

Coalition to Abolish Mercury Fillings

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MEMORANDUM OF LAW

The Minnesota Board of Dentistry Violates Free Speech Rights of Mercury-Free Dentists

Introduction:

The Minnesota Board of Dentistry (Board), for more than two decades, has had a policy and practice of investigating and/or disciplining mercury-free dentists for their opinions about the risks of mercury amalgam dental fillings. (See Attachment # 1 – Gag Rule History by Kip Sullivan.) These actions by the Board are intended to, and actually do, discourage mercury-free dentists from advertising their unique practices, and from truthfully advising their patients about the risks associated with mercury amalgam dental fillings. *Id.*

The ACLU (Minnesota) has received complaints stating that the Board severely sanctions dentists discussing the merits of mercury-free dentistry with their patients and that some dentists who have done so have lost their licenses to practice. (See Attachment # 2 – Letter from Minnesota ACLU.)

The Board support for the safety of mercury amalgam dental fillings and suppression of contrary opinion, mirrors the position of the American Dental Association (ADA). The ADA has adopted an “ethics” rule which memorializes its position:

Code of Professional Conduct

5.A. Representation of Care. *Dentists shall not represent the care being rendered to their patients in a false or misleading manner.*

Advisory Opinions

Dental Amalgam and Other Restorative Materials. *Based on current scientific data the ADA has determined that the removal of amalgam restorations from the non-allergic patient for the alleged purpose of removing toxic substances from the body, when such treatment is performed solely at the recommendation of the dentist, is improper and unethical. The same principle of veracity applies to*

the dentist's recommendation concerning the removal of any dental restorative material.

Many state dental boards adopt the ADA rules as rules of the state board or, they have adopted rules which incorporate the basic provisions of ADA 5A. For example, Oregon had an even more draconian policy which provided:

Silver amalgams are a safe and cost effective restorative material when properly placed in cases which warrant its usage. It is fraud and a violation of the Dental Practice Act for a dentist to advocate to a patient the removal of clinically-serviceable amalgam restorations solely to substitute a material that does not contain mercury unless evidence suggests that the patient has mercury intolerance. Oregon Board of Dentistry Meeting Minutes, September 7, 1990, Section IX.¹

The Board has not adopted any similar rule but, using its more general statutes and administrative rules which prohibit fraud, misrepresentation or misleading advertisements,² has adopted a practice of investigating and/or disciplining mercury-free dentists. This practice has succeeded in stopping communications to patients by the targeted dentists; and, for those who have lost their licenses, stopped the mercury-free practice of dentistry. In turn, these activities have chilled other mercury-free dentists from communicating to their patients and the public about mercury-free dentistry.

Up to 28% of dentists practicing in the U.S. claim to have a mercury-free practice.³ Dentists practice mercury-free dentistry because they have made a professional judgment that the risks of mercury restorations outweigh any perceived benefits for their patients. Mercury amalgam also is an occupational hazard for dentists and dental personnel. These are opinions supported by a large body of research.⁴

¹ Oregon Board of Dentistry rescinded its policy on March 8, 2002 based on a challenge by the ACLU and advice of the Attorney General. Similar action was taken in Iowa in 2003.

² Chapter 150A [Dentistry], Minnesota Statutes 150A.08. **Suspension, revocation, limitation, modification or denial of license.** [A license may be revoked for:] (1) Fraud or deception in connection with the practice of dentistry ..., (14) Knowingly providing false or misleading information that is directly related to the care of that patient; Minnesota Rules, Board of Dentistry, Dentists, Hygienists, and Assistants, Chapter 3100: Rule 3100.6100 provides that the grounds for license revocation are set forth in MS 150A.08 Subdivision (1) [see above], Rule 3100.6200 prohibits conduct unbecoming a Licensee or Registrant: ...B ...treatment which fall[s] below accepted standards, E ...performing unnecessary servicesI. perpetrating fraud upon patients ..., Rule 3100.6500 prohibits communication containing a false, fraudulent, misleading, or deceptive statement or claim.

³ Christianson Research Institute and Dental Products Magazine.

⁴ www.testfoundation.org; www.vimy-dentistry.com; www.bioprobe.com; www.hugnet.com; www.amalgam.org; www.home.earthlink.net/~berniew/; www.mercola.com; www.toxicteeth.net; www.pubmed.com keyword search: mercury

State Action Suppresses Speech:

The Board investigations and discipline of mercury-free dentists is aimed at suppressing speech and keeping dental consumers from knowing mercury amalgam dental fillings are 50% elemental mercury, the most toxic, non-radioactive material known to man.

There is clearly a controversy over the safety and efficacy of mercury amalgam dental fillings. There are at least two sides to this debate. The majority, mercury-using dentists, are using the authority of the Board to suppress the opinions of the mercury-free minority and to protect their economic interests in the continued use of mercury amalgam.

