STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF DENTISTRY, Petitioner, vs. FRANCISCO FONTE, D.D.S., Respondent.	Case No. 10-10476PL

RECOMMENDED ORDER

Administrative Law Judge John G. Van Laningham conducted the final hearing in this case, which began on February 28, 2011, and ended on March 3, 2011. The hearing, which was webcast over the Internet using streaming media technology, took place at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Jeff G. Peters, Esquire
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For Respondent: Orlando Rodriguez-Rams, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a dentist who owns a multidentist practice, (a) failed to keep dental

records and medical history records justifying the course of a patient's treatment; (b) billed a patient for dental services that were not actually rendered, thereby committing fraud, deceit, or misconduct; or (c) caused a dental office to be operated in such a manner as to result in substandard dental treatment. If Respondent committed any of these offenses, it will be necessary to determine an appropriate penalty.

PRELIMINARY STATEMENT

On May 25, 2010, Petitioner Department of Health issued a three-count Administrative Complaint against Respondent Francisco Fonte, D.D.S. Dr. Fonte timely requested a formal hearing, and on December 2, 2010, the Department referred the matter to the Division of Administrative Hearings. The undersigned scheduled a multiday hearing to begin on February 28, 2011.

Both parties were represented by counsel at the hearing, which went forward as planned. The Department's witnesses were Robert Seimitz, Maria Cardoso, Margarita Subirats, Lisa Ortega, A.H., O.R., D.S., J.S., Dr. Hal Haering, and Dr. Fonte. Dr. Fonte called Dr. Idalmis Ramos-Abelenda as a witness. Received in evidence were Joint Exhibits 1, 19, 22, 32, and 36; and Petitioner's Exhibits 2, 4, 24, 26, 27, 28, 29, and 30.

The final hearing transcript, comprising eight volumes, was filed on March 29, 2011. The Department's motion requesting

that the deadline for filing proposed recommended orders be enlarged to April 21, 2011, was granted. Each party timely filed a Proposed Recommended Order, and these have been considered. Dr. Fonte's motion to strike the appendix attached to the Department's Proposed Recommended Order is denied.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 Florida Statutes.[1]

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Francisco Fonte, D.D.S., was licensed to practice dentistry in the state of Florida.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over licensed dentists such as Dr. Fonte. In particular, the Department is authorized to file and prosecute an administrative complaint against a dentist, as it has done in this instance, when a panel of the Board of Dentistry has found that probable cause exists to suspect that the dentist has committed a disciplinable offense.

3. Here, the Department alleges that Dr. Fonte committed three such offenses. In Count I of the Administrative Complaint, the Department charged Dr. Fonte with the offense defined in section 466.028(1)(m), alleging that he failed to keep written dental records justifying the course of treatment of a patient named J.S. In Count II, Dr. Fonte was charged with

committing fraud, deceit, or misconduct in the practice of dentistry, an offense under section 466.028(1)(t). In support of this charge, the Department alleged that, as part of a systematic scheme to defraud patients, Dr. Fonte had sought payment from J.S. for services not actually rendered, and had done the same to "Patients P.W., J.M., E.T., A.C., A.H., F.C., M.S., D.L. and/or as many as 500 additional patients . . . ." In Count III, the Department charged Dr. Fonte with having caused a dental office to be operated in such a manner as to result in dental treatment that is below minimum acceptable standards of performance for the community, which is an offense defined in section 466.028(1)(ff).

4. The events giving rise to this case began in the summer of 2008, when a young adult named J.S. went to the offices of Advanced Dental Innovations, P.A. ("ADI") for treatment of a painful tooth. ADI, which was owned by Dr. Fonte, operated a dental clinic in Royal Palm Beach, Florida. Several dentists practiced in ADI's premises——but not Dr. Fonte himself. He was employed by the Florida Department of Corrections as a Senior Dentist and worked at the Everglades Correctional Institution in Miami, where he treated the inmates.

5. Dr. Fonte was not actively involved in the daily business or professional operations of ADI. To manage the clinic, ADI hired Martha Somohano, who held a Florida dental

radiographer license and was purportedly experienced in running dental offices. Dr. Fonte trusted Ms. Somohano to manage the business competently and protect his investment in ADI.

