

**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 REPLY MEMORANDUM REGARDING HIS PRE-HEARING MOTIONS

Now comes the Respondent, David S. Chase, M.D., by and through counsel, and hereby submits the following Reply Memorandum in response to the State’s Memorandum In Opposition To Respondent’s Pre-Hearing Motions.

The State has filed a single Opposition to Dr. Chase’s requests for the Board to:

1. Exclude the testimony of patients who have not provided Dr. Chase with access to their medical records;
2. Require the State to turn over all *Brady* material in its possession and to produce all information required by the VAPA and Board Rule 19.1;
3. Require the State to provide Dr. Chase with an updated and accurate witness list; and
4. Require the Board to admit into evidence the original medical records of the 12 complaining patients.

Once again, the State is attempting to prevent the Board from hearing relevant evidence and to disadvantage the Respondent in every possible way, whether fair or not. The State’s opposition so misstates relevant law and misconstrues the history of this case that it has provided the Respondent with no choice but to file a reply memorandum in order to set the record straight.

I. The Board Has The Power And The Obligation To Exclude The Testimony Of Patients Who Do Not Provide Dr. Chase With Access To Their Medical Records.

The State first opposes Dr. Chase's request to exclude the testimony of witnesses who will not give Dr. Chase access to their updated medical records. The government's position is incorrect for two fundamental reasons: it ignores the relevant facts, and it misstates the relief Dr. Chase seeks. When Dr. Chase's true request is considered in light of the actual history of this case, it is clear that the Board has the authority and the legal obligation to exclude the testimony of any complaining patients who do not provide Dr. Chase with the updated medical records that are relevant to their claims.

The State first asserts that the Board already decided this issue in its August 13, 2004 Order. (Opposition at 3.) The State's position overlooks the very reason why the instant Motion had to be filed – namely, *the material facts have changed since 2004*. By the time the Board ruled upon Dr. Chase's original 2004 Motion seeking access to patient records, Dr. Chase had been given releases allowing him to access the complaining patients' up-to-date medical records. The Board's decision that Dr. Chase's 2004 request was rendered moot by virtue of his receipt of the releases may have been appropriate at that time. (See, e.g., Motion to Exclude at 2-5.) However, because those same patients now refuse to provide Dr. Chase with current releases, the issue is no longer moot and must be addressed under these current, and legally different circumstances. The State strategically ignores this point in its Opposition.¹

Second, the State asserts that the Board has "no power to order patients to release their

¹ Curiously, the State goes so far as to claim that "[n]owhere in his instant motion does Respondent explain why... the August 13, 2004 decision [is] no longer controlling." (Opposition at 4.) In fact, that is exactly what Dr. Chase does in section II.B. of his Motion, which bears the self-explanatory title: "**Dr. Chase Has Now Requested Updated Releases, But Nine Out Of The 12 Remaining Witnesses Have Either Refused Or Declined To Respond.**" (Motion at 4 (bold in original)).

medical records.” (Opposition at 3.) Dr. Chase does not argue to the contrary and is not asking the Board for such an order. Rather, Dr. Chase is asking the Board to exercise its authority (unchallenged by the State) to exclude prejudicial, confusing, unreasonable, or otherwise improper evidence at the merits hearing under the Rules of Evidence, which are applicable to this proceeding. As pointed out in Dr. Chase’s Motion, caselaw makes clear that where a patient refuses to provide the defense with access to medical records after putting his or her medical condition at issue, the tribunal must preclude that patient from testifying. (Motion to Exclude at 6-13.) Any other result would allow the patient (and, here, the State) to use the physician-patient privilege and medical records privacy considerations as a “sword” rather than a “shield” and would deprive the defense of the information necessary to fully evaluate and cross-examine the patient regarding his or her claims. Notably, the State mounts no challenge to the Respondent’s extensively briefed legal position.

The Respondent’s concern over access to updated patient medical records, and the importance of those records to his defense, are not theoretical. In the federal criminal case, the government was required to turn over all of its complaining witnesses’ updated medical records. Those records often revealed that the complaining patients had complained to other doctors of the very same symptoms they denied reporting to Dr. Chase, greatly undermining the government’s accusations that Dr. Chase had falsified the patient complaints in his charts. The same records often revealed that other eye doctors had later recommended the very same surgeries that the government accused Dr. Chase of recommending unnecessarily.

