

**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	MPC 87-0703
Respondent	)		

**STATE OF VERMONT’S REPLY MEMORANDUM IN SUPPORT OF MOTION IN  
LIMINE AND IN SUPPORT OF MOTION TO ADMIT DEPOSITIONS OF STEPHEN  
GREEN**

**BACKGROUND**

Currently pending before the Hearing Committee (“Committee”), appointed by the Vermont Board of Medical Practice (“Board”) in the above-captioned matters, are motions and memoranda filed by both parties related to the presentation of evidence at hearing. The filings illustrate the parties’ wildly divergent perceptions of the proceedings in these matters. The State approaches the hearing as an administrative proceeding dealing with twelve individual patients and whether their individual treatment by Respondent constituted unprofessional conduct. By contrast Respondent, as he has done throughout, attempts to graft onto these proceedings concepts of criminal law and procedure that are wholly inapposite. Respondent apparently desires, for reasons of his own, to replicate the scope and length of his criminal trial.

It is vitally important that the Committee, in deciding these motions, keep in mind that this proceeding is a *hearing* and not a trial. There is no reason for the Committee to aspire to duplicate a criminal trial. The focus of the hearing should be narrow—concentrating only on the Respondent’s treatment of the twelve individual patients. Evidence of the efficacy of contrast sensitivity testing or the positive experiences of Respondent’s other patients is irrelevant.

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Further, the Committee should, in deciding these motions, take advantage of the flexibility and informality with respect to the admission of evidence in the administrative process, *vis-à-vis* a civil or criminal trial.

#### ARGUMENT

### **I. STATE HAS NOT WAIVED ITS RIGHT TO CHALLENGE ADMISSION OF TESTIMONY OF RESPONDENT'S LATE-DISCLOSED WITNESSES.**

The State has moved to exclude the testimony of those witnesses disclosed by Respondent on February 8, 2006. Respondent disclosed these witnesses more than a year after the Board had stayed the proceedings days before the hearing was to begin. Respondent had not offered, and still has not offered, any explanation as to why there was delay in disclosing these witnesses. Instead, Respondent appears to argue that the State has somehow waived its right to challenge the admission of the testimony of these witnesses. The State has made no such waiver and the State's motion to exclude these witnesses should be granted.

Respondent's argument is that, because the State did not voice objection to Respondent being given the option to update his witness list, the State cannot object to the witnesses identified in the February 8, 2006 disclosure. The Respondent's argument is simply not logical. The State has no way of prohibiting the Respondent from updating his witness list. However, once the Respondent has identified additional witnesses, the State is free to challenge the admissibility of the witnesses' testimony on the grounds argued in the State's motion in limine. Respondent offers no authority for the argument that the State has waived its right to challenge admissibility of testimony of late-disclosed witnesses. The State's motion to exclude the testimony of late-disclosed witnesses must be granted.

**II. RESPONDENT DOES NOT OPPOSE THE LIMITATION OF DR. FREEMAN'S TESTIMONY AND THEREFORE THE STATE'S MOTION LIMITING SUCH TESTIMONY SHOULD BE GRANTED.**

In his disclosures of February 8, 2006, Respondent disclosed an additional expert, Dr. James Freeman. In the disclosure letter (Attached to State's Motion in Limine as Exhibit 1) Respondent stated that Dr. Freeman's testimony at hearing, would address "the same subjects" and be "consistent with [his] trial testimony." Exhibit 1, p.2. In its motion in limine the State argued that, if the Committee were to deny the State's motion to exclude Dr. Freeman on the basis of late disclosure, that, alternatively, Dr. Freeman's testimony be limited to the three patients that are included in the Amended Specification of Charges (Patient #4, Patient #13, and Patient #14). The State argued in its motion that while Dr. Freeman proffered opinions as to many of Respondent's patients, only the opinions as to the three patients in the Charges were relevant.

In his opposition Respondent does not address the State's motion to limit the testimony of Dr. Freeman. Instead, Respondent distorts the State's motion to limit Dr. Freeman's testimony by asserting that the State seeks to exclude Dr. Freeman's in its entirety as irrelevant. The State made no such argument with respect to Dr. Freeman's testimony. Because Respondent has not opposed the State's motion to limit Dr. Freeman's testimony, the Committee should grant the State's motion, assuming the State's motion to exclude late-disclosed witnesses is denied .

