

Dr. Harry Greenough has been licensed as a dentist in Alaska since 1985. In 1988, he incorporated Northland Dental, Inc. and opened his own dental office in Anchorage. He has operated that business continuously from its inception to the present. Dr. Greenough entered a stipulation with the board in 1992 admitting to improper prescribing practices for controlled substances in his dentistry practice. His license was placed on probation for three years. In 1994, he entered a second stipulation with the board agreeing to other disciplinary sanctions and probation continuing through January 24, 1998, as a result of additional inappropriate prescriptive practices.

On November 22, 1996, Dr. Greenough contacted the Jewel Lake Carrs pharmacy by phone and misrepresented himself in an effort to obtain a prescription for a patient. On January 30, 1997, the Division of Occupational Licensing filed an Accusation against Dr. Greenough under AS 44.62.360 seeking disciplinary sanctions based upon the Carrs incident. The division filed an Amended Accusation on December 17, 1997, adding additional allegations based upon Dr. Greenough's 1997 criminal convictions stemming from Medicaid fraud and insurance fraud in his billing practices, and based upon untruthful statements in a license renewal application to the division. The division filed a Second Amended Accusation on June 9, 1998.¹ The current accusation has two counts. The first count alleges the Carrs incident provides a basis for discipline

¹ The document was signed on March 20, 1998, but not filed with the hearing officer until June 9, 1998.

under AS 08.36.315(2) and (7). The second count seeks to impose discipline under AS 08.36.315(2) and (5) based upon Dr. Greenough's convictions.

The current accusation also alleges violations of provisions 8 (D), (F), and (H) of the 1994 stipulation. Among other things, these provisions reserve sanction options for the board and require Dr. Greenough to obey all board orders as well as Alaska and federal laws pertaining to the practice of dentistry. (exh. 11, pp. 4-8)

Dr. Greenough requested a hearing under the APA, and the matter was referred to the hearing officer under AS 44.62.340. The parties stipulated to partial summary judgment to the effect that Greenough violated AS 08.36.315(2), (5) and (7), and violated paragraphs D and H of the November 14, 1997 Order by the board. See June 10, 1998 Order Granting Partial Summary Judgment. However, the proposed order filed with and signed by the hearing officer misidentifies the convictions as "two felony charges of scheme to defraud" and misidentifies violations of a November 14, 1997 board Order, instead of November 14, 1994.

A hearing commenced on June 30, 1998. Testimony was taken over a period of four days, with the concluding testimony and closing arguments made on September 1, 1998, at the request of Dr. Greenough and by agreement of the parties. All references to exhibits in this proposed decision are to exhibits admitted as evidence at the hearing.

The parties stipulated to many of the facts in this case, including most of the facts surrounding the Carrs incident and Dr. Greenough's two convictions.

They also stipulated to the two convictions and the telephone call giving rise to the Carrs incident providing a basis for board discipline under AS 08.36.315(2), (5) and (7). (exh. 2, pp. 6-7; Direct examination of Greenough, tape 12A; Order dated March 20, 1998) The central issue in this case is therefore the appropriate disciplinary sanction under these statutory provisions. The division argued at the hearing for suspension of Dr. Greenough's license. In contrast, Greenough seeks a lesser sanction and has argued for a combination of probationary conditions with no suspension.

II. Procedural Considerations

The following procedural considerations apply to the board in this case. When reviewing a proposed decision by the hearing officer, the board is acting in an adjudicative (quasi-judicial) capacity and is restricted in its deliberations to the evidentiary record created in conjunction with the administrative hearing. See Stein v. Kelso, 846 P.2d 123, 126 (Alaska 1993). Under AS 44.62.630, board members may not engage in interviews with, or receive evidence or argument from a party, directly or indirectly, except upon opportunity for all other parties to be present. This prohibition does not preclude the hearing officer from attending a closed executive session of the board upon request, and it does not deprive the board of discretion to receive assistance from the hearing officer in its deliberations. See AS 44.62.500; Storrs v. State Medical Board, 664 P.2d 547, 553 (Alaska 1983); Rosi v. State Medical Board, 665 P.2d 28, 29 (Alaska 1983). If a board member is contacted by a party or a representative of a party, or

otherwise exposed to information regarding this case which is not in the record, the board member should disclose the communication or conflict without tainting the deliberations of the board, and consider whether disqualification or withdrawal is appropriate under AS 44.62.450(c) and AS 44.62.630.

At this juncture, the APA does not provide for briefing or other communications from the parties to the board until after a decision has been made in accordance with AS 44.62.500. Any objections to or requests for reconsideration of the proposed decision are premature if filed by the parties before the board chooses an option under the statute. If the board chooses to address objections at this preliminary stage, it does so without having heard the evidence presented at the hearing and with the risk that all objections may be raised again after the board's final decision, in accordance with AS 44.62.540.

This document constitutes the hearing officer's proposed decision to the board under AS 44.62.500. The board may either accept, reject, or modify this proposed decision as allowed by the statute. And, if the board accepts or modifies this decision as allowed by AS 44.62.500, that action constitutes the final administrative order from which an appeal by right is allowed to superior court. See AS 44.62.560; Alaska R. App. Proc. 602(a)(2).

III. Issue

What is the appropriate sanction of Dr. Greenough's license for admitted violations of AS 08.36.315(2), (5) and (7), and allegations in the Second Amended Accusation and Petition to Revoke Probation that are proven?

IV. Applicable Law

The following laws apply in this administrative proceeding.

Sec. 08.01.075. Disciplinary powers of boards. (a) A board may take the following disciplinary actions, singly or in combination:

- (1) permanently revoke a license;
- (2) suspend a license for a specified period;
- (3) censure or reprimand a licensee;
- (4) impose limitations or conditions on the professional practice of a licensee;
- (5) require a licensee to submit to peer review;
- (6) impose requirements for remedial professional education to correct deficiencies in the education, training, and skill of the licensee;
- (7) impose probation requiring a licensee to report regularly to the board on matters related to the grounds for probation;
- (8) impose a civil fine not to exceed \$5,000.

(b) A board may withdraw probationary status if the deficiencies that required the sanction are remedied.

(c) A board may summarily suspend a licensee from the practice of the profession before a final hearing is held or during an appeal if the board finds that the licensee poses a clear and immediate danger to the public health and safety. A person is entitled to a hearing before the board to appeal the summary suspension within seven days after the order of suspension is issued. A person may appeal an adverse decision of the board on an appeal of a summary suspension to a court of competent jurisdiction.

(d) A board may reinstate a suspended or revoked license if, after a hearing, the board finds that the applicant is able to practice the profession with skill and safety.

(e) A board may accept the voluntary surrender of a license. A license may not be returned unless the board determines that the licensee is competent to resume practice and the licensee pays the appropriate renewal fee.

(f) A board shall seek consistency in the application of disciplinary sanctions. A board shall explain a significant departure from prior decisions involving similar facts in the order imposing the sanction.

Sec. 08.36.070. General powers. (a) The board shall

- (1) provide for the examination of applicants and issue licenses to those applicants it finds qualified;
- (2) register licensed dentists and licensed dental hygienists who are in good standing;

- (3) affiliate with the American Association of Dental Examiners, and pay annual dues to the association;
- (4) hold hearings, and order the disciplinary sanction of a person who violates this chapter, AS 08.32, or a regulation of the board;
- (5) supply forms for applications, licenses, permits, certificates, and other papers and records;
- (6) enforce the provisions of this chapter and AS 08.32 and adopt or amend the regulations necessary to make the provisions of this chapter and AS 08.32 effective;
- (7) adopt regulations ensuring that renewal or registration is contingent upon proof of continued professional competence by a licensed dentist or licensed dental hygienist;
- (8) provide the department with the requirements for proof of continued professional competence and request the department to make these requirements available to each licensed dentist and licensed dental hygienist at least one year before the date on which the dentist or dental hygienist must renew registration;
- (9) at least annually cause to be published in a newspaper of general circulation in each major city in the state a summary of disciplinary actions the board has taken during the preceding calendar year;
- (10) issue permits or certificates to licensed dentists, licensed dental hygienists, and dental assistants who meet standards determined by the board for specific procedures that require specific education and training;
- (11) regulate the reentry into practice of inactive dentists and dental hygienists;
- (12) require, as a condition of a license or license renewal issued by the board, that an applicant or licensee has, at the time of licensing or renewal and maintains throughout the period of a license, current certification in cardiopulmonary resuscitation techniques, except that the board may waive this requirement under an agreement with the applicant or licensee if the physical impairment that results in an inability to be certified in cardiopulmonary resuscitation techniques and the agreement specifies that the applicant or licensee will ensure that another person who is certified in cardiopulmonary resuscitation techniques will be in the same room as the applicant or licensee whenever the applicant or licensee is practicing dentistry on a living patient who is also present; the board may include in the agreement an expiration date or provide that the agreement remains in effect until reviewed by the board.

(b) The board may

- (1) order a licensed dentist or licensed dental hygienist to submit to a reasonable physical or mental examination if the dentist's or the dental hygienist's physical or mental capacity to practice safely is at issue; and

(2) authorize its representative to inspect the practice facilities or patient or professional records of a dentist at reasonable times and in a reasonable manner to monitor compliance with this chapter and with AS 08.32

Sec. 08.36.110. Qualifications for license. An applicant for a license to practice dentistry shall

(1) provide certification to the board that the applicant

(A) is a graduate of a dental school that at the time of graduation is accredited by the Commission on Accreditation of the American Dental Association;

(B) holds a certificate from the American Dental Association Joint Commission on National Dental Examinations that the applicant has successfully passed the written examinations given by the commission;

(C) has not had a license to practice dentistry revoked, suspended, or voluntarily surrendered in this state or another state;

(D) is not the subject of an adverse decision based upon a complaint, investigation, review procedure, or other disciplinary proceeding within the five years immediately preceding application, or of an unresolved complaint, investigation, review procedure, or other disciplinary proceeding, undertaken by a state, territorial, local, or federal dental licensing jurisdiction or a dental society;

(E) is not the subject of an unresolved or an adverse decision based upon a complaint, investigation, review procedure, or other disciplinary proceeding, undertaken by a state, territorial, local or federal dental licensing jurisdiction, dental society, or law enforcement agency that relates to criminal or fraudulent activity, dental malpractice, or negligent dental care and that adversely reflects on the applicant's ability or competence to practice dentistry or on the safety or well-being of patients;

(F) is not the subject of an adverse report from the National Practitioner Data Bank or the American Association of Dental Examiners Clearinghouse for Disciplinary Information that relates to criminal or fraudulent activity, or dental malpractice;

(G) is not an impaired practitioner;

(2) pass, to the satisfaction of the board, written, clinical, and other examinations administered or approved by the board; and

(3) meet the other qualifications for a license established by the board by regulation.

