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STATE OF WISCONSIN
BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST DOUGLAS F. PIERRE, D.D.S., RESPONDENT.	: : : : :	FINAL DECISION AND ORDER LS9106181DEN

The State of Wisconsin, Dentistry Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Dentistry Examining Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs, and mail a copy thereof to respondent or his or her representative, within 15 days of this decision.

Respondent or his or her representative shall mail any objections to the affidavit of costs filed pursuant to the foregoing paragraph within 30 days of this decision, and mail a copy thereof to the Division of Enforcement and Administrative Law Judge.

The rights of a party aggrieved by this Decision to petition the board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 24th day of May, 1993.

Thomas G. Brandt
Pres

STATE OF WISCONSIN
BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

DOUGLAS F. PIERRE, D.D.S.

Respondent

PROPOSED DECISION

The parties to this matter for the purposes of Wis. Stats. sec. 227.53 are:

Douglas F. Pierre, D.D.S.
2626 South Oneida
Green Bay, WI 54304

State of Wisconsin
Dentistry Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing was conducted in this matter on January 28, January 29, January 30 and June 3, 1992, at 1400 East Washington Avenue, Madison, Wisconsin. The Division of Enforcement appeared by Attorney Arthur Thexton. Dr. Pierre appeared by Attorneys P. Scott Hassett, Joseph M. Recka and Edward J. Zinman, D.D.S. The final transcript of the proceedings was received on August 6, 1992.

Based upon the entire record in this matter the administrative law judge recommends that the Dentistry Examining Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Douglas F. Pierre, D.D.S., 2626 South Oneida, Green Bay, WI 54304, is currently licensed to practice as a dentist in Wisconsin by license #5000682, granted on June 2, 1969.

2. In November, 1988, Roberta Atkinson, 625 Saratoga Street, Green Bay, Wisconsin, was 33 years of age. Ms. Atkinson was at that time receiving regular dental care from George Smullen, D.D.S., a Green Bay general dentist, and had received care from Dr. Smullen since February 15, 1984. She was attempting with varying success to maintain a four-month schedule for oral prophylactic appointments. Ongoing dental care included regular monitoring of Ms. Atkinson's periodontic status, and Dr. Smullen considered her status to be relatively stable, with no sulcus pockets exceeding four millimeters. Prophylaxis included tooth scaling and polishing, but did not include root planing.

3. Root planing may be defined as a procedure by which tooth roots are planed to remove both calculus and bacterial products that have become incorporated into the cementum.

4. For some time prior to November, 1988, Ms. Atkinson had experienced some pain in her lower front teeth. Dr. Smullen therefore recommended that she have an orthodontic consultation and made an appointment with Donald M. Martens, D.D.S., a Green Bay orthodontist, for that purpose. Prior to that appointment, Ms. Atkinson lunched with an employee of Dr. Pierre, who indicated that Dr. Pierre did bite adjustments. Ms. Atkinson followed the recommendation of Dr. Pierre's employee and made an appointment with Dr. Pierre.

5. Ms. Atkinson first saw Dr. Pierre on December 8, 1988. A medical and dental history was taken by a member of Dr. Pierre's staff, after which Dr. Pierre conducted a periodontal examination.

6. Following the completion of the periodontal examination, Dr. Pierre indicated to Ms. Atkinson that she suffered from moderate to severe periodontal disease, and that periodontal surgery was required on all four dental quadrants of her mouth. Dr. Pierre did not discuss alternative non-surgical courses of treatment with Ms. Atkinson.

7. Dr. Pierre's records of Ms. Atkinson's periodontal examination indicate he found pockets of 5 or 6 millimeters on teeth 1, 2, 3, 4, 13, 14, 15, 16, 18, 19, 20, 30 and 31. Dr. Pierre's records of Ms. Atkinson's periodontal examination also indicate that there

was an inadequate zone of attached gingiva on the buccal of teeth numbers 21 and 28. Subsequent periodontic examinations conducted by Dr. Todd Needham, D.D.S. on December 27, 1988, by Paula S. Crum, D.D.S. a board qualified periodontist, on January 30, 1989, and by Dr. Ronald L. Van Swol, a board-certified periodontist, on January 9, 1992, all resulted in findings that Dr. Pierre's findings as to Ms. Atkinson's sulci were incorrect and that there existed adequate attached gingiva on the buccal of both teeth 21 and 28 at the time of Dr. Pierre's periodontal examination.

8. Within the profession of periodontics, periodontal disease is said to fall into five classes or degrees of seriousness. Class I is simple gingivitis with normal or near-normal sulci. In Class II, the gingival inflammation has moved to the attachment tissues. Some bone loss has occurred, and sulcus pockets range from normal to five millimeters in depth. Class III is characterized by more generalized bone loss and pockets up to 10 millimeters. A Class IV case would show pockets up to 12 mm. in depth, and both horizontal and vertical bone loss as well as bone loss between the roots, resulting in significantly altered osseous topography.

9. Dr. Pierre's recorded classification of Ms. Atkinson's periodontal status was described as moderate or Type III periodontitis. One suffering from moderate periodontitis would display moderate probing depths, moderate bone loss and moderate tooth mobility. At the time of Ms. Atkinson's periodontal evaluation by Dr. Pierre, her periodontal condition could best be described as periodontal Class II, with generalized gingivitis and localized early periodontitis, and without moderate bone loss or mobility.

10. Phase 1 periodontal therapy is the preparation phase of periodontal treatment and consists of various steps, including patient education on plaque control techniques, tooth scaling and polishing, root planing, caries control if necessary, necessary extractions, endodontic care if necessary, and periodontic reevaluation following phase 1 therapy to determine further appropriate therapy, if any. Dr. Pierre did not undertake Phase 1 therapy prior to recommending surgery.

11. Dr. Pierre did not communicate with Ms. Atkinson's regular dentist, Dr. Smullen, prior to recommending surgery to determine whether surgery was consistent with Dr. Smullen's treatment plan for his patient or for any other purpose.

12. Dr. Pierre suggested to Ms. Atkinson that the surgery could go forward on December 13, 1988. When Ms. Atkinson expressed reluctance to submit to surgery just prior to the Christmas holidays, Dr. Pierre indicated that because of annual limits on

Ms. Atkinson's insurance coverage, it was advisable to complete surgery on two of the four quadrants before the end of the year in order to ensure that the entire course of treatment would be covered by insurance.

13. Ms. Atkinson's health insurance coverage, including coverage for periodontal care, was with Employer's Insurance Company through her husband's employment as a City of Green Bay Municipal Judge. There were no limits on Ms. Atkinson's health insurance coverage which would have militated for completing a portion of the surgery prior to the end of 1988.

14. Dr. Pierre knew or should have known that there were no annual limits on Ms. Atkinson's health insurance coverage which would have militated for completing a portion of the surgery prior to the end of 1988.

15. Dr. Pierre performed periodontal surgery on Ms. Atkinson's mouth on December 13, 1988. Dr. Pierre's records indicate that surgery consisted of buccal flap osseous surgery and lingual gingivectomies involving the interproximal area between teeth numbers 30 and 31, and flap surgery on teeth 1, 2, 3 and 4 of the right maxillary arch. Dr. Pierre also performed a free gingival graft on the buccal of tooth 28. The records indicate that at the time of the surgery, Dr. Pierre also performed an occlusal adjustment.

