

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

<b>In re:</b>	)	<b>MPC 15-0203</b>	<b>MPC 110-0803</b>
	)	<b>MPC 208-1003</b>	<b>MPC 163-0803</b>
<b>David S. Chase,</b>	)	<b>MPC 148-0803</b>	<b>MPD 126-0803</b>
	)	<b>MPC 106-0803</b>	<b>MPC 209-1003</b>
<b>Respondent.</b>	)	<b>MPC 122-0803</b>	<b>MPC 89-0703</b>
	)		<b>MPC 90-0703</b>
	)		<b>MPC 87-0703</b>

**DR. CHASE’S OPPOSITION TO THE STATE’S MOTION TO RECONSIDER  
AND SECOND MOTION IN LIMINE**

Now comes the Respondent, David S. Chase, M.D., by and through counsel, and hereby opposes the State’s Motion to Reconsider and Second Motion in Limine.

**I. Introduction.**

The hearing panel has determined that intermittent cross-examination of Dr. Chase will most effectively provide the Board with the information it needs to decide this case. Nonetheless, the State has moved for reconsideration of the Board’s ruling setting that procedure. The State’s request lacks legal or practical support. The State has chosen to present its case in a confusing and misleading manner, calling Dr. Chase as its first witness without first introducing essential foundation and contextual evidence. It is also asking him to address only fragments of his treatment records for 11 separate patients over the course of many days. As a result, the hearing panel can and should exercise its broad discretion to allow the parties to continue to present the evidence in the manner most helpful to the Board.

In a separate motion, the State has moved to prevent Respondent’s counsel from asking any leading questions of Dr. Chase during their cross-examination of him. The State’s motion mischaracterizes the nature of the questions posed to Dr. Chase and, if granted, would slow the proceedings even further, as leading questions are permissible with respect to foundational and preliminary issues in all cases because they promote the efficient presentation of evidence. If

leading questions are not permitted to draw Dr. Chase's and the Board's attention to the relevant portions of the voluminous medical records, the proceedings will be unnecessarily delayed. Those records, and Dr. Chase, will speak for themselves. If the State objects to particular questions asked of Dr. Chase, it should voice its objections at the appropriate time so the Board can rule on them taking into account the nature and purpose of the objectionable question. The Board cannot, however, prohibit the use of leading questions generally.

## **II. Factual Background.**

The State has chosen to combine into a single case over 100 charges of unprofessional conduct with respect to 11 separate patients. Despite the breadth of its case, the State provided the hearing panel with a five minute opening statement that gave no roadmap to its proof. The State then chose to call the Respondent as its initial witness, without first presenting any patient complaints, any explanation of cataracts and cataract surgery, or any evidence regarding proper medical standards or recordkeeping procedures.<sup>1</sup> As the predictable result of these choices, the hearing panel has been provided with a massive amount of fragmentary evidence regarding many patients with little context into which it can place that evidence.

The State has now examined Dr. Chase for a day and a half,<sup>2</sup> but has only elicited evidence regarding two of the 11 complaining patients and, more disturbingly, has conducted misleading examinations based on selected excerpts of those patients medical records. As a result of the breadth of the State's charges and the length of its direct examination, the hearing panel asked for the opportunity to question the Respondent intermittently during the State's examination. Both

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<sup>1</sup> In contrast, in the federal case, the United States presented the claims of groups of complaining patients, followed closely by the testimony of the second opinion doctor who treated them. Those second opinion doctors also presented evidence regarding cataracts, cataract surgery, medical standards, and recordkeeping. As a result, the jury heard a logical progression of evidence.

<sup>2</sup> Of the 9 hours of testimony to date, far less than one hour has been devoted to the cross-examination of Respondent by his own lawyers.

parties agreed to the hearing panel's request, and the State raised no concern regarding the interruption the Board's questions might cause.

During its examination of Dr. Chase regarding individual patients, the State strategically ignored crucial information regarding the very subjects on which it is examining Dr. Chase. That information exists in the very medical records the State itself has relied upon. For instance, in examining Dr. Chase regarding his treatment of Judith Salatino, the State spent over a half an hour attempting to prove that Dr. Chase falsified his records when he wrote that Ms. Salatino was "unable to see clearly to drive in glare" at night. (Respondent's Ex. 1-JS-1-013.) However, the State declined to bring to the hearing panel's attention the fact that Ms. Salatino had made the same complaint to Dr. Chase's technicians on two prior occasions, (1-JS-1-007, 009), and later reported to a second ophthalmologist that she "had been having trouble [with] night driving" before her surgery. (1-JS-2-001.) Concerned that he would be unable to correct the misimpression left by the State for several weeks, Respondent objected to the State's fragmentary and misleading examination. (Transcript of 9/12/06 Hearing ("Tr.") at 119-123.)

