CASE STUDY

PROPOSED AMENDMENT TO A RULE OF
THE FLORIDA BOARD OF DENTISTRY
Nature of the Dispute:

In an attempt to exercise the legislative authority given to it by the Florida Legislature, the Florida Board of Dentistry found itself involved in a dispute with the dental community, which lasted approximately four years. During the four-year dispute, the parties involved underwent various informal attempts at settlements that failed. The First District Court of Appeal ultimately decided the matter on legal grounds.\(^1\)

The Florida Legislature enacted Chapter 466, Florida Statutes, in order to ensure that every dentist or dental hygienists practicing in the State of Florida meet minimum requirements for safe practice without undue clinical interference by persons not licensed under said chapter.\(^2\) It was also the intent of the Legislature that dental services be provided only in accordance with the provisions of Chapter 466, Florida Statutes, and not be delegated to unauthorized individuals.\(^3\) As such, the Legislature created the Florida Board of Dentistry (hereinafter the “Board”) to carry out the provisions of Chapter 466, Florida Statutes, and charged said Board with the authority to regulate the licensure and practice of dentistry and dental hygiene, as well as, the authority to adopt rules regulating said profession.\(^4\)

In 1992, the Board became concern with the use of laser devices, devices that produce a light amplification by stimulated emission of radiation encompassing wavelengths above and below those in visual range, in the practice of dentistry. Thus, in order to assess the impact of the usage of such devices on the citizenry of Florida, the Board formed a fact-finding committee that was charged with the task of examining the issue and reporting its findings back to the Board. The fact-finding committee held numerous public meetings wherein testimonies were heard from all interested parties as well as the citizenry of this state. At the conclusions of the fact-finding process, the committee recommended to the Board that the delegation of the usage of laser devices in the profession of dentistry should be limited. Based upon the fact-finding committee’s

\(^1\) Although the instant case study contains opinions and viewpoints received from various individuals, who were involved in the instant rule challenge, these individuals have expressed a desire not to be personally identified due to the nature of their professional responsibilities. As a result information received from outside sources are incorporated into this case study in a narrative format.

\(^2\) See § 466.001, Fla. Stat.

\(^3\) Id.

\(^4\) See generally § 466.004, Fla. Stat.
recommendation, and in accordance with its legislative authority pursuant to section 466.024, Florida Statutes, the Board decided to amend its rule, i.e., Florida Administrative Code Rule 64B5-16.001. This amendment proposed to prohibit the use of laser devices by dental hygienists.

The Board’s proposed rule amendment created an alarm within the dental community, specifically among licensed dentists who were utilizing dental hygienists and dental laser devices in their practices, and who were delegating the use of such laser devices to their dental hygienists pursuant to section 466.024(2), Florida Statutes, which allowed a dentist to delegate the tasks of gingival curettage and root planning to a dental hygienist. Therefore, several licensed dentists, Payne and Roshkind, challenged the Board’s statutory authority to promulgate a rule limiting their ability to delegate the usage of dental laser devices to their dental hygienists. These dentists had standing to challenge the Board’s proposed rule wherein they were licensed dentists in the State of Florida, whose abilities to practice their profession were affected by the laws and rules of the Board. The dentists concerns, though cloaked in legal terms, appeared to be more involved with monetary issues than legal issues. The delegation of the usage of dental laser devices to dental hygienists enabled licensed dentists to see more patients per day, whereby these dentists did not have to take time out to personally manage their laser devices. In addition, by delegating the usage of laser devices to dental hygienists, dentists were able to make more money while keeping the cost of certain procedure, such as gingival curettage, at a low level.

The Florida Academy of Laser Dentistry (hereinafter “the Academy”) intervened in the instant rule challenge. The Academy, which is devoted to dental laser education, research and the development of standards and guidelines for the safe and effective use of dental laser technology worldwide, had standing to intervene as an interested party whereby its members included licensed dentists in the State of Florida. Similar to the concerns of Payne and Roshkind, who brought the instant rule challenge, the Academy’s

5 It should be noted that since the time of the instant dispute the rules of the Board of Dentistry underwent several numbering changes, thus, said rule was previously listed as 61F-16.001, as well as 59Q-16.001.
6 The rule challenge case was known as “Payne, et al. vs. Department of Business and Professional Regulation, Board of Dentistry,” DOAH Case No.: 93-5941RP. It should be noted that since the filing of the instant case, the Department of Business and Professional Regulation, as well as the Department of
concerns appeared to be more monetary than legal -- though this concern was never stated. As educators on the usage of dental laser devices, the Academy stood to loose monetarily in the event the Board limited the usage of such laser devices. Such a limitation could cause licensed dentists not to utilize the devices in their practices since they were unable to delegate its usage, hence, decreasing the demand for dental laser education. However, unlike Payne and Roshkind, the Academy did not participate in the entire process and was eventually dismissed as a party by the Administrative Law Judge in 1995.

