

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

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

**DR. CHASE’S SUR-REPLY REGARDING THE STATE’S OMNIBUS
MOTION IN LIMINE AND MOTION TO ADMIT DEPOSITION OF STEPHEN GREEN**

Now comes the Respondent, David S. Chase, M.D., by and through counsel, and hereby offers the following sur-reply regarding the State’s omnibus Motion in Limine and Motion to Admit the Depositions of Stephen Green.

I. Dr. Chase Does Not Consent To The State’s Proposed Limitation On Dr. Freeman’s Testimony, Which Must Be Admitted In Its Entirety.

In its Reply Memorandum Regarding Its Motion in Limine and Motion to Admit Depositions of Stephen Green (“Reply”), the State misrepresents the Respondent’s position with regard to Dr. Freeman’s testimony. As noted in Dr. Chase’s Opposition, at the hearing, Dr. Freeman will testify regarding Dr. Chase’s treatment of all 12 patients in the Specification of Charges, in addition to the general ophthalmic subjects relevant to that treatment. The State has offered no reasoned argument why that testimony should be barred. As set forth in Dr. Chase’s prior pleadings, it is directly relevant to the issues raised by the State’s charges and must be admitted.

II. The Testimony of Drs. Javitt, Ginsburg, and Evans Is Directly Relevant And Must Be Admitted.

In opposing the admission of Drs. Javitt, Ginsburg, and Evans, the State continues to argue that their testimony is irrelevant because they will not specifically address Dr. Chase's treatment of individual patients. The State's position is at odds with its own charges, its approach to proving them, and even its own Reply. The State has alleged that Dr. Chase recommended and performed unnecessary cataract surgery with respect to 12 patients and that he purposefully falsified his records to make it appear as if the patients needed surgery when they did not. Thus, the motive, or in other words the reason, he performed certain acts has been placed directly in issue by the State,¹ and Dr. Chase has a right to explain, through himself and other witnesses, the rationale underlying his testing procedures, record keeping, diagnosis and recommendations.

For example, Dr. Chase relied upon contrast sensitivity ("CST") and brightness acuity ("BAT") testing in order to help him determine whether or not the 12 patients were proper surgical candidates. He also employed a number of other diagnostic and recordkeeping practices to help him make and document this important medical decision. Drs. Javitt, Ginsburg, and Evans will testify regarding the propriety and effectiveness of those practices. Many of the State's second opinion doctors did not employ CST or BAT testing which explains in large part why they differed in some respects in their positions on surgery regarding specific patients. Thus, contrary to the State's assertion that CST, BAT, and Dr. Chase's other medical and recordkeeping practices are irrelevant, they play a vital role in Dr. Chase's defense of the State's main allegations.

¹ The State incorrectly claims that motive is an element of criminal fraud and has no place in the Board proceeding. In fact, motive is not an element of fraud or any other crime; motive is the reason a person commits a particular act, and its probativeness is recognized in civil, criminal and administrative proceeding. State Reply at 5.

The State's insincerity in attempting to exclude Respondent's expert testimony is demonstrated by the contradictory positions it takes within its Reply. On page 4 of its Reply, the State asks that Dr. Chase's expert testimony be excluded because it offers opinions about Respondent's practices and asks the Committee to infer that he took the same approach to practicing medicine with respect to the 12 specific patients. Then, on page 6 of its Reply, the State argues to admit the testimony of its doctor witnesses regarding both Dr. Chase's specific treatment of "the twelve patients" and Dr. Chase's approach to practicing medicine that would be relevant to the twelve patients (i.e. to infer that his approach to practicing medicine was followed with respect to the twelve patients). Moreover, in the very trial transcripts that the State seeks to admit, its own physician witnesses offer their own opinions on the validity of Dr. Chase's use of CST, BAT, patient questionnaires, and a number of Dr. Chase's other practices. After seeking to have this very evidence admitted in its own case, the State cannot seek to have it excluded as irrelevant when offered by the Respondent. The State's blatant double speak in its evidentiary positions reveals the true character of its Motion In Limine: it is a cynical attempt to silence Dr. Chase and again deny him a meaningful opportunity to present favorable, competent evidence in his defense.

Finally, the State's position that the Board must exclude any testimony not related directly to the 12 individual patients would bar most of its own witnesses from testifying. The State plans to call many of Dr. Chase's former staff members to testify regarding his office practices. At deposition, nearly all of those staff members denied any involvement in or memory of treating the 12 patients in the Specification of Charges. Nonetheless, the State seeks to have their testimony admitted in order to show Dr. Chase's clinical and recordkeeping practices—the very practices that are implicated in the State's charges regarding each of the 12 patients. The

State cannot have it both ways. Testimony regarding Dr. Chase's use of CST, BAT, patient questionnaires, and other clinical practices is relevant to explain and defend his treatment of each of the 12 individual patients.

