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OCT 14 2010

MISSOURI DENTAL BOARD

**SETTLEMENT AGREEMENT BETWEEN MISSOURI DENTAL BOARD
AND BOBBY W. AUSTIN, D.D.S.**

Come now Bobby W. Austin, D.D.S. ("Licensee") and the Missouri Dental Board ("Board") and enter into this settlement agreement for the purpose of resolving the question of whether Licensee's license as a dentist will be subject to discipline.

Pursuant to the terms of § 536.060, RSMo 2000, the parties hereto waive the right to a hearing by the Administrative Hearing Commission of the State of Missouri ("AHC") regarding cause to discipline the Licensee's license, and, additionally, the right to a disciplinary hearing before the Board under § 621.110, RSMo 2000.

Licensee acknowledges that he understands the various rights and privileges afforded him by law, including the right to a hearing of the charges against him; the right to appear and be represented by legal counsel; the right to have all charges against him proven upon the record by competent and substantial evidence; the right to cross-examine any witnesses appearing at the hearing against him; the right to present evidence on his own behalf at the hearing; the right to a decision upon the record by a fair and impartial administrative hearing commissioner concerning the charges pending against him and, subsequently, the right to a disciplinary hearing before the Board at which time he may present evidence in mitigation of discipline; and the right to recover attorney's fees incurred in defending this action against his license. Being aware of these rights provided him by operation of law, Licensee knowingly and voluntarily waives each and every one of these rights and freely enters into this settlement agreement and agrees to abide by the terms of this document, as they pertain to him.

Licensee acknowledges that he has received a copy of the investigative report and other documents relied upon by the Board in determining there was cause to discipline his license, along with citations to law and/or regulations the Board believes was violated.

For the purpose of settling this dispute, Licensee stipulates that the factual allegations contained in this settlement agreement are true and stipulates with the Board that Licensee's license, numbered 012345 is subject to disciplinary action by the Board in accordance with the provisions of Chapter 621, Cum. Supp. 2009 and Chapter 332, RSMo.

Joint Stipulation of Fact and Conclusions of Law

1. The Missouri Dental Board ("Board") is an agency of the State of Missouri created and established pursuant to § 332.021, RSMo 2000, for the purpose of executing and enforcing the provisions of Chapter 332.

2. Licensee Bobby W. Austin, D.D.S. ("Austin") is licensed by the Board as a dentist, License No. 012345. Licensee's Missouri license was at all times relevant herein, and is now, current and active.

3. The Board received two complaints related to Dr. Austin concerning quality of care, improper delegation, and personal treatment by Dr. Austin. The Board received the complaints from:

and

Complainant _____

4. On or about June 16, 2008, the Board received a complaint from _____

_____ which alleged that:

a. _____ purchased a complete set of dentures from Austin in November, 2007. On June 2, 2008, one of the teeth in the lower denture was loose. _____ contacted Austin for an appointment. _____ went to her appointment on June 4, 2008.

b. She was told during the appointment that her denture would be ready in the afternoon. When _____ and her husband returned, they had to wait for the denture. Eventually, following interaction between Austin and his staff and the _____ Licensee tossed the denture in the direction of the _____: The denture landed on the floor.

c. _____ states that upon arriving home, she inspected the lower denture and it "was worse than when I took it in to Dr. Austin." She states it "had been chiseled out around the broken tooth and nothing more had been done." She also stated in her complaint that she has "a 7-month old set of dentures that are unusable." Austin's receptionist telephoned at 4:30 p.m. that same afternoon and offered an appointment to repair the denture at no cost to

_____ declined and took her denture to another dentist in Camdenton on June 6, 2008 who told her that the lower denture was not repairable. She needs a new complete set of dentures.

_____ also filed a complaint with the Better Business Bureau.

5. The Board's investigation of the complaint determined:

- a. Dr. Austin's practice consists of himself, one other dentist, two dental assistants (Anna Denney and Maria DeFreece formerly known as Maria Rocha) and one licensed hygienist. The other dentist is his daughter, Dr. Crystal Strickler. The hygienist is Julie Koth, RDH who works only one day every two weeks.
- b. In an interview with Board Investigator Joseph Sears, Austin stated that:
 - i. When I _____, learned the dentures were not ready, he started yelling and cussing at Austin's staff.
 - ii. Austin stated "he and his staff will not begin arguments but [] he will defend himself and his staff."
 - iii. He was called to the reception area and Mr. _____ continued to argue with him. He (Austin) returned the unfinished dentures and asked the _____ to leave or he would call the police.
- c. Austin provided _____ patient records. The records corroborated Austin's statements to Investigator Sears. Additionally, the records revealed that the dentures were "tossed" to Mr. _____ in the waiting room.

