

To: Minnesota Board of Dentistry

From: Kip Sullivan, 5600 11<sup>th</sup> Ave. S., Minneapolis, MN 55417

Re: Hearing on board policy regarding freedom of dentists to practice mercury free, and to communicate with their patients about the risks of silver-mercury fillings: The case of Dr. Gary Jacobson

Date: May 26, 2004

## INTRODUCTION

Minnesota's Board of Dentistry has apparently never reduced to writing a rule that (a) prohibits Minnesota dentists from removing functional amalgams for health reasons and (b) prohibits dentists from discussing with their patients or the public the evidence that mercury in so-called silver fillings damages health. But by its behavior, including statements in documents containing allegations of fraud, unprofessional conduct and other charges against mercury-free dentists, the board has made it clear to Minnesota dentists that it will act as if such a rule has been explicitly endorsed. The board's policy was clearly on display in its 15-year persecution of my former dentist, Dr. Gary Jacobson. Dr. Jacobson was forced to give up his license in 1996. I now see a different dentist.

The harassment of mercury-free dentists was something I knew nothing about prior to December 1990. In fact, thanks in part to the harassment of mercury-free dentists, I didn't even know amalgam contained mercury prior to the evening of December 16, 1990 when I saw a "60 Minutes" report about amalgam. CBS reporter Morley Safer interviewed a number of patients with serious ailments who got better after having their fillings removed. He also reported that the New York dental board had destroyed Dr. Joel Berger, a mercury-free New York dentist, in 1990.

I learned later that the "60 Minutes" report infuriated the American Dental Association. According to papers shared with me by an attorney who represented Dr. Hal Huggins after he came under attack by the Colorado dental licensing board for refusing to use mercury fillings, the ADA decided in the spring of 1991 to encourage state dental boards to take down mercury-free dentists. The ADA was particularly angry at Dr. Huggins because by 1990 he was drawing patients from all over the country to his Colorado clinic. The 1990s witnessed dozens of harassing actions against mercury-free dentists across the country, all instigated by state dental boards. At least a half-dozen dentists lost their licenses during the '90s. At least two more were apparently seriously harmed by the physical stress their investigations put them through; an Iowa dentist in his forties died of a heart attack; a California dentist suffered a stroke from which he has never completely recovered.

I learned shortly after the "60 Minutes" report how frightened mercury-free dentists were in Minnesota. Because I had colitis at the time (colitis is, supposedly, a disease with no cure), I wanted to talk to a mercury-free dentist about the pros and cons of removing my amalgams; I really didn't want to make such an important decision based solely on a TV show. The mainstream dentist I was seeing at the time happened to know that a Minneapolis dentist named Dr. Carol Austin refused to use amalgam. When I called her, her receptionist listened to my request to speak to Dr. Austin, put the phone down, then came back and said Dr. Austin wouldn't talk to me because "it's illegal in

Minnesota for dentists to talk about mercury in fillings." The receptionist gave me a 1-800 number for Dr. Huggins. From Dr. Huggins, I got the name of Dr. Gary Jacobson, a mercury-free dentist practicing at the time in Bloomington.

When I visited Dr. Jacobson in February 1991, he was cautious about what he said to me. He kept prefacing his remarks with statements like, "All I can do is give you examples of what has happened to other patients." He gave me a lot of literature on the subject, most of it newspaper clippings. I had the distinct feeling he was trying to avoid transgressing the "law" in Minnesota that said dentists couldn't talk about mercury in fillings. Over the last decade I have spoken to another half-dozen mercury-free Minnesota dentists who were guarded in what they said to me about mercury in fillings.

Dr. Jacobson removed 14 mercury fillings from my mouth in April and May 1991. Six weeks after my last filling was removed, my colitis was gone and has never returned. Other symptoms that had accompanied my colitis, including crushing fatigue, night sweats, skin that felt sensitive as if I had the flu, and a constant need to clear phlegm from my throat, also disappeared and never returned.

I spent much of the next four years reading the medical literature on the effect of mercury on the body. I would never have become all that interested in what has come to be called "the amalgam wars" – the harassment of mercury-free dentists by state licensing boards and the American Dental Association – if Attorney General Skip Humphrey and the Minnesota Board of Dentistry had left Dr. Jacobson alone. But in 1995, the Board sent Dr. Jacobson a "notice of hearing" charging him with fraud and incompetence. Of 21 patients whose files were used as of the charges against him, the allegations about ten of these patients mentioned mercury. In 1996, Dr. Jacobson gave up his license. That same year, the Colorado board took the license of Hal Huggins.