16. In performing the free gingival graft on tooth number 28, Dr. Pierre placed the graft below a zone of existing attached keratinized gingiva. The graft was attached with medical grade cyanoacrylate, a surgical glue, and was attached to gingival tissue rather than to the tooth, giving rise to the possibility that the affected portion of the graft would be deprived of a blood supply and would necrotize. Cyanoacrylate is not approved by the FDA for use in the oral cavity.

17. Following surgery, Dr. Pierre administered approximately one unit (1/40th cc.) of Protamine Zinc Insulin to Ms. Atkinson. Protamine Zinc Insulin is normally administered only for the control of diabetes. Dr. Pierre also dispensed a quantity of Vitamin C to Ms. Atkinson for self-administration. Dr. Pierre's records for Ms. Atkinson do not reflect the amount and dosage dispensed, or the instructions for its use. The package provided to the patient, however, specified "1000 milligram Vitamin C tablets. Take one three times daily with meals."

18. Dr. Pierre's records indicate that the periodontal surgery performed on December 13, 1988, took a total of one hour. Dr. Pierre billed the insurer in the amount of $440 for one quadrant of surgical treatment, $280 for the segment, and $280 for the graft.

19. Ms. Atkinson's periodontal condition in December, 1988, required neither flap surgery, osseous surgery nor free gingival grafts.

20. Dr. Pierre knew or should have known that Ms. Atkinson's periodontal condition in December, 1988, required neither flap surgery, osseous surgery nor free gingival grafts.

21. Ms Atkinson appeared for three post-operative visits to examine the surgical sites and to have dressings changed and removed. Dr. Pierre failed to see the patient on at least one of those occasions.

22. After discussions with her husband, Ms. Atkinson made an appointment with Todd Needham, D.D.S., a periodontist, to secure a second opinion whether additional surgery was indicated. Dr. Needham examined the left two quadrants on December 27, 1988, at a time following the surgery when the right quadrants were still covered with dressings. Dr. Needham's findings were that probing depths generally ranged from 3 to 4 mm. in the maxillary anterior area. Four mm. probing depths were noted at the mesial and distal of #14 & 15 at the facial and lingual line angle with 5 to 6 mm. noted on the mesial facial and mesial lingual aspect of tooth #13. Four mm. depths were noted in the mandibular arch at the mesial facial line of #22 & 19 as well as the distal facial aspect at #19 & 18. A 5 mm. probing depth was noted on the mesial of tooth #18. Dr. Needham suggested that based upon Ms. Atkinson's presenting condition, she follow a continuing non-surgical hygiene maintenance routine with an attempt to control subgingival areas with subgingival scaling, localized root planing and curettage with anesthetic in localized areas of persistent bleeding. He recommended against a gingival graft in the left mandibular bicuspid area.

23. Dr. Needham referred Ms. Atkinson for a third opinion by Paula S. Crum, D.D.S., a board-eligible periodontist practicing in Green Bay. Ms. Atkinson appeared for an appointment with Dr. Crum on January 30, 1989.

24. At the time of Dr. Crum's examination, she found that all probing depths were within normal limits with the exception of a 5 millimeter pocket on the mesial of number 13, and that there was an adequate band of keratinized tissue throughout, including tooth 21. Her findings were thus in substantial agreement with Dr. Needham's.

25. Ms. Atkinson has seen Dr. Crum on a regular basis to the time of the hearing herein. She has had no further surgical intervention, and none is anticipated.

CONCLUSIONS OF LAW

1. The Dentistry Examining Board has jurisdiction in this matter pursuant to Wis. Stats. sec. 447.07.

2. In recording Ms. Atkinson's periodontal status as moderate or class III periodontitis, when in fact her status could best be described as periodontal class II, with generalized gingivitis and early localized periodontitis, and in having represented to Ms. Atkinson that she suffered from moderate to severe periodontal disease requiring periodontal surgery in all four quadrants of her mouth, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

3. In failing to discuss alternative non-surgical courses of treatment with Ms. Atkinson, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

4. In failing to undertake Phase 1 therapy prior to recommending surgery to Ms. Atkinson, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

5. In failing to communicate with Ms. Atkinson's regular dentist, Dr. Smullen, prior to recommending surgery to determine whether surgery was consistent with Dr. Smullen's treatment plan for his patient, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5),

engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

6. By representing to Ms. Atkinson that she should proceed to surgery before the end of 1988 in order to avoid annual limits on her insurance coverage when he knew or should have known that no such limits existed, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

7. In performing periodontal surgery on Ms. Atkinson consisting of buccal flap osseous surgery and lingual gingivectomies involving the interproximal area between teeth numbers 30 and 31 and flap surgery on four teeth in the molar area of the right maxillary arch, and including a free gingival graft on the buccal of tooth 28, when he knew or should have known that Ms. Atkinson's periodontal condition at the time of surgery required neither flap surgery, osseous surgery nor a free gingival graft, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988], and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

8. By placing the free gingival graft on tooth number 28 below a zone of existing attached keratinized gingiva, and by attaching the graft with cyanoacrylate to gingival tissue rather than to the tooth, thereby giving rise to the possibility that the affected portion of the graft would be deprived of a blood supply and would necrose, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988], and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

9. There is insufficient evidence to establish that performing an occlusal adjustment on Ms. Atkinson at the time of surgery constituted practicing in a

manner which substantially departed from the standard of care ordinarily exercised by a dentist which harmed or could have harmed the patient, or that these actions indicate a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession.

10. There is insufficient evidence to establish that using Protamine Zinc Insulin in conjunction with surgery to enhance healing, and dispensing Vitamin C to Ms. Atkinson following surgery for the same purpose, constitutes practicing in a manner which substantially departs from the standard ~~of~~ care ordinarily exercised by a dentist which harmed or could have harmed a patient, or that these actions indicate a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession.

11. There is insufficient evidence to establish that failing to examine Ms. Atkinson on the occasion of at least one of her post-operative visits constitutes practicing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, or that these actions indicate a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Douglas F. Pierre, D.D.S., to practice dentistry in the State of Wisconsin be, and hereby is, suspended for a period of six months, commencing 60 days from the date of the Final Decision and Order of the Dentistry Examining Board adopting this Proposed Decision.

IT IS FURTHER ORDERED that, pursuant to Wis. Stats. sec. 440.22(2), Douglas F. Pierre shall pay the assessable costs of this proceeding.

OPINION

The recommended Findings of Fact, as set forth above, may be summarized as follows:

At the time of the events herein, Roberta Atkinson, a 33 year old married mother of two, was receiving regular dental care from Dr. George Smullen, a Green Bay dentist. Dr. Smullen had Ms. Atkinson on a four-month prophylaxis cycle, which she attempted -- sometimes with limited success -- to follow. Dr. Smullen had followed

Ms. Atkinson's periodontic status since first seeing her in 1984, and considered her status at the time of these events to be stable, with sulcus pocket depths not exceeding four millimeters.

Ms. Atkinson suffered from bruxism and periodic pain in her lower front teeth resulting from malocclusions or bite prematurities. Her dentist recommended that she seek an orthodontic consultation, and made an appointment for her with a Green Bay orthodontist for that purpose. Prior to that appointment, however, Ms. Atkinson had lunch with a friend who happened to be an employee of Dr. Pierre's. The friend told Ms. Atkinson that her boss did bite adjustments and gave her a coupon purporting to entitle Ms. Atkinson to a free examination by Dr. Pierre. She made the appointment and appeared in Dr. Pierre's office on December 8, 1988.