6. One of the dentists who saw patients for ADI was Dr. Idalmis Ramos-Abelenda. She worked in ADI's offices one day per week from around April 2008 to April 2009.[2] Although J.S. was seen by at least one other dentist at ADI's clinic, Dr. Ramos-Abelenda became his treating dentist of record. Dr. Fonte never saw or treated J.S.

7. During a five-month period, from July through November 2008, Dr. Ramos-Abelenda performed extensive dental work on J.S., which is documented in handwritten progress notes that ADI maintained in its records. Based on the opinion of the Department's expert witness, which was not disputed, the undersigned finds that the dental work which J.S. received met or exceeded the applicable minimum standards of performance.

8. The bills for this dental work eventually totaled around $26,000. There is no evidence that this amount exceeded the fair market value of the services rendered.[3] Initially, J.S. paid for his treatment using a regular credit card, rapidly incurring a debt of $4,685. Then, J.S. established a credit card account with CareCredit®, a credit service of GE Money Bank which provides financing for health related costs. Through

CareCredit®, ADI was paid $21,429 for dental services rendered to J.S.[4]

9. A separate CareCredit® account was opened in the name of J.S.'s mother, D.S. The evidence fails to establish clearly the extent to which ADI submitted J.S.'s charges to D.S.'s CareCredit® account for payment, although there is evidence suggesting that this happened. More important, however, are the Department's allegations that D.S. never applied for a CareCredit® credit card, and that someone at ADI forged her signature on the application.

10. The accusation that Dr. Fonte or his agent stole D.S.'s identity and fraudulently established a line of credit in her name is a very serious one, to be sure, but the undersigned is far from convinced of its veracity. The proof consists largely, if not exclusively, of D.S.'s testimony——an awfully thin evidential ground for this sort of wrongdoing, which should have left an incriminating paper trail. Further, the Department did not call a forensic document examiner to testify, for example, that a questioned document examination had established that the signature on the CareCredit® application is not D.S.'s, or to give an opinion that the application can be traced to another known source, e.g., Ms. Somohano. Thus, even if the undersigned were able to find based on clear and convincing evidence that D.S.'s signature had been forged on a credit

application (which he is not), there is insufficient evidence to determine who was responsible for the purported fraud, and no basis for finding that Dr. Fonte was involved in——or even aware of——the alleged misdeed.

11. Much of the Department's case against Dr. Fonte rests on a "Single Patient Ledger" (the "Ledger") that ADI maintained in the ordinary course of business, which showed the debits and credits entered upon J.S.'s account. Recorded on the Ledger are the dates on which dental services were rendered to J.S., a brief description of each service, the charge for each service, payments received, and J.S.'s current balance. The Ledger is clearly not a dental record or medical history record; it is, rather, a business record——and most likely was prepared primarily for internal purposes, as part of ADI's book of accounts.

12. The Department alleges that the Ledger lists services that were not rendered to J.S. Plainly, the services shown on the Ledger are more extensive than those described in the handwritten progress notes, which are the dental records made by J.S.'s treating dentists. Based on the opinion of the Department's expert witness, which was credible in this regard, the undersigned finds that the Ledger identifies services that could not reasonably have been performed in J.S.'s mouth. The undersigned further finds, based primarily on the testimony of

Dr. Ramos-Abelenda, that where the progress notes and the Ledger are in conflict, the progress notes are the accurate record of the dental services rendered to J.S.

13. That the Ledger lists services not actually rendered to J.S. does not necessarily mean, however, that a fraud was committed, as the Department alleges. For one thing, the evidence does not clearly and convincingly establish that someone knowingly falsified the Leger with intent to deceive. The Ledger's inaccuracies, for instance, might have been the result of incompetence instead of malice.

