

**STATE OF VERMONT
BOARD OF DENTAL EXAMINERS**

In re: Robert Schmidt, D.M.D.
License No. 016-2158

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Docket No. 2009-473

**Decision on
UNPROFESSIONAL CONDUCT CHARGE**

Board Members Participating:

John Lavoie, D.D.S., Chair
John C. Langfeldt, D.D.S.
Gertrude M. Hodge
Raymond N. McCandless
Linda Retchin, R.D.H.
Katherine Silloway, D.D.S.
Joanne Bugbee, R.D.H.
Randall Miller, D.D.S.

Appearances:

for Petitioner, State of Vermont: Edward G. Adrian
for Respondent: Pietro J. Lynn

Presiding Officer: Larry S. Novins

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

The Board of Dental Examiners held a hearing in the above matter on September 8, 2010 at the Office of Professional Regulation hearing room at the National Life Building in Montpelier, Vermont.

The prosecution has the burden of proof in this matter. To prevail on any unprofessional conduct charge, it must prove the charge by a preponderance of the evidence.

Background

The State alleges in its Specification of Charges that Dr. Schmidt failed to practice competently by impermissibly delegating dental examinations to a dental hygienist and failing to give a patient periodic oral examinations, in violation of Vermont statutes.

Findings of Fact

Based upon the evidence presented, the Board finds as follows:

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Vermont Secretary of State
Office of Professional Regulation

1. Dr. Robert Schmidt is licensed by and subject to the disciplinary authority of this Board. 26 V.S.A. §§ 767 and 809, 3 V.S.A. §§ 129 and 129(a), the Rules of the Board of Dental Examiners, and the Rules of the Office of Professional Regulation.
2. Dr. Schmidt has been a practicing dentist since 1977. He practiced in Massachusetts for approximately 25 years and briefly in New Hampshire. He has practiced in Vermont since 2004.
3. The Board heard the testimony of J.C. who was a patient of Dr. Schmidt's, L.S, a dental hygienist who works for Dr. Schmidt, and Dr. Schmidt himself. The parties submitted J.C.'s dental records as exhibits for the hearing. The records do not fully inform readers about J.C.'s treatment or who provided it.
4. J.C. is a retired IRS agent. He had been employed by the IRS for 33 years. His memory of the events in question was assisted by his review of Dr. Schmidt's office records and his own records regarding the treatment he received. He testified credibly. His testimony reflected his clear memory of the one time he was treated by Dr. Schmidt and the other four times when he was not treated by Dr. Schmidt while at his office. Dr. Schmidt's records do not contradict J.C.'s testimony.
5. J.C. first came to Dr. Schmidt's office for treatment of a broken tooth on June 7, 2007. At that time J.C. had an initial examination and cleaning. Dr. Schmidt was able to treat the broken tooth that day.
6. Dr. Schmidt's records confirm that Dr. Schmidt did treat J.C. on his first visit to the practice on June 7, 2007.
7. After the June 2007 visit, J.C. went to Dr. Schmidt's office four times beginning in January 2008 and through August 2009 for cleaning and periodic oral examinations. They were all performed by Dr. Schmidt's dental hygienists, not Dr. Schmidt.
8. On August 11, 2008 J.C. declined to have bite wing x-rays taken. J.C. had not had a cavity in years before seeing Dr. Schmidt. J.C. believed the bite wing x-rays would only confirm his "positive dental history."
9. As a board comprised in substantial part of Dr. Schmidt's peers, we note what is commonly understood within the professional community: A periodic oral examination is conducted to determine whether a patient is in satisfactory dental health. It includes examining for any changes in a patient's oral health since the last examination. A periodic oral examination results in a diagnosis of good health or diagnosis of the existence of a condition which may require further observation or treatment. Reliance on a dental hygienist's observations is not a permissible substitute for the dentist's own examination of the patient. A periodic oral examination requires the skill and training which dentists receive.
10. Dr. Schmidt's records do not show that he treated J.C. after June 7, 2007. Dr. Schmidt said his office's "Account History Report" does not show when he saw J.C. because the "Account History Report's" purpose, as Dr. Schmidt described it, was to track office revenue. The "Report" shows, Dr. Schmidt testified, that J.C.'s treatment was provided by the hygienist regardless of whether Dr. Schmidt saw the patient, or not. According to Dr. Schmidt, his office's billing "Report" makes no distinction between periodic oral examinations by his hygienist and the ones he conducts. He claims that patients are billed for hygienist evaluations, and that his patient examinations come with no extra charge. His office charges one rate for periodic oral exams regardless of who performs them.