Following a periodontal examination, Dr. Pierre advised Ms. Atkinson that she suffered from moderate to severe periodontal disease, and recommended that periodontic surgery was required on all four quadrants of her mouth. Dr. Pierre did not advise Ms. Atkinson of other non-surgical treatment modalities, and specifically did not recommend that Phase 1 periodontal treatment precede surgical intervention. Dr. Pierre also did not contact Dr. Smullen to notify him that he had provided Ms. Atkinson a periodontal examination or to determine whether the recommended surgical intervention was consistent with Dr. Smullen's treatment plan.

The ostensible basis for Dr. Pierre's recommendation that surgery be performed was that Ms. Atkinson suffered from moderate or class III periodontitis with an inadequate zone of attached gingiva on the buccal of teeth 21 and 28. In fact, at the time in question, Ms. Atkinson's periodontal status could be best described as Periodontal Class II, with generalized gingivitis and localized early periodontitis. Her periodontic condition did not therefore require or justify surgical intervention.

Not only did Dr. Pierre recommend surgery, he recommended that it be performed five days later, in order to avoid suggested problems with annual limits on Ms. Atkinson's health coverage and to thereby ensure that the entire course of treatment would be covered by her medical and dental insurance. This recommendation was made notwithstanding the fact that there were no annual limits for periodontal care imposed by Ms. Atkinson's health care policy, and notwithstanding that Ms. Atkinson expressed a preference not to have surgery performed just prior to the Christmas holidays.

Surgery went forward on December 13, with Dr. Pierre operating on the left two quadrants. The surgery included buccal flap osseous surgery and lingual

gingivectomies involving the interproximal area between teeth numbers 30 and 31, flap surgery on teeth 1, 2, 3 and 4 of the right maxillary arch; a free gingival graft on the buccal of tooth 28, and an occlusal adjustment. The gingival graft was attached with medical grade cyanoacrylate, or "superglue," to gingival tissue below a zone of existing attached gingival tissue. Dr. Pierre administered a small dose of Protamine Zinc Insulin following surgery to promote healing, and sent Ms. Atkinson home with a packet of Vitamin C to be taken before meals. Ms. Atkinson appeared for three post-op visits, and Dr. Pierre examined her on two of those occasions.

Ms. Atkinson's regular dentist, Dr. Smullen, also provides dental care for Ms. Atkinson's husband. At the time of a dental appointment following Ms. Atkinson's surgery, Mr. Atkinson, who was at that time a Green Bay municipal judge, disclosed to Dr. Smullen the fact that Dr. Pierre had performed periodontal surgery on his wife. Dr. Smullen advised Mr. Atkinson that Ms. Atkinson should seek a second opinion on whether further surgery was appropriate. Ms. Atkinson received a second opinion from Dr. Todd Needham, an Appleton periodontist, and a third opinion from Dr. Paula Crum, a Green Bay periodontist. Both consultants recommended against further surgical intervention. Ms. Atkinson has seen Dr. Crum regularly to the date of the hearing herein, and no further surgery has been undertaken or is anticipated.

Based on these proposed findings, the ALJ recommends that the Dentistry Examining Board find as Conclusions of Law that Dr. Pierre's practice in a number of areas constituted a danger to the health, welfare or safety of a patient or the public and/or that his practice in this instance substantially departed from the standard of care ordinarily exercised in the profession. The specific factual bases for those conclusions, and the evidence supporting them, is as follows:

CONCLUSION OF LAW # 2

In recording Ms. Atkinson's periodontal status as moderate or class III periodontitis, when in fact her status could best be described as periodontal class II, with generalized gingivitis and early localized periodontitis, and in having represented to Ms. Atkinson that she suffered from moderate to severe periodontal disease requiring periodontal surgery in all four quadrants of her mouth, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

It is undisputed that Dr. Pierre performed a periodontic examination on Ms. Atkinson, after which he recorded Ms. Atkinson's periodontal status as a class III with an inadequate zone of attached gingiva on the buccal of teeth 21 and 28. He recorded having found pockets of 5 or 6 millimeters on teeth 1, 2, 3, 4, 13, 14, 15, 16, 18, 19, 20, 30 and 31. Nineteen days following Dr. Pierre's examination, Dr. Todd needham performed a periodontal examination of those areas of Ms. Atkinson's mouth not covered with surgical dressing. He found pockets exceeding 4 millimeters in depth at the mesial lingual of tooth #18 (5 mm.), the mesial surface of number 13 (5 mm.), and the lingual surface of number 13 (6 mm.). Dr. Needham found one millimeter of attached gingiva at tooth 21 (p. 247)[1].

Approximately one month later, Dr. Paula S. Crum also did a periodontic examination. Her findings were in substantial agreement with Dr. Needham's in that she noted that all probing depths were within normal limits with the exception of a 5 millimeter pocket on the mesial of 13. She also found an adequate band of attached keratinized tissue throughout (p.445). Dr. Crum testified that based on her findings, she concluded that Dr. Pierre's findings both as to probing depths and attached gingival were incorrect (pp. 472, 474). Complainant's expert, Dr. Ronald L. Van Swol, testified that based on the clinical findings of Drs. Needham and Crum as well as his own examination, Dr. Pierre's diagnosis was "absolutely incorrect" (p. 193). Dr. Van Swol agreed with Dr. Crum that a correct diagnosis was a periodontal class II patient with generalized gingivitis and localized early periodontitis (p, 193, 472). Dr. Van Swol also agreed with Dr. Crum that Ms. Atkinson had an adequate zone of attached gingiva at tooth 21 (202). That testimony is accepted, as is Dr. Van Swol's further testimony that such misdiagnosis by Dr. Pierre constituted a danger to Ms. Atkinson in creating the risk of an inappropriate treatment plan and inappropriate treatment. (pp. 193-197)

Dr. Pierre defended his findings by citing to various factors which could account for variances in probing depths he found and those found in subsequent examinations, including probing pressures, variation in the diameters of probes, gingival inflammation, improvements in dental hygiene, and the possibility that Ms. Atkinson was suffering from one of the rare side effects of a drug, Anafrinil, that she was taking periodically at the time. (pp. 535, 747-749). These attempted explanations fall far short of explaining the substantial disparity between his findings and the subsequent findings, and the ALJ finds that the evidence is preponderant that Dr. Pierre's findings were indeed, in the words of Dr. Van Swol, absolutely incorrect.

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[1] All page references are to the hearing transcript.

Ms. Atkinson testified that Dr. Pierre indicated to her that his examination revealed that she suffered from moderate to severe periodontal disease requiring surgery in all four quadrants of her mouth (p. 40). Dr. Pierre testified that in his interview with Ms. Atkinson following the examination, he reviewed with her his diagnostic findings of moderate localized periodontitis, and indicated to her that her prognosis was good (p.727). In light of the uncontested fact that Dr. Pierre recommended that Ms. Atkinson undergo surgery in all four quadrants of her mouth, I accept Ms. Atkinson's testimony as to the assessment that Dr. Pierre provided to her.

It is not necessary at this juncture to decide whether Dr. Pierre's periodontal findings were based on incompetence or, rather, on an intentional misrepresentation designed to generate a surgical fee. Suffice it to say that a failure to correctly assess Ms. Atkinson's periodontal status clearly constitutes practice which substantially departs from the standard of care ordinarily exercised by a dentist.

