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STATE OF WISCONSIN

BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF :

DISCIPLINARY PROCEEDINGS :

: LS0010011DEN

LEE KRAHENBUHL, D.D.S., :
RESPONDENT :

FINAL DECISION AND ORDER FOLLOWING REMAND

PARTIES

The parties to this action for purposes of §227.53, Wis. Stats. are:

Lee Krahenbuhl, D.D.S.

1720 Congress Avenue

Oshkosh, WI 54901

Dentistry Examining Board

P.O. Box 8935

Madison, WI 53708-8935

Department of Regulation and Licensing

Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

PROCEDURAL HISTORY

A complaint in the above-captioned matter was filed on October 1, 2000. Respondent's answer is dated October 16, 2000. A hearing was held on April 12, 2001, before Administrative Law Judge William Anderson Black. The Division of Enforcement appeared at the hearing by attorney James E. Polewski. Dr. Lee R. Krahenbuhl (respondent) appeared in person and by his attorneys Reinhart, Boerner, Van Duren S.C. of Madison, Wisconsin by Raymond M. Roder and Frank R. Recker & Assocs. Co. L.P.A. of Cincinnati, Ohio by Frank R. Recker. The Administrative Law Judge filed a proposed decision with the Board on November 20, 2001, proposing that the matter be dismissed.

The Board issued a variance in the form of a Final Decision and Order on May 1, 2002, rejecting the proposal to dismiss and concluding that respondent had engaged in unprofessional conduct contrary to Wis. Stat. § 447.07(3)(a) and (h) and Wis. Admin. Code § DE 5.02 (5). The Board suspended the license to practice dentistry of respondent for six months, ordered a forfeiture and limited his license.

Respondent sought review of the matter in the Circuit Court of Winnebago County under Wis. Stat. ch. 227. On October 27, 2002, the Circuit Court ordered the matter remanded to the Dentistry Examining Board. The Circuit Court concluded that the Board's variance was not issued in compliance with the requirements of due process because the Board issued its variance based on its own credibility determination relative to the testimony of John Sadowski and did not consult wit the Administrative Law Judge on the record. The Court concluded: "The Board's variance is, therefore, null and void as a matter of law and, thus, neither has nor had any force and effect in any of its terms and conditions."

Following remand, the Board reviewed the Court's decision and consulted with the Administrative Law Judge on the record at its meeting on November 6, 2002. Prior to consultation with the Administrative Law Judge, each member of the Board received a copy of the complete administrative record in the case, except for Exhibits #6 - #10 (x-rays) which were made available to members at the November 6, 2002 meeting.

At its meeting on November 6, 2002 and at a subsequent meeting on December 5, 2002 the Board reconsidered its previous decision, and considered the decision of the Circuit Court, the Board's consultation with the Administrative Law Judge, the proposed decision and the administrative record in the case. Based on its reconsideration of the matter following remand from the Circuit Court, the Board makes the following Findings of Fact, Conclusions of Law, Order, Opinion and Explanation of Variance. This order replaces the Board's Final Decision and Order of May 1, 2002.

FINDINGS OF FACT

1. Lee R. Krahenbuhl, D.D.S., whose date of birth is June 11, 1957, is licensed to practice dentistry in the State of Wisconsin pursuant to License #2934. His license was first granted on June 7, 1982. Dr. Krahenbuhl practices dentistry in Oshkosh, Wisconsin.

2. In performing endodontic (root canal) therapy a minimally competent dentist will take a post-treatment x-ray of the endodontic treatment to check that the canals are completely obturated and not overfilled through the apical end of the tooth.

3. In performing endodontic therapy a minimally competent dentist who sees that endodontic treatment has failed to completely obdurate a canal or overfilled a canal will take immediate steps to rectify the incomplete obturation or overfill.

4. The September 1993 and on July 5 and 11, 1994, Dr. Krahenbuhl performed endodontic therapy on Tooth #18 of his patient, Michael Mosher.

5. There is insufficient evidence in Dr. Krahenbuhl's records for Michael Mosher or any other member of Michael Mosher's immediate family or elsewhere in the administrative record of this matter to establish that Dr. Krahenbuhl took a post-treatment x-ray of the root canal treatment on Michael Mosher as part of completing treatment in July 1994.

6. Michael Mosher had no dental treatment between July 11, 1994, and April 29, 1996.

7. On April 29, 1996, Michael Mosher presented at Dr. John LeMaster, D.M.D., a dentist, with complaints of pain localized to Tooth #18.

8. An x-ray taken of Michael Mosher by Dr. John LeMaster on April 29, 1996, depicts the status of Michael Mosher's Tooth #18 prior to any treatment on April 29, 1996 by Dr. LeMaster. The x-ray taken of Michael Mosher by Dr. John LeMaster on April 29, 1996 depicts a radio-opaque line running from the top of the tooth, through the usual location of the distal canal, through the apical end of the distal root of Tooth #18, and continuing in a distally curving line approximately 8 millimeters into the jaw bone. [This x-ray is included in the record as Exhibit 10.] The x-ray shows inadequate filling of the distal canal, decay of the tooth at the top of the distal canal, and extension of the fill past the apical end of the distal root, i.e. an overfill of the distal root canal of Tooth #18.

9. Respondent Dr. Krahenbuhl overfilled the distal canal of Michael Mosher's Tooth #18.

10. During the course of the investigation of Dr. Lee Krahenbuhl's treatment of Michael Mosher, Dr. Krahenbuhl presented a series of x-rays to the Division of Enforcement in the Department of Regulation and Licensing, representing that the x-rays were of Michael Mosher and accurately depicted the root canal treatment of Mosher's Tooth #18.

11. The x-ray Dr. Krahenbuhl represented to be his post-treatment x-ray of root canal therapy on Michael Mosher's Tooth #18 taken July 11, 1994, is included in the record as Exhibit 9.

12. The x-ray Dr. Krahenbuhl represented to be his post-treatment x-ray of root canal therapy on of Michael Mosher's Tooth #18 taken July 11, 1994, [Exhibit 9] is not a post-treatment x-ray taken July 11, 1994 as represented by Dr. Krahenbuhl.