Sec. 08.36.315. Grounds for discipline, suspension, or revocation of license. The board may revoke or suspend the license of a dentist, or may reprimand, censure, or discipline a dentist, or both, if the board finds after a hearing that the dentist

- (1) used or knowingly cooperated in deceit, fraud, or intentional misrepresentation to obtain a license;
- (2) engaged in deceit, fraud, or intentional misrepresentation in the course of providing or billing for professional dental services or engaging in professional activities;
- (3) advertised professional dental services in a false or misleading manner;
- (4) received compensation for referring a person to another dentist or dental practice;
- (5) has been convicted of a felony or other crime that affects the dentist's ability to continue to practice dentistry competently and safely;
- (6) engaged in the performance of patient care, or permitted the performance of patient care by persons under the dentist's supervision, that does not conform to minimum professional standards of dentistry regardless of whether actual injury to the patient occurred;
- (7) failed to comply with this chapter, with a regulation adopted under this chapter, or with an order of the board;
- (8) continued to practice after becoming unfit due to
 - (A) professional incompetence;
 - (B) failure to keep informed of or use current professional theories or practices;
 - (C) addiction or dependence on alcohol or other drugs that impairs the dentist's ability to practice safely;
 - (D) physical or mental disability;
- (9) engaged in lewd or immoral conduct in connection with the delivery of professional service to patients;
- (10) permitted a dental hygienist or dental assistant who is employed by the dentist or working under the dentist's supervision to perform a dental procedure in violation of AS 08.32.110 or AS 08.36.070(a)(10);
- (11) failed to report to the board a death that occurred on the premises used for the practice of dentistry within 48 hours.

12 AAC 28.910. DENIAL OF LICENSURE. Conviction of a felony in the five years preceding application is evidence of unacceptable moral character and may result in denial of licensure.

V. Burden and Standard of Proof

Under the APA, the division has the burden of proof by a preponderance of the evidence to establish a basis for disciplinary sanctions. See AS 44.62.460(e)(1). A preponderance of the evidence means something is more

likely than not true. That is, there is a greater than 50 percent chance that it is true. See Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America, 748 P.2d 1169, 1170-72 (Alaska 1988). Because the parties stipulated to the Carrs incident and Dr. Greenough's two convictions providing a basis for discipline under provisions of AS 08.36.315, this case is primarily concerned with the board's exercise of discretion in choosing an appropriate disciplinary sanction.² See June 10, 1998 Order Granting Partial Summary Judgment.

VI. Findings of Fact

At the hearing, there were few objections to testimony, and nearly all of the exhibits introduced were admitted as evidence. Both parties were given an opportunity after the hearing to file written objections to the final exhibit list. (9/4/98 Order Regarding Closing Briefs and Final Exhibit List) Neither party filed objections. The parties also stipulated to many facts in advance of the hearing. (exh. 2) Based on the evidence in the record, and having listened to all the testimony twice and sometimes more, the hearing officer makes the following findings of fact:

1. Harry W. Greenough completed his dental training in 1984 at the Medical College of Virginia. In 1985, Greenough obtained a license to practice

² The Second Amended Accusation seeks to impose discipline "for Greenough's previous conduct which resulted in the Stipulation dated November 14, 1994 and his current conduct resulting in probation violations." (Second Amended Accusation and Petition to Revoke Probation, p. 3)(emphasis added)

dentistry in Alaska. He has practiced dentistry in Alaska continuously since that time. (Cross-examination of Greenough, tape 12B; exh. 2, p.1; exh. 8)

2. Dr. Greenough's technical dentistry skills in treating patients reflect competence. (Cross-examination of Harper, tape 5B; Direct examination of Hansen, tape 6A; Direct examination of Garrison, tape 11A; Direct examination of Smith, tape 11A; Direct examination of Haller, tape 11B; exhs. A, F)

3. In 1985 or 1986, Dr. Greenough worked with S.B., another dentist in Anchorage with whom he shared an office. During that time, Greenough wrote prescriptions for injectable Demerol for S.B. that were not dentally necessary. Greenough testified at the hearing he "knew that it was wrong." He stopped working in that dental office due to his colleague's drug abuse problem. (Cross-examination of Greenough, tape 12B; exh. 6, pp. 2-3)

4. Dr. Greenough worked for A-Bar-O dental clinic in Anchorage during 1987 and 1988. He testified at the hearing "I was terminated" by A-Bar-O. In contrast, he told Dr. Paul Craig during an evaluation required by the board on September 1, 1994, that other than being fired from a factory job after high school, he had never been terminated from a job. Upon leaving A-Bar-O in 1988, Greenough incorporated as Northland Dental, Inc. He operated the corporation primarily as a solo dental practice in Anchorage from that time to the present. (Cross-examination of Greenough, tape 12B; exh. 6, p. 6)

5. By stipulation dated January 24, 1992 and approved by the Board of Dental Examiners, Dr. Greenough admitted to the following facts:

(a) During the period from approximately November 29, 1988, to approximately March 16, 1990, Greenough issued to a patient named P.L. 16 prescriptions, for a total of 268 four milligram capsules of Dilaudid, a synthetic analog of morphine and a schedule II controlled drug. During this period, Greenough provided routine dental treatment to P.L., including dental cleanings, restorative crowns, and one filling.

(b) During the period from approximately March 23, 1990, to approximately October 18, 1990, Dr. Greenough issued eight prescriptions to P.L., for a total of 88 four milligram capsules of Dilaudid. Greenough continued to prescribe Dilaudid even after he had counseled P.L. on approximately April 10 and April 19, 1990, about the addictive qualities of the drug. During the period from March 23, 1990, to October 18, 1990, Greenough performed routine dental treatment on P.L., such as cleanings and restorative crowns. He also performed a gingival graft on P.L. on March 23, 1990.

(c) During the period from September 1989 through July 1991, Greenough issued to C.B. at least 48 prescriptions for analgesic medications, including Vicodin, a schedule III controlled substance; Hydrocodone with APAP, a schedule III controlled substance; and Anexsia, a schedule III controlled substance. The dosage selected, the quantity prescribed, and the regularity with which Dr. Greenough prescribed these controlled substances to C.B. was excessive. In addition, in some instances prescriptions were dispensed to C.B. without accompanying dental treatment. Greenough admitted that prescriptions

for C.B. were not dentally necessary. He held the belief that: "I was the only one who could help him." (Direct examination of Greenough, tape 12A)

(Direct examination of Greenough, tape 12A; exh. 1, pp. 1-2; exh. 2, p.1)

6. C.B. and his wife own Val-Pak, a coupon business in Alaska providing commercial advertising. Greenough and C.B. started out with a dentist-patient relationship. In addition to that still on-going relationship, they developed a business relationship involving Greenough's long-time (1989 to present) continuous use of Val-Pak for advertising. The two men are also social friends. Greenough lived with C.B. for 5-6 months during his divorce, and they have gone fishing together. (Direct examination of Greenough, tape 12A; Cross-examination of Greenough, tape 12B; exh. 2, attach. 1, p. 2; exh. 6, p. 2; exhs. 15 – 19; exh. 24, 2/16/98 Adult Hospital Admission Note)

7. As part of the January 24, 1992 stipulation, the board placed Dr. Greenough on probation for three years. As a condition of probation Greenough was required to write all prescriptions for schedule II and III controlled substances on sequentially numbered triplicate prescription pads, providing one copy of each prescription to the division's probation coordinator. Greenough also was required to attend a prescriptive practices seminar at the Oregon Health Sciences University in Portland, Oregon. Paragraph nine of the stipulation gave the board continuing authority to discipline Dr. Greenough's license for violation of any term or condition of his probation. (Direct examination of Slisz, tape 9B; exh. 1, pp. 4-8; exh. 2, pp. 1-2)

8. Dr. Greenough did not meet the probation condition that he write all prescriptions for schedule II and III controlled substances on sequentially numbered triplicate prescription pads and provide a copy of each prescription to the division's probation coordinator. He wrote 47 prescriptions in violation of the probation order. On 37 of those occasions, he wrote prescriptions for Vicodin to C.B. that were not dentally necessary. Other unjustified prescriptions were written for a former patient who knew nothing about the prescription, and for two other individuals – a patient and Greenough's sister – for which there were no corresponding notes in their dental charts. (exh. 2, attach. 1, pp. 2-3; exh. 6, p. 2)

9. By decision dated July 7, 1994, the board summarily suspended Dr. Greenough's license based on a series of alleged probation violations, including his writing additional prescriptions for C.B. not dentally necessary and not reported to the probation coordinator. At the time of summary suspension, there was also an allegation that Dr. Greenough was personally using prescription drugs unlawfully. The allegation was not proven, and none of the medical records in this case establish that Greenough unlawfully used prescription drugs himself. (exh. 2, p. 2; exh. 2, attach. 1, pp. 2-8; exh. 24; exh. E)

10. After a hearing on the summary suspension of Dr. Greenough's license, the board adopted a recommended decision by hearing officer Johnson allowing Greenough to continue to practice dentistry, pending a final hearing, under conditions that included the following:

(a) "Dr. Greenough will submit to random urinalysis and/or blood

serum testing within two hours of a request by the Division of Occupational Licensing.”

(b) “Dr. Greenough will submit to any further neurological and/or physical exams as requested by the Division of Occupational Licensing based on the last medical exam performed.”

(c) “Dr. Greenough will have a complete psychological exam focusing on any propensity for addiction to controlled substances and/or abuse of controlled substances, by Dr. Harper, or another psychologist nominated by the Division of Occupational Licensing.”

(d) “Dr. Greenough will continue in therapy with Dr. Harper on the basis of at least one session per week or more, as Dr. Harper shall deem necessary.”

(e) “Dr. Greenough will have no further professional, personal or social contact, including any telephone contact, with [C.B.]”

(f) “Dr. Greenough will be prohibited from writing prescriptions for any controlled substance from any schedule, but will not be required at this time to surrender his DEA registration.”

(exh. 2, attach. 1)

11. The division sought to revoke Dr. Greenough’s license through an Amended Accusation dated November 1, 1994 in combined Case Nos. 1200-90-9 and 1200-94-6. On November 17, 1994, Greenough entered a stipulation which was approved by the board. In it, he admitted to violating conditions of probation from the January 24, 1992 Order by writing additional prescriptions for

C.B. of controlled substances not dentally necessary and which he failed to report to the probation coordinator. Through the November 17 stipulation, Greenough agreed to the following:

- (a) 60 day suspension of license consisting of two 30 day suspension periods;
- (b) \$10,000 combined fine consisting of two \$5,000 fines;
- (c) surrender of Drug Enforcement Administration (DEA) Certificate of Registration allowing prescription of controlled substances;
- (d) continued probation conditions until January 24, 1998 including the use of another dentist as a practice monitor.