Moreover, though they never became a named party in the instant case, licensed dental hygienists were also interested parties in the referenced dispute because they would be substantially impacted by the adoption of the proposed rule amendment. Dental hygienists were unable to intervened in the rule challenged because they did not have legal standing, whereby the Board’s proposed rule dealt only with the delegation of dental laser devices that could only be done by licensed dentists, who were the delegators.

Case History: -

At the start of this referenced rule challenge, all interested parties, with standing to participate in the process, were represented by licensed attorneys in the State of Florida. In an attempt to settle the matter, the interested parties requested, within the statutory time period, public hearings on the proposed rule amendment. Thus, at the public hearings the Board heard further testimonies on the pros and cons of the proposed amendment, as well as, reviewed statistical and research data. The Board found the testimonies and data, which demonstrated that laser devices have qualitatively different effects on human tissue than other dental instrumentalities, very persuasive. The public hearings were unable to settle the matter informally, therefore, the issue proceeded to a section 120.57(1), Florida Statutes, hearing involving disputed issues of material fact at the Division of Administrative Hearings (hereinafter “DOAH”).

Health, underwent extensive structural changes. As a result, the Board of Dentistry currently falls under the umbrella of the Department of Health.
The DOAH Administrative Law Judge (hereinafter the “ALJ”) began the hearing by ensuring that all parties had legal standing to participate in the process. The ALJ heard testimonies of witnesses, arguments of the parties’ legal representatives and reviewed the parties’ documentations, which were presented in the form of exhibits. At the conclusion of the section 120.57(1), Florida Statutes, hearing, the ALJ ruled in favor of the Petitioners, Payne and Roshkind. The ALJ found that Board’s proposed rule amendment was without a basis in statutory authority to the extent where it could prohibit dentists from delegating the task of gingival curettage by use of dental lasers to dental hygienists. The ALJ also found that the legislature did not designate gingival curettage as a remedial or non-remedial task, thus, the Board did not have the legislative delegated authority to redefine gingival curettage or root planning as remedial, or not remedial, for the purpose of prohibiting the use of certain instrumentation to carry out those tasks.

Thereafter, the Board appealed the ALJ’s decision to the First District Court of Appeal (hereinafter the “District Court”).\(^7\) The issue upon appeal was ‘whether or not the Board’s proposed rule amendment was an invalid exercise of delegated legislative authority to the extent that it seeks to prohibit performance of gingival curettage with laser technology by dental hygienists.”\(^8\) The District Court reversed the ALJ’s ruling on the basis that the ALJ applied tighter constrictions on the Board’s statutory authority than the law required. The Court found that although the statutes applied by the ALJ restrict the Board’s ability to prohibit a dentist from delegating the task of gingival curettage to a dental hygienist, nothing in the statutes completely bars the Board from regulating the use of certain tools available to perform a delegated task.\(^9\) The Court also found that the proposed laser rule amendment does not improperly infringe upon the legislature’s determination that a dentist may delegate gingival curettage to dental hygienists, whereby said rule only addresses the use of laser devices by dental hygienists.\(^10\) The Court stated that when the legislature authorizes an agency to enforce laws enacted under its police

\(^7\) See Board of Dentistry vs. Payne, 687 So. 2d 866 (Fla. 1st DCA 1997).
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. at 867-868.
power, it is not required to prescribe specific rules of action or cover all conceivable situations that may confront the agency.\textsuperscript{11}

Subsequently, the licensed dentists, Payne and Roshkind, requested a rehearing of the District Court’s decision, which was denied by that Court on March 3, 1997. Following the issuance of the District Court’s Mandate, the Board was able to proceed with the promulgation of its proposed rule amendment. To date, said rule remains in effect.

