

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

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

**MOTION TO EXCLUDE TESTMONY OF WITNESSES  
WHO HAVE DENIED DR. CHASE UPDATED ACCESS  
TO THEIR MEDICAL RECORDS**

Respondent, David S. Chase, M.D., through counsel, hereby submits this Motion to exclude the testimony of any State witnesses who have denied Dr. Chase updated access to their medical records. In support of this Motion, Dr. Chase relies upon the following incorporated Memorandum of Fact and Law.

**MEMORANDUM OF FACT AND LAW**

**I. Introduction.**

In 2003 and 2004, Dr. Chase received limited medical releases from all of the complaining witnesses in this proceeding. Those releases helped Dr. Chase procure and review at least some of the witnesses' relevant medical records so that he could prepare his defense. Since that time, however, the releases, each of which was valid for a limited period of time, have expired. Now that the stay pending resolution of Dr. Chase's federal criminal proceeding has been lifted, most of the witnesses (9 of the remaining 12 complainants) are refusing to re-execute similar releases. As a result, Dr. Chase and his experts are unable to review up-to-date medical records in preparation for the upcoming merits hearing.

The Board must exclude the testimony of any State witnesses who refuse to update their releases for Dr. Chase. There are at least three reasons this is so. First, the Vermont Rules of

Evidence (V.R.E.), which the Board is empowered to apply by virtue of the Vermont Administrative Procedures Act (V.A.P.A.), as well as caselaw from Vermont and elsewhere, provide that a patient's right to the confidentiality of his or her medical records is waived where, as here, the patient's medical condition is placed at issue in a proceeding. Exclusion of testimony by patients who refuse to disclose their medical records after waiving their privilege – precisely the remedy Dr. Chase seeks here – is an established method employed by courts to ensure the fundamental fairness of judicial proceedings. Second, the Board Rules, read together with the V.A.P.A., require the Board to exclude prejudicial, confusing or unreasonable evidence, which includes any testimony relating to medical conditions that Dr. Chase is unable to assess. Third, the Due Process clause of the Fourteenth Amendment to the United States Constitution grants Dr. Chase the right to confront and cross-examine the witnesses against him. Implicit within that constitutional protection is the right to properly and thoroughly prepare for such cross-examination, which cannot happen if Dr. Chase is denied the right to review the medical records relevant to the testimony of the witnesses he must cross-examine.

Finally, it should be noted that the Board's August 13, 2004 Decision denying Dr. Chase's request for access to patient records at that time is not applicable to the current circumstances. In that decision, the Board indicated that Dr. Chase's request had essentially become moot in light of the fact that all 13 patients had executed limited releases by the time of the Board's decision. In the present circumstances, most of the complaining patients have refused to execute updated releases and that fact requires exclusion under applicable law.

## **II. Factual Background.**

### **A. Respondent's Initial Request For Access To Patient Medical Records.**

In the course of deposing the complaining witnesses in the early stages of this proceeding in 2003 and 2004, Dr. Chase requested that the witnesses provide him with releases similar to

those the State required the witnesses to sign as a condition of their filing a complaint against Dr. Chase in the first place.<sup>1</sup> The complaining witnesses were initially slow to comply with Dr. Chase's request. As of July 20, 2004, Dr. Chase had releases from only six of the original 13 complaining witnesses. Fearing he would be irreparably prejudiced as a result of not having full advance access to all the relevant treatment records, Dr. Chase filed a Motion for Access to Patient Medical Records and Patient Exams (hereafter "Motion for Access").

Dr. Chase's Motion prompted the remaining witnesses to execute limited releases, which helped Dr. Chase prepare for his then upcoming merits hearing. As a result of these limited releases, the Board denied Dr. Chase's Motion, indicating "[t]he patients in question and their attorneys *were willing to sign a limited release to allow Respondent certain access to medical records.*" (August 13, 2004 Decision on Respondent's Second Motion to Dismiss Superceding Specification Of Charges And Motion For Access To Patient Medical Records And Patient Exams (hereafter "8/13/04 Decision"), at 2.) Although it was still unfair that Dr. Chase was not granted the same unlimited access to patient records enjoyed by the State, the fact that he was at least allowed to review medical records relating to the witnesses' eyes provided a modicum of fairness in advance of the proceeding. Consequently, as of August 2004, Dr. Chase had access to the minimum records he needed to prepare his defense.