CONCLUSION OF LAW #3

In failing to discuss alternative non-surgical courses of treatment with Ms. Atkinson, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

Ms. Atkinson testified that following the periodontal examination, Dr. Pierre indicated that surgery would be required on all four quadrants of her mouth, and that surgery should be undertaken the following week (pp. 40-41). She testified that at no time did he discuss possible alternative non-surgical treatments (p. 43) or make reference to root planing or scaling (p. 46). Dr. Pierre testified that he gave Ms. Atkinson the option of "deep cleanings," but recommended the surgical alternative as being less risky because of anticipated orthodontic treatment and the attendant problem of keeping orthodontic appliances clean (p. 728). There was no motive for Ms. Atkinson to falsify the content of her discussion with Dr. Pierre, and good reason for Dr. Pierre to testify as he did. It was clear from her testimony that Ms. Atkinson was extremely reluctant to undergo the surgery just prior to the Christmas holidays and expressed that reluctance to Dr. Pierre; and it is probable that had Dr. Pierre presented non-surgical treatment alternatives to her at that time, she would have taken careful note of that (p. 41). Moreover, Dr. Pierre, while testifying that he discussed nonsurgical treatment alternatives, also testified that he did not consider such alternatives reasonable (p. 817).

I accept Ms. Atkinson's testimony as the more credible. I also accept the testimony of Dr. Van Swol that it is the obligation of a periodontist to notify a patient of all alternative forms of treatment, that such notification is necessary to provide the patient with an opportunity to give informed consent, and that failure to provide that information is a substantial departure from the accepted standard of care.

CONCLUSION OF LAW #4

In failing to undertake Phase 1 therapy prior to recommending surgery to Ms. Atkinson, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

Both Dr. Van Swol (p. 188) and Dr. Crum (469) testified that it was a substantial departure from accepted standards of care to fail to provide phase 1 care to stabilize the patient prior to undertaking surgical intervention, and that failure to undertake such prior treatment poses the risk to the patient of undertaking traumatic treatments that may prove not to be necessary (p. 469). Dr. Pierre testified that he did not feel that phase 1 treatment was a reasonable alternative because he believed that Ms. Atkinson was to undergo orthodontic care. At that point in time, Ms. Atkinson had not yet even had an orthodontic consultation and, as of the date of her testimony herein, she had not in fact seen an orthodontist. Any expectation Dr. Pierre may have had as to future orthodontic care for Ms. Atkinson was therefore purely speculative. Moreover, if this was a consideration at the time of his treatment discussion with Ms. Atkinson, he apparently failed to mention it to her. Ms. Atkinson testified at length as to the content of that discussion, and her recollection was that Dr. Pierre's exclusive stated reason for undertaking immediate surgery was to preserve her insurance coverage.

In any event, Dr. Pierre's reason for considering phase 1 care to be inappropriate completely misses the point. To undertake such treatment would obviously not condemn Ms. Atkinson to the periodontic risks of undergoing orthodontia with active periodontal disease. At most, it would have delayed orthodontic treatment for some time until all appropriate periodontal treatment had been completed.

Perhaps the most telling testimony in terms of Dr. Pierre's failure to undertake phase 1 treatment was by his own expert, Dr. Clifford Ochsenbein, who testified as follows (pp. 354-355).

Q. (by Mr. Thexton) Do you believe -- is it your professional opinion that a patient's condition should be stabilized before surgery?

A. I'll tell you what. If you can look at that patient and tell that it's stabilized, I mean really stabilized. We send an awful lot of plaque samples to get DNA probe analysis on these cases. We send them every week to try to find out what kind of plaque the patient is growing and so forth and so on, and I'll send them to the University of Pennsylvania and up -- also up in Boston. And -- give me that question again.

Q. Okay. Do you believe that the periodontist should attempt to stabilize the patient before surgery?

A. yeah, okay. Thank you. He should make an effort to do that. However to try to really -- it's like assessing disease activity. The latest stuff that we have in our literature, people that are trying to say which cases are going to get worse, they can't project it. They tell it to you right up front, and that is a difficult thing to do and so where one's stabilized I don't know. I'm going to be on a panel in Boston in about two months on refractory periodontitis, and they're going to have some pretty good people talking, and these are cases that were treated, and they got it again, and now we got to try to find out why do they have it again. What is it due to? And these are real problem things. So when a case is stabilized, that's hard to say. Really is.

Q. But you think the periodontist should make the effort?

A. He should make an effort, yes, sir.

Dr. Ochsenbein's reluctance to answer the question was just as obvious in his direct testimony on the subject (pp. 320-321):

Q. Now are -- is it -- are there some reasonable periodontists who given 5 to 6 millimeter pockets that are fibrotic, that will just eliminate, you know, treatment other than proceeding immediately to surgery? Is that acceptable among --

A. You mean he will do surgery prior to doing any initial therapy, you mean?

Q. Right. Are there some reasonable periodontists, are there any reasonable periodontists --

A. That would do that?

Q. -- that do that?

A. Well yeah, I think there's some.

Dr. Pierre testified that he didn't feel that root planing and scaling would do any good because he thought that Ms. Atkinson's regular dentist had already done deep cleaning, and because "additional scaling and root planing would [not] have decreased these pockets because they were firm." First, Dr. Pierre never contacted Ms. Atkinson's regular dentist, and the only basis he would have had for determining whether root planing had been performed (other, obviously, than from his own examination) was from the history given by the patient, who knew nothing of periodontal treatment. As to his testimony that he didn't feel that root planing would do any good, if that was in fact his conclusion, that conclusion was clearly erroneous. Ms. Atkinson's subsequent treatment by Dr. Crum has obviated the need for any further surgical intervention. Further, for Dr. Pierre to testify that Ms. Atkinson's pockets were firm and therefore would not respond to nonsurgical treatment is seriously at odds with his evaluation of active periodontal disease.

CONCLUSION OF LAW #5

In failing to communicate with Ms. Atkinson's regular dentist, Dr. Smullen, prior to recommending surgery to determine whether surgery was consistent with Dr. Smullen's treatment plan for his patient, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988] and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

It is uncontested that Dr. Pierre failed to communicate with Dr. Smullen, Ms. Atkinson's regular dentist, prior to undertaking surgical intervention. Dr. Van Swol testified as to this aspect of the care provided as follows (p. 190):

> Mrs. Atkinson is Dr. Smullen's patient. The general dentist manages her overall dental health, and he knows because she's been in his practice and in his hands over a period of years what has gone on. An examination taking 30 minutes or 40 minutes does not give the periodontist the insights that he needs to make a logical and realistic treatment plan. So I think communication between the general dentist and the specialist, whatever specialty we're talking about, is absolutely mandatory.

As to the dangers in failing to make that communication, Dr. Van Swol testified (p. 191):

> [The risks of harm] could be numerous. In a hypothetical case things could be done to the patient that would not be in the realm of what the general dentist had in mind for the patient and so there could be a clashing of treatment plans.

Dr. Crum's testimony was similar (p. 470):

> The patient is a patient of a general dentist, is the patient of record. A periodontist -- periodontal practice is primarily referral. It does not have to be a referral from the general dentist but it's based on a referral. I think it's a matter of responsibility of ours to discuss a patient that presents to us without a referral to discuss that patient with the general dentist. The risk I see is that there's a risk of possibly repeating treatment that the general dentist has done or there's a risk of going too quickly into treatment without exploring maybe some more conservative or what we would term the correct sequencing of periodontal care.