Dr. Chase’s acquittal was due in no small part to the fact that he had the complaining witnesses’ updated medical records. Dr. Chase must have, and the Board should want, the same access to this very important information here. If the complaining patients continue to refuse to provide the Board and the Respondent with this relevant evidence, the Board must preclude them

from testifying against Dr. Chase. Any other result would not only be deeply unfair, it would constitute reversible error.

II. Dr. Chase Is Entitled To All Material Exculpatory Information In The State's Possession And To All Information Relevant To The Charges Against Him.

In his Motion For Disclosure Of All Exculpatory Information And Witness Statements In The Possession Or Control Of The Board Or The State ("Disclosure Motion"), Dr. Chase seeks disclosure of two separate, yet overlapping categories of relevant information to which he is entitled. First, given the State's unduly narrow view of its disclosure duties, the Respondent again requests that the State comply with its obligations under 26 V.S.A. § 1318(e) by providing him with all information in the possession of the Board or the State that pertains to Dr. Chase and that is not otherwise protected from disclosure. Second, consistent with the *Brady* principle, Dr. Chase has requested that the State provide him with all exculpatory information within the possession and control of the Board or the State. In its Response, the State conflates Dr. Chase's two distinct requests and again demonstrates its fundamental misunderstanding of both the nature of this proceeding and the State's disclosure obligations under applicable law.

A. Dr. Chase Is Entitled To All Information Relevant To The Charges Against Him.

The State concedes, as it must given the Board's prior rulings, that Dr. Chase is entitled to all of the information "pertaining to the licensee" that is in the files of the Board or the State, except for information that has not resulted in charges of unprofessional conduct. *See* 26 V.S.A. § 1318(e); Board Rule 19.1. Nonetheless, the State has studiously avoided certifying that it has made available to the Respondent all such information. Instead, the State contends that it has complied with this rule because it has given Dr. Chase all statements or documents "relating to the twelve individual patients" named in the Superceding Specification. The government's careful choice of words---that it has turned over information "relating to the twelve individual patients" rather than all information

“pertaining to the licensee”---is an attempt to hide the fact that it still has not made available all of the information to which Dr. Chase is entitled.

Consistent with its unduly narrow view of its disclosure obligations, the State has provided the Respondent only with the information in the “files” of the 12 complaining patients. Dr. Chase believes, and the State’s evasion suggests, that it still has in its possession a great deal of information that relates both to Dr. Chase and to the charges pending against him that is not (or should not be) sequestered in the files of patients whose complaints have not resulted in formal charges.² For instance, the charges that the State has brought with respect to the 12 complaining patients directly implicate a host of larger scientific and medical issues: the validity of contrast sensitivity testing (“CST”), the validity and proper use of brightness acuity testing (“BAT”), the limitations of Snellen visual acuity testing, the role of patient questionnaires in diagnosing operable cataracts, and the proper standard for when cataract surgery is medically necessary, to name a few. It is inconceivable that the State has leveled career-ending charges against Dr. Chase without investigating and evaluating these central issues. Yet, the State has produced virtually no discovery information on these topics. Instead, it has contented itself with turning over the files of the 12 patients.

This slim disclosure does not begin to meet the State’s discovery obligations. The language of 26 V.S.A. § 1318(e) and Board Rule 19.1 is clearly designed to provide the Respondent with all of the information in the Board’s or the State’s possession that is relevant to the licensee and the pending charges against him, while protecting from disclosure only information that is instead solely relevant to an ongoing or closed investigation of uncharged conduct (such as the medical

² The State and the Board cannot avoid their obligations to disclose information relevant to the pending charges by placing such information in a file that is otherwise exempt from disclosure. To the extent that the State or the Board’s investigator have hidden information pertaining to the charges against Dr. Chase in the files of patients whom it has not chosen to charge, that purposefully deceptive conduct would deserve the most serious of sanctions.

records of a complaining patient who is not the subject of formal charges). The Vermont Rules of Evidence, which are applicable to this proceeding, *see* 3 V.S.A. § 810(1), define “relevant evidence” to include “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” V.R.E. 401. Under this or any other definition, the types of information recited above are relevant to the charges currently pending against Dr. Chase. While this information may or may not be contained in the file of any one of the 12 individual patients, it “pertains to the licensee” and to all of the charges against him. As such, it must be disclosed.³ Only information that is solely relevant to uncharged complaints is protected by 26 V.S.A. § 1318(e) and this Board’s Rules.