The hearing panel raised its own concerns that the long gaps between hearing dates, combined with the fact that Dr. Chase was being asked to testify without proper factual context regarding 11 individual patients, would make it difficult for the panel members to evaluate the evidence. As a result, *the panel* proposed that Respondent's lawyers cross-examine him intermittently during the State's direct examination. (Tr. at 123-24.) The Board then adopted its proposed procedure over the objection of the State. (Tr. at 127-28.) The State asked the Board to reconsider its decision, (Tr. at 129), but the hearing panel declined, stating that the "hearing panel wants the information" provided by cross-examination, and is trying to receive that information "in the best way possible." (Tr. at 133.)

Dr. Chase's lawyers then proceeded to question him regarding the two patients about whom the State had already examined him. At no time did Dr. Chase's lawyers examine Dr. Chase about topics or patients who had not already been the subject of the State's direct examination. The State's single objection to the contrary was overruled. (Tr. at 155.) Moreover, the State did not raise any objection to the form of the questions being asked Dr. Chase. Indeed, the State conceded that Dr. Chase's attorneys were entitled to ask leading questions "because they were part of cross-examination." (Tr. at 185.) As a result, Dr. Chase's lawyers did use some leading questions in an attempt to direct Dr. Chase's attention to particular parts of the voluminous medical records and to generally expedite the examination. At no point did Dr. Chase's lawyers improperly attempt to influence Dr. Chase's answers through the form of their questions.

### **III. Discussion.**

The State has now moved the Board to reconsider its decision regarding intermittent cross examination for the second time. The State's request is directly contrary to controlling law and the hearing panel's common sense procedural evaluation of the case.

#### **A. The State Has Cited No Reason For The Board To Reconsider Its Common Sense Determination Regarding The Presentation Of Evidence.**

"The standard for granting [a motion to reconsider] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Latouche v. North Country Union High School District*, 131 F. Supp. 2d 568, 569 (D. Vt. 2001) (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). "A motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id.* Here, the State is asking for nothing more than the opportunity to

relitigate an issue that it has twice argued, and twice lost. Accordingly, the Board should refuse to reconsider its prior ruling.

**B. The Constitution, The Vermont Rules Of Evidence, And This Board's Prior Orders Support Its Decision To Allow Intermittent Cross-Examination.**

If the Board does re-examine its prior rulings, it should reject the State's arguments.

Without citation to any rule or statute, the State claims that intermittent cross-examination violates its "rights" to present its evidence as it sees fit. However, the Rules of Evidence governing this proceeding make clear that the State has no such right. Instead, those rules explicitly allow the Board to control the order of proof to suit *its* needs. Vermont Rule of Evidence 611(a), which is applicable to this proceeding, states that the Board "shall exercise reasonable control over the mode *and order* of interrogating witnesses and presenting evidence so as to *(1) make the interrogation and presentation orderly and effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time.*" V.R.E. 611(a) (emphasis added). The Reporter's Notes to the Rule make clear that "Rule 611(a) sets out a flexible approach." *Id.* (Reporter's Notes). As such, "[c]ontrol of the order of proof and the limits of cross-examination are of necessity committed to the trial judge who is responsible for the orderly progress of the trial." *Id.* The Rule is intended to "emphasize the court's power and responsibility to guide the proceedings to an *efficient as well as just conclusion.*" *Id.* (emphasis added). Simply put, the Rules of Evidence allow, indeed encourage, exactly the sort of flexibility demonstrated by the hearing panel. The State has cited, and can cite, no authority to the contrary.

The State's suggestion that it has a constitutional right to present its evidence without interruption is similarly baseless. The very case upon which the State relies, *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976), counsels flexibility and holds that the procedures at trial "be tailored, in light of the decision to be made, [and] to the capacities and circumstances of those who are to be

heard.” *Id.* As such, it supports, rather than refutes, the hearing panel’s decision, which is carefully tailored to allow the Board to render the best decision possible under the particular circumstances of this case. Indeed, in the past, both the State and the Board have emphasized the flexibility that the Due Process Clause affords the Board in an administrative hearing such as this. The State cannot now credibly disavow that flexibility for strategic purposes.

**C. The Intermittent Cross-Examination Of Respondent Has Not, And Will Not, Go Beyond The Scope Of The State’s Direct Examination.**

In an afterthought presented as a “Supplemental Memorandum,” the State argues that the Respondent intends to use his cross-examination to go beyond the scope of the State’s direct exam.<sup>3</sup> Nothing could be further from the truth. The State was allowed to examine Dr. Chase regarding the general issues in this case. Respondent’s lawyers have not cross-examined him with respect to these general issues, and will not be able to do so until the State has completed its direct examination. Rather, in performing their intermittent cross-examinations, Dr. Chase’s lawyers have asked him only about those patients and subjects that have formed the basis of the State’s direct examinations. The State’s concern that the defense team has utilized different portions of Dr. Chase’s medical records during their cross-examinations is entirely beside the point. The records used by the Respondent are part of the very same stipulated exhibits utilized by the State and pertain to the very issues raised by the State. If, in the future, the State believes that Dr. Chase’s lawyers exceed the proper bounds of cross-examination, it is free to object at the time. Until that time, Dr. Chase’s proper cross-examination should be allowed to continue.