11. Dr. Schmidt testified that J.C.'s "Account History Report" does not accurately show who performed dental services to him.
12. Dr. Schmidt testified that his office's clinical chart notes for J.C., some of which were handwritten and some of which were converted to computer notes, similarly do not document that he saw J.C. after June 7, 2007. If Dr. Schmidt's version of events is true, his clinical chart notes are inaccurate.
13. Dr. Schmidt's "Account History Report" confirms that on January 23, 2008, August 11, 2008, February 16, 2009, and August 20, 2009 J.C.'s treatment included a "D0120 Periodic Oral Exam." Dr. Schmidt's office used that code which is consistent with State's Exhibit 3. Dr. Schmidt did not indicate or claim that the code he used varied in meaning in any way from that provided in Exhibit 3. He did imply that his office used the code as a billing code, and that he was not very familiar with its meaning.
14. L.S. has been employed by Dr. Schmidt for years. She did not possess a clear, independent recollection of J.C.'s treatment. Much of her testimony relied on Dr. Schmidt's office records of J.C.'s treatment. To the extent that her testimony contradicted J.C.'s, it was based on assumptions and conclusions she drew from the dental records.
15. Dr. Schmidt did not deny that on three occasions J.C. received periodic oral examinations conducted by his hygienists, and not by him.
16. According to Dr. Schmidt and his hygienist, when a patient is seen for a routine examination, the hygienist examines the patient. If she sees anything of interest or abnormal, she reports this to Dr. Schmidt, and then he will see the patient. If the hygienist sees nothing abnormal, she concludes that the patient's dental health is satisfactory. This is the essence of a diagnosis. And, at this point her periodic oral examination of a patient is complete.
17. Dr. Schmidt claimed that his office has a "protocol" which governs when he examines his patients. He testified that patients are supposed to have examinations by the dentist when they have their bite wing x-rays taken. His office typically takes patient bite wing x-rays once per year. Taking bite wing x-rays, not the passage of time, triggers Dr. Schmidt's examinations of his patients.
18. J.C. had bite wing x-rays taken on February 16, 2009. Dr. Schmidt could only assume that, based on his office "protocol," that he saw and examined J.C. on that date, when J.C. had bite wing x-rays taken. Dr. Schmidt offered no documentary evidence of an office "protocol." Dr. Schmidt could only assume that he did certain things because it was his practice to do them that way. None of Dr. Schmidt's records show that he performed a periodic oral examination of J.C. at the time J.C. had his bite wing x-rays.
19. Dr. Schmidt's office records regarding J.C. are insufficient to permit us to find that as a matter of habit or routine (V.R.E. 406) he acted in conformity with his office "protocol." The records contradict Dr. Schmidt and his hygienist's testimony. Dr. Schmidt's testimony was not sufficiently credible for us to find that he examined J.C. when he had his bite wing x-rays on February 16, 2009.
20. Rather, the credible evidence in this case shows that on January 23, 2008, August 11, 2008, February 16, 2009, and August 20, 2009 J.C. came to Dr. Schmidt's office for prophylaxis and periodic oral examinations. Each time J.C.'s treatment was provided by one of Dr. Schmidt's dental hygienists. Dr. Schmidt did not provide J.C. a periodic oral