The Board should issue an order explicitly saying that the State is required to provide the Respondent access to all of the information in its or the Board’s possession that pertains to Dr. Chase (including all information that is relevant to the pending charges) as long as that information is not solely relevant to the uncharged complaint of another patient. Absent such an explicit order, the State will continue to play semantic games in order to prevent Dr. Chase from receiving the evidence to which he is entitled.

B. The State Has A Separate Constitutional Obligation To Disclose All Of The Material Exculpatory Information In Its Possession, Custody, or Control.

The State has opposed Respondent’s entirely separate request for disclosure of material exculpatory information, or so-called “*Brady*” material. The State begins by purposefully conflating the Respondent’s VAPA request for all information “pertaining to the licensee” with his constitutionally based request for all material exculpatory information. Dr. Chase does not contend

³ The State’s argument that the Respondent must come to the Board’s office and view the files to which he is entitled, rather than having them produced to him, is beside the point. Regardless of where Dr. Chase and his attorneys review the responsive information in the possession of the State and the Board, he is entitled to access it. The State has denied him that access.

that *Brady* requires the disclosure of all relevant information, as the State misrepresents. Rather, *Brady* requires the government to produce a separate and smaller (if overlapping) universe of information, consisting of all of the material exculpatory information within its possession, custody, or control.

Even as to this more limited request, the State refuses to affirm that it has provided the Respondent with all of the responsive information it has. Rather, it claims that because the Vermont Supreme Court has not been called upon to decide whether the State must make such disclosures in this context, it can be under no such obligation. While the Vermont Supreme Court has not yet had occasion to consider the issue, other state and federal courts from around the country have. Applying the same Due Process Clause applicable to these proceedings, those courts recognize that an individual subject to disciplinary action must 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); *Wills v. Composite State Bd. of Medical Examiners*, 384 S.E.2d 636, 639 (Ga. 1989). They expressly state that the *Brady* principle extends to administrative hearings. See *Los Alamos Constructors, Inc.*, 382 F. Supp. at 1383 n.5; *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966); *Wills*, 384 S.E.2d at 639.⁴

In the face of this body of caselaw, the State cites a single comment of one Vermont justice in a *dissenting* opinion. That single aside is not applicable here and, of course, does not represent that state of the law in Vermont. To the contrary, the Vermont Supreme Court has long recognized

⁴ The State's cited cases and parenthetical comments on the applicability of *Brady* to administrative proceedings are so inapplicable as to be affirmatively misleading. It is irrelevant that neither the plaintiff nor the trial court in *Sherman v. Washington*, 905 P.2d 355, 371 (Wash. 1995), cited authority for the proposition that a prosecutor has a duty to disclose material exculpatory information in an administrative proceeding. As noted above, such authority exists and is persuasive. In *Hachamovitch*, the Court stated that it would not address the argument about withholding exculpatory information first, because it was not raised in the initial proceeding, and second, because it found the argument to be factually without merit. *Hachamovitch v. Office of Professional Medical Conduct*, 641 N.Y.S.2d 757, 759 (N.Y. App. Div. 1996).

that what process is due in any given administrative proceeding depends on the interests at stake. *See In re Smith*, 169 Vt. 162, 171 (Vt. 1999). Thus, the steps the Board and the State must take to ensure a fair proceeding depends on the particular facts. Where as here, the licensee is facing the possibility of the loss of his professional license, and thereby his livelihood, he must be given the basic due process rights afforded by *Brady*. *See Wills*, 384 S.E.2d at 639.

The State next contends it is not obligated to learn of favorable evidence in files outside of the prosecutor's individual office. The State is wrong. Just this week, the United States Supreme Court reiterated that, "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Youngblood v. West Virginia*, --- S. Ct. ---, 2006 WL 1666862, at *1 (U.S. June 19, 2006) (quoting and citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995), for the proposition that, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.") The State has an obligation to check with the Board and other agencies in order to identify and produce evidence favorable to Dr. Chase.