14. There is, moreover, insufficient evidence to identify clearly the person or persons who prepared the Ledger. The signs point to Ms. Somohano, who reportedly exercised tight control over the accounting systems at ADI. The evidence fails, however, to convince the undersigned that she was the <u>only</u> person who might have accessed the Ledger. More important, there is no persuasive (much less clear and convincing) evidence that Dr. Fonte had anything to do with the Ledger. Even assuming that Ms. Somohano or some other employee of ADI knowingly falsified the Ledger, there is not a sufficient evidential basis for finding that Dr. Fonte authorized, ratified, acquiesced to, or even knew about such wrongdoing, which affected only a single patient.[5]

15. Although the Department alleged that Dr. Fonte had "engaged in an organized scheme to systematically bill for dental services that were never rendered," there is no persuasive evidence that J.S. or any other patients were "defrauded." Besides J.S., only two patients——A.H. and O.R.—— gave testimony at the final hearing. There are no allegations of material fact in the Administrative Complaint which, if proved, would establish that Dr. Fonte defrauded either A.H. or O.R., the latter of whom was not even identified in the complaint.[6]

16. Pleading deficiencies aside, neither A.H. nor O.R. gave testimony that clearly and convincingly proved fraud, much less a fraudulent scheme similar to the one alleged (but not proved) to have been perpetrated against J.S. Each of them, it can fairly be said, is a disgruntled former patient of ADI. Broadly speaking, one or the other, or both, claim to have been overcharged for services rendered, provided unwanted services, given shoddy treatment, and administered controlled substances by someone other than a dentist. None of this was alleged in the Administrative Complaint. No dental or billing records concerning either of these patients were offered as evidence. No expert testimony was given concerning the treatment these patients received.

17. Indeed, the only expert testimony offered at the final hearing concerning standards of performance came from the Department's expert, who testified that the treatment J.S. had received was "fine," and that he had no opinion regarding the care of any patient other than J.S. Thus, the evidence fails to establish that the operation of ADI resulted in dental treatment that fell below the minimum acceptable standards of performance for the community.

Ultimate Facts

18. The evidence is insufficient to prove that Dr. Fonte, as the owner of ADI, failed to maintain either the original or a duplicate of J.S.'s dental records; to the contrary, ADI maintained these records. It is a close question, however, whether the dental records made by J.S.'s dentist of record, Dr. Ramos-Abelenda, fully satisfied the minimum content requirements prescribed in Florida Administrative Code Rule 64B5-17.002(1). This question need not be decided, however, because (a) the owner dentist of a multidentist practice is not responsible for the content of dental records made by a dentist of record, and Dr. Fonte was not the dentist of record for J.S.; and, alternatively, (b) if an owner dentist is responsible for the content of other dentists' records, his responsibility in this regard extends only to "employee, associate or visiting dentists"——and the evidence fails to prove clearly and

convincingly that Dr. Ramos-Abelenda was any of these. Consequently, Dr. Fonte is not guilty of committing an offense punishable under section 466.028(1)(m), Florida Statutes.[7]

19. The evidence fails to establish clearly and convincingly that anyone, much less Dr. Fonte, committed fraud, deceit, or misconduct in the practice of dentistry. Assuming such wrongdoing did occur in connection with the treatment and billing of J.S., however, it was clearly not done by Dr. Fonte himself, and there was no allegation, nor any persuasive evidence, that Dr. Fonte directed, approved, or should have known about an agent's misconduct. Accordingly, Dr. Fonte is not guilty of committing an offense punishable under section 466.028(1)(t).

20. Finally, because there is no evidence that any patient of ADI received substandard dental treatment, Dr. Fonte is not guilty of causing a dental office to be operated in such a manner as to result in dental treatment that is below minimum acceptable standards of performance, which is a disciplinable offense under section 466.028(1)(ff).

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

22. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Dr. Fonte by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

23. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

24. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929 (Fla. 1st DCA 2011)(statues imposing a penalty must never be extended by construction).

25. Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action . . . ."); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

26. In Count I of the Administrative Complaint, the Department charged Dr. Fonte under section 466.028(1)(m), which provides in pertinent part as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action . . . :
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> * * *
>
> (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.

27. In connection with this charge, the Department alleged further that Dr. Fonte had not complied with rule 64B5-17.002, which provides, in the parts quoted in the Administrative Complaint, as follows:

> **64B5-17.002 Written Dental Records; Minimum Content; Retention.**
> (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.

28. At hearing, when it became clear that Dr. Fonte had neither seen nor treated J.S., the Department invoked subsection (5) of rule 64B5-17.002, which provides as follows:

> All dental records required by this rule and any additional records maintained in the course of practicing dentistry shall be the property of the owner dentist of the dental practice in which the dental patient is seen or treated and the owner dentist shall be ultimately responsible for all record keeping requirements set forth by statute or rule.