13. The x-ray represented by Dr. Krahenbuhl as having been taken on July 5, 1994 [included in the record as Exhibit 8] was taken after the x-ray represented by Dr. Krahenbuhl as having been taken on July 11, 1994 [Exhibit 9].

14. During the investigation of this matter, Dr. Lee Krahenbuhl falsely represented an x-ray [Exhibit 9] as the x-ray he provided as his post-treatment x-ray of the root canal treatment he did on Michael Mosher's Tooth #18 in July 1994.

15. Dr. Krahenbuhl's license was previously suspended for a period of thirty days, and he was ordered to complete remedial education in business ethics, pursuant to a disciplinary proceeding Order entered in 1993, in connection with Dr. Krahenbuhl's misdemeanor criminal conviction for false representation in violation of the Wisconsin regulations for the medical assistance program.

CONCLUSIONS OF LAW

I. The Dentistry Examining Board has jurisdiction over this matter pursuant to Wis. Stat.

§ 447.07.

II. By having failed to properly perform root canal therapy on Michael Mosher and by having failed to properly address the complications of that root canal treatment, as described in paragraphs 4 through 9 in the Findings of Fact, above, Dr. Krahenbuhl engaged in conduct that is cause for disciplinary action, specifically: under Wis. Stat. § 447.07 (3) (h), Dr. Krahenbuhl's conduct indicates a lack of knowledge of, an inability to apply or the negligent application of, principles or skills of dentistry; and, under Wis. Admin. Code § DE 5.02 (5), Dr. Krahenbuhl practiced dentistry in a manner which substantially departs from the standard of care ordinarily exercised by a dentist which harmed or could have harmed a patient.

III. By providing false information to the Division of Enforcement during the investigation of this matter as described in paragraphs 10 through 14 in the Findings of Fact, above, Dr. Krahenbuhl engaged in unprofessional conduct in violation of Wis. Stat. § 447.07 (3) (a).

ORDER

NOW THEREFORE IT IS HEREBY ORDERED, that the license of Lee R. Krahenbuhl to practice as a dentist in the State of Wisconsin is SUSPENDED for six months commencing thirty days from the date this FINAL DECISION AND ORDER FOLLOWING REMAND is signed.

IT IS FURTHER ORDERED that following the period of suspension, Dr. Lee R. Krahenbuhl may not commence the practice of dentistry until he has applied for and been granted approval by the Board to return to practice. Upon return to practice after suspension, the license of Lee R. Krahenbuhl to practice as a dentist in the State of Wisconsin shall be limited by the following terms and conditions:

A. Dr. Lee R. Krahenbuhl shall not perform any endodontic procedures other than pulp capping. The procedures that Dr. Krahenbuhl shall not perform are described more specifically in codes D3220 through D3999 under IV. ENDODONTICS in *Current Dental Terminology-Third Edition* (CDT-3) published by the American Dental Association 211 E. Chicago Ave. Chicago, IL 60611. Dr. Krahenbuhl may perform the endodontic procedures under CDT -3 codes D3110 and D3120 described as *pulp cap - direct (excluding final restoration)* and *pulp cap - indirect (excluding final restoration)*, respectively.

B. Dr. Lee R. Krahenbuhl shall participate in and satisfactorily complete a course in record keeping within six months of the date on which this Order is signed. Before taking the course, Dr. Krahenbuhl shall request and receive approval of the course from the Dentistry Examining Board.

C. Dr. Lee R. Krahenbuhl's patient records shall be monitored for a period of not less than two (2) years by a Wisconsin licensed dentist approved in advance by the Dentistry Examining Board. The monitor shall submit quarterly reports to the Board expressing an opinion on whether Dr. Krahenbuhl's record keeping is satisfactory, based on a review of randomly selected patient records. Dr. Krahenbuhl shall be responsible for any costs associated with the monitor's duties.

IT IS FURTHER ORDERED that Lee R. Krahenbuhl shall pay a forfeiture in the amount of

$5000.00 pursuant to Wis. Stat. § 440.04(7).

IT IS FURTHER ORDERED that the assessable costs of this proceeding shall be paid by Lee R. Krahenbuhl pursuant to §440.22, Wis. Stats.

OPINION AND EXPLANATION OF VARIANCE

The disciplinary matter before the Board involves root canal treatment of a patient. In root canal treatment an opening is made into the pulp chamber. The pulp is removed, and the root canals are cleaned, enlarged and shaped to a form that can be filled. The pulp chamber and root canals are filled and sealed. In the final step, a gold or porcelain crown is usually restored over the tooth. X-rays are taken during root canal treatment to diagnose the tooth and plan treatment. Among other functions, the x-rays assist the dentist in measuring the lengths of the canals and confirm the progress of the treatment. A final x-ray is taken at the completion of the treatment to confirm the success of treatment by, among other things, determining whether the root canals have been filled or overfilled and whether any correction is required.

In this opinion, the terms "root canal treatment," "root canal therapy" and "endodontic treatment" are used synonymously and the term "x-ray" is generally used over the term "radiograph" except in quotations from the record. The terms "internal resorption" and "external resorption" are used. "Resorption" generally refers to the loss of dentin and cementum of a tooth through disease or normal body function. In dentistry, "internal resorption" refers to a pathologic process initiated within the pulp space with loss of dentin and possible invasion of the cementum. "External resorption" also referred to as "root resorption," affects the external surfaces of the tooth.[1]

ISSUES IN THE CASE

A. Whether Dr. Krahenbuhl overfilled the distal canal of Michael Mosher's Tooth #18?

On April 29, 1996, Michael Mosher presented to Dr. LeMaster, a practicing dentist in North Carolina, with pain in Tooth #18. Dr. LeMaster examined Mr. Mosher and took an x-ray of that tooth. (Exhibit 10; R. 88, Tr. 95, 96; R. 274). Upon examining the x-ray, Dr. LeMaster found the distal canal on Tooth #18 to have been grossly overfilled with gutta percha, and the mesial (two) canals to have been appropriately filled with gutta percha. (Exhibit 10, R. 279-284). This is the same tooth on which Dr. Krahenbuhl had previously performed root canal therapy. The pleadings establish that Dr. Krahenbuhl performed root canal therapy on tooth #18 of Patient Michael Mosher on July 5 and 11, 1994. (R. 635, 646).