III. The State Has Specifically Made Dr. Chase's Intent An Issue In This Case.

The State summarily contends that Dr. Chase's intent is not an issue in this case and that, as a result, his treatment of other patients is irrelevant. The State's newfound position is directly at odds with the charges it has brought against Dr. Chase. The Superceding Specification of Charges specifically alleges that Dr. Chase *intentionally* misrepresented his patients' symptoms and test scores, among other things, in order to purposefully recommend and perform surgery that he knew the patients did not need. It accuses Dr. Chase not simply of making a series of mistakes, but of acting immorally toward his patients. In short, the State has most certainly made Dr. Chase's intent an issue in this case.²

IV. The State Cannot Admit Only The Favorable Trial Testimony Of Its Physician Witnesses.

Despite Dr. Chase's offer to consider consenting to the admission of the prior trial testimony of some of the State's expert witnesses, the State has still not designated which portions of which prior testimony it seeks to admit. Moreover, it is now apparently taking the position that it should be allowed to introduce only the favorable portions of its witnesses' prior testimony, leaving it to Dr. Chase to subpoena the State's own physician-experts as adverse witnesses during his own case in chief. The State's position is absurd. The State has the burden of proving the charges against Dr. Chase and of bringing its witnesses to the hearing to provide testimony. That testimony must be subject to cross-examination at the time it is given, not many

² Dr. Chase does not assert that the State needs to show "criminal" intent. It does not. However, it does need to prove the intent allegations contained within the administrative charges it has brought.

weeks later. Moreover, the Respondent cannot be compelled to interrupt his own presentation of evidence in order to call witnesses whom he knows will be adverse to him in many respects. If the State wishes to introduce the prior trial transcripts of its physician witnesses, both their direct and cross-examinations, Dr. Chase is still willing to consider such a request. However, the State must designate which portions of the transcripts it believes are relevant so that Dr. Chase can make an informed decision whether or not to consent to their admission.

V. The State Has Still Not Designated Those Attorney Statements It Seeks To Present As Admissions Of Dr. Chase.

As Dr. Chase pointed out in his Opposition, the admissibility of counsel's statements depends on a number of factors specific to the individual statements offered. The law requires that before the Statement of a party's counsel can be attributed to the party, the adjudicator must analyze and consider the specific statement, the context in which it was made, and the purpose for which it was made. Nonetheless, the State has refused to designate the statements of counsel that it seeks to admit, preferring litigation by ambush rather than reasonable disclosure. Neither the Respondent nor the Board cannot make a decision on the State's request until the State designate the specific statements it would like to admit.

VI. Stephen Green's Deposition Transcript Is Inadmissible And Contains Hearsay and Incompetent Statements.

Dr. Chase demonstrated that the State has not met its burden of proving that Stephen Green is unavailable. In its Reply, the State does nothing to remedy that deficiency. It does not state that it has tried to ascertain Mr. Green's whereabouts or that it has even attempted to contact him during the past two years. Clearly, the State would rather not have to produce Mr. Green for cross-examination. It may also be the case that Mr. Green would prefer not to testify. However, under the controlling caselaw and statutes set forth in Dr. Chase's Opposition, neither

the State's nor Mr. Green's reluctance regarding his testimony is sufficient ground to admit his deposition transcripts. The Board must deny the State's request on this ground alone.

Moreover, the deposition testimony of Mr. Green is itself replete with hearsay, conjecture and incompetent opinion statements that would be inadmissible even if Mr. Green were testifying before the Board. For instance, Mr. Green often relates what another staff person told him about her non-medical conclusions related to Dr. Chase's practice. Indeed, because he worked in Dr. Chase's office for less than three weeks before contacting the Board with his concerns, Mr. Green had virtually no firsthand knowledge of anything relevant to this case. In other instances, Mr. Green offers opinions as to medical decisions and criteria even though he has no medical, or even optometry, training or education. The vast majority of his deposition testimony consists of inadmissible hearsay, unfounded speculation and incompetent opinion testimony. All of which are inadmissible whether he testifies in person or not.

VII. Dr. Chase Is Not Attempting To Turn This Hearing Into A Criminal Trial.

Throughout its Reply, the State accuses Dr. Chase of attempting to turn this administrative hearing into a criminal trial. He is not. The criminal trial involved approximately 100 witnesses and lasted three months. Dr. Chase is confident that this hearing can be conducted in far less time with far fewer witnesses. It will be far more streamlined and focused. However, that narrowing cannot come at the cost of Dr. Chase's due process rights or the Rules of Evidence, both of which are applicable to this administrative proceeding. The hearing envisioned by the State would sacrifice all of Dr. Chase's rights in a rush to judgment based only on the evidence the State wants the Board to hear.

Dated at Burlington, Vermont, this 5th day of July, 2006.

SHEEHEY FURLONG & BEHM P.C.
Attorneys for DAVID S. CHASE, M.D.

By: Eric S. Miller / R. Jeffrey Behm

Eric S. Miller
R. Jeffrey Behm
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891
emiller@sheeheyvt.com
jbehm@sheeheyvt.com

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