(Direct examination of Slisz, tape 9B; exh. 1; exh. 9; exh. 11)

12. On November 21, 1994, Dr. Greenough filed a license renewal application with the division. Greenough's signature on the application was dated October 17, 1994 and certified under penalty of perjury. In the Professional Practice section of the application, question 2 asks "During the last registration period, have you: engaged in deceit, fraud, or intentional misrepresentation in the course of providing or billing for professional billing services or engaging professional activities?" Question 6 of the same section asks "During the last registration period, have you: failed to comply with this chapter, with a regulation adopted under this chapter, or with an order of the board?" Dr. Greenough responded "no" to both questions. Both of his answers were false. At the hearing in this case, Dr. Greenough admitted "I answered incorrectly on one of the questions." He also admitted through stipulation in this

case that he engaged in deceit, fraud or intentional misrepresentation regarding his billings during 1992-94. (Cross-examination of Greenough, tape 12B; exh. 2, p. 7; exh. 2, attach. 4; exh. 8)

13. Dr. George Hansen is a retired dentist who agreed to monitor Dr. Greenough during his probation and report to the division's probation coordinator. Hansen has known Dr. Greenough from the time Greenough took his Alaska dental board exam in 1985, and they belong to the same church. He frequently refers patients to Greenough. He testified that Greenough is a highly competent dentist. Although there was no obligation, Greenough compensated Dr. Hansen for serving as his monitor by giving him artwork. Hansen expressed his opinion that it would be an injustice for the board to take Greenough's license, and he believes Greenough's loss of his DEA certificate is penalty enough. Hansen also wrote a letter to the judge in support of Greenough at his criminal sentencing proceeding. (Direct testimony of Hansen, tape 6A; Cross-examination of Hansen, tape 6B; exh. 11, p. 7; exh. A - 1)

14. Dr. Jess Ellis has been licensed as a dentist in Alaska since 1988 practicing in the specialty area of endodontics. Prior to Dr. Greenough's license probation in 1992, Greenough referred many patients to him. Ellis also belonged to the same church congregation as Greenough, and he has known Dr. Hansen since 1988. After Greenough surrendered his DEA certificate in 1994, he and Ellis began an arrangement by which Greenough could obtain prescriptions for his dental patients through referral. The procedure, which the division did not object to, involved Greenough contacting Ellis when there was a need for a

prescription. Ellis usually would receive a phone call, but the procedure involved a fax transmittal as well. Upon reviewing the information from Greenough, Ellis would prescribe the appropriate drug and call the pharmacy. Near the conclusion of his direct examination, Dr. Ellis used the following driving analogy in reference to Dr. Greenough's conduct as a dentist: "He may have done a few California stops at the stop light, or he may have done a little speeding, but I haven't seen any reckless driving." (Direct examination of Ellis, tape 10B; Cross-examination of Ellis, tape 10B; exh. 2, p. 3)

15. On November 22, 1996, while still on probation, Dr. Greenough provided dental treatment to T.R. Upon determining that T.R. was in significant pain after treatment, Greenough believed it was appropriate to prescribe the controlled substance Anexia to alleviate pain, and he faxed the proposed prescription to Dr. Ellis' office. After learning that Dr. Ellis was out of town, Dr. Greenough took it upon himself to obtain the prescription. He called the Jewel Lake Carr's pharmacy in Anchorage and either represented himself as Dr. Ellis or indicated he was an agent for Ellis. The pharmacist's contemporaneous report of the incident reflects that Greenough identified himself as Dr. Ellis. There was evidence supporting both possibilities. Greenough was not an authorized agent for Ellis in any event. The pharmacist asked Greenough for Dr. Ellis' DEA number. Although Greenough had Ellis' number, he put the pharmacist on hold, then came back to the phone and indicated he would have to call back later. According to Greenough, he kept Ellis' DEA number in his Weekly Minder calendar as a backup plan for obtaining prescriptions in situations

such as he faced with T.R. He testified that after the Carrs incident, "I destroyed that piece of evidence." (Direct examination of Ellis, tape 10B; Cross-examination of Ellis, tape 10B; Direct examination of Greenough, tape 12A; Cross-examination of Greenough, tape 12A; exh. 2, pp. 3-6)

16. After his conversation with the pharmacist, Greenough called Dr. Ellis in Seattle. Ellis was surprised by Greenough's actions, and he advised Greenough to "straighten it out" by calling the pharmacy back and apologizing. Ellis contacted his office about the prescription, and then he called the pharmacy. He spoke with the same pharmacist who had the conversation with Greenough. The pharmacist asked Dr. Ellis if he had just called, and he responded no. The pharmacist told him that someone else had called a short while earlier, identifying himself as Dr. Ellis and requesting a prescription. Although he knew what had taken place, Ellis did not identify Greenough or explain what he had done. During the phone call, Dr. Ellis authorized the prescription for T.R. (Direct examination of Ellis, tape 10B; Cross-examination of Ellis, tape 10B; exh. 2, pp. 3-4)

17. In response to Dr. Ellis' request, Greenough called the pharmacy later that evening. Greenough identified himself, explained that he called earlier and misrepresented his identity, and apologized. The pharmacist receiving the phone call notified her supervisor of it, and at his direction prepared a summary of the events. The pharmacist later shared the incident with the division's investigator. (Direct examination of Slisz, tape 9B; Direct examination of Greenough, tape 12A; exh. 2, p. 4)

18. On January 30, 1997, the division issued an Accusation against Dr. Greenough in this case alleging that he misrepresented himself as Dr. Ellis to the Carrs pharmacy on November 22, 1996 in an attempt to dispense a controlled substance. The accusation alleges violations of AS 08.36.315(2) and (7) arising from the Carrs incident. (exh. 2, p. 4)

19. On June 14, 1996, a 29 count indictment was filed against Dr. Greenough in superior court Case No. 3AN-S96-4199 CR, charging him with criminal felony violations relating to Medicaid fraud, insurance fraud and falsifying records allegedly occurring between May 1989 and September 1994. An Information Amending and Supplanting Indictment was filed on April 16, 1997, containing two counts involving billings to: Alaska Medicaid Program; Aetna Insurance Company; Zenith Administrators, Inc. or Northern Alaska Carpenters Health/Security Trust; and Blue Cross Insurance Company. On September 16, 1997, Dr. Greenough plead no contest to and was convicted of the following two class C felonies in Case No. 3AN-S96-4199 CR: Theft in the Second Degree (AS 11.46.130(a)(1)) and Falsifying Business Records (AS 11.46.630(a)(1)). Greenough has stipulated "for purposes of the criminal case and for proceedings before the Board of Dental Examiners, he has been convicted of offenses involving multiple instances of intentionally deceptive and fraudulent behavior." (exh. 2, pp. 4-5; exh. 2, attach. 2 – 4; exh. C)

20. On September 16, 1997, Dr. Greenough was sentenced in Case No. 3AN-S96-4199 CR. The sentence included the following:

(a) four year suspended imposition of sentence;

(b) conditions of probation including

- (1) six months incarceration on each count to run concurrently;
- (2) 300 hours of community service, part of which is to be "spent educating your peers about consequences of this conduct;" and
- (3) restitution in the amount of \$5,335.33.

(Direct examination of Greenough, tape 11B; exh. 2, pp. 5-6; exh. 2, attach. 4; exh. C)

21. In serving his sentence, Dr. Greenough spent six days incarcerated at Cook Inlet Pre-Trial Facility. He was then moved to a half-way house for the remainder of his incarceration. While residing at the half-way house, he was released during the day to work normal office hours at his dental clinic. (Cross-examination of Greenough, tape 12B; exh. 24, 2/16/98 Admission Note of Dr. Irons and 2/17/98 Daily Progress Report by Irons)

22. After his convictions on September 16, 1997, Dr. Greenough's attorney recommended that he begin counseling with psychiatrist Deborah Geeseman, M.D. Although Greenough's therapy with her occurred over two dozen times during a 4 - 6 month period, Greenough said he did not feel he had a significant therapeutic dialog with her. Dr. Geeseman's records regarding therapy with Greenough were not introduced as evidence at the hearing, and she did not testify at the hearing. Her records were not provided to Dr. Sperbeck for his 1998 evaluation. A note from Dr. Irons at Menninger Clinic memorializes

his May 4, 1998 conversation with Dr. Geeseman expressing “significant questions that were raised regarding the possibility of [Greenough] and [Geeseman] working together in the future.” Dr. Irons also noted that Greenough had difficulty acknowledging his therapeutic relationship with Geeseman. (Cross-examination of Greenough, tape 12B; exh. 21; exh. 24, Inpatient Addictions Assessment, 2/19/98; exh. 24, 3/4/98 Report of Phone Contact; exh. 24, 3/4/98 Therapy Record; exh. 24, 3/5/98 Therapy Record; exh. 24, Therapy Record of Dr. Irons, 3/12/98)

23. On December 17, 1997, the division filed an Amended Accusation and Petition to Revoke Probation in this case. The pleading added allegations under AS 08.36.315(5) against Dr. Greenough based upon his criminal convictions. It also added allegations under AS 08.36.315(1) against Greenough based on untruthful statements in his November 21, 1994 license renewal application to the effect that he had not engaged in any fraud or misrepresentation in the course of billing for dental services and had not failed to comply with licensing laws or an order of the board. (Amended Accusation and Petition to Revoke Probation; exh. 2, p. 6)

24. Beginning in 1994 and upon the advice of his attorney, Dr. Greenough began seeing clinical psychologist James Harper, Ph. D. for counseling. The sessions initially focused on issues related to his divorce that year, but according to Dr. Harper they eventually “were eclipsed by issues relating to his dental practice.” Dr. Greenough was on probation with the board during most of the time he was seeing Dr. Harper. In 1994, Greenough denied

to Harper that he had engaged in billing fraud. Harper indicated that by August 1994, Greenough was adequately progressing with therapy and was keeping appointments. However, that changed as the year progressed. Harper testified at the hearing that Greenough later attempted to keep introspection "at arm's length;" had difficulty making and keeping appointments; and was primarily responsible for ending the therapy relationship. According to Harper, Greenough "simply stopped making appointments," and he "did not complete the treatment." Greenough testified that a reason he ended therapy was "I fizzled out." Dr. Harper last met with Greenough on December 31, 1994. Harper closed his Alaska practice and moved out of state in October 1995. (Direct examination of Harper, tapes 3A and 3B; Cross-examination of Harper, tape 6A; Re-direct examination of Harper, tape 5B; Cross-examination of Greenough, tape 12B; exhs. 5, 10; exh. B - 1)

25. As a condition of the board's July 19, 1994 decision in combined case nos. 1200-90-009 and 1200-94-006, Dr. Greenough was required to undergo a psychological evaluation. He was evaluated the following month by clinical psychologist David Sperbeck, Ph. D. Dr. Sperbeck issued a report dated August 17, 1994 in which he diagnosed Greenough with dependent personality disorder and identified Greenough's major clinical symptom as anxiety. The report also indicated Greenough was making progress in therapy with Dr. Harper, and it contained the recommendation that Greenough continue the therapy. At the hearing, Dr. Sperbeck expressed his opinion that Greenough had a "severe personality pathology" and there was a "need for this patient to develop an

internal system of moral checks and balances.” (Direct examination of Sperbeck, tapes 7B, 8A and 8B; exh. 2, attach. 1, pp. 9-10; exh. 4)

26. Dr. Sperbeck evaluated Dr. Greenough a second time, after the Menninger Clinic treatment and at the request of the division. His report for this evaluation is dated June 8, 1998. In response to questions regarding Dr. Greenough’s prognosis, Dr. Sperbeck replied:

The prognosis for Dr. Greenough’s psychological improvement is fair to good, due to the reasons cited in the preceding response [exh. 21, pp. 5-6]. Although his treatment experiences with Dr. Geeseman and the Menninger Clinic were not curative, these no doubt were of some value to him. More importantly, Dr. Greenough’s condition is now clearly understood by him to be in need of a long-term treatment response, i.e., foundational and insight-oriented psychotherapy, rather than short-term crisis intervention. He has an excellent therapist who understands and also believes this in Dr. Kiehl. The outcome now is wholly dependent upon Dr. Greenough’s willingness to stay in therapy until discharged by Dr. Kiehl.

