

**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 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
Respondent	)		MPC 87-0703

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR RECUSAL
OR DISQUALIFICATION OF BOARD MEMBER
SHARON NICOL**

Pursuant to the Scheduling Order set forth by the Hearing Committee ("Committee") on April 27, 2006, The State and Respondent submitted numerous pre-hearing motions to the Committee on May 25, 2006. According to the order of April 27, responses to the motions are to be filed by June 16, 2005. However, in order to facilitate scheduling of a hearing on the merits, the State believes a prompt response to one of Respondent's motions is necessary. The State therefore files this memorandum in opposition to Respondent's motion for recusal or disqualification of Board Member Sharon Nicol from the Committee.

In his motion and memorandum Respondent asserts that Ms. Nicol's recusal or disqualification is necessary because Respondent *may* amend his recently filed civil action to include a claim for damages against Ms. Nicol. The basis for Respondent's claim against Ms. Nicol is Ms. Nicol's involvement, in a quasi-judicial capacity, in the decision to summarily suspend Respondent's license. Respondent argues that because Ms. Nicol is, potentially, subject to a claim for a damages by Respondent, she possesses a pecuniary interest in the outcome of the Board proceeding and therefore must either recuse herself or be disqualified from the Committee.

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The Respondent's argument is fundamentally flawed in three respects. First, even if Respondent's analysis were correct (which it is not), Ms. Nicol possesses no pecuniary interest in the outcome of the Board proceeding at this time. Respondent's whole argument is based on the *possibility* that he may name Ms. Nicol as a defendant at some point in the future. None of the authority cited by Respondent stands for the proposition that a judicial or, in this case, quasi-judicial, officer must recuse himself or herself or be disqualified on the basis that he or she *may* develop a pecuniary interest in the outcome at some undetermined point in the future. Indeed federal case law indicates that a decision maker's pecuniary interest has to be " 'direct, personal, and substantial' " in order to require recusal or disqualification. *Fairly v. Andrews*, 423 F. Supp. 2d 800, 816 (N.D. Ill. 2006) (quoting *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1374 (7th Cir. 1994)). The pecuniary interest Respondent alleges Ms. Nicol to possess in the *possibility* she may be named as a defendant in Respondent's civil rights action is too indirect and insubstantial to require recusal or disqualification.

Second, even if Respondent named Ms. Nicol as a defendant, the alleged pecuniary interest would remain indirect and insubstantial. Respondent would have to overcome Ms. Nicol's entitlement to absolute judicial immunity from a suit for damages. Federal circuit courts of appeals have uniformly held that medical board members are entitled to absolute judicial immunity when deciding to revoke or suspend a license. *See e.g. Wang v. New Hampshire Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995); *Watts v. Burkhardt*, 978 F.2d 269, 272-78 (6th Cir. 1992) (en banc); *Bettencourt v. Board of Registration in Med.*, 904 F.2d 772, 782-84 (1st Cir. 1990); *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1512- 16 (10th Cir. 1987).

Finally, assuming Respondent were to name Ms. Nicol as a defendant and overcome Ms. Nicole's entitlement to absolute immunity, there is still no basis for recusal or disqualification

under Vermont law. The Vermont Supreme Court has held that judges need not recuse themselves based on a litigant's threat to sue that judge. *In re: Vermont Supreme Court A.D.#17*, 154 Vt. 217, 226 (1990)(court cannot allow such an easy method of disqualification). In *In re: Illuzzi*, 164 Vt. 623 (mem. 1995) the Vermont Supreme Court, citing to *A.D.#17*, refused to recuse themselves from considering a disciplinary action against an attorney even though the attorney had named the members of the Court as defendants in a civil rights action. The Court noted that:

[R]equiring a judge's disqualification merely because a litigant sues or threatens to sue the judge would permit manipulation of the court and judge shopping.

Illuzzi, 164 Vt. At 624 (*citations omitted*). The Court has applied the reasoning of both *A.D.#17* and *Illuzzi* to administrative proceedings. *Secretary of ANR v. Upper Valley Regional landfill Corp.*, 167 Vt. 228, 237 (1997).

The Vermont Supreme Court's admonition in *Illuzzi* regarding manipulation is especially relevant to these and other Board proceedings. If Ms. Nicol's recusal or disqualification is required based on the Respondent's threat of litigation it sets a dangerous precedent. Were recusal or disqualification required under these circumstances, any current or prospective member of this hearing committee or any hearing panel in any future cases could be easily removed simply by threat, or actual, filing of a lawsuit. In the instant case, Respondent has argued in his motion for preliminary injunction in his civil case that these proceedings are unconstitutional. Given that argument, any member of the Hearing Committee is subject to the same threat of litigation as Ms. Nicol. The unacceptable result would then be that these proceedings could not go forward.

WHEREFORE, the State asks that the Respondent's motion for recusal or disqualification of Board Member Nicol be **DENIED**.

Dated at Burlington, Vermont this 31st day of May, 2006.

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BY**



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