**III. RESPONDENT'S OFFER OF PROOF WITH RESPECT TO THE TESTIMONY OF JAVITT, EVANS, AND GINSBURG SUPPORTS THE EXCLUSION OF THEIR EXPERT TESTIMONY AS IRRELEVANT.**

In its motion in limine the State argued that the expert testimony of Respondent's three other experts should be excluded as irrelevant under the second prong of the *Daubert* test for the admission of expert testimony. The State argued that none of Respondent's experts were going

to offer opinions regarding Respondent's individual treatment of the twelve complaining patients. Therefore, the expert testimony proffered by Respondent has no bearing on the relevant issue before the Committee—Did Respondent's treatment of these twelve patients constitutes unprofessional conduct? In his opposition to the motion Respondent confirms that, indeed, none of the three experts will offer opinions regarding Respondent's individual treatment of the twelve complaining patients. Instead the Respondent's experts will offer general opinions about Respondent's practices and ask the Committee to infer that these opinions apply to the specific cases before the Board. The Respondent's opposition supports the arguments of the State and the motion to exclude the expert testimony of Javitt, Ginsberg, and Evans must be granted.

The proffered testimony of Respondent's experts has no application to the specific issues before the Board. Dr. Javitt's proffered testimony that some patients under-report symptoms does not aid the fact finder in determining whether Respondent engaged in unprofessional conduct. Further, the State has never questioned the validity of contrast sensitivity testing with brightness acuity test. Indeed, the Respondent's exclusive focus on CST and its validity ignores the fact that most of the allegations in the Charges deal primarily with Respondent's interaction with the individual patients—not that he employed CST. The State's case does not rise or fall on the issue of the propriety of CST in general. The most important element of the State's case is whether the Committee deems the State's witnesses more credible than Respondent. The proffered testimony of the Respondent's experts has no bearing on the issue of credibility.

Respondent also argues that the Committee should admit the expert testimony because Judge Sessions admitted such testimony in the Respondent's criminal trial. Respondent apparently does not understand that the inquiry in these proceedings is not the same as the inquiry in the criminal case. The State is not required and is not seeking to prove, as the

government was in the criminal case, that Respondent engaged in a scheme to defraud insurance companies. Indeed, notwithstanding Respondent's repeated references to fraud, the State nowhere in the Amended Charges alleges that Respondent engaged in fraud-- purposeful or otherwise. Such allegations would require the State to prove motive. The State is not required to prove motive in these proceedings, only that Respondent's conduct in twelve specific cases was unprofessional. The proffered testimony of the Respondent's experts does not aid the fact-finder in that determination and the State's motion to exclude the testimony of Respondent's three experts must be granted.

**IV. TESTIMONY OF FORMER PATIENTS IS IRRELEVANT TO RESPONDENT'S TREATMENT OF TWELVE COMPLAINING PATIENTS AND MOTIVE IS NOT AN ELEMENT IN THESE PROCEEDINGS.**

Respondent argues that the testimony of former patients should be admitted to rebut the testimony of the twelve complaining witnesses and is relevant to the issue of motive. As stated above, motive is not an element in these proceedings. Respondent could have altruistic motives for his conduct but motive does not make the conduct in question more or less unprofessional. Respondent's attempt to implant the issue of motive in these proceedings is yet another attempt to turn these administrative proceedings into a criminal trial. The Committee should resist such attempts by Respondent.

Respondent's argument that the testimony of other patients will somehow rebut the testimony of the twelve complaining witnesses is simply illogical and unsupported by any authority. The experiences of Respondent's other patients have no bearing on the experiences of the twelve complaining patients. If Respondent were alleged to have committed boundary violations with a particular patient, the fact that he did not commit boundary violations with

other patients would have no relevance. The State's motion to exclude testimony of former patients must be granted.

**V. ADMISSION OF TRIAL TESTIMONY OF RELEVANT WITNESSES AND RECORDS OF PHYSICIANS WHO PROVIDED SECOND OPINIONS WILL NOT PREJUDICE RESPONDENT.**

The State has moved that the trial testimony of relevant witnesses be admitted and that the records of the second-opinion doctors be admitted without the testimony of those doctors.<sup>1</sup> The Respondent will not be prejudiced by the admission of this evidence. Respondent has already cross-examined the witnesses who testified at trial. Further, the Respondent is free to subpoena the second-opinion doctors in his case if he wishes to examine them regarding their records.