Sperbeck’s 1998 report also describes Greenough as a complicated patient and recommended treatment “[m]ay include periodic supplemental psychotropic medication trials, confrontation therapy, values clarification therapy and periodic marriage / family therapy to maintain, extend, and / or test gains made in the psychotherapy setting.”

(Direct examination of Sperbeck, tape 8B; exh. 21, pp. 4, 6)

27. Clinical neuropsychologist Paul Craig, Ph. D. also evaluated Greenough on September 1, 1994. Dr. Craig reviewed reports of Dr. Sperbeck and Dr. Harper regarding Greenough. Craig’s report concludes:

In summary, from a neuropsychological perspective, this patient has the necessary neurocognitive skills to be able to handle his

responsibilities as a dentist. There is no indication that he is suffering from any organic brain dysfunction in association with any substance usage in the past. It appears that the exclusive issues of concern in this patient's case involve his dependency as described by Dr. Sperbeck. Likewise, his behavior would suggest that he still does not fully understand his personal responsibility for some of the problems in his life, which remains an issue. Of course, this is the reason he continues to be in need of psychotherapeutic intervention under the care of Dr. Harper.

(exh. 6)

28. Dr. Greenough admits that for purposes of his criminal case (3AN-S96-4199 Cr.) and the current proceeding before the board, "he has been convicted of offenses involving multiple instances of intentionally deceptive and fraudulent behavior." (exh. 2, p. 5)

29. A hearing in this case was initially scheduled for May 22, 1997, before hearing officer Flavin based on the January 30, 1997 Accusation and Petition to Revoke Probation. On March 18, 1997, the hearing was rescheduled to June 3, 1997. Effective May 5, 1997, this case was re-assigned to hearing officer Stebing based Mr. Flavin's departure from state employment. At a status conference on May 27, 1997, the parties jointly requested and were granted a continuance of the hearing until after Dr. Greenough was sentenced in Case No. 3AN-S96-4199 Cr. The sentencing was later postponed from August until September 16, 1997. At a telephonic conference in this case on September 25, 1997, a hearing was rescheduled for February 24, 1998 by agreement of the parties. On February 10, 1998, Dr. Greenough filed a Motion to Continue Hearing on an expedited basis for the purpose of allowing him to participate as part of an in-patient psychiatric program at the Menninger Clinic in Topeka,

Kansas. The motion was granted, and the hearing was continued. At a telephonic conference on February 24, 1998, a hearing was re-scheduled to commence April 13, 1998. By Order dated March 27, 1998, the hearing was continued again upon request of the division for the purpose of having Dr. Greenough evaluated by Dr. Sperbeck. Greenough did not oppose the request. With agreement of the parties, the division issued a Second Amended Accusation and Petition to Revoke Probation on March 20, 1998. By Order dated March 27, 1998, the hearing was re-scheduled a final time to commence June 30, 1998. (case file; tapes 1 and 2; exh. 2)

30. Upon the advice of Dr. Geeseman and his attorney, Greenough was admitted to Menninger Clinic on February 16, 1998. On the day he was admitted, he placed a phone call from Kansas to the pharmacist in Anchorage who turned him in for the Carrs incident. Greenough contacted her to indicate how her reporting the incident had impacted his life. He testified at the hearing he was "reaching out" to her; "I was opening my heart to her;" and his thinking included "did she realize how much pain it had caused me?" The call frightened the pharmacist. Greenough stayed at Menninger four weeks and was discharged on March 13, 1998. While at the facility, he was primarily treated by Ronald Cobb, Ph. D., Irwin Rosen, Ph. D., and Richard Irons, M.D. (Direct examination of Greenough, tapes 12A and 12B; exh. 20; exh. 24; exh. D)

31. Dr. Cobb is an addiction counselor. He concluded that Greenough was not a drug or substance abuser. However, he was in need of counseling based upon other addictions that impacted his life and "many unresolved anger

issues" originating from a family with significant dysfunction. He indicated that Greenough exhibited "classic co-dependent behavior." Cobb's notes reflect that Greenough acknowledged he had an addictive personality. Cobb generally reported favorable progress by Dr. Greenough while at Menninger, and his notes indicate Greenough made some progress while at the program. (Direct examination of Cobb, tapes 4A and 4B; exh. 20)

32. Dr. Rosen is a clinical psychologist and has worked at Menninger for over 20 years. He was a psychotherapist for Greenough and had nine appointments with him. Rosen's initial diagnosis of Greenough was dysthymia, a depressive mood disorder. He testified that at the beginning of therapy, Greenough "tended to blame others more than himself." He also testified that Greenough was "opening up and becoming more genuine" during the therapy, and that he needs continuing help. (Direct examination of Rosen, tape 10A; Cross-examination of Rosen, tape 10A; exh. 24, 3/5/98 Encounter Record)

33. Psychiatrist Richard Irons was the "responsible physician" for Greenough's treatment at Menninger. Dr. Irons did not testify at the hearing. His records reflect a conclusion that Greenough was not a drug or substance abuser. He diagnosed Greenough with dysthymia and narcissistic personality disorder. Greenough's goals with Dr. Irons included dealing with depression and understanding why he has difficulty with authority and following rules. In a February 23, 1990 note, a member of Irons' staff indicated regarding Greenough: "Continues to resist looking at deeper treatment goals beyond getting a favorable report that would allow return to dental practice." A February 26, 1998 note by

Dr. Irons states Greenough "continues to struggle with the multiple problems associated with rule breaking, bending of rules and inappropriate boundaries in his personal and professional life." The February 26 note also indicates in regard to Dr. Greenough's court-ordered restitution: "The patient states he can understand \$200 of this fine, but continues to dispute the need to pay the remaining restitution." Irons noted on March 2, 1998 that Greenough "admits that he has felt somewhat coerced into treatment." Another entry by Irons' staff on March 4, 1998 states Greenough "continues to show an ongoing desire to control or manipulate the system." On March 12, 1998, the day before he was to be discharged from Menninger, a Progress Record indicates that at a group psychotherapy session addressing the topic of anger, Greenough was disinterested and: "Inattentive to discussion on identifying anger triggers and coping mechanisms – glanced at handouts. Chose to read and highlight an article he brought." A note by Dr. Irons from the day before Greenough was discharged states "he is seen to have significant rehabilitation potential." (Direct examination of Rosen, tape 10A; exh. 24, 2/16/98 Adult Hospital Admission Note; exh. 24, 2/18/98 Progress Note; exh. 24, 2/23/98 Master Treatment Plan Update; exh. 24, 2/26/98 Day Hospital Progress Record; exh. 24, 2/27/98 Residential Program Discharge Note; exh. 24, 3/2/98 Therapy Record; exh. 24, 3/4/98 Master Treatment Plan Update; exh. 24, 3/11/98 Hospital Progress Note; exh. 24, 3/12/98 Hospital Progress Note)

34. While at Menninger Clinic, Greenough underwent psychological testing by Joseph Colletti, Ph. D, including Rorschach, WAIS-R, Thematic

Apperception Test (TAT), Menninger Self-Report Packet, MCMI-III, and MMPI-2. Dr. Colletti's report, based on test results and interviews, indicates that when he asked Greenough about the criminal allegations leading to his convictions, Greenough stated: "I am the victim here." The report also states: "When asked about the billing disputes he stated that there was no fraud and that there was little 'relevance' to his backdating his services." Near the end of the report Dr. Colletti concluded Greenough "is prone to externalizing problems and blaming others for his difficulties." (exh. 24, 3/6/98 Psychological Test Report)

35. Greenough admitted at the hearing that at the time he entered Menninger, in regard to his criminal convictions he believed he was a victim of circumstances, and "the punishment was far greater than the crime." He held this belief over a year after the current proceeding was commenced, and after the hearing was continued specifically for his psychiatric treatment. Dr. Irons' notes state in reference to Greenough: "Both his psychiatrist [Geeseman] and attorney felt that he needed to show remorse and desire to change." Greenough further testified at the hearing, using apparent hyperbole, that four years ago he would have justified "to my death" the acts giving rise to his billing fraud. Upon examining Greenough at the request of the division in May 1998, Dr. Sperbeck noted Greenough was then "less prone to blaming others for his mistakes in judgment than he was at the Menninger Clinic." Dr. Harper also testified at the hearing that after the Menninger treatment, Greenough has finally moved from blaming others to recognizing how much of a role he has played. (Direct examination of Harper, tape 3A; Direct examination of Sperbeck, tape 8A; Cross-

examination of Greenough, tape 12A; exh. 21, p. 3; exh. 24, 2/16/98 Adult Hospital Admission Note, p. 2)

36. At the suggestion of Dr. Cobb, Greenough has attended Alcoholics-Anonymous (AA) meetings since the time of his Menninger treatment. Greenough indicated he intends to keep participating with AA. (Direct examination of Cobb, tape 4A; Direct examination of Greenough, tape 11B)