The evidence that the distal canal of Michael Mosher's Tooth # 18 was overfilled when examined on April 29, 1996 is undisputed. In addition to Dr. LeMaster's records (Exhibit 12, R. 273-286) opinion testimony from Dr. Kippa (Exhibit 31, R. 360) and Dr. Sadowski (R. 88, Tr. 96) constitute sufficient evidence to find that the distal canal on Tooth #18 was overfilled. Exhibit 10, the LeMaster x-ray, depicts the status of Michael Mosher's Tooth #18 prior to any treatment on April 29, 1996 by Dr. John LeMaster and shows that the distal root canal fill is overfilled beyond the apex of the tooth. (R. 88, Tr. 96).

The Board has viewed the LeMaster x-ray, Exhibit 10, and finds that Exhibit 10 shows the distal canal on Tooth #18 to have been overfilled. The description of Exhibit 10 in paragraph 11 of the complaint (R. 647) is an accurate description,

specifically:

> *The radiograph depicts a radio-opaque line running from the top of the tooth, through the usual location of the distal canal, through the apical end of the distal root of Tooth #18, and continuing in a distally curving line approximately 8 mm into the jaw bone.*

Because Dr. Krahenbuhl performed root canal therapy on Michael Mosher's Tooth #18 in July 1994, the overfill of the distal canal on Tooth #18 is logically and reasonably the result of Dr. Krahenbuhl's treatment unless another cause can be shown. Dr. Krahenbuhl offers several explanations for the overfill that would relieve him of responsibility, none of which are accepted by the Board.

1. Treatment altered or redone by another dentist.

Dr. Krahenbuhl contends as an affirmative defense that his treatment of Mosher's tooth was altered or redone by another dentist before Michael Mosher was seen by Dr. LeMaster. (R. 641). No treatment, billing or insurance records support this theory. The patient, Michael Mosher, does not recall seeing another dentist. (R. 76, Tr. 48, 49). His mother, who evidently arranged for all of his dental care, asserts that no other dentist treated her son. (R. 68, 17; R. 74, Tr., 38). Michael Mosher had dental insurance between July 1994 and April 1996. (R. 69, Tr. 18; R. 359). No evidence was offered by either party of insurance claims made by Michael or Cheryl Mosher for dental care received by Michael Mosher between July 1994 and April 1996.

Respondent argued for the existence of another dentist as a reason for the overfill, but did not produce any probative evidence to support the defense. Generally an affirmative defense is a defense upon which the proponent bears the burden of proof. 61A Am Jur 2d PLEADING § 298. (footnotes omitted). However it is unnecessary to determine whether a burden of producing evidence or of persuasion shifts to the respondent on this issue because no evidence in the record supports the affirmative defense of a "third" dentist. The statement in the affidavit of Dr. LeMaster that intervening treatment could have occurred is not probative of respondent's contention.

2. External resorption.

After treatment by Dr. LeMaster, the patient's mother contacted Dr. Krahenbuhl concerning her son's condition and Dr. Krahenbuhl responded to her by a letter dated May 1996, stating:

> *I was informed today of your phone call regarding endodontic therapy provided for your son on July 11, 1994.*
>
> *As you remember, I informed you on July 5, 1994 (before the endodontic therapy), the tooth was undergoing a process called "external resorption". This would explain the "over-extention" that you refer to. When the root resorbs, it gets shorter and the root canal material remains at its original length (see diagram).*
>
> *If your current dentist in North Carolina is not trained in endodontic surgery, I would suggest apical surgery by an*

endodontist (root canal specialist). Although extraction is an option, it is surely not your only option.

I am not accepting responsibility for this situation and I would like to remind you that regular dental visits and dietary consideration could have avoided the premature breakdown of your child's twelve year molar. (R. 283).

On September 16, 1996 Dr. LeMaster wrote to the patient's mother, as follows:

I read the letter you received from Dr. Krahenbuhl and found his response surprising. I made several attempts to call his office without success and never received a return phone call.

At this point and time it is my suggestion that you approach the Wisconsin State Board of Dentistry at (608)266-0483, and have them look into the matter. The technical term for what appears on the radiograph is "gross endodontic overfill" and there does not appear to be external root resorption. This is the next appropriate step to resolve this issue. I do hope that you and your former dentist can come to terms on this issue.

I have enclosed a duplicate of the x-ray for your use. . . . (R. 284, emphasis added).

Dr. Sadowski testified concerning external resorption:

Q. What sort of process could happen to a tooth, physical process, without the intervention of a dentist that would change the shape or length of the root of a tooth?

A. You could have -- once again, you could have some sort of pathology at the apexes of the tooth that could cause, you know, a changing of the length. However, it is, to the best of my knowledge, impossible for you to have any type of a pathological process that would end up with the situation like you see on the '96 x-ray.

Q. Why is it impossible?

A. Let's assume that it was external resorption. You would typically have a much, much, much shorter length of the root compared to the -- you know, to the adjacent root of the same tooth. The other situation would be that, in my opinion, the extension of this is something that occurred during a refill procedure. I think it's -- to me, it's rather obvious that that's -- that's the thing that occurred. (R. 89, Tr. 100-101).

The testimony of Dr. Terry Kippa, was introduced by stipulation at the hearing. Dr. Kippa states with respect to the x-ray that is Exhibit 10:

. . . c. the April 29, 1996 Radiograph depicts endodontic overfill of the distal root of tooth #18;

d. root resorption does not look like it accounts for the amount of endodontic overfill depicted on April 29, 1996 Radiograph; . . .(Exhibit 31, R. 360).