**Outcomes:**

The rule challenge process was a split process. At the start of this process all interested parties were able to play an active role. Interested parties were able to give testimony and have their documentations reviewed by the Board during the public hearing process. It was not until the process proceeded to the litigation phase that several of the key interested parties, i.e., dental hygienists, were locked out of the process because they lacked legal standing to participate.

In addition, it appeared that the Florida licensed dentists, as well as the Academy and dental hygienists, were dissatisfied with the outcome of the public hearings held by the Board during its fact-finding process and at the start of the rule challenge process. They felt that the Board was illegally attempting to regulate an area that could have detrimental economic effects on their abilities to practice their trade. Therefore, they felt validated by the ALJ’s ruling, which found that the Board had no statutory authority for its proposed amendment. However, their feeling of being vindicated was short lived, whereby, after said ruling the First District Court of Appeal overturned the ALJ’s decision. They had a profound feeling of being wronged by the very system that was to protect their interests as citizens of Florida. With no other recourse open to them, they attempted to make the best of a very difficult situation. Many licensed dentists were forced to reorganize their practices that were already utilizing dental laser devices, with the primary users being dental hygienists. They were also forced to contend with the knowledge that they had wasted a lot of time and money in the instant rule challenged, though many believed that it was worth it because that was approximately four years

\textsuperscript{11} Id. at 868.
within which they were able to delegate the use of laser devices, schedule large amount of patients in a given day while keeping the cost of certain procedures at a low level.

On the other hand, it appeared that the Board, based upon the testimonies and documentation it received, felt that there was a great need for the regulation of the usage of laser devices in the dental profession in order to protect the citizenry of Florida. However, the only way in which the Board could regulate such devices was to make the proposed rule changes, which it clearly believed it had the statutory authority to do. Thus, it was great disappointment that it received the opinion of the ALJ finding that it had no statutory authority for its amendment. Despite the ALJ’s ruling, the Board felt that it would be negligent in its duties to the public and the charges set by the legislature pursuant to Chapter 466, Florida Statutes, had it not challenge the basis of the ALJ’s ruling. The ruling of the District Court confirmed what the Board believed all along, that is, it had the statutory authority and the duty to carry out the charge of the legislature to protect the general public through the regulation of the dental profession. The Board also breathed a sigh of relief that it was able to do its job.

**Conclusion:**

This case was somewhat difficult to analyze because there appeared to be no easy way for the parties to arrive at a solution. The Board was concerned with protecting the public from the misuse of laser devices, while the other parties appeared to be mainly concerned with monetary issues, which ranged from making a profit to being able to find and maintain work. There did not appear to be any way in which the parties could have arrive at a negotiated settlement and be able to get what the other wanted. The Board wanted to limit the use of dental laser instrumentalities by persons who were not licensed dentists, the licensed dentists want to be able to delegate the use of laser without incurring additional costs of having to hire a licensed dentist to only manage their laser devices, and the dental hygienists want to be able work in their chosen profession without experiencing a salary decrease or change in their professional roles. Therefore, the dispute dissolved into a matter of each party wanting to win, while the other lost. It seemed that the only way to resolve this dispute was by the means in which the parties approached the problem, via litigation. The question that begs to be asked is whether
there was a winner in this scenario? The Board, as well as the licensed dentists, eventually spent a lot of money and time and manpower in litigating this matter.

One could argue that the situation could have been handled differently had the parties eliminated the use of attorneys in the informal settlement process because once attorneys got involved, the stance of the parties became defensive and no one spoke directly to each other. Though it is unrealistic to believe that such a process as a rule challenge would be allowed to proceed without the involvement of attorneys, it would have been interesting to see the outcome had they not been involved. Would there have been a more open and honest line of communication between the parties? Possible so, but it’s hard to say when one’s dealing with a regulatory body and individuals whom it regulates.

One could also argue that had the parties utilized a professional facilitator and/or mediator in the informal settlement process, the parties may have been able to reach an agreement or been able to explore alternative avenues prior to litigating the instant matter. For example, the parties may have been able to reach an agreement whereby the Board could limit the use of laser devices by individuals who were not licensed dentists, unless such individuals obtained a specified amount or type of educational training. Unfortunately, the parties were unable to utilize any settlement because they took an “I want to win” stance very early in the process, which was difficult to overcome as the parties proceeded further into the rule challenge.