#### THE ENFORCEMENT OF THE BOARD'S UNWRITTEN POLICY AGAINST DR. JACOBSON

Researchers at the University of Iowa were the first in modern times to demonstrate that mercury vapor escapes constantly from amalgams. Their research, first published in 1979, and more research like it published in the 1980s, convinced many American dentists to renounce mercury. Gary Jacobson did so in 1981. He advertised himself as mercury-free, and was almost immediately placed under investigation by the Minnesota Board of Dentistry. By 1983, Dr. Jacobson was defending himself before the Board of Dentistry against seven trivial charges, including that he announced in an advertisement that he treated "mercury toxicity," that he told a patient, "There, we removed a pound of mercury out of your mouth," and that his attorney had put the title "Inc." after the title of his clinic rather than "P.A." Dr. Jacobson was not told who accused him of these sins. During the 1983 hearing, a representative of the board accidentally revealed that his accuser was a bookkeeper Dr. Jacobson had fired earlier. To avoid hiring an attorney, Dr. Jacobson agreed with the Board to stop committing these sins.

The American Dental Association responded to the research showing that amalgams emit mercury not by financing more research to understand the risks of amalgam, but, rather, added to its so-called code of ethics a provision that effectively prohibited dentists from discussing the risks of amalgams with their patients. Unlike

dental boards in other states, the Minnesota board did not, to my knowledge, formally adopt the ADA's "ethical" principle that dentists could not suggest to patients that removing their amalgams might be a good idea. But, like dental boards around the country, the Minnesota Board of Dentistry stepped up its harassment of mercury-free dentists in the late 1980s and early 1990s. Dr. Austin was called before the board in 1990, and a few years later Dr. Gary Ohlin was notified that he was under investigation for an ad he placed in the "help wanted" section of the St. Paul *Pioneer Press* in which he announced his need for a dental assistant and that his office was mercury free. Dr. Ed Littlejohn, a mercury-free Winona dentist who practiced briefly with Dr. Jacobson, also came under investigation. So did Dr. Dwight Tschetter of Minnetonka (now Hopkins), and at least one other mercury-free dentist whose name I won't mention because he was so frightened by the investigation he cut off communication with me after our first conversation.

As part of this stepped up enforcement of the apparently unwritten, and never publicly debated, policy of gagging mercury-free dentists, the Minnesota board prosecuted Dr. Jacobson again in 1990. The 1990 allegations were based on 14 patient files. Again, it was unclear who initiated the complaints. The evidence suggests the complaints came primarily from Delta Dental employees who wondered why Dr. Jacobson was removing so many "perfectly good" amalgams. (Incidentally, Dr. Jacobson would tell patients which fillings were old or cracked and in need of replacement on functional, as opposed to health, grounds, and which were not in need of replacement, so that patients could seek reimbursement from their insurers for those fillings which were wearing out.)

Three of the 14 patients whose files were being used by the board in its prosecution of Dr. Jacobson were friends of Dr. Jacobson's and made it clear to Dr. Jacobson and to the board, in writing, that they wanted nothing to do with the investigation. Patient privacy was a value unheard of at the Minnesota Board of Dentistry and in the Attorney General's office under Skip Humphrey, at least where patients of mercury-free dentists were concerned. Humphrey's investigators, notably Pat Glasrud, typically demanded unfettered access to patient files and never asked patients if they minded. In one case involving a patient of Dr. Jacobson's named Sylvia Jesse, Tom Vasaly, one of Humphrey's assistant attorneys general, refused to delete allegations against Dr. Jacobson based on Sylvia's file even after Sylvia sent Mr. Vasaly a letter in 1995 making that demand. Mr. Vasaly's reply to Sylvia stated that Mr. Vasaly was unaware "of a procedure to expunge accurate information from government records," and he went on to say "the Board's concerns go beyond the question of whether you personally object to or are supportive of Dr. Jacobson's practices."

The board's second investigation of Dr. Jacobson lurched through two stages – the 1990 phase that petered out with no explanation, and another phase that began in 1995 and culminated with the destruction of Dr. Jacobson's career in 1996. In 1990, Dr. Jacobson was interrogated by three members of the board over two days for a total of eleven hours about the allegations developed with the use of the 14 patient files. I have a transcript of that interrogation which was given to me by Dr. Jacobson's attorney. The three board members who constituted the board of inquiry made statements that clearly indicated they were upset with Dr. Jacobson's refusal to use mercury and considered his avoidance of mercury to be evidence of "incompetence" and "fraud." At no time did Dr.

Jacobson's inquisitors feel that they had any obligation to prove that amalgams are safe, something they could not have done in 1990, nor could anyone do today. In the peculiar worldview of the board, mercury-free dentists bear all evidentiary burdens, including the burden of demonstrating that amalgams are dangerous and that discussing these dangers with patients is not fraudulent.