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- examination at any of those visits.
21. At the hearing Dr. Schmidt attempted to shift the blame for lack of dentist-conducted examination on J.C.. He suggested that his failure to examine J.C. was because J.C. did not want x-rays or was impatient and left before beginning a scheduled appointment. Had J.C. agreed to x-rays on the schedule suggested by Dr. Schmidt's office, then according to their "protocol," Dr. Schmidt would have examined him.
 22. Dr. Schmidt admitted that J.C. was examined by his hygienists. His office billed for "periodic oral examinations" on January 23, 2008, August 11, 2008, February 16, 2009, and August 20, 2009.
 23. The essential standards of acceptable and prevailing practice require the dentist to examine patients at least on an annual basis. Dr. Schmidt was unable to clearly articulate why it is important for a dentist to see a patient this frequently. He acknowledged that this Board had stressed the need for this in a July 2009 newsletter to licensees.
 24. Dr. Schmidt failed to examine J.C. on a yearly basis. This is unacceptable patient care. This is a failure to conform to the essential standards of acceptable and prevailing practice.
 25. The Board notes that a dental hygienist receives a different level of education and training from that of a dentist. As noted above, an examination diagnoses a patient's oral health. The Board finds that under the essential standards of acceptable and prevailing practice that: A dental hygienist may perform a screening and report to the dentist the hygienist's observations. And the dentist's examination may be aided by the hygienist's observations. But the hygienist's observations and assistance are no substitute for the dentist's trained eyes. A dentist's education is required to make a diagnosis, whether that diagnosis be that a patient has a particular condition or is in satisfactory health. The periodic oral examination is the dentist's responsibility. This has been the standard of practice in Vermont since long before J.C. went to Dr. Schmidt for treatment.
 26. The Board finds that under the essential standards of acceptable and prevailing practice, the periodic oral examination is triggered by the passage of time, not by the taking of x-rays. To the extent that Dr. Schmidt's protocol depends on x-rays as the impetus for an examination, his protocol fails to meet essential standards of acceptable and prevailing practice.
 27. The essential standards of acceptable and prevailing practice for dentists require that *the dentist* examine the patient at least annually. Dr. Schmidt did not examine J.C. on any of his visits from January 2008 through August 2009. His failure to examine J.C. during that period is a failure to conform to the essential standards of acceptable and prevailing practice.
 28. Dr. Schmidt's failure to examine J.C. is unsafe and unacceptable. A dentist's training is necessary to conduct a periodic oral examination.
 29. The essential standards of acceptable and prevailing practice do not permit a dentist to delegate periodic oral examinations of patients to hygienists. This has been the standard of practice in Vermont since before J.C. went to Dr. Schmidt for treatment.
 30. Dr. Schmidt delegated examination responsibilities to his dental hygienists C.B. and L.S. Neither is a licensed dentist. Neither is permitted under their license to make a dental diagnosis. This delegation is a failure to conform to the essential standards of acceptable and prevailing practice.

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Conclusions of Law

1. **Re: Alleged Violation of 3 V.S.A. § 129a(b)(1) and (2):** The State has proved by a preponderance of the evidence that Dr. Schmidt failed to practice competently. We conclude that Dr. Schmidt's conduct as found above constitutes performance of unsafe and unacceptable patient or client care. 3 V.S.A. § 129a(b)(1). As found above, Dr. Schmidt failed to conform to the essential standards of acceptable and prevailing practice. This is unprofessional conduct. 3 V.S.A. § 129a(b)(2).
2. **Re: Alleged Violation of 26 V.S.A. § 129a(a)(3):** 3 V.S.A. § 129a(a)(3) defines unprofessional conduct to include failing to comply with provisions of federal or state statutes or rules governing the practice of the profession. Any allegation of failure to comply with statutes or rules has been addressed above. This statute does not provide an independent grounds for discipline. There is no violation of this statute. This charge is dismissed.
3. **Re: Alleged Violation of 26 V.S.A. § 864(b):** The State has proved by a preponderance of the evidence that Dr. Schmidt assigned diagnoses to another person not licensed or approved by the Board to practice dentistry, by delegating to his dental hygienists the task of conducting patient periodic oral examinations. This is unprofessional conduct.