Complainant _____

6. On or about October 5, 2007, the Board received a complaint about Austin from _____ regarding Austin's care of her husband _____'s teeth. The complaint alleged that:
 - a. Mr. _____ wished to have all his teeth pulled (18 teeth) and dentures made. Austin said he did not recommend that course of action but did nothing to dissuade Mr. _____. Austin's office took impressions of Mr. _____'s mouth that day. Mrs. _____ alleges that on the next visit Austin pulled the 18 teeth in a "very rough" manner and with an "unconcerned attitude." Mr. _____'s gums bled terribly and Austin "shoved the dentures with no concern for my husband's sore mouth." Austin gave Mr. _____ a prescription for "short term antibiotics and a few pain pills." Mr. _____'s gums bled for four days and she had to call Austin because the dentures were "hug[e] and so ill fitting" that Mr. _____ was unable to eat.
 - b. Austin made a second set of dentures for Mr. _____. At the time he made the second set,

Austin noticed some infection and removed a sliver of bone from Mr. [redacted] s gums. Mrs.

[redacted] also alleges that Mr. [redacted] suffered all winter with the ill-fitting dentures, his health was getting worse and he lost weight because he was unable to eat. Additionally, Mr.

[redacted] s family doctor diagnosed a problem with Mr. [redacted] s blood which was caused by a low grade infection or virus.

c. Austin was "flip, rough, and unconcerned." That he "just jokes [and] spends no time with the patients." She also states in her complaint that she was not certain he washed his hands between patients. [redacted] returned both sets of dentures to Austin.

7. The Board's investigation determined:

- a. During an interview with Board Investigator Joseph Sears, Austin stated he did not remember Mr. [redacted] .. Austin also did not remember why Mrs. [redacted] felt his treatment of Mr. [redacted] was rough or that his attitude had been unconcerned.
- b. Austin stated that "it was not uncommon for a patient's new dentures to not fit properly and for a patient to experience sore gums soon after."
- c. Austin informed Sears that "he would have done whatever the patient needed or wanted in order to correct whatever problems they have had with their dentures."
- d. He stated he did not understand the complaint or why it took Mrs. [redacted] almost a year from the date of the last appointment to make the complaint.
- e. Austin stated he changes gloves between each patient and washes his hands before and after each glove use. He stated he never neglects changing his gloves or washing his hands between patients.
- f. The Board's investigator reviewed Austin's infection control practices and found them to be satisfactory and in compliance with the Centers for Disease Control's guidelines in all areas.

8. At the time of the [redacted] complaint, the Board was also reviewing and investigating the complaint. The Board considered the two cases to be companion cases.

9. Dr. Austin's actions in tossing the dentures to Mrs. [redacted] and/or her husband, in acting in a manner that was perceived as rough or unconcerned toward Mr. [redacted] , and in making and providing a set of dentures for Mr. [redacted] which were unusable constitute a violation of professional trust.

10. The Board's investigation of the complaints also determined:
- a. Dental Assistant Anna Denney is an expanded function dental assistant (EFDA) in prosthodontics. Her expanded function skills include: placement of retraction cord in preparation for fixed prosthodontic impressions, making impressions for the fabrication of removable and fixed prosthesis, placement of temporary softliners/tissue conditioners, extra-oral adjustment of fixed and removable prosthesis, and final cementation of fixed prosthesis.
 - b. Dental Assistant Maria Rocha (now known as Maria DeFreece) is a Dental Assisting National Board (DANB) certified dental assistant.
 - c. Investigator Sears interviewed Denney. According to investigator Sears' report, she stated that her job duties include preparing the operatory before and after each patient, cleaning each operatory and sterilizing tools, taking impressions for dentures, and making dentures for adjustments. She stated she does not adjust dentures.
 - d. Investigator Sears also interviewed Rocha. According to investigator Sears' report, she stated that her job duties include preparing the operatory before and after each patient, cleaning each operatory and sterilizing tools, taking impressions for dentures, and making dentures for adjustments. She stated she does not adjust dentures.

11. Pursuant to regulation 20 CSR 2110-2.120:

(2) A registered and currently licensed dentist may not delegate to a dental assistant or certified dental assistant, as defined in subsections (1)(B) and (C) respectively, the performance of the following procedures:

- (A) Diagnosis, including interpretation of dental radiographs and treatment planning;
- (B) Cutting of tooth structure;
- (C) Surgical procedures on hard and soft tissues including, but not limited to, the removal of teeth and the cutting and suturing of soft tissues;
- (D) The prescription, injection and parenteral administration of drugs;
- (E) The final bending of archwire prior to ligation;
- (F) The scaling of teeth; and
- (G) Administration of nitrous oxide-oxygen analgesia except that a dental assistant or certified dental assistant may assist in the administration of and monitor nitrous oxide-oxygen analgesia with specific training as provided in section (3) of this rule.