37. Royal Kiehl, M.D. is a psychiatrist in Anchorage to whom Greenough was referred by Dr. Rosen for treatment after Menninger. He has been treating Dr. Greenough approximately once a week since March 1998. His primary diagnosis is dependent personality, which he described as not an illness but a personality style. Dr. Kiehl expressed the opinion that much of Greenough's past psychotherapy involved blaming other people, and "coming up with excuses for why he would bend a rule." There were no significant differences between Kiehl and Sperbeck's diagnoses. Dr. Kiehl testified that Greenough is making definite improvement, and he believes Greenough will need a couple years of treatment. (Direct examination of Kiehl, tapes 6B and 7A; Direct examination of Rosen, tape 10A)

38. Most of the health care providers who counseled or evaluated Dr. Greenough expressed the opinion that depriving him of the ability to practice dentistry will negatively impact his mental health and future therapy. (Direct examination of Harper, tape 4A; Cross-examination of Harper 5B; Direct examination of Kiehl, tape 7A; Direct examination of Sperbeck, tape 8B)

39. Both Dr. Kiehl and Dr. Sperbeck expressed the opinion that

personality disorders are difficult to treat, and successful treatment is dependent on continuing in therapy. (Cross-examination of Kiehl, tape 7A; Direct examination of Sperbeck, tape 8B; exh. 21, pp. 5-6)

40. Dr. Greenough testified that he agreed with most of what Drs. Harper, Sperbeck, Rosen and Kiehl had to say at the hearing. He also testified that: "I know who's responsible for the mistakes, it's me," and "Previously, it would seem I didn't take the board seriously." (Direct examination of Greenough, tape 11B)

41. By stipulation in this case, Dr. Greenough admits the following:

- (a) his first telephone call in the Carrs incident was a violation of his probation condition requiring him to obey all board orders and all laws of the United States and Alaska pertaining to the practice of dentistry;
- (b) he violated AS 17.30.020 and 21 U.S.C. § 822 and related statutes and regulations in attempting to dispense a controlled substance without holding a valid DEA certificate;
- (c) he committed deceit, fraud, or intentional misrepresentation in the course of providing professional services when he misrepresented himself in the Carrs incident; and
- (d) he engaged in deceit, fraud, or intentional misrepresentation in the course of billing for professional dental services through his convictions for theft and falsifying business records.

(exh. 2, pp. 6-7)

42. On September 1, 1998, the last day of this hearing, and over eleven

months after he was sentenced in the criminal action, Dr. Greenough testified that he had not completed any of the 300 hours of community service required as a condition of his probation. In contrast, he told Dr. Irons the day he was admitted to Menninger that he "went to a halfway house work release program in which he was allowed to do community service," and the day following admission that "while he was on work release, he was able to continue to work in his dental practice." (Cross-examination of Greenough, tape 13A; exh. 24, Adult Hospital Admission Note 2/16/98; exh. 24, 2/17/98 Day Hospital Progress Record)

43. Many of the health care providers who evaluated or counseled Dr. Greenough and provided testimony or a report in evidence at the hearing recognized that Greenough was vulnerable to undue influence in his prescriptive practices by his friend and business compatriot C.B. At various times, Greenough's providers and the board recommended that he sever his business relationship with C.B. Greenough nonetheless continues to advertise with Val-Pak, C.B.'s company, primarily because of the pecuniary advantage he perceives. (Direct examination of Greenough, tape 12A; Cross-examination of Greenough, tape 12B; Direct examination of Harper, tape 3A and 3B; Direct examination of Sperbeck, tape 8A; exh. 2, attach. 1; exh. 4; exh. 6; exhs. 15-19; exh. 24, 2/17/98 Day Hospital Progress Record)

44. Drs. Kiehl, Sperbeck, Irons and Cobb each referenced Greenough's expressed belief that he was "above the law" in regard to his past difficulties with the board. Greenough also testified to this past belief. He no longer holds that belief. (Direct examination of Kiehl, tape 6B; Cross-examination of Sperbeck,

tape 9A; Direct examination of Greenough, tapes 11B and 12A; exh. 20; exh. 21, p. 3; exh. 24, 2/17/98 Day Hospital Progress Record)

45. Dr. Greenough's September 16, 1997 criminal sentencing in Case No. 3AN-S96-4199 CR leaves to the Alaska Board of Dental Examiners licensing sanctions for conduct giving rise to his convictions. (exh. 2, attach. 4, p. 3)

46. Through a March 20, 1998 Order in this case, the parties' Stipulated Facts are included in these findings of fact. (March 20, 1998 Order; exh. 2)

VII. Analysis

A. Competing Interests

(1) Protecting the Public Health, Safety and Welfare

Initially, it is useful to acknowledge the nature of this proceeding and the interests at stake. This is a regulatory proceeding by the state under its police power. Described as an inherent power, police power falls within the rubric of those laws "reserved to the states" under the United States Constitution. See U.S. Const. amend. X; Creelman v. State Board of Registration for Architects, 438 P.2d 215, 216 (Wash. 1968). Early in the history of our country, laws deriving from this domain were described as "that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government." See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). More recently, the Court held that in general the police power extends to all the great public needs and may be utilized in aid of what the legislative judgment

deems necessary to the public welfare. See California State Automobile Ass'n Inter-Insurance Bureau v. Maloney, 341 U.S. 105, 109 (1951).

States have long exercised the prerogative to regulate the licensing of professions under the police power. See, e.g., Dent v. State of West Virginia, 129 U.S. 114, 121-23 (1889); Smith v. State of California, 336 F.2d 530, 533-34 (9th Cir. 1964). See also 51 Am. Jur. 2d Licenses and Permits § 14 (1970).

Laws exercising the police power are universally recognized as protecting the public's health and safety through assuring competency of those who provide the services regulated. See, e.g., Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 108 (1992); Allison v. State of Alaska, 583 P.2d 813, 816 (Alaska 1978). Regarding a state's licensing authority, the United States Supreme Court has stated:

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). It has long been accepted that the practice of dentistry, relating as it does to the public health, is subject to government control. See, e.g., Semler v. Oregon State Bd. Of Dental Examiners, 294 U.S. 608, 611 (1935); Francisco v. Board of Dental Examiners, 149 S.W.2d 619, 621 (Tex. 1941).

Notwithstanding the preceding considerations recognizing a state's licensing prerogative under the police power, no state agency (or board) has inherent authority, and a delegation of authority is necessary. The Alaska

Supreme Court has held that “[a]dministrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim.” See Warner v. State of Alaska, Real Estate Commission, 819 P.2d 28, 30 (Alaska 1991). Provisions of AS 08.36 delegate to the Board of Dental Examiners authority necessary to regulate licensing in the field of dentistry. The legislature expressly charges the board as follows: “The board shall . . . hold hearings, and order the disciplinary sanction of a person who violates this chapter, AS 08.32 [dental hygienists], or a regulation of the board.” See AS 08.36.070(a)(5). Most of the types of activity listed as a basis for sanctions in AS 08.36.315 are not criminal in nature and “constitute what the legislature felt to be unprofessional conduct.” See State of Alaska v. Smith, 593 P.2d 625, 629 n.7 (Alaska 1979)(addressing disciplinary sanctions for dentist license under AS 08.36.310, now repealed, and the predecessor to AS 08.36.315)³.

(2) Greenough’s Constitutionally Protected Property Right

Another important interest in this case is Dr. Greenough’s constitutionally protected property right in his professional license. The right to engage in a profession is a qualified right and is uniquely American in some ways. In the landmark case for professional licensing, cited by most states, the Supreme Court stated in 1889:

³ Former AS 08.36.310 is entitled “Grounds for Revocation of License,” although the statute addresses the full range of disciplinary sanctions. A statute’s heading or title is not a creation of the legislature and does not constitute law. See Ketchikan Retail Liquor Dealers Ass’n v. State of Alaska, 602 P.2d 434, 438 (Alaska 1979), mod. on other grounds, 615 P.2d 1391 (1980); AS 01.05.006.

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate' acquired in them -- that is, the right to continue their prosecution -- is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

Dent v. State of West Virginia, 129 U.S. at 121 (involving validity of statute regulating licensure of physicians). The right to engage in a profession has also been characterized as an inherent right. See Waller v. State of Texas, 68 S.W.2d 601, 605 (Tex. 1934).

Subject to regulatory requirements, the right to engage in an occupation is protected by due process provisions of federal and state constitutions. See U.S. Const. amend. 14; Alaska Const. art. I, § 7. Property interests are not created by the constitution. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Rather, the constitution "extends various procedural safeguards to certain interests 'that stem from an independent source.'" See Leis v. Flynt, 439 U.S. 438, 441 (1979).

The Alaska Supreme Court has held that an individual's proprietary interest in a professional license is of sufficient importance to warrant protection under constitutional requirements providing due process of law. See Herscher v. State of Alaska, Department of Commerce, 568 P.2d 996, 1002-03 (Alaska 1977)(hunting guide license). In addition, protection is afforded a licensee under

art. I, § 1 of the Alaska Constitution. It provides in part: “. . . all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry, . . .” In regard to this provision, the Herscher court held “[i]t would be inconsistent with the spirit of this constitutional provision to take away Herscher’s right to follow his chosen pursuit as a hunting guide without affording him due process of law.” See Herscher, supra, 568 P.2d at 1003.

Depriving a person of the right to practice a profession should not be lightly undertaken. Denying or suspending a professional license may result in disgrace and humiliation to an individual as well as precluding him from the means to earn a living. See, e.g., Kalman v. Walsh, 189 N.E. 315, 317 (Ill. 1934); Waller v. State of Texas, 68 S.W.2d at 605.

B. Timing of this Discipline

Considerable time has passed between the initial accusation in this case on January 30, 1997, and the issuance of this decision. While there are no express time constraints addressing the time by which a hearing must be held, due process is a foundational consideration permeating provisions for a fair hearing under the APA. See AS 44.62.570(b)(2)(scope of review includes “whether there was a fair hearing”). At some point, delay in a legal proceeding may sufficiently affect an aggrieved party adversely so as to violate the constitutional due process protections. As the agency administering justice, the board also has an interest in seeing that disciplinary sanctions are not unduly

delayed. There were legitimate reasons for delaying the hearing in this case, as addressed in the findings and as set forth below.

The hearing officer initially assigned to this case left state employment in April 1997, and the case was re-assigned on May 5, 1997. At a telephonic conference on May 27, 1997, the parties both agreed to delay the hearing until after Greenough's criminal sentencing, which was then scheduled for August. The delay was appropriate given the potential for this civil proceeding adversely impacting Greenough's right against self-incrimination in the criminal proceeding. Cf. Herscher v. State of Alaska, Department of Commerce, 568 P.2d at 1006-07 (no adverse inference allowed from exercise of right to remain silent in administrative action). At a September 8, 1997 telephonic conference, Greenough's counsel represented that sentencing was postponed until September 17. With the consent of the parties, a status conference was held later that month at which counsel represented that Greenough was sentenced and scheduled to report for incarceration on October 1, 1997. He was to serve six months. Counsel for both parties agreed that the hearing should be set for after the first of the year, and a February 24, 1998 hearing date was chosen.