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<sup>1</sup> The Board utilizes a standard complaint form that it provides to anyone who wishes to file a complaint against a physician. That complaint form prominently informs each complainant: "***Please note: Investigation of your complaint also requires your signed release. When we receive both this signed Complaint Form and your Authorization for Release of Medical Records, we will send an acknowledgement assigning a docket number to your case.***" (See Medical Practice Board Complaint Form at 2, an example of which is attached as Exhibit A. (emphasis added).) This is consistent with Board Rule 13.2, which instructs that every complainant shall be notified "that a medical release form signed by the patient who is the subject of the complaint ***must be filed with the Board.***" Rule 13.2 (emphasis added). Thus, according to the Board itself, full investigation of any complaint requires a signed medical records release form. Indeed, the Board states that it will not even open a docket on a complaint without first receiving such a form. (Id.)

**B. Dr. Chase Has Now Requested Updated Releases, But Nine Out Of The 12 Remaining Witnesses Have Either Refused Or Declined To Respond.**

Under HIPAA, medical records releases must include “[a]n expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.” 45 C.F.R. § 164.508(c)(5). In accordance with this limitation, the original witness releases procured by Dr. Chase were valid for limited periods of time. However, due to the lengthy stay in this proceeding during Dr. Chase’s federal criminal trial, all of these releases have now expired. Dr. Chase therefore no longer has the ability he once had to review the ongoing condition of the eyes of the individuals who will testify against him.

On March 28, 2006, counsel for Dr. Chase sent a letter requesting a medical release authorization to each of the following nine patient witnesses: Helena Nordstrom, Jane Corning (through her attorney, Owen Jenkins, Esq.), Joseph Touchette, Donald Olson, William Pierson, Margaret McGowan (through her attorney, John Kellner), Franklin Cole, Jan Kerr, and Robert McClain. (*See* May 22, 2006 Affidavit of Eric S. Miller (“Miller Affidavit”), attached hereto as Exhibit B, at ¶ 2; March 28, 2006 letter from Eric Miller to Helena Nordstrom, attached hereto as Exhibit C.) On May 10, 2006, counsel for Dr. Chase sent a letter to Michael Hanley, Esq., requesting a medical release authorization from the remaining three patient witnesses, all of whom are his clients, Judith Salatino, Susan Lang and Marylen Grigas. (Miller Affidavit, at ¶ 3; May 10, 2006 letter from Eric Miller to Michael Hanley, attached hereto as Exhibit D.) To date, Dr. Chase has received medical release authorizations from only three witnesses: William Pierson, Franklin Cole and Jane Corning. Margaret McGowan has affirmatively refused to provide a release, and the remaining eight witnesses have not responded to the request. (Miller Affidavit, at ¶ 4.)

In requesting that the complainants re-execute their releases, Dr. Chase is asking for nothing more than the same access he once had. That it is vital for Dr. Chase to have updated

eye records for these patients is self-evident – the central allegation in this proceeding is that Dr. Chase improperly recommended cataract surgery for the complaining witnesses. Evaluating any changes in the condition of these patients’ eyes over time is therefore directly relevant to evaluating the legitimacy of Dr. Chase’s diagnoses just a few years ago, as well as the patients’ credibility in describing their past and current vision. Dr. Chase and his experts therefore must be allowed to review up-to-date records of any complaining witnesses who testify against him. Anything less would undermine the legitimacy of this proceeding.

### **III. Discussion.**

The Board Rules, the V.A.P.A., the V.R.E., state and federal caselaw, and the United States Constitution all provide that the Board must exclude the testimony of any witness who has denied Dr. Chase access to his or her up-to-date eyecare records. If Dr. Chase is precluded from reviewing these records, he will not be able to undertake meaningful cross examination of the complaining witnesses because he will not have been given an opportunity to review the condition of their eyes subsequent to his diagnoses. If he and his experts cannot review the same records, they will not be able to present fully informed, up-to-date opinions on whether the conditions of the patients’ eyes over time validate Dr. Chase’s prior diagnoses. Dr. Chase will have no way to test the patients’ testimony regarding their current vision and recent eye care. In short, denial of access to these records will force Dr. Chase to wage an underinformed, underprepared, and therefore unconstitutional battle to exonerate himself of the charges that have been brought against him.

**A. Under The Rules Of Evidence And Relevant Caselaw, A Patient’s Refusal To Disclose Relevant Medical Records In A Proceeding Where The Patient’s Medical Condition Is At Issue Requires Exclusion Of The Patient’s Testimony.**

**1. The Vermont Rules Of Evidence Apply To This Proceeding Pursuant To The Vermont Administrative Procedures Act.**

The merits hearing in this case is required to “be conducted according to the contested case provisions of the Administrative Procedure Act, 3 V.S.A. §809-815.” Board Rule 16.3.