Dr. Krahenbuhl apparently offered the affidavit of Dr. LeMaster (Exhibit 20, R. 311) to support a theory of external resorption. However, although the affidavit includes a statement that external resorption could have occurred between July 1994 and April 1996, Dr. LeMaster does not relate this possibility to the overfill and, in fact, includes in his affidavit the statement that in April 1996 he found the distal canal of Tooth #18 to have been "grossly overfilled" with gutta percha.

The Board finds the testimony of Dr. Kippa, the September 16, 1996 letter of Dr. LeMaster and the testimony of Dr. Sadowski persuasive that external resorption does not account for the overfill. The evidence offered is insufficient to support respondent's claim that what is shown as an overfill of the distal canal on the April 29, 1996 x-ray was actually the result of external resorption.

3. Patient negligence.

Respondent asserts that Mosher did not care for his teeth, suggesting that the patient may be responsible for his own dental condition. (R. 70, Tr. 23; R. 283). No evidence in the record supports this conclusion.

The preponderance of the evidence supports a finding that respondent overfilled the distal canal of Michael Mosher's Tooth #18. The defenses raised by respondent are not supported by evidence in the record.

B. Whether Exhibit 9 is a post-treatment x-ray of the final root canal treatment that Dr. Krahenbuhl performed on Tooth #18 of Michael Mosher in July 1994?

The pleadings establish that during the course of the investigation of Dr. Krahenbuhl's treatment of Patient Michael Mosher, Dr. Krahenbuhl presented a series of x-rays to the Division of Enforcement, representing that the x-rays were of Patient Michael Mosher and accurately depicted Dr. Krahenbuhl's root canal treatment on Patient Michael Mosher's tooth #18. (R. 635, 646). The pleadings also establish that Dr. Krahenbuhl provided the Division of Enforcement with an x-ray of Michael Mosher's Tooth #18 which Dr. Krahenbuhl contended was taken on July 11, 1994 and was his post-treatment x-ray of root canal therapy on Michael Mosher. (R. 636, 646). Exhibit 9 in the record is this x-ray that Dr. Krahenbuhl presented to the Division of Enforcement and which he contends was his July 11, 1994 post root canal treatment x-ray. (R. 81, Tr. 66; R. 86, 87, Tr. 87-91; R. 125, Tr. 245).

The Board agrees with the conclusion of the Administrative Law Judge, and with the testimony of Drs. Sadowski and Kippa that the x-ray [Exhibit 9] represented by respondent to be a post root canal treatment x-ray is out of sequence and is not the post treatment x-ray for the root canal treatment performed in July 1994. For the purpose of this matter, it is not necessary for the Board to determine the date when the x-ray [Exhibit 9] was taken or the specific treatment or sequence of treatment provided by respondent in September 1993 and July 1994. Respondent's violations relate to the facts that he overfilled the distal root canal of Tooth #18 in September 1993, and did not take a post treatment x-ray, or if one was taken, did not utilize it to rectify the overfill.

Although unnecessary to resolve all of the factual issues concerning the root canal therapy of Michael Mosher in 1993 and 1994, in the Board's opinion the evidence supports findings that respondent completed root canal therapy in 1993 and Exhibit 9 was taken during respondent's 1993 treatment of Mosher. Persuasive evidence for this determination is the record of respondent's treatment of Michael Mosher for Tuesday, July 5, 1994 that includes the following:

> RETREAT ENDO NUMBER 18 UNABLE TO GET CANALS DRYU ENOUGH TO FILL, PLACED FORMOCRESOL PELLET AND TEMP FILLING, NA4U FILL ENDO#18 WITH LASER LJD/LK (R. 249)

The subsequent entry dated Monday, July 11, 1994 states:

> TOOTH HAS FELT GREAT SINCE WE RETREATED THE ENDO LAST TIME, FILLED ENDO #18 AT #40, PLACED #18 O/R FORTIFIED, LJD.LK..ljd (R. 249)

Dr. Sadowski testified that the term "retreat" in the notes means to "redo something that you've already done; in other words, you would redo a root canal procedure." (R. 86, Tr. 85). Use of the term "retreat" indicates that respondent had completed the root canal therapy and had decided to redo the treatment. The conclusion that respondent considered treatment complete in September 1993, is also evidenced by the fact that respondent had placed a permanent crown on Tooth #18 as shown in the July 5, 1994 x-ray and in accord with his affidavit of January 29, 2001 attached to his motion to dismiss. (R. 508, 509). Just as a temporary crown is placed with temporary cement because it is intended to be "temporary" and anticipates further treatment by the dentist, it is reasonable to infer from the placement of a permanent crown that the treatment was complete.

The Board rejects as far-fetched the explanations for placing a permanent crown given by respondent through his attorney on January 7, 2000. (R. 349, 350). According to respondent's January 2000 account, a permanent crown was cemented on July 5, 1994, to insure that the crown was delivered to the patient (not knowing if the patient would disappear again), and to allow the dentist to have a more stable reference point for taking final measurements.[2] (R. 350). Respondent's contention that a permanent crown was placed knowing that an opening would have to be made in the crown to complete the root canal treatment is contrary to logic and accepted professional practice. If respondent had the opportunity to place a permanent crown on September 28, 1993 or July 5, 1994, he could have finished the root canal treatment. The second reason given for cementing a permanent crown on July 5, 1994, i.e. to have a more stable reference point, is also not believable. Small tolerance measurements critical to successful treatment were made with the temporary crown in place. These measurements would have to be redone if the temporary crown is replaced by a permanent crown. The Board finds it extremely unlikely that a dentist would risk damage to a permanent crown for the reasons described by respondent. The integrity of the permanent crown is important for the long term success of the procedure.

The Board also finds that the billing and insurance records are persuasive evidence that the September 1993, root canal was considered by respondent to be a final, completed procedure. (R. 86, Tr. 86). Respondent billed for the root canal therapy in 1993 and was paid because he considered the treatment complete. (R. 268, 272) The "Dental Claim Form" requires the dentist to verify by a signature that procedures for which payment is claimed have been completed. (R. 337). This evidence supports the theory that the x-ray claimed by respondent to be his post treatment x-ray in 1994 was actually part of the 1993 treatment and not the x-ray he represented it to be.