(3) A dental assistant or certified dental assistant may assist the administration of and monitor nitrous oxide analgesia under direct supervision if s/he—

- (A) Has successfully completed formal certified training in a course approved by the Missouri Dental Board; and

- (B) Has successfully passed an approved competency test regarding the clinical and didactic training; or
- (C) Has been certified in another state to assist the administration and monitor nitrous oxide subsequent to equivalent training and testing. The dental assistant may qualify to perform this function by presenting proof of competence of this equivalent training and testing to the Missouri Dental Board;
- (D) The responsibility of the dental assistant or certified dental assistant shall be to provide the Missouri Dental Board proof of competence; and
- (E) Upon presentation to the dental board of proof of competency that the dental assistant or certified dental assistant has complied with the requirements imposed by subsections (3)(A), (B) or (C) of this rule, and remitted the appropriate fee as specified in 4CSR 110-2.170, the Missouri Dental Board will issue the appropriate certification to the dental assistant or certified dental assistant.

(4) A currently licensed dentist may delegate, under direct supervision, functions listed in subsection (4)(D) of this rule to a certified dental assistant or a dental assistant subsequent to submission to the Missouri Dental Board of the following satisfactory proof of competence:

- (A) After June 1, 1995, all certified dental assistants graduating from accredited dental assisting programs in Missouri will have competency testing for all functions listed in subsection (4)(D) of this rule and may be delegated those functions by a currently licensed dentist;
- (B) Certified dental assistants graduating prior to June 1, 1995, or from programs outside Missouri, may be delegated the functions in subsection (4)(D) of this rule with proof of competence issued by their educational institutions and may be delegated other specific functions if they have completed an approved course, passed an approved competency examination, and can provide proof of competency as defined in subsection (1)(D);
- (C) Dental assistants, as defined in subsection (1)(B), may be delegated any specific function listed in subsection (4)(D) of this rule if they have successfully completed a basic dental assisting skills mastery examination approved by the board, completed an approved course, passed an approved competency examination, and can provide proof of competence as defined in subsection (1)(D);
- (D) Functions delegable upon successful completion of competency testing are—

1. Placement of post-extraction and sedative dressings;
2. Placing periodontal dressings;
3. Size stainless steel crowns;
4. Placing and condensing amalgam for Class I, V, and VI restorations;
5. Carving amalgam;
6. Placing composite for Class I, V, and VI restorations;
7. Polishing the coronal surfaces of teeth (air polisher);
8. Minor palliative care of dental emergencies (place sedative filling);
9. Preliminary bending of archwire;
10. Removal of orthodontic bands and bonds;
11. Final cementation of any permanent appliance or prosthesis;
12. Minor palliative care of orthodontic emergencies (that is, bend/clip wire, remove broken appliance);
13. Making impressions for the fabrication of removable prosthesis;
14. Placement of temporary soft liners in a removable prosthesis;
15. Place retraction cord in preparation for fixed prosthodontic impressions;
16. Making impressions for the fabrication of fixed prosthesis;
17. Extra-oral adjustment of fixed prosthesis;

18. Extra-oral adjustment of removable prosthesis during and after insertion; and
 19. Placement and cementation of orthodontic brackets and/or bands; and
- (E) Upon request by the Missouri Dental Board, the licensed and supervising dentist must provide copies of proof of competence of dental auxiliaries.

(5) A currently licensed dentist may delegate under direct supervision to a dental assistant or certified dental assistant any functions not specifically referenced *in* sections (2)–(4) of this rule and not considered either the practice of dentistry or the practice of dental hygiene as defined in sections 332.071 and 332.091, RSMo, and 4 CSR 110-2.130.

(6) The licensed dentist is responsible for determining the appropriateness of delegation of any specific function based upon knowledge of the skills of the auxiliary, the needs of the patient, the requirements of the task and whether proof of the competence is required.

(6) Pursuant to section 332.031.2., RSMo, the dentist is ultimately responsible for patient care. Nothing contained in the authority given the dentist by this rule to delegate the performance of certain procedures shall in any way relieve the supervising dentist from liability to the patient for negligent performance by a dental assistant or certified dental assistant.

