

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 122-0803	MPC 89-0703
	)		MPC 90-0703
Respondent	)		MPC 87-0703

MOTION TO RECONSIDER AND MEMORANDUM

Now comes the State of Vermont (“State”) and, by and through undersigned counsel, moves the Hearing Committee (“Committee”) appointed by the Vermont Board of Medical Practice (“Board”) to reconsider and reverse its decision of December 18, 2006 allowing testimony of former patients of Respondent not charged in the Amended Superceding Specification of Charges and allowing the testimony of two non-physician experts regarding contrast sensitivity testing (“CST”).

MEMORANDUM

At hearing in the above-captioned matters on December 18, 2006, the Committee granted Respondent’s motion to allow the testimony of former patients of Respondent not charged in the Amended Superceding Specification of Charges and to allow testimony of two non-physician experts regarding CST. The Respondent’s motion was filed after the State had rested its case, and the Committee’s decision was rendered before the expiration of the customary ten-day period allowed for parties to respond to motions. The Committee issued no written decision explaining why it had reversed its two prior decisions precluding this

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

testimony. The State requests that the Committee reconsider and reverse its decision of December 18, 2006.

I TESTIMONY OF NONPHYSICIAN EXPERTS IS IRRELEVANT TO THE ISSUE OF WHETHER RESPONDENT ENGAGED IN UNPROFESSIONAL CONDUCT WITH RESPECT TO THE ELEVEN PATIENTS IN THE AMENDED SUPERCEDING SPECIFICATION OF CHARGES.

The opinions of both Mr. Ginsburg and Mr. Evans are clearly irrelevant. As noted in the State's original motion in limine to exclude their testimony (which the Committee granted) neither is a medical expert. Therefore, neither can offer expert opinions as physicians as to whether Respondent's treatment of the eleven patients does or does not constitute unprofessional conduct in the medical field. Further, neither Mr. Ginsburg nor Mr. Evans proffers any opinions regarding Respondent's treatment of any of the eleven individual patients. Whether Respondent's reliance on certain criteria of contrast sensitivity and glare testing might be generally appropriate is not the material issue before the Committee.

In his recent motion, the Respondent continues to exaggerate the importance of the CST with BAT to the State's case in order to justify the testimony of Mr. Evans and Mr. Ginsburg. Contrary to the assertions in Respondent's motion, the State has not challenged the use of CST and glare testing as diagnostic tools. Indeed, many of the ophthalmologists who testified for the State use some form of glare testing in their practice and Dr. Morhun uses CST as a diagnostic tool in his practice.

Instead, the Respondent's use of the CST with BAT results is merely one aspect of the State's allegations that Respondent created misleading records to justify his decision to perform cataract surgery. The issue before the Committee is whether Respondent used the results of the CST with BAT to indicate that many of the eleven patients in this case, especially the three patients on whom Respondent performed surgery (Judith Salatino, Margaret McGowan, and Susan Lang), had poorer vision than indicated by their visual symptoms or other testing in order to create a record that justified cataract surgery. Further, in contravention of AAO guidelines, the Respondent relied on CST with BAT results to justify his decision to perform surgery on these eleven patients and did not consider or did not perform other visual testing in making his decision. Indeed, the records of the eleven patients indicate that at those appointments where Respondent had made his decision to perform surgery, all visual acuity testing performed by Respondent—whether CST or Snellen—employed glare or dilation or both. Neither Mr. Ginsberg nor Mr. Evans can offer relevant expert testimony on these issues and their testimony should be excluded as irrelevant.

II TESTIMONY OF TWELVE OTHER PATIENTS IS IRRELEVANT TO THE DETERMINATION OF WHETHER RESPONDENT ENGAGED IN UNPROFESSIONAL CONDUCT IN TREATING THE ELEVEN PATIENTS CHARGED AND ADMISSION OF SUCH TESTIMONY WILL PROLONG THE HEARING.

The State has twice argued, and the Committee has twice agreed, that the testimony of other patients describing positive experiences with Respondent is irrelevant and does not negate or rebut the testimony of the eleven patients who

have testified. As argued previously by the State, if the allegations against Respondent involved physician/patient “boundary” violations, the testimony of patients where Respondent did not commit boundary violations would be irrelevant. The same reasoning still applies with regard to the Respondent’s latest motion. Now, after the close of the State’s case, and without explanation, the Committee has reversed its two previous decision.

The Respondent’s motion to call twelve former patients is not a coincidental number. At the close of all the evidence it is expected that the Respondent will argue to the Committee that his twelve patient witnesses overcome by one patient the evidence adduced by the State regarding the eleven patients who are the subject of this proceeding. The Respondent will further argue that since the State only called eleven former patients, as opposed to his twelve patients, the State has not met its burden of proof that the Respondent engaged in unprofessional conduct by a preponderance of the evidence, or 51%.

By introducing the testimony of other patients not charged in the Amended Superceding Specification of Charges, Respondent introduces the issues of Respondent’s pattern or practice and motive as defenses. Under these circumstances, the State will call rebuttal witnesses to testify as to Respondent’s treatment of other patients as to Respondent’s pattern or practice. This testimony will include the testimony of numerous other patients who will be called to testify as to Respondent’s treatment of them in order to refute, counteract and contradict the testimony of the Respondent’s twelve patients regarding the Respondent’s motive

and pattern and practice. Rebuttal witnesses will also include former staff (whether or not previously identified), who observed Respondent's pattern or practice with several patients. In rebuttal, the State will also recall the physicians who have already testified and call other physicians to describe their experiences with other former patients of Respondent.

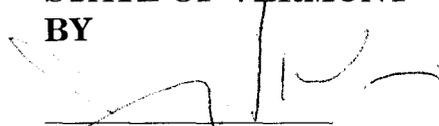
Respondent will no doubt argue (as he has previously) that the State could have introduced this evidence in its case in chief. However, when a party to a proceeding offers evidence which is designed to counteract new matters introduced by the adverse party, the party offering the rebuttal evidence is entitled to have the rebuttal evidence admitted, even when the evidence might have been offered in the case in chief. *Morrison v. Air California*, 101 Nev. 233, 236, 699 P.2d 600, 602 (Nev. 1985). The State amended its Superceding Specification of Charges by deleting the counts and allegations relating to Respondent's pattern and practice. The State amended the charges in that manner in order to narrow the focus of the issues on the eleven patients and avoid a much lengthier hearing. Consistent with the amended charges, the State's evidence was devoted solely to the eleven patients. Given the Committee's ruling, the State in rebuttal is entitled to and must therefore put on the evidence it would have put on had the pattern and practice allegations not been deleted. The Committee should reconsider and reverse its decision to allow the testimony of other patients of the Respondent.

CONCLUSION

For the reasons argued above, the State requests the Committee to reconsider its decision of December 18, 2006 and **REVERSE**.

Dated at Burlington, Vermont this 28th day of December, 2006.

**WILLIAM SORRELL
ATTORNEY GENERAL
STATE OF VERMONT
BY**



Joseph L. Winn
Michael Duane
Assistant Attorneys General