C. Whether the endodontic treatment of Mosher Tooth #18 by respondent is cause for disciplinary action by the Board under

Wis. Stat. § 447.07 (3) (h) and Wis. Admin. Code § DE 5.02 (5)?

A minimally competent dentist will take a post-treatment x-ray of endodontic treatment to check that the root canals are completely obturated and not overfilled. Also in accordance with minimum standards of treatment, if the post-treatment x-ray reveals that endodontic treatment has failed to completely obturate the root canal or overfilled a canal, the dentist will take steps to rectify the incomplete obturation or overfill. (R. 90, Tr. 104, 105; R. 638, 647). These standards exist, in part, to enable the dentist to protect the patient from complications of the treatment such as an overfill of a root canal. Respondent violated both standards.

The post treatment x-ray taken in a case of root canal therapy is significant for long-term care of the patient. Minimal care requires a dentist to retain the post treatment x-ray. In this case, the patient, through his mother, notified the respondent of concerns about the care provided in her letter of May 8, 1996, approximately 2 years after the treatment by Dr. Krahenbuhl. As the treating dentist the respondent's obligation was to take and preserve the x-ray for the benefit of his patient. It is reasonable to expect that Dr. Krahenbuhl would have retained records of his treatment of Michael Mosher at the time of the contact from Mrs. Mosher two years after treating the patient. Once contacted about the concern she expressed for his treatment of her son, it is reasonable and fair to expect that he would retain his records of treatment. Respondent did not present an x-ray of his a post-July 1994 treatment of Mosher. Respondent's patient and business records do not indicate that he took a post treatment x-ray in July 1994. Evidence that he took such an x-ray is insufficient to establish that he met this minimum standard of practice.

Under Wis. Stat. § 440.20 (3) the prosecution has the burden of establishing the violations by a preponderance of the evidence. However, in this matter the respondent was obligated to produce evidence to establish that he took a post-treatment x-ray. For the prosecution to prove that respondent did not take a post treatment x-ray would require proof of a negative. Respondent attempted to prove that an x-ray was taken. He was unsuccessful.

On the basis of the pleadings, it is not disputed that in some instances of root canal treatment, failure to correct an overfill through the apical end of a root presents an unacceptable risk that the patient will suffer later infection, pain, and loss of the tooth. (R. 638, 647). The record establishes that in treating Michael Mosher, respondent was dealing with just such an instance.

The overfill of Michael Mosher's Tooth #18 was a "gross endodontic overfill" according to Dr. LeMaster's description. (R. 284). LeMaster's conclusion is supported by Dr. Sadowski's testimony. Dr. Sadowski was asked:

Q. Previously, you said that anybody who does endodontics is going to have an overfill from time to time. What's the difference between everybody does it and this falls substantially below the standard of care ordinarily exercised?

He responded:

A. *Typically, you know, if you have the overfills, you know, you would normally find them in the range of a millimeter, you know, maybe two millimeters at the most. But I think it's what happens after the fact that's important, and that would be that the dentist would take a final x-ray and that final x-ray would be reviewed with the patient, and at that point in time the patient should be informed of the dentist's opinion as to the quality of the root canal fill. If you have an overfill, in my opinion, the patient has a right to know that, and all risks, options, complications should be explained to the patient. In a situation like this one, this one is of such magnitude that you would most certainly want to do that, give the patient the options of what*

could be done, and then after that discussion decide what you're going to do to rectify that particular problem. (R. 90, Tr. 104-105).

Consistent with the opinions of Dr. LeMaster and Dr. Sadowski, the Board finds that the overfill of Mosher's Tooth #18 was a flagrant breach of minimum acceptable standards for professional practice.

Failure to correct an overfill through the apical end of a root, as was the case here, presents a risk that the patient may suffer later infection, pain, or loss of the tooth. Under such circumstances, the patient must be informed of the risks and their potential consequences.

Q. *Doctor, when you were discussing that, you -- you said that it was important to tell the patient about the risks and the options related to the condition. Using the April '96 x-ray as the final x-ray in a root canal procedure, what would you tell that patient?*

A. *(By Dr. Sadowski) I would have told the patient that we had a major problem, that the root canal filling material was accidentally pushed to an unacceptable length through the apex, and at that point I would suggest to the patient that that be removed right then and there on the spot before the – before the sealer or the cement that holds that in there would solidify. That would have been my first recommendation. Second recommendation would have been if you don't do anything, future problems could exi – could arise, infection, irritation, which ultimately would require you to either, as I first suggested, try to remove it, and/or secondly, surgically go through the bone and remove it that way. Or you could possibly end up losing the tooth or having a root amputation.*

Q. *(By Mr. Polewski) You said that your first option would be to remove the filling right then and there, correct?*

A. *I believe that would have been what I would have done. It'd have been the best thing for the patient, yes.*

Q. *In your opinion, is that –*

A. *That's assuming you knew it.*

Q. *Assuming you knew it.*

A. *Assuming I had taken an x-ray and I knew it.* (R. 91, Tr. 106-107)

The overfill in the Mosher tooth was not just any overfill. It was gross and uncorrected. Respondent did not rectify the overfill. The evidence suggests he did not have or did not use a post-treatment x-ray. Without a final x-ray, respondent was

unable to advise his patient of the overfill. Respondent's conduct with respect to the root canal treatment of Michael Mosher constitutes unprofessional conduct.

The Board's authority for disciplinary action is in Wis. Stat. § 447.07. Under this statue, the board may,

(3) . . . reprimand any dentist or dental hygienist who is licensed or certified under this chapter or deny, limit, suspend or revoke his or her license or certificate if it finds that the dentist or dental hygienist has done any of the following:

(a) Engaged in unprofessional conduct.

(b) . . .

(h) Engaged in conduct that indicates a lack of knowledge of, an inability to apply or the negligent application of, principles or skills of dentistry . . .