Respondent's expert again waffled on the question:

> Q. (by Dr. Zinman) But is there -- is there any requirement within the standard of care that you always have to communicate and check with the general dentist before proceeding with periodontal surgery?
>
> A. I've never heard of it that way.
>
> Q. If the patient gives you a history, they seem to be a knowledgeable historian, that is, they seem intelligent, you know, it's a judge's wife, she seems to have food communication skills, the tissues are, as I said, fibrotic and 5 to 6 millimeter pockets with bleeding, do you have to -- as far as the standard of care, does it absolutely require that you check with the general dentist in order to verify the prior dental care, or can the periodontist make his own judgment or her own judgment as to the prior dental care?
>
> A. I think that would depend -- that would depend upon the periodontist and how he feels about the particulars of that -- of that situation but it's not a written law.
>
> Q. Does the standard of care require for all periodontists to always check with the general dentist to verify dental histories?
>
> A. It's not in my state.

Q. Okay. And Okay. And among reasonable periodontists is it acceptable not to check and just if the reasonable periodontist so elects, not only in your state but, you know, others -- other practitioners in other states?

A. Yeah, I think I would inform him that we were treating the patient.

Q. But I'm talking about verifying the dental history. Does it --

A. Oh.

Q. Do you have to verify a dental history with the general dentist before proceeding with treatment with a patient --

A. Well I think we can usually get a fair history from the patient. They're pretty vocal about this.

There was testimony by Dr. Pierre to the effect that he did not contact Dr. Smullen regarding his treatment of Ms. Atkinson because Smullen was hostile toward him and would feel that he was stealing Dr. Smullen's patients (p.822). There was considerable evidence on whether such hostility existed, whether Dr. Smullen had referred patients to Dr. Pierre previously, and whether Dr. Pierre had acknowledged any such referrals. Regardless of all that, the evidence is clear that prevailing standards of care require that a periodontist contact a patient's regular dentist prior to undertaking treatment to ensure continuity of care, and respondent failed to do that. If Dr. Pierre failed to do that because of some personal conflict with Dr. Smullen, then he exposed his patient to risk for the sake of his own comfort and convenience.

CONCLUSION OF LAW #6

By representing to Ms. Atkinson that she should proceed to surgery before the end of 1988 in order to avoid annual limits on her insurance coverage when he knew or should have known that no such limits existed, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

Ms. Atkinson testified that after being told that following oral surgery she would have dressings on the surgical sites for three weeks following surgery, she expressed reluctance to undergo such surgery just prior to the Christmas holidays. She further testified that Dr. Pierre indicated she was better off to have the surgery done before the end of the year in order to ensure insurance coverage for the entire course of

treatment (p. 41). The evidence is clear that Ms. Atkinson's health insurance would have covered the entire surgical treatment regardless of when it occurred. Dr. Pierre testified that there is no record of any inquiry (p. 813), but that an inquiry was made by an employee, Jean Dillon, and that she indicated to him that there was a $1000 limit on the dental policy (p. 751).

Ms. Atkinson's health insurance was through her husband's group policy with Employer's Insurance Company in Green Bay. Dr. Crum, who practices in Green Bay, testified that Employer's Insurance Company insures a great number of people in the Green Bay area, that she is and was at the time in question aware that there were no limits on periodontic care under that company's medical care group policy, and that a periodontist should be expected to know that. I accept that testimony. What we have here is not simple error or ignorance. Respondent persuaded a reluctant patient to submit to surgery five days after the initial evaluation through the force of his affirmative assertion that she would exceed the limits of her insurance coverage if she underwent the entire course of anticipated treatment within one calendar year. That assertion was false, respondent knew or should have known it was false, and his conduct thereby substantially departed from the standard of care ordinarily exercised by a dentist.

CONCLUSION OF LAW #7

In performing periodontal surgery on Ms. Atkinson consisting of buccal flap osseous surgery and lingual gingivectomies involving the interproximal area between teeth numbers 30 and 31 and three teeth in the molar area of the right maxillary arch, and including a free gingival graft on the buccal of tooth 28, when he knew or should have known that Ms. Atkinson's periodontal condition at the time of surgery required neither flap surgery, osseous surgery nor a free gingival graft, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988], and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

Testimony by complainant's experts, each of whom actually evaluated Ms. Atkinson's periodontal status following the initial surgical procedures performed by Dr. Pierre, establish that her status was a periodontal class II, with generalized gingivitis and early localized periodontitis (pp. 193, 472). Each testified that there was an adequate zone of attached gingiva on the buccal of teeth 21 and 28 (pp. 201-205, 247, 445,). Drs. Crum and Van Swol both testified that there was no indication of bone loss in x-rays of teeth

taken prior to Dr. Pierre's surgery so as to require osseous surgery, and Dr. Van Swol testified that in his opinion the osseous surgery had in fact not been performed (pp. 212-213). Dr. Pierre testified that the surgery was in fact indicated (pp. 734-741), and he presented x-ray evidence in support of his testimony that surgery had in fact been performed (791-794).

Perhaps no more eloquent testimony exists supporting the conclusion that surgery was not required in this case than the fact that from the time of surgery in 1988 until the time of the hearing in 1992, Ms. Atkinson was under the care of periodontist Paula S. Crum, who stabilized Ms. Atkinson's periodontal status with routine periodontal nonsurgical care consisting of full mouth scaling and root planing of tooth #13. Surgery was not required or contemplated at the time Dr. Crum first saw Ms. Atkinson and was not required or contemplated at the time of the hearing herein (pp. 447-451). the evidence is clear that surgery was not indicated at the time that Dr. Pierre saw Ms. Atkinson, and it may not be gainsaid that in having performed unneeded surgery, Dr. Pierre practiced in a manner which substantially departed from accepted standards of the profession. The evidence is not preponderant, however, that the unnecessary surgery was not in fact performed.

CONCLUSION OF LAW #8

By placing the free gingival graft on tooth number 28 below a zone of existing attached keratinized gingiva, and by attaching the graft with cyanoacrylate to gingival tissue rather than to the tooth, thereby giving rise to the possibility that the affected portion of the graft would be deprived of a blood supply and would necrose, Dr. Pierre practiced in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, in violation of Wis. Adm. Code sec. DE 5.02(5), engaged in conduct which indicates a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession, in violation of Wis. Stats. sec. 447.07(3)(g) [1988], and thereby engaged in unprofessional conduct, in violation of Wis. Stats. sec. 447.07(3)(a) [1988].

Dr. Van Swol's testimony as to this aspect of the case included the following:

Q. (by Mr. Thexton) Did you examine the Tooth Number 28 in that area where Dr. Pierre did in fact say that he performed surgery?

A. Yes.

Q. And do you have an opinion, a professional opinion which you are reasonably certain is correct as to whether or not that surgery was competently performed?

A. Yes.

Q. What is your opinion?

A. It was not.

Q. What was wrong with it?

A. Basically two things. There's still a zone of keratinized tissue coronal or above the graft that she had all along. The graft is placed below that zone, that adequate zone of keratinized tissue. That's one criticism. The second criticism is that the graft is a -- let us say, unsightly, aesthetically unpleasing and a very thick and bulky graft. It looks as though a thick patch was placed on a tire tube, and this is not the goal that a reasonable and prudent periodontist would want to obtain when placing a free gingival graft.