The contested case provisions of the V.A.P.A., in turn, provide, in relevant part:

The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

3 V.S.A. § 810(1); *In Re Desautels Real Estate*, 142 Vt. 326, 335 (1982); *In re Petition of Central Vermont Public Service Corporation For A 6.23% Increase In Rates*, 141 Vt. 284, 292 (1982). Thus, the Board is required to apply the Rules of Evidence, or only when absolutely necessary, the “reasonably prudent man” standard. *Id.*

**2. Under V.R.E. 503, A Patient Who Puts Her Medical Condition At Issue Waives Her Privilege To The Confidentiality Of Relevant Medical Records, Even If She Is Not A Party To The Action.**

Vermont Rule of Evidence 503(b) provides that “[a] patient has a privilege to refuse to disclose and to prevent any other person . . . from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, dental, or emotional condition . . . .” *Id.* However, Rule 503 establishes that this privilege is waived when a patient puts her medical condition at issue:

There is no privilege under [Rule 503(b)] as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense. . . .

V.R.E. 503(d)(3). As the Vermont Supreme Court has stated, a patient's interest in the confidentiality of her medical records "is not sacrosanct and can properly be waived in the interest of public policy under appropriate circumstances." *Peck v. Counseling Service of Addison County*, 146 Vt. 61, 67 (1985).

The Vermont Supreme Court has also held that a patient suing her doctor for malpractice waives any privilege or statutory right of confidentiality in medical records "causally or historically related to the patient-plaintiff's health put in issue by the injuries and damages claimed in the action." *Mattison v. Poulen*, 134 Vt. 158, 162-63 (1976). To hold otherwise would make the privilege "not a shield only, but a sword." *Id.* at 161 (internal quotation marks omitted).

These waivers of the physician-patient privilege, and the public policies motivating them, do not apply solely when the patient is a party to a proceeding, as in a malpractice claim. Rather, the privilege is waived whenever the patient has made an issue of her medical condition in a proceeding involving the adjudication of important rights – even when a patient is not a party. For instance, in *In re: M.M.*, 153 Vt. 102 (1989), the State attempted to terminate the parental rights of a mother. The mother, who was not a party to the action, opposed the termination. The trial court excluded the State's evidence consisting of two psychological evaluations of the mother, holding that they were privileged. The Supreme Court reversed, finding that the mother had placed her mental health at issue and had thereby "justif[ied] the admission of testimony by treating physicians or the admission of psychiatric records." *Id.* at 105. In so doing, the Court held: "The fact that the mother did not initiate the termination proceedings or any other action . . . is not determinative." *Id.* Rather, "when otherwise inaccessible and privileged information becomes pertinent to an issue vital to the future well-being of the child, the parent's right to privacy and confidentiality must yield." *Id.* at n.4 (internal quotation omitted). Similarly, in *In re*

*C.I.*, 155 Vt. 52 (1990), the Court held that a juvenile appealing Child In Need Of Supervision designation could not invoke the doctor-patient privilege to prevent testimony of the child's treating psychologist because the juvenile's "physical, mental and emotional well-being . . . were very much an issue in this proceeding". *Id.* at 58.

Once a patient has waived her physician-patient privilege, that privilege is waived as to all parties to the proceeding. *See, e.g., John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003) ("It is well established doctrine that in certain circumstances a party's assertion of factual claims can, ***out of considerations of fairness to the party's adversary***, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted . . . ." (emphasis added)).

By filing complaints against Dr. Chase about the medical treatments he provided to them, the State's witnesses in this case placed their medical conditions at issue, and therefore waived their Rule 503(b) privilege. In addition, because the complaining patients signed comprehensive medical records releases for the State, they effected a similar waiver in favor of the other party to this litigation—Dr. Chase. *See John Doe*, 350 F.3d at 302. As a result, the complainants cannot be allowed to deny Dr. Chase access to their medical records. Indeed, the complaining witnesses took an affirmative and entirely voluntary step to avail themselves of this proceeding by filing complaints against Dr. Chase. They have voluntarily agreed to testify against Dr. Chase in this license revocation proceeding; have voluntarily released all of their medical records to the State; have voluntarily agreed to share the results of recent eye exams conducted by the State's physician-witnesses; and have voluntarily agreed to allow those physicians to testify regarding their examinations. The State's case will turn on this very evidence.