The term "unprofessional conduct" is defined in Wis. Admin. Code § DE 5.02 (5) to include:

(5) Practicing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist or dental hygienist which harms or could have harmed a patient.

In causing the gross overfill and failing to detect and rectify the overfill through the use of a post-treatment x-ray, respondent engaged in conduct that indicates a lack of knowledge of, an inability to apply or the negligent application of, fundamental principles and skills of root canal treatment. Respondent's treatment of Michael Mosher substantially departed from the standard of care ordinarily exercised by dentists in root canal therapy, namely, to prevent and rectify overfill conditions through the use of a post-treatment x-ray. It is reasonable to conclude that respondent's manner of practice contributed to his patient's discomfort and the need for additional treatment. Respondent's conduct is cause for disciplinary action under Wis. Stat. § 447.07 (3) (h) and Wis. Admin. Code § DE 5.02 (5).

D. Whether respondent's misrepresentation of an x-ray as his post-treatment x-ray is cause for disciplinary action by the Board under Wis. Stat. § 447.07 (3) (a)?

The complaint charges respondent with unprofessional conduct in that he provided false information to the Department by misrepresenting an x-ray as a post-treatment x-ray. Under Wis. Stat. § 447.07 (3) (a) the Board may discipline licensees for "unprofessional conduct." While "unprofessional conduct" is not defined in Wis. Stat. ch. 447, the Wisconsin Supreme Court has approved a definition of unprofessional conduct:

"Unprofessional conduct" is conduct which violates those standards of professional behavior which through

professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest. . . . Strigenz v. Department of Regulation , 103 Wis.2d 281, 290; 307 N.W.2d 664 (1981) quoting *Reyburn v. Minnesota State Board of Optometry,* 247 Minn. 520, 523-24, 77 N.W.2d 651 (1956)

Fundamental and established standards of professional behavior for licensees of the Board include an obligation to be truthful in dealing with the Board. Licensing boards have dealt harshly with licensees who submit false information to the board. See, for example, the Medical Examining Board's decision *In the Matter of Disciplinary Proceedings against Thomas V. Rankin, M.D. Respondent* LS00051910MED, available on the Internet at http://www.drl.state.wi.us/Regulation/html/1100023.html, and the unpublished decision of the Court of Appeals affirming the Medical Examining Board's decision, *Rankin v. Medical Examining Board*, Appeal No. 02-0168, 2002 Wisc. App. LEXIS 1098 (Wis. Ct. App. Oct. 8, 2002).

The Board's non-exclusive list in Wis. Stat. § 5.02 describing unprofessional conduct is consistent with an interpretation of "unprofessional conduct" that prohibits misrepresentation of an x-ray in the circumstances of this case. "Unprofessional conduct" includes:

After a request by the board, failing to cooperate in a timely manner with the board's investigation of complaints filed against the applicant or licensee. . . . Wis. Admin. Code § 5.02 (25).

While this subsection of the rule does not specifically identify "providing false information," the phrase "failing to cooperate" implies that licensees shall cooperate and this, in turn, requires good faith and truthfulness. In order for the licensing system to function the Board must be able to rely on representations made to it by its credential holders. Patient records are critical to competent and safe practice. The Board finds respondent's misrepresentation of a patient record to be a serious instance of unprofessional conduct.

The evidence shows that respondent did in fact misrepresent the x-ray provided to the Division of Enforcement [Exhibit 9] and thereby provided false information to the Department. Respondent maintained that Exhibit 9 was his post-treatment x-ray for the July 1994 endodontic treatment of Mosher throughout the investigation and hearing. At the hearing respondent testified:

Q. There has been some testimony to the effect that the radiograph which is dated as July 11 of 1994, represents the completion of work in 1993. What is your understanding of the July 11th, 1994 radiograph?

A. I have no reason to believe that it's not anything but what it's labeled. It's a completion x-ray of the endodontics done on July 11th, '94. (Tr. 245)

The overwhelming evidence in the record is that x-ray [Exhibit 9] is not the completion x-ray. The Board concludes that in this matter respondent knew or should have known that the x-ray he presented is not what he claims and that his representation was false. In presenting false information in his defense he engaged in unprofessional conduct contrary to Wis. Stat. §§ 447.07 (3) (a).

CONSULTATION WITH ADMINISTRATIVE LAW JUDGE

At its meeting on November 6, 2002, the Board consulted with the Administrative Law Judge concerning his conclusions about the testimony of the witness John Sadowski. Included in its consultation were the following questions asked by the Board Chairperson

MR. BARRETTE: Mr. Black, as you know, we're here today. The circuit court of Winnebago County asked us to have a meeting with you to consult regarding your proposed decision and conclusions about the credibility of the witness John Sadowski in the matter of disciplinary proceedings against Lee Krahenbuhl, DDS. We have a number of questions to ask you. Beginning, No. 1, other than the comments regarding the credibility of the witness John Sadowski that are set forth in your proposed decision, was there any aspect of witness credibility relating to the internal consistency of the testimony of John Sadowski that led you to reach your findings, conclusions, and opinion?

THE WITNESS: No.

MR. BARRETTE: Two, other than the comments regarding the credibility of the witness John Sadowski that are set forth in your proposed decision, was there any aspect of witness credibility relating to the general believability -- relating to the general believability of the testimony of John Sadowski that led you to reach your findings, conclusion, and opinion?

THE WITNESS: No.

MR. BARRETTE: Three, did you make any judgements relating to the credibility of the expert witness John Sadowski based upon the demeanor of the witness while testifying such as the general appearance of the witness, facial expressions, physical reactions to specific questions, including inflection in the voice of the witness as he responded to questions or other similar characteristics?

THE WITNESS: No.

MR. BARRETTE: If so, what were those judgements and how do you relate to the findings -- to your findings and findings, conclusions, and opinions?

THE WITNESS: Inapplicable.

MR. BARRETTE: Four, is there anything else relating to your judgement as to the credibility of the expert witness John Sadowski that was relevant to your finding that you feel the Board -- that you feel should be known by the Board?