Discussion

We note that as Dr. Schmidt and his hygienist described his practice, it has for many years been at odds with acceptable standards of practice. His "protocol" which has hygienists conduct periodic oral examinations violates acceptable standards of practice. His practice impermissibly allows a dental hygienist's observations and diagnosis of good health to substitute for his own examination. Dr. Schmidt's records did not fully reflect J.C.'s treatment or who provided it. His record keeping interferes with his ability to determine whether he has met his professional responsibilities such as assuring that patients have received timely periodic oral examinations by the dentist. Dr. Schmidt's inability to address the rationale for why a dentist must perform a periodic oral examination is stunning. Dr. Schmidt's attempt to blame his failure to examine J.C. on that patient shows a profound and disturbing misunderstanding of his responsibilities to his patients. We cannot say whether Dr. Schmidt's failure to personally examine his patient was because he was oblivious to the requirement, or a deliberate choice. Either way, the failure is major. Dr. Schmidt's overall conduct as revealed in this case shows a need to reeducate him in the ethical obligations of a practicing dentist.

Dr. Schmidt's failure to conform to essential standards of acceptable and prevailing practice require a response that will meet three goals, each of which is necessary to protect the public. First, the response must ensure that Dr. Schmidt can practice safely. Second, the response must ensure that he will not take lightly his responsibilities to his patients and the public that a dental license carries. Third, the response must reflect the seriousness of his unprofessional conduct to deter others from similar conduct while preserving the integrity of the

disciplinary process.

Order

For the unprofessional conduct found above, the Board imposes the following:

1. Dr. Schmidt's license to practice shall be suspended for 30 days beginning October 20, 2010.
2. At the end of the period of suspension, Dr. Schmidt's license will be re-issued marked "conditioned." The conditions below shall remain in place for a minimum of one year and until Dr. Schmidt completes all requirements ordered and meets each condition.
3. Within 180 days Dr. Schmidt shall successfully complete a course in documentation. The course must be pre-approved by the Board.
4. Within 180 days Dr. Schmidt shall successfully complete a course in coding and billing. This course or these courses must be pre-approved by the Board.
5. Within 180 days Dr. Schmidt shall successfully complete a course in ethics. This course must be pre-approved by the Board.
6. Within 90 days, Dr. Schmidt shall pay an administrative penalty of \$2,000.00.
7. Dr. Schmidt shall submit for the Board's approval the names of three Vermont licensed dentists from which the Board shall select one to audit Dr. Schmidt's patient files. Beginning within 30 days of the time Dr. Schmidt resumes his practice and monthly thereafter for 12 months the auditor shall randomly select a minimum of five records of patients treated within the preceding 30 days. The auditor will verify that Dr. Schmidt is keeping acceptable and accurate patient treatment and billing records. The auditor will assure that at least annually Dr. Schmidt is providing his patients their periodic oral examinations. The auditor shall report his or her findings to the Board monthly. The auditing dentist shall on his or her own letterhead acknowledge receipt of this Order and acknowledge his or her ability to audit Dr. Schmidt files.
8. Dr. Schmidt shall bear all costs of complying with this Order.
9. If Dr. Schmidt violates the terms of this Order in any respect, the Board, after giving Dr. Schmidt notice and an opportunity to be heard, may rescind or modify this Order and impose additional appropriate disciplinary sanctions. If a complaint of unprofessional conduct is made against Dr. Schmidt during the term of this Order, the Order shall be automatically extended until the unprofessional conduct matter is concluded.
10. After the conditional license period, Dr. Schmidt may petition the Board to remove any and all license conditions. Dr. Schmidt must present proof that all terms of this Order

have been met. Once Dr. Schmidt has shown that all conditions of this Order have been met, the Board will remove the conditions on Dr. Schmidt's license and restore Dr. Schmidt's licensure privileges.

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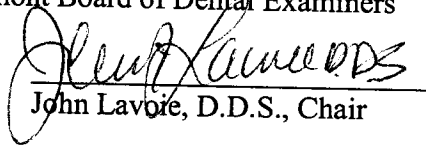
This is a final administrative determination by the Vermont Board of Dental Examiners.

A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, National Life Bldg., North, FL2, Montpelier, VT 05620-3402 within 30 days of the entry of this Order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a. To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Dental Examiners

By:


John Lavoie, D.D.S., Chair

Dated: September 15, 2010

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: September 17, 2010

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