In order to rebut these patient claims, Dr. Chase must be able to determine whether the patients have recently reported similar symptoms to their other practitioners. He must also be

allowed to know whether any of those other practitioners made diagnoses or treatment decisions that support his actions or refute the patients' claims and the State's allegations. According to the well-settled law cited above, the patients have therefore put their medical conditions at issue, and have waived their interests in keeping confidential any medical records that might bear upon the propriety of Dr. Chase's decision to offer them cataract surgery. Because the patients' otherwise privileged or confidential information is directly "pertinent to an issue vital" to Dr. Chase's constitutionally recognized right in his medical license, the patients' "right to privacy and confidentiality must yield," *id.* at n.4 (internal quotation omitted), to Dr. Chase just as it has already yielded to the State.

**3. Exclusion Of Testimony By Patients Who Refuse To Produce Relevant Medical Records Is An Established Remedy Employed By Courts To Ensure Fair Proceedings.**

Although the Vermont Supreme Court has not addressed the exclusion of patient testimony to remedy refusal to disclose relevant medical records, courts in other jurisdictions have. In *State v. Skillicorn*, 944 S.W.2d 877 (Mo. 1997), the Missouri Supreme Court held that the trial court "was well within its discretion" when it excluded a physician's testimony regarding his treatment of the defendant's medical condition where the defendant refused to provide the opposing party with his medical file, even after he had waived his privilege by placing his own medical condition at issue through the testimony of his doctor. *Id.* at 896-97.

Likewise, in *State v. Luna*, 921 P.2d 950 (N.M. 1996), the New Mexico Court of Appeals upheld the trial court's decision to exclude the testimony of a victim in a harassment case because she refused to turn over her mental health records, even though she had placed her mental condition at issue through prior statements. *Id.* at 952-54. The court commented: "Because the court could not order Victim to release the records, exclusion of her testimony was the only proper disposition." *Id.* at 954, *citing State v. Gonzales*, 912 P.2d 297, 303 (N.M. Ct. App. 1996)

(suppression of witness' testimony was the only way to protect defendant's right to fair trial).

Notably, the *Luna* decision excluded the testimony of a complaining witness who was not a formal party to the case, just as the complaining patients are not formal parties here.

In *State v. Shiffra*, 499 N.W.2d 719, 724-25 (Wis. Ct. App. 1993) (*abrogated on other grounds in State v. Green*, 646 N.W.2d 298 (Wis. 2002)), the Wisconsin Court of Appeals also upheld the trial court's decision to exclude the testimony of the complaining witness in a sexual assault case when she refused to submit her mental health treatment records for in camera review even though the court found her mental health was at issue in the trial. *Id.* at 721. In support of the trial court's decision to exclude the complainant's testimony, the court wrote:

In this situation, no other sanction would be appropriate. The court did not have the authority to hold Pamela in contempt because she is not obligated to disclose her psychiatric records. An adjournment in this case would be of no benefit because the sought-after evidence would still be unavailable. Under the circumstances, the only method of protecting *Shiffra's* right to a fair trial was to suppress Pamela's testimony if she refused to disclose her records.

*Id.* at 724-25. The *Shiffra* decision applies with equal force here, where the Board has ruled that it lacks the authority to compel patients to sign releases but clearly does have the power to exclude testimony under the Rules of Evidence.

Thus, exclusion of testimony by third party witnesses due to refusal to disclose relevant medical records is a well established method for ensuring a fair judicial proceedings. If anything, the facts presently before the Board make an even more compelling case for exclusion of complaining witness testimony than is do the foregoing cases. In *Sillikorn*, *Luna*, and *Shiffra* the relevance of the medical conditions were collateral to the central issues in each proceeding, namely, whether a crime had been committed. Here, the medical records sought by Dr. Chase are not a collateral issue, but rather bear directly on the central question raised by this proceeding – whether Dr. Chase's recommendations for surgery were medically valid. Moreover, the complaining witnesses voluntarily chose to initiate these proceedings; they were

not dragged in unwillingly. Consequently, exclusion of testimony by non-cooperating witnesses is even more justified in this case than it is in the cases discussed above.