The implementation of policies and practices by the Board, which punish speech and create a prior restraint on speech, even if they do not exist in written form, are unconstitutional under both the state and federal constitutions.⁵ *First National Bank of Boston v. Bellotti*, 437 U.S. 785-86 (1978) (the First Amendment is offended when government suppression of speech targets one side of the debate).

Dental consumers have the right to know about the controversy. The U.S. Supreme Court in *Central Hudson Gas and Electric Co. v. Public Service Commission*, 477 U.S. 561-62 (1980) held that “commercial speech not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” The Board’s actions are designed to keep consumers from learning about the toxic components of mercury amalgam dental fillings and the adverse health effects associated with them.

An ADA survey reveals that 60% of dental consumers do not know there is a controversy over mercury amalgam dental fillings. This means mercury-using dentists have been largely successful in keeping the controversy within dentistry and out of the public domain.

A policy (written or unwritten) which prohibits advocating removal of amalgam fillings is of particular concern in light of the legitimate scientific debate regarding the safety of amalgam fillings. One manufacturer’s statement (Dentsply’s) of the side effects of amalgam

amalgam [over 1800 hits]; a compelling authoritative work summarizing world literature was done by Swedish scientist, Maths Berlin. He testified to his conclusions to a Congressional House Subcommittee on May 8, 2003. They include:

- For occupationally exposed workers (dental workers), neuropsychological symptoms occur at extremely low exposure levels (<4 ug/l of urine), and such exposure causes lasting damage to the central nervous system (p. 41);
- The safety factor thought to exist with respect to mercury exposure from amalgam has been erased (p. 41);
- “For medical reasons, amalgam should be eliminated in dental care as soon as possible” (p. 42).

⁵ Minnesota Constitution, Article I Section 3; U.S. Constitution, Amendment I.

includes various health warnings⁶ that, under the Board's policy and practice cannot be passed along to patients by the dentist.

Cases of Import:

When government actions violate the constitutional rights of citizens, 42 USC Section 1983 provides a cause of action for a plaintiff who can show that a person, acting under color of state law, deprived him/her of a federal constitutional right.

If a mercury-free dentist were to challenge the Board's policies and practices for impinging on his/her free speech rights under the First Amendment, there is a well-developed body of case law which would guide the court's examination. Violation of the free speech provision of the Minnesota Constitution provides a separate cause of action.

The free speech provision of the U.S. Constitution, Amendment I provides as follows:

Congress shall make no law ... abridging the freedom of speech, or of the press ... [the protections of the First Amendment are made applicable to the states by the Fourteenth Amendment].

And, the free speech provision of the Minnesota Constitution, Article I, Section 3, provides:

... all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

The Minnesota Supreme Court has found that the differences in terminology between the federal constitutional free speech protection and the Minnesota Constitution's free speech provision do not support a conclusion that the state protection should be more broadly applied than the federal protection, i.e. cases interpreting the federal constitution are applicable to interpretations of the Minnesota free speech provision of its constitution. *State of Minnesota v. Wicklund*, 589 NW 2d 793 (1999).

⁶ 1997 Dentsply Caulk "Directions for Use" provide the following warnings:

- This product contains mercury, which is known by the state of California to cause birth defects or other reproductive harm.
- Exposure to mercury may cause irritation to skin, eyes, respiratory tract and mucous membrane. In individual cases, hypersensitivity reactions, allergies, or electrochemically caused local reactions have been observed. Due to electrochemical processes, the lichen planus of the mucosa may develop.
- Mercury may also be a skin sensitizer, pulmonary sensitizer, nephrotoxin [toxic to the kidneys] and neurotoxin [toxic to the central nervous system].
- After placement or removal of amalgam restorations, there is a temporary increase of the mercury concentration in the blood and urine.
- Mercury expressed during condensation and unset amalgam may cause amalgamation or galvanic effect if in contact with other metal restorations. If symptoms persist, the amalgam should be replaced by a different material.
- Removal of clinically acceptable amalgam restorations should be avoided to minimize mercury exposure, especially in expectant mothers.
- The number of amalgam restorations for one patient should be kept to a minimum.
- Inhalation of mercury vapor by dental staff may be avoided by proper handling of the amalgam, the use of masks, along with adequate ventilation.
- Avoid contact with skin and wear safety glasses and gloves.

It is within the police power of the state to require a license as a condition precedent to the practice of dentistry in the state of Minnesota. Licensing statutes and rules must set forth definitive, objective guidelines for the issuance or revocation of licenses so that the decision to grant, deny or revoke a license is not left to the discretion of a public officer or regulatory board. *Staub. v. City of Baxley*, 355 US 313 (1958).

The Minnesota Supreme Court in *Alexander v. City of St. Paul*, 303 Minn. 201 (1975), stated that: “And, as is the case in licensing any activity, the standards for excluding a person from engaging in the licensed activity must bear a reasonable relationship to their qualifications to engage in that activity.” *Id.* The Board’s actions against mercury-free dentists are *impairing* the dentist – patient relationship wherein the dentist has an affirmative obligation to communicate all risks of treatment as part of informed consent.