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<sup>3</sup> It bears noting that V.R.E. 611(b) makes clear that, in normal circumstances, the cross-examination of a *party* to an action is not limited to the scope of the direct but instead may include “any mater of consequence to the determination of the action.” Under the special circumstances of this case, Dr. Chase’s lawyers have agreed to limit their intermittent cross-examinations to the particular patients that were the subject of the State’s preceding direct examinations. Of course, at the conclusion of the State’s direct, Dr. Chase’s attorneys will be allowed to cross-examine him on all subjects relevant to the Board’s decision. As a result, even if the evidence were presented in the “normal” fashion, the State’s direct case would be interrupted by Dr. Chase’s evidence regarding the key issues facing the Board.

**D. The Alternative To Intermittent Examination Would Be Unworkable.**

The State argues again and again that the interruption of its case will present untold (and largely undescribed) “procedural and substantive issues.” Any procedural and substantive issues that have arisen or will arise are solely the result of the State’s strategic choice to bring hundreds of charges in a single case and to call Dr. Chase as its first witness, examining him at great length regarding his medical decisionmaking without first presenting the Board with the patient complaints or medical background that would allow the hearing panel to make sense of and remember Dr. Chase’s testimony.

Prior to the start of this hearing, the Respondent made a written request that the hearing be conducted on consecutive days due to the breadth and complexity of the evidence that would be presented. The Board felt that it was unable to honor that request, and instead scheduled the hearing to take place on non-consecutive days spanning four months. As a result, both the parties and the Board are now faced with the impossible challenge of remembering detailed medical information regarding nearly a dozen separate patients presented over the course of several months.

As a result, any “issues” that will arise as a result of intermittent cross examination pale in comparison to the problems and inefficiencies that will arise if Dr. Chase were to be cross-examined regarding his treatment of individual patients only at the conclusion of his direct testimony in mid-October. The result would be time consuming and inefficient, and ultimately ineffective. Most importantly, it would not give the hearing panel the information it wants and needs in the manner best designed to promote the Board’s truth seeking function. The Board should therefore deny the State’s Motion for Reconsideration.

**E. The Cross Examination Has Been Proper.**

Although it has chosen to call Dr. Chase as a witness in its case-in-chief, and has asked for permission to ask leading questions on its direct examination, the State now objects to one of the

consequences of that choice: It seeks to prevent Dr. Chase's attorneys from using leading questions in any way during their cross-examination of him. The State's request misrepresents the purpose of counsel's questions and misconstrues controlling law.

Because the State has chosen to conduct a direct examination of Dr. Chase by calling him in its own case, the Respondent's lawyers are placed in the position of cross-examining their own client. Vermont Rule of Evidence makes clear that ordinarily "leading questions should be permitted on cross-examination." V.R.E. 611(c). As a result, many courts confronting the issue have determined that parties may use leading questions when they are forced to cross-examine witnesses who would otherwise be considered as their own. For instance, in *Morvant v. Construction Aggregates Corp.*, 570 F.2d 626, 635 (6<sup>th</sup> Cir. 1978), the court found that "[i]t was not error for the trial court to permit the defense to use leading questions when cross-examining its own employees, who had been called by the plaintiff as part of her case-in-chief." *Id.* Indeed, at the hearing, the State acknowledged the consequences of its decision to call Dr. Chase in its case-in-chief, conceding that counsel's use of leading questions was appropriate. (Tr. at 185.)

More importantly, most of the leading questions used by Respondent's counsel have been appropriate and permissible even if asked on direct examination. As every court and commentator to address the issue has noted, leading questions are appropriate even on direct examination in order to address foundational and preliminary questions. See *Weinstein's Federal Evidence* § 611.06[2][b]; Wright & Gold, *Federal Practice and Procedure* § 6168; *McClard v. United States*, 386 F.2d 495, 501 (1967). Such questions avoid time-consuming examination and, as a result, are an appropriate means to "expedite the trial." *Weinstein's Federal Evidence* § 611.06[2][b]. Contrary to the State's insinuations, the defense has not asked leading questions with the intent to suggest substantive answers to the witness. Instead, the questions have generally been directed to preliminary or foundational issues, such as directing the witness to a particular page or entry in the

voluminous medical records. The witness, and the records, have then been allowed to speak for themselves. The alternative---to require the Respondent to sort through thousands of pages of records while on the stand in order to find the relevant portions---would bring the presentation of evidence to a virtual standstill.

For all of these reasons, the Board cannot issue a blanket ruling prohibiting Respondent's counsel from asking leading questions when cross-examining Dr. Chase. If the State has objections to particular questions, it should raise them at the appropriate time. The hearing panel may then rule on those objections, taking into account the context and purpose of the specific question. Only through this process can the Board ensure that it receives the information it needs to decide this case in an efficient and proper fashion.

**IV. Conclusion.**

For all of the foregoing reasons, the Board should deny the State's Motion for Reconsideration and Second Motion in Limine.

Dated at Burlington, Vermont, this 19<sup>th</sup> day of September, 2006.

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