THE WITNESS: No. (Transcript of Consultation pp. 4-6)

During the consultation the Administrative Law Judge further elaborated on his decision, indicated that demeanor did not play a role in the Administrative Law Judge's conclusion as to the credibility of Dr. Sadowski. Rather the Administrative Law Judge concluded that Dr. Sadowski lacked credibility because he found Dr. Sadowski's conclusions were wrong and that Dr. Sadowski's testimony did not make sense to the Administrative Law Judge. (Transcript of Consultation, pp. 6, 7). The Administrative Law Judge acknowledged that Dr. Sadowski testified truthfully, but that he was wrong. (Transcript of Consultation, pp. 7, 13, 14).

BASIS FOR REJECTING THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT DR. JOHN SADOWSKI WAS NOT A CREDIBLE WITNESS.

In a contested administrative hearing, initial determinations of a hearing examiner on witness credibility are subject to the agency's independent review. Ultimate responsibility for credibility determinations rests with the administrative agency, not with the hearing examiner. *Hakes v. LIRC*, 187 Wis.2d 582, 589, 523 N.W.2d 155, 158 (Ct. App. 1994). The Administrative Law Judge concluded that Dr. John Sadowski had made an error in evaluating respondent's x-rays prior to the hearing, and that his testimony was inconsistent and contained errors. On this basis the Administrative Law Judge found as a fact in the case that Dr. John Sadowski ". . . is disqualified as an expert witness." (R. 35). The proposed decision of the Administrative Law Judge and the consultation with the Administrative Law Judge by the Board indicate that the Administrative Law Judge's conclusions on credibility were based on the conclusions that John Sadowski reached and stated in his testimony and not on his general believability or demeanor.

The record reveals that during the hearing on this matter the attorney for the Division of Enforcement elicited testimony from John Sadowski concerning his qualifications as an expert by reason of his education, training and experience. (R. 79, 80, 90, Tr. 61 – 63, 102 and 103). Questioning concerning John Sadowski's qualifications ended when the attorney for Dr. Krahenbuhl stipulated that Dr. Sadowski is an expert. (R. 90, Tr. 103). The Administrative Law Judge's opinion regarding the conclusions reached by John Sadowski may be significant in evaluating the weight of Sadowski testimony as evidence, but does not disqualify him as an expert.

The Board reviewed the testimony of John L. Sadowski, D.D.S., and, contrary to the opinion of the Administrative Law Judge, finds him to be a qualified expert witness and that his testimony warrants weight as evidence in this matter. The Board finds that the bases for his opinions are sound and premised upon the recognized standards of care within the dental profession as described in more detail throughout his testimony and this decision. In specific contrast to the Administrative Law Judge's opinion, the Board finds that Dr. Sadowski did not make an error in concluding that Dr. Krahenbuhl wrongly substituted one x-ray for another in his treatment of Michael Mosher.

BASIS FOR REJECTING THE PROPOSAL OF THE ADMINISTRATIVE LAW JUDGE TO DISMISS THE COMPLAINT.

The Administrative Law Judge writes that,

How, when and by whom the overfill occurred are asserted by both sides to be at issue, although it isn't clear why. (R. 37).

This question asked by the Administrative Law Judge identified the extremely different view of the case maintained by the Board from that expressed by the Administrative Law Judge. Two fundamental principles of endodontic therapy are present in this case: (1) In performing endodontic therapy a minimally competent dentist will take a post-treatment x-ray of the endodontic treatment to check that the canals are completely obturated and not overfilled through the apical end of the tooth; and, (2) In performing endodontic therapy a minimally competent dentist who sees that endodontic treatment has failed to completely obturate the canal or overfilled a canal will take immediate steps to rectify the incomplete obturation or overfill.

The great preponderance of the evidence submitted shows that the respondent's dental work caused the gross overfill of the distal canal in Tooth #18. Had he followed the basic principles of practice, he would have discovered the overfill in a post treatment x0-ray and performed the correction. Everyone but the respondent, even the Administrative Law Judge, agrees that the x-ray that Dr. K claims was his post treatment x-ray is not what respondent claims.

The Board sees the case as involving the fundamentals of practice and the evidence as showing that the respondent did not utilize and follow fundamental procedures that are necessary to protect the health and safety of the patient.

The Administrative Law Judge concludes that,

The overfill, even if committed by Dr. Krahenbuhl, did not cause the decay noted by Dr. LeMaster which ultimately led to the hemisection on tooth #18. (R. 37)

What the Administrative Law Judge states unreservedly is directly contrary to evidence in the record that the overfill resulted in pain and decay. In May 1996, Dr. LeMaster wrote:

Michael Mosher presented with a gross endodontic overfill of #18 distal root and pain associated with the overfill. On 5-8-96 we removed the crown and the gutta percha in the distal root to find gross decay in the root itself extending into the furcation. The decay was excavated, the root canal temporarily sealed and crown recemented until a hemisection of the distal root can be performed. (Exhibit 19, R. 308).

In his September 16, 1996 letter concerning his findings, Dr. LeMaster notes that he found. . . . a *periapical radiolucency under the distal root.* . . . (R. 307, Exhibit 19). In Dr. Kippa's opinion:

i. the patient should be informed of the overfill because the gutta percha is a foreign body which can act as an irritant in the periapical area around the root of the tooth, and even though it is inert, the gutta percha may cause problems in the future if it is extended beyond the apical end of the tooth. (Exhibit 31; R. 361).

Dr. LeMaster's uncontradicted statement in May 1996, is that Mosher had pain associated with the overfill, decay in the root itself and periapical radiolucency i.e. infection under the distal root. Dr. Kippa's statement directly links the overfill as a

cause of problems identified by Dr. LeMaster in Mosher's Tooth #18. The Board finds that Dr. Kippa's opinion is supported by the evidence and that the need for the hemisection performed by Dr. LeMaster is a direct result of the overfill.