On February 10, 1998, Greenough filed an expedited motion to continue the hearing, primarily for the purpose of allowing him to attend a four week in-patient psychiatric program at Menninger Clinic. The motion indicated he "has airplane tickets and has made all the necessary arrangements to be in treatment starting February 16." The motion was granted by Order dated February 17, 1998. At a telephonic conference on February 24, 1998, the parties agreed to

reschedule the hearing for April 13, 1998. However, upon Dr. Greenough's return from psychiatric treatment at Menninger, the division determined it needed its own expert (Dr. Sperbeck) to evaluate him. The division's request to continue the hearing was granted without opposition on March 27, 1998, and the hearing was re-scheduled a final time to commence June 30, 1998. The hearing took place as scheduled, and was not completed in the three days allotted for the hearing. The parties agreed prior to commencement of the hearing that it would resume on September 1, 1998, if necessary, in order to accommodate participants' schedules. On September 1, Dr. Greenough testified as the last witness in the case, and closing arguments were presented. The record remained open until September 18, 1998, to allow supplemental closing briefs and objections to the Final Exhibit List. From the time this case commenced until the close of the hearing, there was no allegation that a patient of Dr. Greenough was being harmed. All continuances of the hearing in this case were made based upon good cause as required by AS 44.62.580.

In summary, continuances prior to conducting the hearing were appropriate, and neither violated Dr. Greenough's due process protections nor unjustifiably prevented the administration of justice. It has taken considerable time to develop and write this decision as well. That time was necessary given the length of the hearing; voluminous provider records; and the importance of the issues.

C. Dr. Greenough's Criminal Convictions

Greenough's convictions for Theft in the Second Degree and Falsifying Business Records may be characterized as activities involving Medicaid fraud and insurance fraud based on billing practices. (Findings of Fact 19 – 21) This type of fraud by a health care provider involves conduct inextricably related to the professional practice of the provider. See, e.g., Matanky v. Board of Medical Examiners of the State of California, 144 Cal. Rptr. 826, 835 (1978); Feldstein v. Board of Registration in Medicine, 439 N.E.2d 824, 826 (Mass. 1982).

Insurance fraud and Medicaid fraud are not victimless crimes. The conduct harms the fiscal health of the payor. It also harms the public interest insofar as less money is available to provide services to the needy through the Medicaid system, and in spreading risk, insurers are forced to raise premiums for all to cover the expense of fraud by a few. See, e.g., Manyam v. Sobol, 583 N.Y.S.2d 613, 613 (1992).

Dr. Greenough has been inconsistent in characterizing his criminal conduct and accepting culpability for those actions. In 1997 he pled no contest to two felonies "involving multiple instances of intentionally deceptive and fraudulent behavior." (exh. 2, p. 5) Both crimes require a specific intent. See AS 11.46.100 ("with intent to deprive another of property or to appropriate property of another to oneself or a third person"); AS 11.46.630 ("with intent to defraud"). In conjunction with his sentencing, Greenough stated in a letter to the judge dated July 10, 1997:

My understanding of the offense [sic] to which I have plead no contest is my having recorded erroneous dates of service for a couple of my patients, one being my own father. In addition, I believe I failed to adequately detail patient complaints in a number of instances involving 'emergency office visit' billings. I mistakenly believed that the treatment itself explained the nature of the patients' complaints.

(exh. A – 5) The above representation to the judge does not reflect an acknowledgement by Greenough that he was convicted solely for intentional acts. His attempt to alter the factual basis for his conviction was properly disregarded by the court at sentencing. See Scott v. State of Alaska, 928 P.2d 1234, 1238 (Alaska 1996).

At the hearing, Greenough admitted he engaged in some deceitful conduct regarding the billing fraud. However, he also testified that some double billing for which he was convicted could be characterized as a "mistake" or "human error." In referring to his backdating conduct Greenough testified: "I knew that I maybe stretched a little bit on helping someone with a date to get their coverage;" "[t]here were a couple of instances where a service was billed out on the wrong day;" and "there were some dates that didn't match." He testified that at the time, he believed he was "working in a gray area," and "[t]here was no criminal behavior there." He also admitted to rationalizing root canal therapy as a two step process for the purpose of billing. According to Greenough, in 1992, "I was okay with working in the gray zone still, and I was going to find a way to help this person, and I was going to fool the board." (All

testimony referred to in this paragraph is in Direct examination of Greenough, tape 12A; or Cross-examination of Greenough, tapes 12A and 12B)

Dr. Greenough's statements at Menninger are noteworthy. In February 1998, an admission note by Dr. Irons provides: "The patient states that there is one acknowledged instance involving fraudulent billing." (exh. 24, 2/16/98 Adult Hospital Admission Note) A couple weeks later he told Dr. Colletti that there was no fraud relating to the billing disputes for which he was convicted. (exh. 24, 3/6/98 Psychological Test Report) Less than a month later, Greenough admitted by stipulation in this proceeding to being "convicted of offenses involving multiple instances of intentionally deceptive and fraudulent behavior." (Finding of Fact 28) Except for the stipulation, many of the preceding representations by Greenough are inconsistent with the intentional nature of the acts providing a basis for the crimes to which he pled no contest. (Findings of Fact 19 - 20, 41; exh. 2, p. 5; exh. 2, attach. 4) They also reflect his failure to acknowledge the moral implications of that conduct.

While there are no published Alaska cases addressing sanctions to a professional license because of Medicaid fraud or insurance fraud, authorities elsewhere have held that a conviction for fraud of this nature provides a basis for revoking a license. See, e.g., Vining v. Board of Dental Examiners of Alabama, 492 So.2d 607, 608-09 (Ala. Civ. App. 1985); Weiss v. New Mexico Board of Dentistry, 798 P.2d 175, 179-81 (N.M. 1990); Manyam v. Sobol, 583 N.Y.S.2d at 613; Eisenstein v. Board of Regents of the University of the State of New York, 274 N.Y.S.2d 707, 708 (1966); McGee v. Ohio State Board of Psychology, 611

N.E.2d 902, 903-07 (Ohio 1993). See also 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 91 (1981) (“The conviction of a criminal offense, particularly one involving moral turpitude, is usually regarded as sufficient ground for the revocation of a physician’s or dentist’s license, and the offense need not be one related to the profession itself.”); Annotation, Filing of False Insurance Claims for Medical Services as Ground for Disciplinary Action Against Dentist, Physician, or Other Medical Practitioner, 70 A.L.R. 4th 132 (1989).

The Alaska Board of Dental Examiners has an express policy that: “[c]onviction of a felony in the five years preceding application is evidence of unacceptable moral character and may result in denial of licensure.” See 12 AAC 28.910. A conviction for billing fraud is generally accepted as immoral conduct or a crime of moral turpitude. See, e.g., Carey v. Board of Medical Examiners, 136 Cal. Rptr. 91, 92-93 (1977); Kansas State Board of Healing Arts v. Seasholtz, 504 P.2d 576, 579 (Kansas 1973). In Alaska, even a misdemeanor conviction for theft is considered a crime of moral turpitude. See In re Schuler, 818 P.2d 138, 140 n.1 (Alaska 1991). While 12 AAC 28.910 is not directly at issue in this case, it reflects board policy that a felony in the background of a dentist applying for a license is a serious matter – serious enough to prohibit the individual from licensure.

D. The Carrs Incident

Professionals have a deep responsibility not to abuse the trust which licensure places in them regarding the use and control of dangerous drugs. A medical doctor or dentist is an integral part of the regulatory machinery intended

to prevent misuse of prescriptive drugs. They are a key to the successful operation of the system. See Weissbuch v. Board of Medical Examiners, 116 Cal. Rptr. 479, 482 (1974). Regulatory authority in this area goes to the heart of a state's police power.

In committing the Carrs incident, Greenough violated both state and federal law through an intentional act. (Finding of Fact 41) He also violated a board order. (exh. 11, pp. 6, 11) The timing and circumstances of his conduct are significant since he did it after he was forced to surrender his DEA certificate and while he was on probation for prior unlawful prescriptive practices. (exh. 11, pp. 5, 6, 12, 13)

Once again, there is no published Alaska case addressing sanctions against a professional licensee for unlawful prescriptive practices. Cases from other jurisdictions involving dentists and other providers give some guidance, although they have no precedential effect in this proceeding. The cases generally show that suspension or revocation are appropriate sanctions. See, e.g., Arkansas State Medical Bd. V. Elliot, 563 S.W.2d 427, 429 (Ark. 1978); Scheininger v. Dept. of Professional Regulation, Bd. Of Medical Examiners, 443 So.2d 387, 387-88 (Fla. 1984); Arthurs v. Board of Registration in Medicine, 418 N.E.2d 1236, 1242-44 (Mass. 1981); State of Oklahoma v. Ray, 848 P.2d 46, 47 (Okla. 1992). See also Annotation, Wrongful or Excessive Prescription of Drugs as Ground for Revocation or Suspension of Physician's or Dentist's License to Practice, 22 A.L.R. 4th 668 (1987).

E. Misrepresentation in 1994 License Renewal Application

Dr. Greenough 's 1994 renewal application was admitted as evidence at the hearing without objection. (exhibit 8) Question 2 of the application asks: "During the last registration period [2 years] have you engaged in deceit, fraud, or intentional misrepresentation in the course of providing or billing for professional dental services or engaging in professional activities?" Greenough answered "no," even though he previously engaged in Medicaid fraud and insurance fraud leading to his convictions on September 16, 1997, of one count of Theft in the Second Degree and one count of Falsifying Business Records, both felonies. Greenough signed the application on October 17, 1994.

There are practical as well as legal considerations for state licensing officials being able to rely on the veracity of individuals submitting license applications, and on the completeness of their responses. The Division of Occupational Licensing and the boards and commissions it works with issue over 36,000 professional licenses. There is no reasonable means for the division to fully investigate every application, and the cost of such an undertaking would be prohibitive for state government. Licensing examiners must therefore be able to completely rely on the truthfulness and completeness of responses in applications. This need is implicit in the board's authority to impose a disciplinary sanction against a licensee for obtaining a license through deceit, fraud, or intentional misrepresentation. See AS 08.36.315(1). The legislature made similar provision for other boards and commissions within the Department of Commerce and Economic Development. See, e.g., AS 08.04.450(1)

(accountants); AS 08.20.170(a)(1) (chiropractors); AS 08.40.170(a)(1) (electrical and mechanical administrators); AS 08.48.111 (architects, engineers, and land surveyors); AS 08.62.150(a)(4) (marine pilots); AS 08.64.326(a)(1) (medical doctors).