* * * *

Q. I take it from what you've already testified to that you read that part of Dr. Pierre's deposition in which he stated that he used a medical grade superglue to glue the tissue of Ms. Atkinson when he performed the gingival graft. . . Do you have a professional opinion of which you are reasonably certain as to whether or not the use of this substance was within the -- was a substantial departure from the standard of care?

A. It was.

Q. And in what way?

A. This superglue is really a cyanoacrylate which has not been approved by the FDA for use in the oral cavity.

Dr. Crum's testimony was similar:

Q. Do you have an opinion as to whether or not Dr. Pierre's graft was competently performed?

A. It does not appear like you like a graft to appear once healing is completed.

Q. What is wrong with it?

A. The apical area of it is away from the tissue, away from -- there's a thickness to it, I guess, is the best way you can -- and you can actually kind of lift it up and there's a little mobility to the graft area itself.

* * * *

Q. Do you have an opinion as to whether or not the use of superglue to tack the graft on the vascular area where the graft was placed was a substantial departure from the standard of care in 1988?

* * * *

A. As we've stated, it's not approved by the FDA for that type of use as tacking a graft. In Dr. Pierre's deposition he said that it was tacked to the tooth, but the graft was placed below the -- the keratinized gingiva that was present. It was definitely below so it couldn't have been tacked to the tooth. The tooth is not in the area of the graft. It's on tissue, and so therefore it would have to be tacked to tissue. And a graft, a free gingival graft or an autogenous gingival graft relies on the underlying tissue to give it a blood supply. I think there's too much risk of the controlling of that -- of the solution that it could have gone under the graft and that that would be definitely a risk of the graft necrosing. . . .

Dr. Oechsenbein testified that the manner in which the graft was performed did not fall below the standards of the profession (pp. 332-333).

Q. (by Dr. Zinman) Okay how about is there anything wrong in terms of the standard of care that [the graft] turns out to be thicker than the surrounding tissue, was that a violation of the standard of care because that's the way it ends up?

A. I would hate to condemn a guy for just that alone, yeah.

* * * *

Q. There is mention about cyanoacrylate being used to cover the graft. Have you used on patients cyanoacrylate?

A. I have, yes.

Q. And what is your understanding as to -- is that a form of medical dressing?

A. It is a dressing, yes. You can use it in that fashion.

Q. And -- do you have an opinion as to whether or not the FDA regulates surgical dressings?

A. I think they might influence the manufacturer, but I don't know that they regulate it in the dentist's office.

Q. And would it -- would it in 1988 have met the standard of care to use cyanoacrylate as a surgical dressing following a free gingival graft procedure?

A. Yeah, I don't think that makes him good or bad that he used it.

There is sufficient evidence in the record to establish that the FDA has not approved the use of cyanoacrylate in the oral cavity, but there is not sufficient evidence to establish that it is not an appropriate extra-label use. I have therefore recommended no finding that use of cyanoacrylate in that manner constitutes unprofessional conduct. There is adequate evidence, however, to establish that in utilizing cyanoacrylate to attach the graft directly to tissue below a zone of existing keratinized gingiva, there was a danger that the graft would be deprived of a blood supply and would necrose, and that the placement of the graft in that position and in that manner constituted a substantial departure from accepted standards of care.

CONCLUSION OF LAW #9

There is insufficient evidence to establish that performing an occlusal adjustment on Ms. Atkinson at the time of surgery constituted practicing in a manner which substantially departed from the standard of care ordinarily exercised by a dentist which harmed or could have harmed the patient, or that these actions indicate a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession.

Dr. Oechsenbein, Dr. Van Swol and Dr. Crum all testified that it would substantially depart from accepted standards of care to perform an occlusal adjustment while the patient is anesthetized (pp. 214 345, 484). Dr. Pierre testified, however, that he did the occlusal adjustment prior to administration of anesthetic (pp. 766-767). Dr. Van Swol thereafter testified that even assuming that the adjustment was done prior to anesthetizing the patient, performing the adjustment at the same session that periodontal surgery was performed fell below minimum standards of care. The basis for that opinion was that in so doing, Dr. Pierre was "piggy-backing a lot of treatment in a very short period of time," and it was "an awful lot of treatment in a very condensed period of time" (p. 844). That seems a somewhat trivial basis for a finding that this aspect of Dr. Pierre's practice substantially departed from an acceptable standard of care.

CONCLUSION OF LAW #10

There is insufficient evidence to establish that using protamine zinc chloride in conjunction with surgery to enhance healing, and dispensing Vitamin C to Ms. Atkinson following surgery for the same purpose, constitutes practicing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, or that these actions indicate a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession.

Dr. Van Swol testified that the use of Protamine Zinc Insulin (PZI) to promote healing is not within the scope of dentistry, but could not definitively testify as to possible risks in its use (219). Dr. Crum also testified that she was unaware of any legitimate use in dentistry for PZI and that its use violated minimum standards both for that reason and because Dr. Pierre's records do not reflect the amount administered. She also could not specify any established risks, however. Dr Pierre testified that the use of PZI to promote healing is widespread in periodontics (pp. 762, 815), and introduced an article from the Journal of the International Academy of Preventive Medicine supporting its use (Exhibit #20).

Dr. Crum also testified that it was below minimum standards to have dispensed vitamin C to Ms. Atkinson, both because it is of questionable benefit in promoting healing and because the amount dispensed was not recorded. There is no question that the therapeutic benefits of the ingestion of large quantities of vitamin C is the subject of current debate in medical circles. Dr. Crum was unable to establish in her testimony that such use constitutes any risk, however (488-489).

CONCLUSION OF LAW #11

There is insufficient evidence to establish that failing to examine Ms. Atkinson on the occasion of at least one of her post-operative visits constitutes practicing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient, or that these actions indicate a lack of knowledge, an inability to apply or the negligent application of, principles or skills of the dentistry profession.

Ms. Atkinson testified that Dr. Pierre did not see her at her first post-surgical visit (p. 53). That seemingly unequivocal testimony seemed to be controverted by later testimony elicited by complainant's attorney when he questioned Dr. Van Swol whether failure to see the patient at the second post-operative visit violated minimum standards (p. 659). Counsel's failure to accept his own witness' testimony is probably explained by the fact that Ms. Atkinson's patient record reflects that Dr. Pierre did in

fact see her at the first post-operative visit (Exhibit #1). Consistent with those records, Dr. Pierre testified that he saw her at the first post-operative visit, but that her recovery was uneventful and it was possible he may not have seen her at every visit (p. 772). It is concluded that there is less than sufficient evidence to establish that this aspect of Dr. Pierre's treatment failed to meet minimum standards.

OTHER ISSUES

There were a few other issues addressed at the hearing in this matter which have not been formally addressed hereinbefore. Among these was the use by Dr. Pierre of nitrous oxide during the periodontal evaluation. The ALJ sustained respondent's objection to introduction of evidence tending to establish that such use was inappropriate for lack of notice to respondent that this aspect of Dr. Pierre's care was an issue in the case.

Dr. Van Swol's testimony was that Dr. Pierre's surgical approach in doing flap surgery on the buccal rather than lingual side of teeth 30 and 31 was inappropriate (p. 222). Dr. Pierre's testimony was to the contrary (p. 760). It is concluded that there is insufficient evidence to establish that Dr. Pierre's approach either was or was not below minimum standards.