Respondent's accusation that the State has some hidden motive regarding these evidentiary requests is baseless. The State's only motive is to present its case in a manner that is helpful to both the Committee and the State's witnesses.

**VI. STATE HAS IDENTIFIED TYPE OF STATEMENTS MADE BY RESPONDENT'S ATTORNEYS THAT IT SEEKS TO HAVE ADMITTED.**

The State has moved that certain statements by Respondent's attorneys be admitted as admissions of a party opponent. Respondent concedes that some statements of counsel may be admissible as admissions but that the State has specified sufficiently the types of statements the State seeks to have admitted. Contrary to the Respondent's assertion the State in its motion identified the statements as those "regarding both Respondent's specific treatment of the twelve patients and Respondent's approach to practicing medicine that would be relevant to Respondent's treatment of the twelve patients." State's Motion in Limine, p. 15. The State went

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<sup>1</sup> In its motion the State asked that the records of the second opinion doctors be admitted without cross-examination. Framing the request in that manner was misleading. As the State made clear in its memorandum, the Respondent is free to call the second-opinion doctors as witnesses in his case.

on to identify specific examples of the types of statements it seeks to have admitted. Since Respondent concedes that statements of counsel are admissible as admissions and has not voiced objection to the specific examples included in the State's motion, the Committee should grant the State's motion for the admission of statements of Respondent's counsel.

**VII. STATE HAS MADE REASONABLE EFFORTS TO CONTACT STEPHEN GREEN AND HIS DEPOSITIONS WERE TAKEN ACCORDING TO LAW AND SUCH DEPOSITIONS SHOULD BE ADMITTED.**

Respondent opposes the admission of the depositions of Stephen Green arguing that the State has not made sufficient efforts to make Mr. Green available for testimony at hearing and that both the deposition taken in the civil action and the deposition taken in these proceedings were not taken according to law. First, the State has done all it can to contact Mr. Green and exhort him to appear at hearing. As evidenced in his interaction with Ms. Kennedy, Mr. Green does not have the desire to be involved in any proceedings regarding Respondent. AS the last known address for Mr. Green is outside the State of Vermont, the State has no means to require Mr. Green to attend the hearing.

Respondent's reliance on *State v. Lynds*, 158 Vt. 37 (1991) is misplaced. The critical difference between the instant case and *Lynds* is that the party in *Lynds* seeking to have the deposition admitted knew where the witness was located. Because the location of the witness was known, the *Lynds* Court observed that "rules governing availability . . . are not strictly applicable." *Lynds*, 158 Vt., 41 (*internal quotations and citations omitted*). By contrast the State in this case has no knowledge of Mr. Green's whereabouts and no possible means of requiring his presence at hearing.

Respondent's arguments that the depositions are not in conformance with law are without merit. To begin with, the "law" Respondent cites to is a rule of civil procedure. As has been

stated and restated in these proceedings, the Vermont Rules of Civil Procedure are not applicable. The Committee can admit the depositions of Stephen Green under VAPA as reliable hearsay. Such admission is especially justified with respect to the Green deposition in the civil proceedings because that deposition was specifically noticed as a deposition in lieu of trial testimony. The fact that Respondent may not have asked pertinent questions at the deposition with full knowledge that the deposition would be introduced at trial is of no moment. In any event, if the Committee wishes, the State will obtain the necessary statement of the officer required by V.R.C.P. 30 (e).

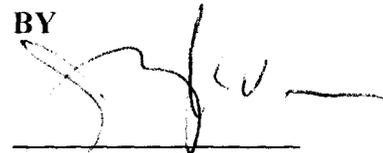
Respondent speculates that Mr. Green's failure to sign the depositions evidences some nefarious motive on Mr. Green's part and the Committee should not admit the deposition based on these speculations. Such speculation is simply that—speculation--and cannot be a basis for excluding the deposition. The State's motion for the admission of Stephen Green's deposition must be granted

#### CONCLUSION

For all the reasons argued above and in the State's previous memoranda, the State's Motion in Limine and Motion for Admission of Depositions of Stephen Green should be **GRANTED** in totum.

Dated at Montpelier, Vermont this 27<sup>th</sup> day of June, 2006.

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