

**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 MOTION FOR DISCLOSURE OF ALL EXCULPATORY
INFORMATION AND WITNESS STATEMENTS IN
THE POSSESSION OR CONTROL OF THE BOARD OR THE STATE**

Now comes the Respondent, David S. Chase, M.D., by and through counsel, and hereby moves for disclosure of all exculpatory information and witness statements in the possession or control of the Board of Medical Practice or the State. In support of this Motion, Dr. Chase relies upon the following incorporated Memorandum.

MEMORANDUM

I. Facts.

From the outset of this case, the State has adopted an unduly narrow view of the discovery and other information to which Dr. Chase is entitled. As a result, Dr. Chase believes he has still not received all of the information within the possession of the Board that is relevant to the charges pending against him, as required by 26 V.S.A. § 1318(e) and Board Rule 19.1. Nor has he received all of the exculpatory information or witness statements in the State’s or Board’s possession. For instance, Dr. Chase does not believe that he has received all notes or reports of interviews with patients, employees, and doctors conducted by the Board’s investigator or all documentary and other evidence collected by that investigator. Moreover, despite the fact that state and federal prosecutors have been investigating and prosecuting Dr. Chase for the past 2 ½ years, and sharing that information with the Board’s investigator and the

State's prosecutor, Dr. Chase has received none of that shared information from the State or the Board. Similarly, the State has not turned over exculpatory information, or any other information, within the possession of other branches of the Attorney General's office, as clearly required by the Constitution.

While Dr. Chase is not in a position to specifically identify the information he has not received, the State's paltry disclosures to date make clear that the Board's investigator and prosecutor must have generated additional discoverable information if they have completely investigated the numerous serious claims set out in the specification of charges.

II. Discussion.

The Board and the State are obligated by statute, caselaw, and the federal and state constitutions to provide Dr. Chase with all relevant information in their possession and control, including all exculpatory material and all witness statements, in order to ensure that the Board accords Dr. Chase a fundamentally fair hearing.

A. Pursuant To 26 V.S.A. § 1318(e), The State Is Mandated To Disclose To Dr. Chase All Information In The Possession Of The Department Of Health Pertaining To Charges Pending Before The Board.

Pursuant to statute, “[a] licensee or applicant shall have the right to inspect and copy all information in the possession of the department of health pertaining to the licensee or applicant, except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.” 26 V.S.A. § 1318(e). Board Rule 19.1 also states that, “[t]he licensee is entitled to any information in the Board's possession, with the exception of (1) investigatory files as to matters which have not resulted in charges of unprofessional conduct; and (2) attorney work product.” Both the statute and Rule clearly contemplate that a licensee such as Dr. Chase should be permitted to inspect and copy all information in the possession and control of the Board, including all exculpatory material and witness statements, that relate in any way to the

charges against him. The relevant information within the Board's control includes all evidence regarding Dr. Chase and his cataract practices, from any source. It includes the statements of patients whose complaints are not included in the specification of charges if these statements pertain in any way to Dr. Chase's cataract practices. It also includes any information the Board's investigator has obtained from other state and federal prosecutors or investigators. Simply put, 26 V.S.A. § 1318(e) and Board Rule 19.1 require the State and Board to produce all information from all sources that may be relevant in any way to the pending charges. Dr. Chase has not received all of that information.

B. It Is Generally Recognized That The Respondent In An Administrative Disciplinary Action Is Entitled To Disclosure Of All Exculpatory Information.

In addition to the general requirement for disclosure of all information contained in 26 V.S.A. § 1318(e), courts have recognized that an individual subject to disciplinary action must generally be allowed to access all exculpatory information within the possession and control of the administrative body and government prosecutors. *See EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1383 (D.N.M. 1974) ("Fair play, a fair trial, and the requirements of due process of law demand that defendant be permitted to find out in advance of trial what the [EEOC's] case is all about."); *Wills v. Composite State Bd. of Medical Examiners*, 384 S.E.2d 636, 639 (Ga. 1989) ("A licensee facing the possibility of the loss of a license/livelihood must, upon proper request, be allowed access to information held by the Board that is exculpatory in order . . . to reach a constitutional result."). Through these and other cases, courts have expressly stated that the *Brady*¹ principle extends to administrative hearings. *See Los Alamos Constructors, Inc.*, 382 F. Supp. at 1383 n.5 ("*Brady* [] orders that exculpatory information must

¹ In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the government is obligated by the Due Process Clause of the United States Constitution to turn over all material exculpatory information in a criminal prosecution.

be furnished a defendant in a criminal case. A defendant in a civil case brought by the government should be afforded no less due process of law.”); *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) (“Presumably the essentials of due process at the administrative level require similar [*Brady*] disclosures by the agency where consistent with the public interest. In civil actions, also, the ultimate objective is not that the Government ‘shall win a case, but that justice shall be done.’”); *Wills*, 384 S.E.2d at 639 (“If a licensee makes a general or specific request for exculpatory, favorable, or arguably favorable information which is relative to the formal complaint, then the Board must furnish the information requested in the same manner as prescribed by *Brady*[].”).