In *Alexander*, a theater owner had his license revoked because an employee had exhibited an obscene movie at the theater without the owner’s knowledge. The court held that the city code, under which the theater owner’s license had been revoked, was an unconstitutional prior restraint of free speech. The Court held that such a prior restraint comes to the court “bearing a heavy presumption against its constitutional validity.” Citing, *Bantam Books, Inc. v. Sullivan*, 372 US 58, 70 (1963). The court said that the city’s remedy was to prosecute future violations when they occurred. *Alexander*, at 206-207.

In *McIntire v. State of Minnesota*, 419 NW 2nd 799 (1988), an employee, an American Indian, was hired as the agency’s Indian Housing Coordinator. She was later fired for insubordination because, she claimed, she publicly criticized the Board, the Director and the agency’s home mortgage program director for their actions. The Court of Appeals remanded because the trial court did not address an immunity issue, but also opined that the trial court should have balanced the interests of the employee, as a citizen with a free speech right to comment on matters of public concern, against the interests of the state as an employer, in promoting the efficiency of the public services it performed through its employees. That issue was to be resolved on remand.⁷

The purpose of the Board is to protect the dental consumers of the State of Minnesota. The free speech rights of mercury-free dentists, which are used to provide vital dental care information to patients far outweigh the Board’s interests in protecting the economic interests of mercury-using dentists.

⁷ Upon appeal after remand, the Court of Appeals found that the employer was qualifiedly immune for its action in firing the plaintiff because the issues upon which plaintiff spoke were already before public. The court also found that plaintiff’s actions preempted the agency’s ability to take corrective action pursuant to an auditor’s report, i.e. the employer’s right to promote efficient public services [by firing plaintiff] outweighed plaintiff’s free speech rights. *McIntire v. State of Minnesota*, 458 NW2d 714 (1990).

The discussion in *McIntire* on immunity would also support the proposition that the members of the Board may not have immunity from suit because a reasonably competent board member should know the clearly established law regarding free speech and know that investigating and disciplining mercury-free dentists for their honestly held opinions violates that clearly established law. This memorandum posits that the law on free speech rights of citizens is clearly established law.^{8 9} The question then would be whether the Board's conduct in investigating and disciplining mercury-free dentists violated that clearly established law.

In *Near v. State of Minnesota*, 283 US 697 (1931) the U.S. Supreme Court struck down a state statute that authorized, under nuisance law, the shutting down of a newspaper for past violations of an obscenity law. The court held that the newspaper could publish without prior restraint and the use of a past crime could not be used to deny the plaintiff the right to exercise a constitutionally protected right. *At 720.*

The U.S. Supreme Court in *Pickering v. Board of Education Twsp H.S. Dist. 205, Will County*, 391 US 563 (1968), reversed and remanded an Illinois state court decision affirming termination of a teacher for sending a letter to a newspaper critical of the Board of Education on school revenue issues. The U.S. Supreme Court held that the teacher's communication was a matter of public concern and, since there was no evidence that the statements were knowingly or recklessly false, could not be the basis of dismissal from public employment. *At 569-573.*

Similarly, a mercury-free dentist's criticism of the ADA's, MDA's and the Board's position on the safety and effectiveness of mercury amalgam dental fillings cannot be the basis for chilling their free speech rights. While the Board has a legitimate role in protecting dental consumers from fraud, the question (and the Board's duty) turns equally on the truth or falsity of the statements made by *mercury-using* dentists on the safety and effectiveness of amalgams. The overwhelming weight of evidence supports the toxicity of mercury in general and the toxicity of amalgams in particular.¹⁰

Conclusion:

History shows that changes in medical care came about because a minority of practitioners dissented. Pasteur was ridiculed. Nineteenth Century physicians who washed their hands were scorned. Dr. Oliver

⁸ If the law on free speech rights was not clearly established, there can be no "violation" of law and the Board would have immunity. If free speech rights are clearly established in law, a violation is either the result of incompetency (failure to know the law) or a willful illegality, and the Board would not be immune from liability.

⁹ If any Board member asserts that he/she is not knowledgeable about the law of free speech, that Board member is now on notice to seek legal advice to clarify that for him/her.

¹⁰ See footnote # 4.

Wendell Holmes¹¹ sharply criticized the medical profession for using mercury in medicines for syphilis, wounds and other ailments. Twentieth Century physicians abandoned mercury in health care vindicating Dr. Holmes. And, in the Twenty-First Century, mercury-free dentists are accused of fraud and quackery by mercury-using dentists.

Dental consumers have the right to know about the controversy, which means that the mercury-free dentists have to be able to speak about their side of the issue. State action that prohibits that, or punishes it, is in violation of the free speech provisions of the U.S. Constitution and the Minnesota Constitution.

The Board must take a formal action to reject its past unwritten policy and practice of investigating and disciplining mercury-free dentists. Until such action takes place, that policy and practice *is* a prior restraint on the speech of mercury-free dentists and subjects the state to liability under 42 USC Section 1983.

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¹¹ He was the father of the Supreme Court Justice, and a physician and poet.