There was somewhat speculative testimony by Dr. Van Swol and Dr. Crum regarding whether Dr. Pierre could have performed all the procedures that Ms. Atkinson's records reflect that he performed in the time allotted, and whether or not Dr. Pierre's billing to the insurance company was appropriate. It is concluded that no violation was established as to either of these.

DISCIPLINE

It is well settled that the purposes of licensee discipline in Wisconsin are to protect the public, to deter other licensees from engaging in similar misconduct, and to promote the rehabilitation of the licensee. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1961). In attempting to arrive at appropriate discipline in this case, one confronts an obvious issue which was not directly addressed at hearing: Whether Dr. Pierre's failure to meet the minimum standards of his profession was the result of incompetence, negligence or simple greed.

Dr. Pierre has practiced periodontics for over 20 years, is a member of several study groups, and stays current with developments in the field through the L.D. Pankey

Institute, where he has served as a lecturer and visiting clinician. He has also lectured at Northwest Technical College before student dental hygienists and assistants, and has on many occasions addressed dental societies and study clubs on the subject of periodontics. On balance, there is not sufficient basis in this record to conclude that Dr. Pierre lacks sufficient skill or knowledge to practice competently. Accordingly, discipline which would require remedial education or training would serve no purpose.

But if respondent's conduct is not a result of incompetence, and given the large number of areas in which his practice in this instance failed to conform to minimum standards, his failure to conform must be the result of his conscious decision not to do so. In such a case, a lengthy suspension of the license should have the requisite deterrent effect as to other dentists who might otherwise decide to practice below the minimum standards of the profession, and will hopefully also have the effect of firmly instilling in Dr. Pierre a recognition that his professional future depends on his conforming his practice to the expectations of his peers. If those two goals are met, then the third goal of protecting the public will have been also subserved.

Dated this 4th day of January, 1993.

Respectfully submitted,

Wayne R. Austin
Administrative Law Judge

WRA:BDLS2:2145

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Dentistry Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Dentistry Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Dentistry Examining Board.

The date of mailing of this decision is May 24, 1993.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

STATE OF WISCONSIN
BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST DOUGLAS F. PIERRE, D.D.S., RESPONDENT	: : : : :	AFFIDAVIT OF COSTS OF THE OFFICE OF BOARD LEGAL SERVICES (Wis. Stats. sec. 440.22)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Wayne R. Austin, being first duly sworn on oath, deposes and states as follows:

1. Your affiant is an attorney licensed to practice law in the State of Wisconsin, and is employed by the Wisconsin Department of Regulation & Licensing, Office of Board Legal Services.

2. In the course of his employment, your affiant was assigned as administrative law judge in the above-captioned matter.

3. Set out below are the actual costs of the proceeding for the Office of Board Legal Services in this matter. Unless otherwise noted, all times commence at the start of the first five minute period following actual start of the activity, and terminate at the start of the first five minute period prior to the actual end of the activity.

ADMINISTRATIVE LAW JUDGE EXPENSE
Wayne R. Austin

DATE & TIME SPENT	ACTIVITY
6/27/91 15 minutes	Draft Prehearing Notice
8/1/91 45 minutes	Prehearing Conference
8/1/91 25 minutes	Draft Prehearing Memorandum
12/5/91 15 minutes	Draft Scheduling Order
1/28/92 6 hours, 50 minutes	Conduct Hearing

1/29/92 7 hours, 59 minutes	Conduct Hearing
1/30/92 7 hours, 48 minutes	Conduct Hearing
6/3/92 2 hours	Conduct Hearing
9/3/92 2 hours, 45 minutes	Prepare Proposed Decision
9/8/92 4 hours, 5 minutes	Prepare Proposed Decision
11/17/92 2 hours 45 minutes	Prepare Proposed Decision
12/22/92 1 hour, 25 minutes	Prepare Proposed Decision
12/23/92 3 hours, 15 minutes	Prepare Proposed Decision
12/28/92 7 hours, 15 minutes	Prepare Proposed Decision
12/29/92 6 hours	Prepare Proposed Decision
12/30/92 6 hours, 35 minutes	Prepare Proposed Decision
1/4/93 6 hours, 55 minutes	Prepare Proposed Decision
1/5/93 2 hours, 30 minutes	Prepare Proposed Decision

Total Time Spent.....69 hours 47 minutes

Total administrative law judge expense for Wayne R. Austin:
69 hours, 47 minutes @ $33.91, salary and benefits:.....$2366.50

REPORTER EXPENSE
Magne-Script

DATE & TIME SPENT | ACTIVITY

Total billing from Magne-Script reporting service:.....$3531.20

TOTAL ASSESSABLE COSTS FOR OFFICE OF BOARD LEGAL SERVICES: $5897.70

Wayne R. Austin
Administrative Law Judge

Sworn to and subscribed before me this 5th day of January, 1993.

Notary Public, State of Wisconsin
My commission is permanent

WRA:BDLS:2682

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST DOUGLAS F. PIERRE, DDS, RESPONDENT.	: : : : :	AFFIDAVIT OF COSTS 89 DEN 74

STATE OF WISCONSIN
COUNTY OF DANE

I, Arthur Thexton, being duly on affirmation, depose and say:

1. That I am an attorney licensed in the state of Wisconsin and am employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties I was assigned as a prosecutor in this matter; and

3. That set out below are costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

Date	Activity	Time Spent
2/19/90	Review File (Atty Heitke)	2.5
4/11/91	Telephone conference with Dr. Van Swol	0.3
4/17/91	Review file, prepare documents for expert	1.0
4/18/91	Continued review of file, letter to expert	3.5
5/9/91	Telphone conferences with Dr. Van Swol, Dr. Smullen, Judge Atkinson	1.5
5/17/91	Telephone conference with Dr. Smullen	0.2
5/21/91	Receive, review and forward radiographs	0.3
6/11/91	Conference with Inv. Ewald, telephone conference with Dr. Van Swol. Begin drafting complaint	1.0
6/12/91	Telephone conference with S/A Vendola, finalize and issue complaint	2.0
6/13/91	Obtain hearing date, prepare Notice of Hearing, telephone conference with Atty Fallen	0.8
6/26/91	Receive, review and file correspondence from Atty Recka	0.4

7/2/91	Review respondent's Interrogatories and Requests for Documents, prepare response	2.0
7/3/91	Letter to Atty Recka with discovery	1.5
7/16/91	Receive and review correspondence, letter to Atty Recka	1.3
8/1/91	Pretrial conference	1.0
8/5/91	Telephone conference with Atty Hassett	0.3
8/12/91	Draft witness list, telephone conference with Atty. Hassett, prepare for deposition	2.0
8/15/91	Receive and review Motion to Compel and preliminary witness list	0.4
8/16/91	Travel to Green Bay for depositions, obtain prescriptions from Shopko Pharmacy	8.0
8/26/91	Analyze applicable law, prepare Response to Motion to Compel	8.0
9/6/91	Receive and review reply brief of respondent	0.4
9/12/91	Receive and review respondent's supplemental expert witness list.	0.3
9/14/91	Attend deposition of Dr. Van Swol	3.0
9/16/91	Receive and review respondent's second supplemental expert witness list.	0.3
9/26/91	Pretrial conference	0.5
10/2/91	Receive and review ALJ order re: discovery	0.6
10/18/92	Letter to Milwaukee Post Office, prepare response to interrogatories and requests for document, letter to Atty Hassett	6.0
10/21/91	Receive and review respondent's third supplemental expert witness list.	0.3
10/28/91	Prepare files for Document Inspection	2.0
	Letter and affidavit to Milwaukee post office, receive and review letter from Ms. Esidore, letter in response.	1.0
10/29/91	Telephone conference with Milwaukee post office, letter with new affidavit to Milwaukee post office	0.7