The Board of Dental Examiners has broad regulatory authority in issuing new and renewal licenses. See AS 08.36.070; AS 08.36.100; AS 08.36.110. It is authorized to supply license application forms. See AS 08.36.070(5). An application must be certified under penalty of perjury. See AS 08.36.110(1); exh. 8. And, under AS 08.36.315(1), the board is authorized to impose discipline against a licensee who “used or knowingly cooperated in deceit, fraud, or intentional misrepresentation to obtain a license.” Laws regulating the practice of dentistry therefore reflect that trustworthiness is an important criterion for the board in regulating the profession.

Under AS 08.36.110(1)(E), an applicant is required to certify to the board that he is not the subject of an unresolved investigation by a law enforcement agency⁴ relating to “criminal or fraudulent activity.” See AS 08.36.110(1)(E). Renewal applications contain the following statement just prior to applicant’s signature: “I certify under penalty of perjury that the above information is true

⁴ The record does not include an original license application. And, the renewal application does not contain a question addressing ongoing investigations so as to allow the board to fulfill its duty under AS 08.36.110(1)(E). For individuals licensed only in Alaska, investigations for billing fraud will typically occur after licensure.

and correct.” See exh. 8; AS 08.36.110(1). Dr. Greenough’s application contained this provision, and he signed it under penalty of perjury. (exh. 8, p. 2)

The healing arts, such as medicine or dentistry, require a high degree of public trust and confidence. Boards regulating these professions are therefore delegated broad licensing and disciplinary powers. Recognized grounds for license denial or disciplinary action expressly include false or fraudulent statements or nondisclosures by an applicant regarding such matters as professional education, licensure or disciplinary proceedings in other jurisdictions, and conduct implicating moral qualifications. See, e.g., Hartman v. Board of Chiropractic Examiners, 66 P.2d 705 (Cal. 1937)(license revoked for false representation of prior criminal conviction); Russell G. Donaldson, False or Fraudulent Statements or Nondisclosures in Application for Issuance or Renewal of License to Practice as Ground for Disciplinary Action Against, or Refusal to License, Medical Practitioner, 32 A.L.R. 5th 57 (1995).

At the hearing, Greenough testified that he knew there was a fraud investigation underway when he completed the application, and he had talked to his attorney about it. (Cross-examination of Greenough, tape 12B) In response to the question at the hearing “what were you thinking?” [when you answered Question 2], Greenough testified “it was naïve of me.” (Direct examination of Greenough, tape 12A) In fairness to Dr. Greenough, on the date he signed the renewal application, he may have genuinely believed he had not engaged in “deceit, fraud, or intentional misrepresentation in the course of providing or billing for professional dental services.”

The board amended its pleadings twice in this proceeding. Only the second pleading (Amended Accusation and Petition to Revoke Probation) expressly addresses the misrepresentation in Greenough's 1994 renewal application. There are two counts in the current pleading (Second Amended Accusation and Petition to Revoke Probation), and neither of the counts expressly reference a misrepresentation in the renewal application. While the alleged misrepresentation is within the scope of conduct violating his probation conditions (e.g., obey all laws), the misrepresentation is not sufficiently set forth in the current pleading to provide a separate statutory basis for discipline. It is also noteworthy that the parties stipulated only to discipline under AS 08.36.315(2), (5) and (7), not AS 08.36.315(1) (“[T]he dentist used or knowingly cooperated in deceit, fraud, or intentional misrepresentation to obtain a license.”) Greenough's misrepresentation would arguably fall within AS 08.36.315 (7) as well.

Although the most recent accusation deleted express reference to the renewal application, Greenough stipulated to facts surrounding the application; incorporated by reference the application within the stipulation; and answered questions without objection at the hearing regarding the application. His own attorney questioned him about the application. (Direct examination of Greenough, tape 12A; Cross-examination of Greenough, tape 12B; exh. 2, p. 7) Nonetheless, in deference to considerations of due process as applied to the most recent accusation, the recommendation at the conclusion of this proposed

decision will not rely or be based upon conduct surrounding Greenough's misrepresentation in the 1994 renewal application.

F. The Appropriate Sanction

Investigator Slisz was the only witness testifying in favor of suspension. Dr. Greenough's witnesses and the health care providers favored a lesser sanction. However, the usefulness of evidence addressing the choice of sanction is not akin to a battle of attrition, or whoever has the most witnesses prevails. The prerogative to choose the appropriate sanction for Dr. Greenough's license belongs neither to the division, health care providers in this case, nor to the judge in the criminal proceeding – it belongs solely to the board.

The board's options for sanctions in this matter include revocation, suspension, reprimand, censure, probation, and imposing a variety of limitations and conditions on Dr. Greenough. See AS 08.01.075; AS 08.36.315. Although the division argued for suspension, it did not advocate a duration. (Direct examination of Slisz, tape 9A; Cross-examination of Slisz, tape 9A)

In sanctioning a dentist, the board may be motivated by a variety of goals, including deterrence of the licensee and others, as well as protecting the public interest. The board's authorization to impose a civil fine is a sanction that may be characterized as punitive. See AS 08.01.075 (a)(8). See also AS 08.36.340; AS 44.62.330(d); AS 44.62.500(b). The ultimate purpose of a disciplinary proceeding, however, is protection of the public, not retribution. Shame and disgrace suffered by a professional person who is disciplined nonetheless do not

render the proceedings and the sanctions penal in nature. See Feldstein v. Board of Registration in Medicine, 439 N.E.2d at 826.

The legislature has expressly charged the board with seeking consistency in the application of disciplinary sanctions. And, the board must explain a significant departure from prior decisions involving similar facts. See AS 08.01.075(f). In this case, there are no prior decisions involving similar facts. The only published decision regarding discipline of a dentist is State of Alaska v. Smith, 593 P.2d 625 (Alaska 1979). The Smith case involved an oral surgeon who was convicted of two counts of assault arising from incidents in which he improperly administered anesthesia, allegedly leading to the death of two patients. The board revoked his license. See id. at 627. Dr. Greenough's conduct is not comparable to that case.

Two disciplinary matters previously before the Board of Dental Examiners were addressed at the hearing. Exhibit 22 consists of documents introduced by the division and admitted without objection from two cases: In re Hillis, Case Nos. DE 87-182; DE 89-39 and In re Cline, Case No. 1200-93-3. The Cline case involved discipline based in large part upon the dentist's convictions for three offenses of Theft in the Second Degree and three offenses of Falsifying Business Records. These are the same felonies for which Greenough was convicted. However, proceedings in both Hillis and Cline were resolved by stipulation and through voluntary surrender of the license. Consequently, the Hillis and Cline cases present no exercise of discretion by the board after a hearing for us to compare in this case.

The following cases from other jurisdictions provide useful comparisons of disciplinary actions, although they have no binding effect in this proceeding. In Kaplan v. Board of Regents of the University of the State of New York, 451 N.Y.S.2d 223 (1982), the court affirmed revocation of a dentist's license due to unauthorized use of drugs obtained through the dental practice by a dentist and his wife, and due to inadequate record-keeping. The dentist had an otherwise unblemished disciplinary record. See id. at 224. In another New York case, Schmelzer v. Ambach, 448 N.Y.S.2d 270 (1982), a dentist's license was suspended based on billing fraud because the dentist received payment of \$320 from an insurer for services not actually performed. See id. at 271. In Sears v. Texas State Board of Dental Examiners, 759 S.W.2d 748 (Tex. 1988), a dentist unlawfully prescribed Percodan to himself on 32 occasions for treating back pain, instead of contacting a physician. The court affirmed the dentist's suspension from practice for five years, with all but 120 days stayed. See id. at 749-51. In Williamson v. District of Columbia Board of Dentistry, 647 A.2d 389 (D.C. Ct. App. 1994), a dentist's license was revoked based on fraudulent use of his license to obtain schedule II controlled substances and failure to keep adequate patient records. Finally, in Little v. North Carolina State Board of Dental Examiners, 306 S.E.2d 534 (N.C. 1983), the board revoked a dentist's license for reasons which included unauthorized prescription of Valium to family members.

Dr. Greenough's path to this point, as revealed in great detail at the hearing, was filled with stumbling blocks, some of his own creation, some not. The record in this case indicates that he had an abusive father who struggled

with a severe addiction; he had a difficult divorce; as a professional he has associated with some manipulative individuals who took advantage of him; and he has a history of rejecting authority. In contrast, he also was blessed with the gifts of an advanced education and the opportunity to serve his fellow man through one of the healing arts. While some of the adverse circumstances he encountered engender compassion, none of them justify the unlawful conduct alleged in the Second Amended Accusation to which he has admitted. Ultimately, each of his transgressions involved a choice by him for which he is personally accountable.

The law presumes that an individual ordinarily makes his own judgments, however imperfect, and acts on them. It does not readily assume that one's will has been overborne by another. See Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). The desire to avoid responsibility for one's actions has ancient origins. At the hearing, Dr. Rosen aptly commented on Greenough's tendency to blame others for his problems by quoting from Shakespeare: "The fault dear Brutus is not in our stars, it is within ourselves." (Direct examination of Rosen, tape 10A)

Dr. Greenough and his witnesses established that he is a highly competent and caring dentist. There was no evidence at the hearing to the contrary. However, practicing dentistry also requires the professional to conduct himself within the constraints of law. A high level of performance by a professional in the techniques of his trade does not excuse unlawful or unethical conduct. See, e.g., In re Buckalew, 731 P.2d 48 (Alaska 1987)(recommending

disbarment of attorney with chronic dysthymic disorder and mixed personality disorder at time of misconduct notwithstanding mitigating factors including absence of any prior record of misconduct, full disclosure of wrongdoings, full cooperation and remorse, and full restitution); In re Preston, 616 P.2d 1 (Alaska 1980)(suspending attorney from practicing law for two years because of drug conviction, notwithstanding lack of prior discipline and otherwise exemplary performance as attorney); Matanky v. Board of Medical Examiners, 144 Cal. Rptr. at 835 (physician may be subject to disciplinary action notwithstanding technical competence or skill where moral character in dispute). See also Annotation, Physician's Conviction of Offense Not Directly Related to Medical Practice as Ground of Disciplinary Action, 12 A.L.R. 3d 1213 (1967). In addition, laws regulating dentistry promote confidence of the public in the dental profession both through maintaining high standards of skill and through maintaining high standards of personal conduct. See AS 08.36.070; 08.36.110; 08.36.315(6), (8) and (9). Dr. Greenough's conduct in the Carrs incident and the conduct providing a basis for his criminal convictions was intentional, and it shows disrespect for the laws regulating dentistry.

The importance of this matter to Dr. Greenough is well illustrated by the fact that he was ably represented by two attorneys throughout this administrative hearing. Despite the vigorous and thorough defense they presented, the facts evidencing Greenough's unlawful conduct are overwhelming. As previously addressed, Greenough's conduct comprising the Carrs incident and giving rise to his convictions occurred when he was already on probation.

