respondent intended to permanently cement the crowns that he affixed on August 15, subject to one condition.

29. However, Respondent was prepared to remove the "permanently" cemented crowns if the margins proved defective. There was no other reason to note in his dental records of August 15 the need to recheck the margins. Likewise, Dr. Shippee testified that, at some point over his long career, he may have "permanently" set a crown with a defective margin, and it would not have been a departure from the standard of performance to have discovered the open margin as much as two years later--as long as he then removed the crown and replaced it with a properly fitting one. Coupled with Dr. Shippee's earlier concession that a dentist could permissibly permanently cement a crown into place prior to checking the margins radiographically, it is difficult to find a departure from the applicable standard of performance by the sequence followed by

Respondent in this case in cementing the permanent crowns, checking the margins, and noting the need to recheck the margins at a later visit.

30. On re-direct, Dr. Shippee reversed himself, again, and testified that he would dry seat porcelain-fused-to-metal crowns and, if he found defective margins, he would not permanently cement them until he had replaced the defective crowns. However, this testimony was less convincing than his above-described admissions on cross-examination, especially after consideration of the testimony of Dr. Fisher. Dr. Fisher testified that a dentist who "permanently" cements porcelain-fused-to-metal crowns, knowing that the margins are defective, does not deviate from the applicable standard of performance, as long as he intends to use the "permanent" crowns as temporaries and replace them with properly fitting crowns at a subsequent visit. Petitioner has failed to prove that Respondent's permanent cementing of the crowns into place, prior to checking them clinically or radiographically, failed to meet the applicable standard of performance, at least when he checked them with an explorer immediately after cementing them and documented the need to recheck the margins--and, if necessary, replace the crowns--at a subsequent office visit.

31. The third claim is the most significant because, as Dr. Shippee testified, "the margins are the real problem." On

this claim, the Administrative Complaint is clear: the distal margins on teeth numbers 3, 14, and 18 are allegedly defective.

32. Dr. Fisher testified that the distal margin on tooth number 14 is defective, and the crown needs to be replaced. However, he found no defective margin on tooth number 18. He evidently found a less serious defective margin on tooth number 3. Dr. Fisher testified that he found no evidence of decay on any of these teeth. Although C. J. had evidence of gum inflammation, Dr. Fisher attributed that to the absence of a cleaning over the preceding year. In contrast, Dr. Shippee unequivocally found defective distal margins on all three teeth-both clinically and radiographically. Dr. Shippee's testimony is credited on this point.

33. The record offers little support for any finding as to why the margins are defective. Respondent sends his impressions to a lab for the preparation of the crowns--a practice that Dr. Shippee finds acceptable, even though he makes his own crowns. The allegations imply a causal link between Respondent's practice of taking impressions shortly after periodontal work with the resulting defective margins. However, the evidentiary record offers little support for this theory.

34. Due to his misreading of the dental records, as noted above, Dr. Shippee erroneously concluded that Respondent took the impressions of teeth numbers 3 and 14 shortly after his

hygienist scaled and planed these teeth. But the sequence of these procedures was actually the reverse of what Dr. Shippee had found. On the other hand, Respondent took the impression of tooth number 18 one week after the periodontal work to that area, but the likelihood of an adverse result caused by this sequence is diminished by two facts. First, Dr. Shippee opined that at least one week was necessary for the proper healing to take place. Second, when Respondent actually took an impression of one tooth--tooth number 30--only a few minutes after the periodontal work, the margins for this tooth were fine: this was the only tooth with acceptable margins, and it was the only tooth for which the impressions followed immediately upon the completion of the periodontal work. This theory of causation thus finds little support in the present record.

35. Notwithstanding whether the defective margins on these three teeth resulted from the poor workmanship of Respondent or the lab, another issue emerges with respect to whether, on August 15, Respondent was finished with his crown work on these three teeth. As noted with respect to the second claim discussed immediately above, Respondent was not finished, and the applicable standard of performance does not prohibit him from continuing to service these teeth, at least for a reasonable period past August 15, until he obtained a satisfactory result.

36. In theory, the work could have been so deficient, as of August 15, as to constitute a departure from the applicable standard of performance, despite Respondent's intent to continue to service these teeth. However, Dr. Shippee's testimony does not support this theory. In particular, the record is devoid of evidence establishing how far a dentist's work must stray, in terms of defective distal margins, before the applicable standard of performance deprives him of a chance to fix his work. Petitioner has failed to prove that, under the circumstances, the crown restoration work, as of August 15, on teeth numbers 3, 14, and 18 failed to meet the applicable standard of performance due to the presence of defective margins on the distal surfaces of these teeth.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 456.073(5), Fla. Stat. (2007).

38. Section 466.028(1)(x), Florida Statutes, authorizes the Board of Dentistry to impose discipline for:

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.

39. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

40. For the reasons set forth above, Petitioner has failed to prove any of the three claims set forth in the Administrative Complaint.

RECOMMENDATION

It is

RECOMMENDED that the Board of Dentistry enter a final order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 31st day of August, 2007, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of August, 2007.

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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 must be filed with the agency that will issue the final order in this case.