Dr. LeMaster's affidavit states that he placed in or tried multiple files in the distal canal of tooth #18 and the first file with which he could obtain any resistance was a #100 file. (R. 308). Dr. Krahenbuhl's testimony is that that the largest file size he can ever remember using was file size #40. (R. 123; T. 236). The Administrative Law Judge argues that Dr. Sadowski's testimony lacks credibility because he does not clearly explain the difference in the diameter of the canal and the file size.

Dr. Sadowski testified that internal changes from internal resorption and recurrent decay within the tooth may have caused an increase in the width of the diameter of that canal. (R. 105; T. 165). Dr. LeMaster noted that when he removed the crown and the gutta percha in the distal root of Michael Mosher's Tooth #18 he found gross decay in the root itself extending into the furcation. (R. 308). The Board is satisfied from the record that internal resorption and decay in the root noted by Dr. LeMaster accounts for the change in the diameter of the canal.

The respondent and the Administrative Law Judge raise concern that the differences between the angles at which the x-rays were taken discredits use of root length and root development as a basis for determining the sequence of the x-rays. As discussed above, the Board's findings as to the sequence of when the x-rays were taken is based on evidence other than root length and root development, specifically, the findings of the Drs. Kippa and Sadowski, the opinion of the Administrative Law Judge, the records of "retreatment," placement of a permanent crown on or before July 5, 1994, and the billing and insurance records. The Board finds a preponderance of evidence in the record to support its conclusions without resorting to root length and root development.

The Administrative Law Judge introduced his own theory of the case, using the package that held the x-ray as exculpatory evidence, speculating that if respondent prepared an x-ray package for July 11, 1994, he must have done the x-ray. The Law Judge's analysis of this point is tenuous. No foundational evidence was provided to show when the package was prepared or who prepared the package. The packages were not offered as evidence to prove the existence of the x-ray. The Administrative Law Judge's theory ignores several evidentiary points central to the case and to the professional responsibility of the respondent, *viz.* the gross overfill is evidence that the respondent did not follow professional procedures for root canal therapy utilized by a minimally competent dentist. Had he done so, respondent would have reviewed the x-ray and discovered and corrected the gross overfill to Tooth #18. The gross overfill itself is circumstantial evidence supporting a conclusion that no x-ray was taken or, if taken, was not utilized. The same conclusion is supported by the fact that the Administrative Law Judge as well Dr. Kippa and Dr. Sadowski agree that the x-ray contained in the package marked July 11, 1994 (Exhibit 9) is not what respondent claims. The Board concludes that the x-ray package itself for Exhibit 9 is an insubstantial element in the case and not entitled to the great weight given to it by the Administrative Law Judge.

NATURE OF DISCIPLINE ORDERED

It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich,* 71 Wis. 2d 206, 209, 237 N.W.2d 689 (1976). Punishment of the licensee is not an appropriate consideration. *State v. MacIntyre,* 41 Wis. 2d 481, 485, 164 N.W.2d 235 (1969).

Dr. Krahenbuhl's treatment of Michael Mosher's Tooth #18 was substantially below minimal acceptable standards of professional practice. He, himself, testified that he had never seen an overfill six to eight millimeters beyond the bottom of the root as shown in Dr. LeMaster's x-ray. (R. 125, 126, Tr. 245, 246) Either Dr. Krahenbuhl was unaware of the professional practice standard and the importance of taking and preserving a post-treatment x-ray of root canal therapy or he chose to ignore the standard. In order to protect patients from possible similar treatment from Dr. Krahenbuhl the Board's order limits his practice to exclude most endodontic procedures as described in the standard nomenclature reference for the practice of dentistry, the *Current Dental Terminology-Third Edition* (CDT-3) published by the American Dental Association.

Preparation and preservation of patient records is an important part of dental practice. Many of the issues in this matter might have been avoided if Dr. Krahenbuhl had created and kept better records. That Dr. Krahenbuhl needs additional training to improve his record keeping practices is evident in the exhibits of his practice records received in this matter. The

Board's order requires that Dr. Krahenbuhl receive additional training in record-keeping and that the adequacy of his patient records be monitored for two years through quarterly reports.

In the present case, Dr. Krahenbuhl falsely represented one x-ray for another. This Board previously disciplined Dr. Krahenbuhl in 1993, following his criminal conviction for false representations with respect to submissions he made to the medical assistance program. The prior conviction and the current case suggest a pattern of misrepresentation in practice. The Board's decision to impose a forfeiture is intended to express the Board's strong disapproval of any misrepresentation in professional practice as well as to deter.

Wisconsin Statutes § 440.22(2), Stats., provides in part:

In any disciplinary proceeding against a holder of a credential in which the . . . examining board, . . . orders suspension, limitation or revocation of the credential or reprimands the holder, the . . . examining board, . . . may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department. . . .

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against a Dr. Krahenbuhl is a discretionary decision on the part of the Board and that the Board's discretion extends to the decision whether to assess the full costs or only a portion of the costs. The Board's recommendation that the full costs of the proceeding be assessed to Dr. Krahenbuhl is based primarily on fairness to other members of the profession.

The Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received by its licensees. Licensing fees are calculated, in part, based upon costs attributable to the regulation of each of the licensed professions and are proportionate to those costs. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. The Board concludes that the licensee who engaged in unprofessional conduct, Dr. Krahenbuhl, should bear the costs of this disciplinary proceeding.

Signed this 6th day of December, 2002, in Madison, Wisconsin.

STATE OF WISCONSIN

DENTISTRY EXAMINING BOARD

Bruce Barrette, D.D.S.

Chairperson

[1] See *Glossary – Contemporary Terminology for Endodontics,* 6th Ed. 1998, The American Association of Endodontists; *Taber's Cyclopedic Medical Dictionary,* 19th Ed. 2001, F.A. Davis Company.

[2] It appears that respondent changed his recollection of when he cemented the first permanent crown, indicating in January 2000, that it was cemented on July 5, 1994, (Exhibit 25, R. 349, 350) and in January 2001, that it was September 28, 1993. (R. 508).