Finally, and perhaps most importantly, the State again attempts to further narrow the definition of "exculpatory" to fit this proceeding and, conveniently, justify its disclosures to date, claiming that no additional documents or statements relating to the twelve individual patients have been "created or received by the State." As discussed at length above, there may be substantial favorable evidence that does not fit within the State's unduly cramped definition. *Brady* requires disclosure of all material exculpatory information, even if it does not narrowly and directly relate to Dr. Chase's treatment of one of the twelve particular patients and even if it is not already in the prosecutor's own files. *See Youngblood*, 2006 WL 1666862, at *1.

III. The Board Should Stop The State From Engaging In Gamesmanship And Order The Parties To Provide Updated Witness Lists And Orders Of Call In Advance Of Trial.

In order to regulate the proceedings before it and to allow the parties to efficiently prepare for the merits hearing, on August 7, 2003 the Board ordered the parties to produce witness lists to one another. The State did not take issue with the Board's authority to order these disclosures or its wisdom in doing so. It proceeded to disclose over 30 witnesses that it might call at trial. Nearly three years have passed since then. Both parties have performed formal and informal discovery and have presumably honed their cases in order to make the most efficient possible presentations to the Board. The State has indicated that it has significantly streamlined its case and will present only a handful of live witnesses at trial. Yet it now takes the position that the Board does not have the power to require the parties to provide one another with updated witness lists that more accurately reflect the witnesses they expect to call at trial.

The Board's refusal to provide an updated witness list, or to give the Respondent significant advance notice of the order in which it will call its witnesses, will prejudice both the Respondent and the Board. There is only one reason why the State will not tell the Respondent or the Board which of its dozens of witnesses it actually expects to call at trial: It does not want Dr. Chase to be able to prepare to cross-examine its witnesses in a meaningful, organized, and efficient way. It would rather Dr. Chase and his attorneys spend countless hours and tens of thousands of dollars preparing to cross-examine a much larger group of witnesses, most of whom the State knows it will never call as witnesses. The result will be a less organized, less efficient merits hearing, marked by more interruptions and delays. It will also be much more expensive and burdensome to Dr. Chase. That is why Dr. Chase asked the State for the common courtesy of updating its witness list prior to trial. But the State flatly refused. The Board should not countenance the State's gamesmanship. It has the authority and the responsibility to take the steps to ensure an efficient hearing. The most

basic of these steps is to order the parties to provide one another with updated witness lists, containing the witnesses they actually expect to call at trial, one month in advance of the hearing.

IV. The Board Should Receive Only The Original Medical Files Into Evidence.

Finally, the State opposes the Respondent's simple request that only the original medical records of the 12 patients be admitted into evidence. Contrary to the nonsensical conspiracy theory floated by the State in its Opposition, Dr. Chase's motion is not a secret attempt to set the groundwork for a subsequent motion to dismiss. Instead, as discussed at length in Dr. Chase's Motion, the precise order and arrangement of Dr. Chase's medical records for the 12 patients is important to his defense. The copies made by the government do not attempt to preserve that order, and the State does not argue to the contrary. As a result, admission of the State's copies into evidence would be "unfair," requiring admission of the originals under Vermont Rule of Evidence 1003. Because the originals are easily available, the Respondent's request imposes no burden on any party or the Board. The State appears to be objecting to the request solely for the sake of standing in the way of the Respondent.

At the same time, Dr. Chase acknowledges that during the trial the parties will sometimes need to show only individual pages of the patients' medical records to particular witnesses and to the Board. In presenting these individual pages, either electronically or on paper, it may make little difference how the charts as a whole are organized. As a result, in order to expedite the hearing, both parties should have the flexibility of using electronic or hard copies of the medical records during their presentations. But when the Board deliberates, it must do so through examination of the original charts admitted into evidence.

The State makes much of the fact that the federal government rearranged the order of many of Dr. Chase's original charts without the permission of the defense or the Court. While that unauthorized rearrangement did compromise the original charts, the federal Court required that the

government re-order the originals to reflect their prior condition as closely as possible. While the re-ordering was imperfect, the originals are still the best, indeed only, evidence of how Dr. Chase's charts were kept. The State has provided no reason why the Board should not ultimately rely on the original records in their original format. For all of these reasons, the Board should reject the State's position and grant Dr. Chase's Motion.

Dated at Burlington, Vermont, this 21st day of June, 2006.

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

By: 
Eric S. Miller
R. Jeffrey Behm
Debra L. Bouffard
Ian P. Carleton
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891