11/4/91	Receive and review correspondence (affidavit) from Milwaukee post office	0.3
11/5/91	Receive and review motion to permit Atty Zinman to practice	0.3
11/6/91	Telephone conferences with Atty Hassett, arrange depositions with Mrs. Atkinson	1.0
11/8/91	Travel to Green Bay, meet with Shopko pharmacists, attempt to meet with Ms. Stuiber.	8.0
11/11/91	Travel to Green Bay, attend depositions, interview witnesses	13.0
11/22/91	Receive and review Order admitting Dr. Zinman	0.3
11/25/91	Letter and stipulation to Atty Hassett	2.5
11/27/91	Recieve and review motion in limine and brief.	1.0
12/5/91	Receive and review ALJ scheduling order	0.3
12/11/91	Confer with Inv. Ewald re: Dentists Concerned for Dentists intervention.	0.5
12/12/91	Confer with Attys Hassett and Carlson re: stip.	1.0
12/13/91	Letter and new stipulation draft to Atty Hassett	1.2
12/19/91	Telephone conference with Atty Hassett, telephone conference with Dr. Kierman, letter and stip to Atty Hassett.	1.3
12/20/91	Telephone conference with Dr. Van Swol, prepare for deposition	3.0
12/24/91	Meet with Dr. Van Swol	0.5
12/26/91	Travel to Oshkosh and Green Bay, meet with Drs. Needham, Smullen, and Crum, depose respondent	10.8
12/27/91	Letters to Bellin, St. Elizabeth's, and Milwaukee Psychiatric Hospitals	1.0
12/31/91	Telephone conference with Ms. Ebbeson of Door County Counseling Center	0.4
1/6/92	Receive and review deposition transcripts, letters to Drs. Crum and Van Swol	0.7
	Letter to Door County Counseling	0.4
1/8/92	Present proposed stipulation to Dentistry Board. Confer with Atty Polewski. Draft new stipulation and letter to Atty Hassett, leave telephone message for Atty Hassett	2.3
1/9/92	Finalize new stipulation proposal, pretrial with ALJ Austin	2.4

1/16/92	Telephone conference with Dr. Crum, telephone conference with Dr. Van Swol, prepare for depositions	2.0
1/17/92	Depose Dr. Oschenbien	2.0
1/18/92	Attend deposition of Dr. Crum	2.0
1/21/92	Travel to Milwaukee, meet with Dr. Van Swol. Letters to witnessess with subpoenae	7.0
1/25/92	Prepare trial plan	3.0
1/27/92	Telephone conferences with witnesses, trial preparation	5.5
1/28/92	Attend trial, meet with Dr. Crum	9.3
1/29/92	Attend trial	10.0
1/30/92	Attend trial	10.0
2/5/92	Review records, transmit to McBride	0.8
	Prepare new complaint, telephone conference with Board Advisor	1.0
2/5/92	Prepare closing argument	0.8
3/9/92	Letter to Atty Hassett with copies of photos of slides, deliver originals to ALJ.	1.0
3/18/92	Telephone conference with Dr. Sorkin	0.3
4/9/92	Receive and review correspondence from McBride	0.4
4/14/92	Letter to Atty Hassett with stipulation and complaint	2.0
4/17/91	Receive and review Notice of Posttrial Conference	0.3
4/27/91	Posttrial Scheduling Conference	0.4
4/28/91	Update letters to witnesses	0.5
4/30/91	Receive and review correspondence from Dr. Van Swol	0.3
5/22/91	Telephone conference with Ms. Ebbeson, Door County Counseling Center	0.5

6/1/92	Prepare closing argument, receive, review and file correspondence from Atty Hassett	5.0
6/2/92	Telephone conference with Atty Hassett. Prepare closing	6.0
6/3/92	Prepare for and conduct closing argument, meet with Attys Hassett and Carlson, Telephone conference with Board Advisor, prepare revised stipulation	6.0
6/19/92	Telephone conference with Atty Hassett	0.3
7/29/92	Telephone conference with Atty Hassett, revise stipulation and complaint	1.0
7/31/92	New stipulation to Atty Hassett	0.5
8/4/92	Telephone conference with Atty Hassett re: ¶5	0.5
8/11/92	Receive and review stipulation from Atty Hassett	0.3
9/2/92	Present stipulation to Dentistry Board	0.5
9/3/92	Update letters to witnesses	0.5
1/5/93	Receive and review ALJ decision, update letters to witnesses	1.5
1/22/93	Receive and review Atty Hassett's request for extension of time, letter in response	0.7
1/27/93	Receive and review Atty Hassett's letter re: extension of time	0.3
3/14/93	Prepare State's Objections to ALJ proposed decision	8.0
3/16/93	Prepare Response to Respondent's Objections	7.0
3/17/93	"	10.0
3/18/93	"	8.0
3/19/93	"	1.5
5/25/93	Prepare affidavit of costs Update letters to witnesses	3.0 0.5
6/7/93	Finish affidavit of costs	4.0

BY ATTORNEY BERNDT:

3/15/93	Review Response to Objections draft	0.5
3/21/93	Review Respondent's Response to State's Objections and draft of Response to Respondent's Objections, review transcript	3.5

3/22/93	Continue review and edit	2.5
5/3/93	Review transcript and exhibits	0.5
5/5/93	Review Proposed Decision, prepare for oral argument	8.0
5/5/93	Present oral argument to Board	1.0
TOTAL HOURS		245.5

Total attorney expense for 245.5 hours at $30.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals: $ 7,365.00

INVESTIGATOR EXPENSE FOR JUDITH EWALD

Date	Activity	Time Spent

(Investigator time was paid in the settlement of file # 87 DEN 9)

COSTS OF DEPOSITIONS

1. Depositions taken by complainant (original and one copy)

Deposition of Clifford Oschenbein, DDS	$ 310.00
Deposition of Frances Vandenberg	$ 68.00
Deposition of Bobbi Jo Rondeau	$ 47.50
Deposition of respondent	$ 209.90

2. Depositions taken by respondent (copy only)

Deposition of Ronald L. Van Swol, DDS	$ 59.85
Deposition of Paula Crum, DDS	$ 42.80
Deposition of Todd Needham, DDS	$ 56.10
Deposition of Paula Crum, DDS	$ 51.70
Deposition of George Smullen, DDS	$ 59.40
Deposition of Roberta Atkinson	$ 37 00
Deposition of Nancy Esidore	$ 89 00

EXPERT WITNESS FEES

Professor Ronald L. Van Swol, DDS.	$ 2,917.50
Paula Sherman Crum, DDS.	$ 4,429.90

WITNESS FEES

1. Roberta L. Atkinson	$ 61.00
2. George Smullen	$ 67.40
3. Todd Needham	$ 45.00

MISCELLANEOUS DISBURSEMENTS

1. Records copying	$ 43.45
2. Mileage for DOE staff to depositions etc.	$ 308.50
TOTAL ASSESSABLE COSTS	**$ 16,269.00**

Arthur Thexton
Prosecuting Attorney

Subscribed to and affirmed before me this 7 day of June, 1993.

Notary Public, State of Wisconsin
My Commission: is permanent

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