> (a) The owner dentist is responsible for the records of patients seen or treated by any employee, associate or visiting dentists.
> (b) Multiple owners will be held equally responsible for the records of patients seen or treated within the dental practice of that dental group.
> (c) An owner dentist is not responsible for the records of an independent dentist who is merely leasing or renting space or services for the operation of a separate dental practice.

(Emphasis added.) The Department contends that, as the owner dentist, Dr. Fonte is responsible for any deficiencies in the content of the dental records and medical history records made during the course of J.S.'s treatment at ADI.

29. As mentioned above, disciplinary statutes and rules must be strictly construed against the enforcing authority, which among other things means that

> without a clear, unambiguous provision in the statute indicating legislative intent to hold the licensee responsible for the negligent or wrongful acts committed by another, the administrative agency is not authorized to extend the effect of the statute.

McDonald v. Dep't of Prof'l Reg., Bd. of Pilot Comm'rs, 582 So. 2d 660, 669 (Fla. 1st DCA 1991)(Zehmer, J., specially concurring). Nothing in section 466.028(1)(m) evinces a legislative intent to penalize one dentist for the failure of another to keep dental records and medical history records

justifying the course of treatment of a patient whom the first dentist never saw.

30. In contrast, section 466.018(4)——which the Department has not charged Dr. Fonte with violating——imposes on owner dentists a record-keeping requirement. This statute provides in relevant part as follows:

> In a multidentist practice of any nature, the owner dentist shall maintain either the original or a duplicate of all patient records, including dental charts, patient histories, examination and test results, study models, and X rays, of any patient treated by a dentist at the owner dentist's practice facility. The purpose of this requirement is to impose a duty upon the owner of a multidentist practice to maintain patient records for all patients treated at the owner's practice facility whether or not the owner was involved in the patient's treatment. This subsection does not relieve the dentist of record in a multidentist practice of the responsibility to maintain patient records.

§ 466.018(4), Fla. Stat.

31. Strictly construing rule 64B5-17.002(5) in favor of the licensee, and being mindful that discipline should not be imposed on a licensee for the acts of another absent a clear statutory warrant, the undersigned concludes that Dr. Fonte's responsibility for the records of patients treated by other dentists at ADI is limited to keeping the records in accordance with the rule and section 466.018(4)——that is, preserving and maintaining the original or a duplicate of such records. In

sum, Dr. Fonte's duty as an owner dentist involves records retention; he is not obligated, as an owner, to create (or ensure the creation of) dental records which justify the treatment of other dentists' patients or otherwise meet minimum content requirements.

32. Alternatively, if rule 64B5-17.002(5) could be construed to obligate an owner dentist to make certain that all dental records concerning patients seen in his multidentist practice meet minimum content requirements, such responsibility extends only to "the records of patients seen or treated by any employee, associate or visiting dentists." Fla. Admin. Code R. 64B5-17.002(5)(a).

33. The rule does not define the terms "employee", "associate" or "visiting." As these terms are commonly used and understood, however, none accurately describes Dr. Ramos-Abelenda, who was J.S.'s treating dentist——especially when interpreted strictly in favor of the licensee. To begin, Dr. Ramos-Abelenda was not an "employee" of ADI because ADI exercised little or no supervision or control over the details of her work, paid her a commission (as opposed to a salary or wage), charged her for laboratory expenses, and expected her to see patients only one day per week. For similar reasons, Dr. Ramos-Abelenda was not an "associate" of Dr. Fonte. That term suggests a close collegial relationship, albeit one in

which the associate occupies a subordinate position vis-à-vis the principal or partner. Dr. Ramos-Abelenda did not have such a relationship with Dr. Fonte or ADI. Finally, the term "visiting" indicates that the relationship is intended to last for a limited time only. There is no evidence proving that Dr. Ramos-Abelenda was visiting at ADI for a specified period.