12. Licensee's delegation of duties including making prosthesis to any dental assistant and delegating duties including making impressions for dentures, crown and bridges and making adjustments to dentures to a non-EFDA or DANB assistant would constitute improper delegation in violation of regulation 20 CSR 2110-2.120. By way of clarification, Austin supplied affidavits to the Board from Anna Denney and Maria Rocha (n/k/a Maria DeFreece) explaining that they assist the dentists but do not adjust dentures or take impressions. Denney is an EFDA who may take impressions and adjust dentures under the direct supervision of a dentist. Rocha is not currently EFDA certified. The Board investigator did not identify any specific instances in which a non-EFDA certified individual took impressions or adjusted dentures. The investigator's report suggests that there may have been confusion or a misunderstanding during the investigator's interview of Denney and Rocha. The Board hereby advises Austin, and Austin acknowledges, that dental assistants who have not obtained an appropriate EFDA certification or who have not graduated from an accredited dental assistant program in Missouri cannot take impressions or adjust dentures under 20 CSR 2110-2.120.

13. Prior to the receipt of these complaints, in 1998, the Board issued Licensee four separate Professional Misconduct Administrative Caution letters as a result of complaints filed with the Board that were concerned with Licensee's quality of care, including but not limited to, problems with the fit and function of dentures.

14. Cause exists for the Board to take disciplinary action against Licensee's license under § 332.321.2(13), RSMo, which states in pertinent part:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of

any permit or license required by this chapter or any person who has failed to renew or has surrendered his or her permit or license for any one or any combination of the following causes:

- (13) Violation of any professional trust or confidence[.]

Joint Agreed Disciplinary Order

Based upon the foregoing, the parties mutually agree and stipulate that the following shall constitute the disciplinary order entered by the Board in this matter under the authority of § 621.045.3, RSMo 2000:

1. The terms of discipline shall include that the dental license, license number 012345, be **CENSURED** and that Licensee shall **REFUND** any and all money paid by Complainants and to the appropriate Complainant or third-party payor within sixty (60) days of the effective date of this Order. Licensee shall provide written proof of the refund including to whom it was paid and the date on which it was paid to the Board within ten (10) business days of payment to each of the two (2) Complainants. In the event all money has already been refunded to any of the two (2) Complainants, Licensee shall provide written proof of the refund, to whom it was made and the date on which it was made to the Board at the time Licensee signs and returns this Agreement to the Board.

2. The parties to this Agreement understand that the Missouri Dental Board will maintain this Agreement as an open record of the Board as provided in Chapters 332, 610, 324, RSMo.

3. The terms of this settlement agreement are contractual, legally enforceable, and binding, not merely recital. Except as otherwise provided herein, neither this settlement agreement nor any of its provisions may be changed, waived, discharged, or terminated, except by an instrument in writing signed by the party against whom the enforcement of the change, waiver, discharge, or termination is sought.

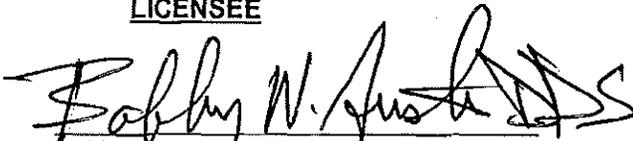
4. Licensee, together with his heirs and assigns, and his attorneys, do hereby waive, release, acquit and forever discharge the Board, its respective members and any of its employees, agents, or attorneys, including any former Board members, employees, agents, and attorneys, of, or from, any liability, claim, actions, causes of action, fees, costs and expenses, and compensation, including but not limited to, any claims for attorney's fees and expenses, including any claims pursuant to § 536.087, RSMo, or any claim arising under 42 U.S.C. § 1983, which may be based upon, arise out of, or relate to any of the matters raised in this case, its settlement, or from the negotiation or execution of this settlement agreement. The parties acknowledge that this paragraph is severable from the remaining portions of this settlement agreement in that it survives in perpetuity

even in the event that any court of law deems this settlement agreement or any portion thereof to be void or unenforceable.

5. If no contested case has been filed against Licensee, Licensee has the right, either at the time the settlement agreement is signed by all parties or within fifteen days thereafter, to submit the agreement to the Administrative Hearing Commission for determination that the facts agreed to by the parties to the settlement agreement constitute grounds for denying or disciplining the license of the licensee. If Licensee desires the Administrative Hearing Commission to review this Agreement, Licensee may submit this request to: Administrative Hearing Commission, Truman State Office Building, Room 640, 301 W. High Street, P.O. Box 1557, Jefferson City, Missouri 65101.

6. If Licensee has requested review, Licensee and Board jointly request that the Administrative Hearing Commission determine whether the facts set forth herein are grounds for disciplining Licensee's license and issue findings of act and conclusions of law stating that the facts agreed to by the parties are grounds for disciplining Licensee's license. Effective the date the Administrative Hearing Commission determines that the agreement sets forth cause for disciplining Licensee's license, the agreed upon discipline set forth herein shall go into effect.

LICENSEE


Bobby W. Austin, D.D.S.

Date 10/10/10

BOARD


Brian Barnett,
Executive Director
Missouri Dental Board

Date 10/14/10