Finally, Dr. Greenough's remorse must be considered. His lack of sufficient remorse and "desire to change" was in part why he was referred to Menninger Clinic for treatment on the eve of the hearing. (Finding of Fact 35) Remorse involves both regret and repentance. See Webster's New Universal Unabridged Dictionary, p. 1529 (2d ed. 1983).

Greenough's repentance for the conduct at issue, as distinguished from regret, only came to substantial fruition after he attended therapy at Menninger. At the time he commenced his treatment in February 1998, Greenough still believed he was a victim of circumstances, and that the criminal punishment imposed on him was far greater than the crimes he committed.⁵ (Findings of Fact 34, 35) Before going to Menninger, he ended his therapy with Dr. Harper of his own volition on December 31, 1994. (Finding of Fact 24) He did not begin seeing Dr. Geeseman until nearly three years later, after his incarceration and upon advice of counsel. Given the seriousness of his disciplinary problems, Greenough exhibited a lackluster commitment to treatment between the time this case commenced and the time of his admission to Menninger Clinic over a year later. He saw Dr. Geeseman over two dozen times for 4 – 6 months without having a therapeutic dialog. (Finding of Fact 22)

Even on the last day of the hearing, the full fruits of Greenough's repentance were not evident, as shown by: (1) his failure at that time to have

⁵ This proposed decision expresses no opinion on the appropriateness of Greenough's criminal sentence, nor should it.

performed any community service in fulfilling his criminal sentence from over eleven months earlier; and (2) his continuing business relationship with C.B., in disregard of concerns expressed by the board and those who counseled and evaluated him. (Findings of Fact 42 and 43; exh. 6, p. 12) Commenting on Greenough's continuing relationship with C.B., Dr. Sperbeck stated: "this is one area where Dr. Greenough still doesn't have a clear understanding of right and wrong, at least enough to be trusted in another moral dilemma. In the case of his friend [C.B.], he (Greenough) wasn't just stupid, he was morally wrong to prescribe pain medications in the manner in which he did." (exh. 21, pp. 5, 8)

Greenough's continuing business relationship with C.B. reflects risky behavior, and an ongoing tendency on his part to push the limits of acceptable professional conduct. As part of the summary suspension proceeding in 1994, the board temporarily directed Greenough to "have no further professional, personal or social contact, including any telephone contact" with C.B. (exh. 2, attach. 1, p. 10) Dr. Harper's testimony on the C.B. relationship is also noteworthy. He indicated Greenough had a significant misperception that C.B. "was essential to the ongoing success of his practice rather than ultimately the nemesis to his practice." He further stated: "The very thing that was likely to destroy his practice and to lead to his license being revoked was a relationship with [C.B.], and yet that was the one thing that Dr. Greenough thought was critical to preserving his practice." Harper further testified at the hearing that based on review of the Menninger records he now recognizes that some of

Greenough's problems stem from an inability to think clearly. (Direct examination of Harper, tapes 3A and 3B).

There was much evidence presented at the hearing about the likelihood of Dr. Greenough committing violations of law in the future. Greenough has benefited from professional counseling recently, particularly at Menninger Clinic and with Dr. Kiehl in 1998. He has made progress in addressing the causes for his present circumstances, including those causes for which he is personally responsible. While at Menninger, Greenough began addressing issues from his childhood for the first time. (Direct examination of Greenough, tape 12A) Witnesses at the hearing uniformly agreed that Dr. Greenough needs continuing counseling to assist him in avoiding future problems. However, in determining a sanction, the board must focus primarily on Greenough's past conduct as alleged in the Second Amended Accusation, as opposed to speculation about his future conduct. The board has a legal obligation to sanction a dentist who engages in activities enumerated in AS 08.36.315.

No health care provider who evaluated or treated Dr. Greenough recommended suspending his license. This is not surprising given the fact that those who treated Greenough are primarily interested in the well-being of their patient. Providers who expressed an opinion on depriving Greenough of his livelihood uniformly indicated the action will adversely impact his mental health. Patients and staff of Northland Dental also urged that Dr. Greenough be allowed to continue his practice. Nonetheless, the board is charged by the legislature with upholding professional standards, protecting the public interest, and

maintaining the integrity of the dental profession. These considerations prevail over Dr. Greenough's personal interest. Because the board's choice of sanction in this case will be referred to and compared with sanctions in future cases before the board, deterrence must be considered in choosing the sanction. See AS 08.01.075(f).

Dr. Greenough's case sometimes focused on a plea for mercy by the board in determining the appropriate sanction. Yet, the division's request for suspension as opposed to revocation already exhibits justice tempered by mercy, given Greenough's long history of disciplinary problems and the fact that both the Carrs incident and the billing fraud convictions separately provide a basis for revocation. In disciplining Greenough previously, the board first imposed lengthy probation with a variety of conditions on conduct. It later imposed a brief suspension, a civil fine, surrender of Greenough's DEA certificate, and continued probation for three years. The discipline did not have a salutary effect. It is also significant that Greenough committed the Carrs incident and some of the conduct leading to his billing fraud convictions while his license was on probationary status with this board. The charges in this case are serious, and they call for a correspondingly serious sanction. Dr. Greenough has disregarded federal and state laws regulating his profession, as well as the dental board's authority. The interests of society and the dental profession will be best served by imposing a lengthy suspension.

There is sufficient evidence in the record upon which to suspend Dr. Greenough from practice for a period of two years followed by a five year period

of supervised probation. In order to reduce inconvenience to patients and staff of Northland Dental, and given the fact that no patients are at risk, it is recommended that the suspension not commence for at least 30 days, but no longer than 60 days from the board's decision. Suspension for a two year period is appropriate based on the findings of fact and the analysis in this proposed decision. Undisputed evidence from the parties' Stipulated Facts alone provides a basis for the proposed sanction. This suspension is not harsh and excessive, or "draconian" in nature as argued by Greenough at the hearing. The Carrs incident coupled with the billing fraud convictions provide a sufficient basis for suspending the license. They were not isolated instances. Dr. Greenough has an unfortunate history of discipline problems extending over a decade of time and exhibiting a pattern of conduct in disregard of laws regulating the dental profession.

The board also has authority to impose conditions in addition to the suspension. See AS 08.01.075; AS 08.36.070; AS 08.36.315. In this case, it is appropriate for the board to exercise its discretion in this area to address Greenough's prescription writing authority; his need for continuing personal counseling; auditing of his business records; his continuing education requirements; monitoring of his future practice of dentistry; and other probationary requirements. The hearing officer recommends a continuation of no prescription writing authority with an explicit procedure for referrals to obtain prescriptions, using a dentist who is not a friend or business associate of Dr. Greenough. It is also recommended that the monitor of Greenough's conduct in

the future not be a friend or business associate. Finally, before recommencing the practice of dentistry, Greenough should be required to make a sufficient showing of rehabilitation and indicate that he has complied with laws.

The board has authority to deliberate and decide this matter in executive session, telephonic or otherwise. It is recommended that the board call an executive session with the hearing officer present for the purpose of explaining the board's options and answering procedural questions. Whatever the board decides, as indicated in section II, there is no possibility for briefing or other communications from the parties to the board until after the board chooses an option under AS 44.62.500.

VIII. Conclusions of Law

1. Dr. Greenough is subject to discipline for violations of AS 08.36.315(2), (5) and (7).
2. The division met its burden to establish a basis for suspending Dr. Greenough's license and imposing probation and other conditions.
3. Suspending Dr. Greenough's license for a two year period followed by a five year period of supervised probation is an appropriate sanction in this case.

Recommendation

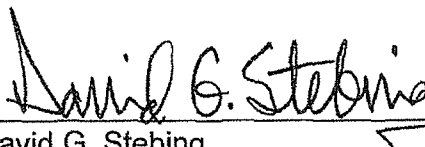
The hearing officer recommends that Dr. Greenough's license be suspended for two years followed by a five year period of supervised probation.

It is further recommended that the board order:

- 1) continued counseling for Dr. Greenough;
- 2) auditing of Greenough's business records, as appropriate;
- 3) continuing education requirements while suspended from practice;
- 4) monitoring of Greenough's future practice, as appropriate;
- 5) no authority for prescribing and an appropriate procedure for prescription referrals;
- 6) termination of business relationship with C.B. and Val-Pak.

These disciplinary actions are taken to protect the public interest; to promote public confidence in the dental profession; to promote the integrity of board orders; to deter other dentists from engaging in Medicaid fraud and insurance fraud; and to deter other dentists from unlawful prescriptive practices.

Dated at Anchorage, Alaska this 30th day of November, 1998.


David G. Stebing
Administrative Hearing Officer

STATE OF ALASKA

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

BEFORE THE BOARD OF DENTAL EXAMINERS

In the Matter of)
)
 Harry W. Greenough, DDS,)
)
 Respondent.)
)
 _____)
 Case No. 1200-94-006 and 1200-96-5

Final Administrative Order

Having reviewed the Findings of Fact, Conclusions of Law and Proposed Decision of the hearing officer dated November 30, 1998, in the matter of Harry W. Greenough, Case Nos. 0750-97-001 and 1200-96-5, the board adopts the Findings of Fact and Conclusions of Law by the hearing officer. The board also adopts the proposed sanction with the below modifications and orders as follows:

1. Dr. Greenough must continue counseling with Dr. Kiehl or another health care provider approved by the board for the period of suspension at least four times a month for a minimum of one hour per visit. The provider must inform the board monthly of Dr. Greenough's compliance with this order and provide a brief description of his treatment.
2. Provision 2) of the recommendation is deleted.
3. Dr. Greenough must remain in compliance with existing continuing education requirements which must include his verified attendance at an ethics course of at least 7 hours which has to be pre-approved by the board.

4. Continued monitoring as determined by the board, of Northland Dental Inc. during Dr. Greenough's suspension and of Dr. Greenough's dental practice following the suspension on a weekly or monthly basis throughout the period of probation. The individual chosen to be a monitor must be a person approved by the board and must submit quarterly written reports to the board.

5. Dr. Greenough has no authority to prescribe or dispense prescription drugs.

6. Provision 6) of the recommendation is deleted.

7. The suspension will begin February 1, 1999.

8. At the end of the suspension period Dr. Greenough must appear before the Board to address his compliance with the conditions of this Order.

These disciplinary actions are taken to protect the public interest; to promote public confidence in the dental profession; to promote the integrity of board orders; to deter other dentists from engaging in Medicaid fraud and insurance fraud; and to deter other dentists from unlawful prescriptive practices.

Dated this 22nd day of December, 1998.

Carol L. Row DDS
Chair, Board of Dental Examiners