**B. The V.A.P.A. And The V.R.E. Provide That The Board Must Exclude Any Evidence That Is Either Inadmissible Under The Rules Of Evidence, Or That Is Not Otherwise Reliable.**

Under the V.A.P.A. and the V.R.E., the Board has the responsibility to determine the admissibility of evidence. This responsibility includes excluding any evidence for which the probative value “is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . .” V.R.E. 403; *State v. Eddy*, 2006 VT 7, 895 A.2d 162, 166 (2006). Cross-examination has been described as “the greatest legal engine ever invented for the discovery of truth.” 5 J. Wigmore, *Evidence* § 1367, at 32 (J. Chadbourn rev. 1974); *United States v. Salerno*, 505 U.S. 317, 328 (1992) (quoting Wigmore observation with approval). The converse of Wigmore’s axiom is that the absence of meaningful cross-examination is *antagonistic* to the search for truth. Testimony that cannot be effectively scrutinized by means of informed cross-examination is inherently prejudicial, confusing, and unreasonable.

The United States Supreme Court has repeatedly articulated its belief in the vital importance of meaningful cross-examination in avoiding unfair prejudice. In *Pointer v. Texas*, 380 U.S. 400 (1965), Justice Black wrote:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and ***cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.***

*Id.* at 405 (citations omitted) (emphasis added); *see also Lee v. Illinois*, 476 U.S. 530, 540 (1986) (“the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest

possible degree society's interest in having the accused and accuser engage in an *open and even contest* in a public trial." (emphasis added)).

The language of the V.A.P.A. embraces the "truth seeking" function of cross examination set forth in *Pointer and Lee*: "In contested cases . . . [a] party may conduct cross-examinations required for a *full and true disclosure of the facts* . . . ." 3 V.S.A. § 810(3) (emphasis added). *Langlois v. Department of Employment & Training*, 149 Vt. 498, 502 (1988). Within this proceeding the Board has expressed similar sentiments, promising that, "Respondent will have *full opportunity to cross-examine witnesses* . . . ." (8/13/04 Decision, at 2 (emphasis added)).

The "full and true disclosure of the facts" required under the V.A.P.A., and the "full opportunity to cross examine witnesses" pledged to Dr. Chase by the Board will not occur if Dr. Chase is confronted by witnesses who have undergone subsequent eye treatment that Dr. Chase cannot review. To win its case, the State must prove by a preponderance of the evidence, largely through testimony of the complaining witnesses and their physicians, that Dr. Chase's recommendations for cataract surgery were unwarranted and therefore fraudulent. Information directly relevant to this testimony will almost assuredly be found in the ophthalmic medical records of those patients over the past two years. For instance, those records will reveal whether the patients have recently reported visual symptoms to their other practitioners. They will also reveal whether any other practitioners made diagnoses or treatment decisions that support Dr. Chase's actions or refute the patients' claims and the State's allegations. This information is central to the State's allegations, and Dr. Chase is therefore entitled to it.

If this matter were in superior court and proceeding under the rules of civil procedure Dr. Chase might be able to procure these records by means of subpoenas, discovery requests, and if necessary, filing motions to compel with the court. He has no such rights here, since the civil rules of procedure are not directly applicable administrative hearings. *Condosta v. D.S.W.*, 154

Vt. 465, 467 (1990); 8/13/04 Decision at 2. Yet it is precisely because the rules of discovery do not apply that the Board must be particularly vigilant in utilizing the authority it does have – in particular, its authority under 3 V.S.A. § 810(1) to determine the admissibility of evidence – in a manner that ensures fairness and impartiality in this hearing. *Petition of N.E. Tel. & Tel. Co.*, 120 Vt. 181, 188 (“[A] quasi-judicial [administrative] action . . . prescribed [by the due process clause] **must faithfully observe the ‘rudiments of fair play.’**” (citations omitted) (emphasis added)). Given the Board’s inability to compel discovery of critical documents, and in light of its duty to promote fundamental fairness, the Board is left with no alternative but to give the witnesses the choice of either re-executing releases for Dr. Chase so he can properly prepare, or foregoing the opportunity to testify against him.

**C. Dr. Chase Possesses A Due Process Right To A Fair Hearing.**

The United States Supreme Court, the Vermont Supreme Court, and other state and federal courts from across the country, have made clear that administrative proceedings such as this 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) (“The essentials of due process permit administrative regulation only by adherence to the fundamental principles of constitutional government.”); *Lowe v. Scott*, 959 F.2d 323, 334-35 (1<sup>st</sup> Cir. 1992); *Colorado State Bd. of Med. Examiners v. Colorado Ct. of App.*, 920 P.2d 807, 812 (Colo. 1996).