Under *Brady*, the prosecutor’s duty to disclose materially favorable information is not limited to the information in his or her own files. Rather, the government has an affirmative obligation to actively seek *Brady* material from the files of related agencies reasonably expected to have possession of such information. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *see also United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001). Those agencies include other branches of the government. *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (“information possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case”). In this case, Dr. Chase believes that there may be additional undisclosed exculpatory information located within the State’s files, and most likely right in the files of the Vermont Attorney General’s Office, which helped prosecute the criminal case against Dr. Chase. Dr. Chase also believes that the Board, its investigator and prosecutor have obtained statements and documents from other patients and witnesses. While some of these witnesses may not have filed formal complaints against Dr. Chase, and others have filed complaints that have not been formally charged, they are nonetheless subject to the State’s *Brady* obligations. Regardless of whether this additional

material is located in a State file down the street or down the hall, the State has a duty to seek out and produce this material to Dr. Chase. To the Respondent's knowledge, the State has taken no steps to fulfill this duty.

C. Fairness Requires The State Or Board To Turn Over Prior Statements Of All Witnesses As Well.

"[T]he rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). To advance these rights, the so-called *Jencks* rule requires that prior statements of witnesses in the possession of the government be turned over to the defendant for use in cross-examination where such statements relate to the witness's testimony. *See* 18 U.S.C. § 3500. The *Jencks* rule is intended to provide defendants with the means and opportunity for thorough cross-examination of government witnesses. *See United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972). The *Jencks* principle has been incorporated into the Vermont Rules of Criminal Procedure, which require state prosecutors to "[d]isclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control." V.R.Cr.P. 16(a)(1).

Although the *Jencks* rule is set forth in a federal statute and state criminal rules, a number of courts have concluded that the principle of the *Jencks* rule is applicable to state and federal administrative proceedings as well. *See NLRB v. Adhesive Prods. Corp.*, 258 F.2d 403, 408 (2d Cir. 1958) ("In our opinion, logic compels the conclusion that [*Jencks*] rules are applicable to an administrative hearing."); *Chief, Montgomery County Department of Police v. Jacocks*, 436 A.2d 930, 936 (Md. Ct. Spec. App. 1981) ("Administrative agencies . . . must observe the basic rules of fairness, and that is what the *Jencks* rule is all about"); *Greco v. State Police Merit Board*, 245 N.E.2d 99, 102 (Ill. App. Ct. 1969) ("Since the Board uses an adversary procedure to perform its

investigation, a fair and unbiased result can obtain only if both adversaries are allowed to present a full case and are allowed to rebut the opposition. Depriving the defense of pre-trial statements of opposition witnesses who testify greatly impairs such full presentation and rebuttal and obliterates the opportunity for meaningful cross-examination.”); *Barbour v. People of the State of New York*, 620 N.Y.S.2d 892, 894 (N.Y. Sup. Ct. 1994) (collecting federal cases holding that *Jencks* rule is applicable in administrative proceedings). Thus, in order to preserve the fundamental fairness of the Board hearing, which Dr. Chase is constitutionally guaranteed, he must be provided with all witness statements within the possession and control of the Board or the State, wherever they are located.

D. Dr. Chase Cannot Exercise His Due Process Rights To Confront And Cross Examine Witnesses Absent The Requested Disclosures.

Administrative proceedings are subject to the requirements of the Due Process Clause of the United States Constitution. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Petition of N.E. Tel. & Tel. Co.*, 120 Vt. 181, 188 (1957); *Lowe v. Scott*, 959 F.2d 323, 334-35 (1st Cir. 1992). Because the rights to confront and cross-examine witnesses are recognized as essential to due process, “the absence of proper confrontation at trial ‘calls into question the ultimate integrity of the fact-finding process.’ ” *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). The Vermont Constitution contains a similar guarantee. *See* Vt. Const., Ch. 1, Art. 1 (“That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety . . .”); Vt. Const., Ch. 1, Art. 7 (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons,

who are a part only of that community”); accord *In re Smith*, 169 Vt. 162, 171 (Vt. 1999) (process due in given administrative proceeding depends on interest at stake). Of course, the right to cross-examination is rendered meaningless if the respondent is denied access to the information necessary to effectively question the State’s witnesses. Among the most important information necessary for effective cross-examination are witness statements and material exculpatory information.

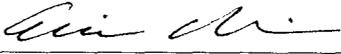
Given all that Dr. Chase and his family have at stake in this proceeding, only a hearing incorporating certain procedural safeguards, including disclosure of exculpatory information and all witness statements within the possession or control of the Board or State, will satisfy the guarantees of the federal and state constitutions.

III. Conclusion.

For the reasons stated above, Dr. Chase respectfully requests the Board to require disclosure of all information, including all exculpatory information and witness statements, in the possession or control of the State or the Board, prior to commencement of the Board’s disciplinary hearings. The disclosure must take place in time for Dr. Chase to effectively use the information at trial.

Dated at Burlington, Vermont, this 25 day of May, 2006.

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

By: 

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