34. Dr. Ramos-Abelenda described herself as an independent contractor of ADI, and that is the status which the evidence most clearly supports. See Dep't of Health v. Webb, Case No. 97-1405, 1997 Fla. Div. Adm. Hear. LEXIS 5538, *10 (Fla. DOAH Oct. 31, 1997)(dentist who, in exchange for a percentage of fees received, performed procedures on respondent's patients without being under respondent's direction or supervision, was an independent contractor). Under rule 64B5-17.002(5)(c), an owner dentist is not responsible for the records of an "independent dentist." The term "independent dentist" is not clearly defined. Because Dr. Ramos-Abelenda does not unambiguously come within any other category of dentist mentioned in the rule; and because ambiguities in the rule must be construed in Dr. Fonte's favor; and because Dr. Ramos-Abelenda was an independent contractor for ADI, the undersigned concludes that Dr. Ramos-Abelenda was an "independent dentist" whose records were among those for which Dr. Fonte is not legally responsible.

35. Consequently, Dr. Fonte is not subject to discipline under section 466.028(1)(m) based on the alleged deficiencies in the dental records and medical history records relating to J.S.'s treatment at ADI.

36. In Count II of the Administrative Complaint, the Department charged Dr. Fonte under section 466.028(1)(t), which provides in relevant part as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action . . . :
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> * * *
>
> (t) Fraud, deceit, or misconduct in the practice of dentistry or dental hygiene.

37. This disciplinary statute does not unambiguously subject a licensee to punishment for the acts of another person. Indeed, to subject a licensee to discipline based solely on another's misconduct, a statute would need to be exceptionally clear with regard to the legislative intent; merely authorizing the imposition of penalties for an agent's violation of law is insufficient——and section 466.028(1)(t) does not do even that. By way of contrast, consider section 561.29(1)(a), which explicitly provides authority to discipline a liquor licensee upon a finding of a "[v]iolation by the licensee <u>or his or her or its agents, officers, servants, or employees</u> . . . of any of the laws . . . in regard to . . . alcoholic beverages . . . ."

(Emphasis added.) Although a "literal reading of [the statute] would indicate that a liquor licensee is under the onus of suspension or revocation of his license for any violation of law committed by his employees on his premises, irrespective of his own personal fault in connection therewith," Pic N' Save Central Fla., Inc. v. Dep't of Bus. Reg., 601 So. 2d 245, 251 (Fla. 1st DCA 1992), the courts consistently have declined to read section 561.29(1)(a) as a warrant for imposing discipline under the respondeat superior doctrine. See, e.g., id. at 249-56; Brother J. Inc. v. Dep't of Bus. and Prof. Reg., 962 So. 2d 1037 (Fla. 1st DCA 2007).

38. Under section 561.29(1)(a) as judicially construed, the prosecuting agency must clearly and convincingly prove misconduct personal to the licensee to suspend or revoke his beverage license. Pic N' Save, 601 So. 2d at 249-56. This means that a liquor licensee cannot be punished unless it is shown that he personally committed, or is personally culpable for, a disciplinable offense. Personal culpability attaches, for example, when a licensee knows, or should know, about the misconduct of his employees; negligently fails to train or supervise employees; negligently overlooks, condones, or fosters the wrongdoing of employees; or fails to exercise due diligence in preventing misconduct. Id. at 250.[8]

39. Thus, even if section 466.028(1)(t) were construed in favor of the Department (contrary to the applicable principle of interpretation), it is inconceivable that discipline could be imposed upon Dr. Fonte in the absence of clear and convincing proof of fault on his part. In this case, the evidence fails to establish clearly and convincingly that anyone committed fraud, deceit, or misconduct in the practice of dentistry; at most it provides a basis for strongly suspecting that an employee of ADI was up to no good. Alternatively, even if the evidence were sufficient to prove such wrongdoing by an employee or agent of ADI, there is no persuasive, much less clear and convincing, evidence that Dr. Fonte authorized, ratified, or knew about the misconduct. (Even if there were evidence of wrongdoing on Dr. Fonte's part, e.g., negligent supervision, which would suffice to make him vicariously liable for punitive disciplinary action, the Department did not allege wrongdoing of that nature in the Administrative Complaint, a pleading deficiency which would preclude the imposition of sanctions, see, e.g., § 120.60(5), Fla. Stat.; and, in any event, section 466.028(1)(t) does not clearly and unambiguously authorize the imposition of punishment for fraud, deceit, or misconduct carried out by a licensee's agent.)