Thus, a proceeding before an administrative agency is always subject to the “**essentials of due process.**” *Petition of N.E. Tel. & Tel. Co.*, 120 Vt. at 188 (emphasis added). “The quasi-judicial [administrative] action . . . prescribed [by the due process clause] **must faithfully observe the ‘rudiments of fair play.’**” *Id.* (emphasis added). As one court recently stated, the “**relaxed procedure**” of an administrative proceeding “**is not a license to violate fundamental**

*fairness.*” *Nichols v. DeStefano*, 70 P.3d 505, 507 (Colo. Ct. App. 2002); *see also Precious Metals Assoc., Inc. v. Commodity Futures Trading Comm’n*, 620 F.2d 900, 910 (1<sup>st</sup> Cir. 1980) (due process mandates that an administrative hearing be conducted in accordance with fundamental principles of fair play); *Silverman v. Commodity Futures Trading Comm’n*, 549 F.2d 28, 33 (7<sup>th</sup> Cir. 1977) (“[T]he due process clause does insure fundamental fairness of the administrative hearing.”); *Miklus v. Zoning Board*, 225 A.2d 637, 641 (Conn. 1967) (“[T]he conduct of [an administrative] hearing shall not violate the fundamentals of natural justice.”); *Sohi v. Ohio State Dental Board*, 720 N.E.2d 187, 192 (Ohio Ct. App. 1998) (“Procedural due process [in medical license suspension hearing] also embodies the concept of fundamental fairness.”).

As set forth in Section III.B above, the due process clause entitles Dr. Chase to conduct meaningful cross-examination. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process.”); *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (“[T]he absence of proper confrontation at trial ‘calls into question the ultimate integrity of the fact-finding process.’” (quoting *Chambers*, 410 U.S. at 295)) *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *see also Pointer*, 380 U.S. at 405; *Lee*, 476 U.S. at 540. However, meaningful cross examination cannot take place if Dr. Chase is forced to confront witnesses about which he has incomplete knowledge that can easily be supplemented but for the patients’ refusal to do what the law requires – turn over their relevant records. Because the key facts identified above cannot be known, much less effectively assessed, without updated medical records for each of the remaining witnesses, Dr. Chase will not be able to cross examine the witnesses on the issues that matter most to establishing Dr. Chase’s innocence. As a result, this proceeding will not embody “the rudiments of fair play,” *Petition of N.E. Tel. & Tel. Co.*, 12 Vt. at 188, nor the “fundamental

fairness,” *Nichols*, 70 P.3d at 507, to which Dr. Chase is constitutionally entitled unless testimony from these witnesses is excluded.

**D. Because Nine Patients Have Changed Their Position On Executing Releases, The Board’s Denial Of Dr. Chase’s 2004 Motion For Access To Patient Records Is Inapplicable.**

In his original Motion for Access to Patient Records, filed July 20, 2004, Dr. Chase wrote:

[T]he Board . . . should give the State’s witnesses a simple and fair choice: They must provide Dr. Chase the same equal access to their medical records and the same equal opportunity to be examined as they have provided to the State or be excluded from testifying at the merits hearing in this matter. No other remedy will guarantee that in presenting his defense, Dr. Chase will have access to the same information the State has at its disposal in prosecuting him. No other remedy will begin to guarantee a level playing field. And no other remedy will produce a meaningful hearing on the merits in this matter.

(Motion for Access, at 3.) In its August 13, 2004 decision denying Dr. Chase’s Motion, the Board correctly noted that by the time Dr. Chase’s Motion was heard and decided, “the patients in question and their attorneys *were willing to sign a limited release to allow Respondent certain access to medical records.*” *Id.* at 2 (emphasis added). Thus, by the time the Board decided this issue back in 2004 the underlying problem had largely been resolved. Presently, however, it does not appear as if a similar resolution will be forthcoming without Board action.

To the extent that the witnesses continue to deny Dr. Chase access to their records, the Board must employ the approach set forth by the courts in *Sillikorn*, *Luna* and *Shiffra*, *supra*, and prevent these witnesses from testifying if they do not change their minds. As demonstrated above, under Board Rule 16.3, 3 V.S.A. § 810(1), and V.R.E. 403 and 503(d)(3), the Board is not just empowered to exclude unfair or prejudicial testimony; it is obligated to do so.

**IV. Conclusion.**

For the above reasons, Dr. Chase requests that the Board preclude any testimony by

witnesses who have not provided Dr. Chase with updated access to their medical records.

Dated at Burlington, Vermont, this 25<sup>th</sup> day of May, 2006.

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