When the 11-hour interrogation was over, the board told Dr. Jacobson it would let him know its decision later and sent him home. But, oddly, the board never notified Dr. Jacobson of any decision. Apparently the board decided it didn't have enough evidence to hang Dr. Jacobson, because in 1992 Pat Glasrud once again began calling several of the 14 patients whose files were used in the 1990 investigation and inviting them to voice any criticisms of Gary they might have. In 1994, Glasrud demanded six more files from Dr. Jacobson, in 1995 Dr. Jacobson received another "notice of hearing," and in 1996 he gave up his license despite the very public protest of hundreds of his patients. (Sixty patients jammed the hearing room of an administrative law judge in October 1995.)

The effort of Dr. Jacobson's patients to save him generated considerable publicity. As this publicity mounted, the Attorney General's office and the Board of Dentistry went to great lengths to argue that the prosecution of Dr. Jacobson had nothing to do with his stance on mercury in amalgams. It is true that the board, after investigating Dr. Jacobson for 12 years, had managed to concoct allegations against Dr. Jacobson that had nothing to do with mercury. They found, for example, a patient willing to say that Dr. Jacobson failed to wash his hands before treating her and yelled at her when she complained about this alleged behavior. They found, to take another example, a patient whose x-rays indicated decay in a tooth that went untreated for four years; they accused Dr. Jacobson of not seeing the decay, when in fact he did see it, he noted it on the patient's file, he noted several attempts to get the patient to come in for a filling, and he noted on the file the patient refused to come in. A few of the allegations were actually serious, but they constituted a tiny fraction of all the charges, and Dr. Jacobson's patients doubted they were true given what we knew about Dr. Jacobson and about the board's hostility to mercury-free dentists.

## AFTERMATH

The group that was formed to defend Dr. Jacobson, Dental Mercury Awareness, undertook two other campaigns in 1995. I participated in the formation of Dental Mercury Awareness. The group consisted primarily of Dr. Jacobson's patients. In the course of working with the group, I heard three or four dozen of Dr. Jacobson's patients describe experiences identical in all important respects to mine. These other patients told me they never knew they had mercury in their mouths, that they felt Dr. Jacobson was cautious in talking to them, that he did not promise them their health would get better, and that in fact their health did get better, in many cases, almost miraculously better. They defended him for the same reasons I did: They were grateful to him for telling them about the risks of amalgams even if it meant he might lose his license.

In 1995, Dental Mercury Awareness got legislation introduced that would require dentists to tell patients amalgam contains mercury. This effort and other activities generated a lot of publicity about the amalgam controversy. Our bill (SF 1229/HF 1520) was heard in the Senate Health Care Committee in December 1995. Before that

committee, Dr. George Kinney, then president of the Board of Dentistry, testified, "I'd like to share with you that the board is opposed to all parts of Senate File 1229. We feel that it is not in the best interests of the citizens of the State of Minnesota." The Minnesota Dental Association lobbied heavily against the bill as well. Dr. Kinney's remarks, and the Minnesota Dental Association's vigorous campaign against a bill that merely required dentists to give their patients the courtesy of telling them amalgams contain mercury, are further evidence that the Board was operating on an unwritten but highly public policy forbidding dentists from telling patients amalgams contain mercury, much less that the mercury might be hazardous to their health.

One of the articles generated in local papers by our efforts was a long front-page article in the *Star Tribune* ("Health claims in dispute over replacing fillings," October 8, 1995). Although Humphrey's office and the board sought to peddle the notion that its investigation of Gary was not centered on his refusal to use amalgam, the *Star Tribune* was not fooled. "[The Minnesota Board of Dentistry] has accused the Bloomington dentist of fraud and misconduct for allegedly pushing an expensive treatment that has never been proven to work: removing people's fillings, called amalgams, to free them of 'mercury poisoning,'" said the paper.

## CONCLUSION

Minnesota's board of dentistry has apparently never formally endorsed the ADA's "ethical" principle or any other version of a gag rule. Nevertheless, dentists in Minnesota have long acted as if such a gag rule is operative, and they have done so for good reason: The Board of Dentistry has made it very clear by its actions that it will persecute mercury-free dentists merely for being mercury-free. The Board of Dentistry's enforcement of its unwritten gag rule has deprived mercury-free dentists in Minnesota of the right to speak freely to their patients and to advise them as they see fit. Most importantly, it has deprived many Minnesotans, including me, of their right to know when a dangerous substance is being placed in their bodies. I urge the board not only to renounce its unwritten gag order, but to adopt a rule requiring that Minnesota dentists tell patients amalgam contains mercury before they place amalgams in their patients' mouths.