40. Because the allegations were not proved, Dr. Fonte is not subject to discipline under section 466.028(1)(t).

41. In Count III of the Administrative Complaint, the Department charged Dr. Fonte under section 466.028(1)(ff), which provides in relevant part as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action . . . :
>
> * * *
>
> (ff) Operating or causing to be operated a dental office in such a manner as to <u>result in dental treatment that is below minimum acceptable standards of performance for the community</u>. This includes, but is not limited to, the use of substandard materials or equipment, the imposition of time limitations within which dental procedures are to be performed, or the failure to maintain patient records as required by this chapter.

(Emphasis added.)

42. The Department offered no persuasive evidence (and no expert testimony) showing that any patient received dental treatment at ADI that was below minimum acceptable standards of performance for the community. The only expert testimony concerning the applicable standards of performance was that of the Department's expert, who testified that the dental treatment which J.S. received at ADI was "fine"——that is, it met or exceeded the relevant standards.

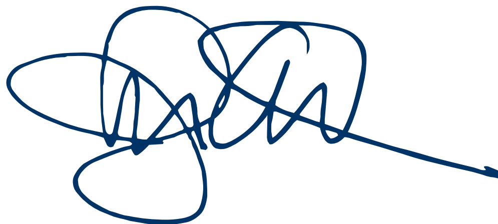
43. The Department thus failed to prove an essential factual element of the offense defined in section 466.028(1)(ff), namely, that the operation of a dental office

resulted in substandard dental treatment. Because this charge against Dr. Fonte fails as a matter of fact, no further legal analysis is necessary.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Dentistry enter a final order finding Dr. Fonte not guilty of the charges set forth in the Administrative Complaint.

DONE AND ENTERED this 23rd day of May, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2011.

ENDNOTES

[1]/ The applicable sections of the Florida Statutes have remained the same at all times relevant to this case.

[2]/ The precise nature of the relationship between ADI and Dr. Ramos-Abelenda is not entirely clear. Plainly, however, she was not a salaried employee. Rather, ADI paid Dr. Ramos-Abelenda a commission of 35 percent of the amounts collected from dental work she performed for ADI's patients. Moreover, ADI exercised little or no control over the manner in which she practiced, and Dr. Ramos-Abelenda used some of her own materials and supplies to treat ADI's patients. ADI even charged Dr. Ramos-Abelenda and other dentists working in its offices 50 percent of their respective patients' laboratory bills for dental restorations such as crowns and bridges. She considered herself to be an independent contractor and practiced in other dental offices besides ADI's under similar arrangements.

[3]/ The Department's expert witness expressly declined to give an opinion regarding the reasonable value of the care and treatment that J.S. received at ADI.

[4]/ J.S. or his mother later disputed some of these credit card charges, and——according to J.S.'s mother, whose testimony in this respect is accepted as true——CareCredit® eventually refunded $7,766.

[5]/ Not only was it not proved that Dr. Fonte, as a principal, had authorized or ratified the wrongful acts of an agent, but also the Department had not even alleged such facts.

[6]/ The Department merely alleged that A.H. and six other patients (identified by their initials) had given sworn testimony to the Palm Beach County Sheriff's Office about "allegations of fraud" similar to those the Department has made with reference to J.S., and that the sheriff had provided the Department copies of the patients' statements. The problem with such allegations is that the fact (if established as alleged) that someone gave a sworn statement accusing another of fraud does not prove that fraud was committed; it merely proves that someone gave a sworn statement accusing another of fraud. To allege fraud effectively, the alleged wrongdoer's deeds must be pleaded. Then, if such conduct were proved, it could be determined that fraud was committed.

[7]/ Most of the allegations in the Administrative Complaint concerning Dr. Fonte's alleged failure to keep dental records justifying the course of J.S.'s treatment focused on the Ledger, which was neither a dental record nor a medical history record, but was instead a business record of ADI whose purposes clearly

did not include justifying the course of the patient's treatment. The Ledger is thus outside the reach of section 466.028(1)(m), which is plainly not designed to subject a dentist's general business, financial, or accounting records to scrutiny.

[8]/ In this respect, the law governing administrative discipline conforms to the common law principles governing civil liability. In Florida, "[b]efore an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part." E.g., Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981)(The "plaintiff [must] allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.").

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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.