

**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 OPPOSITION TO THE STATE’S MOTION FOR ADMISSION OF DEPOSITIONS OF STEPHEN GREEN AS EVIDENCE AND MOTION FOR SUPPRESSION OF THE MARCH 2004 DEPOSITION

Now comes the Respondent, David S. Chase, M.D., by and through counsel, and hereby submits this Opposition To The State’s Motion For Admission Of Depositions Of Stephen Green As Evidence And Motion For Suppression Of The March 2004 Deposition. In support of this Motion, Dr. Chase relies upon the following incorporated Memorandum.

MEMORANDUM

I. Introduction.

Stephen Green, a former employee of Dr. Chase, is one of Dr. Chase’s chief accusers and one of the State’s most important witnesses. It was Mr. Green who, after working for Dr. Chase for just a few weeks, secretly contacted the Medical Practice Board, in order to inform the Board of his unfounded suspicions regarding Dr. Chase’s surgical practices. Mr. Green was deposed in February and March of 2004, once by Dr. Chase in this matter and once by private plaintiffs in a civil malpractice action. However, sometime between March and August of 2004, something changed for Mr. Green. According to the affidavit of Jean Kennedy attached to the State’s Motion For Admission, as of August 30, 2004, Mr. Green was refusing to testify in further Board proceedings, refusing to review his deposition taken in the Board case against Dr. Chase, and refusing to sign that deposition transcript. Claiming that Mr. Green is unavailable to provide live

testimony, the State now seeks to have admitted into the evidence Mr. Green's unreviewed and unsigned Board deposition, taken only for discovery purposes, along with the second deposition taken in the context of a private, civil lawsuit against Dr. Chase and noticed and primarily conducted by the private litigants' counsel.

Specifically, the State has claimed that the Board may admit the depositions of Stephen Green under either 3 V.S.A. § 810(1) or V.R.E. 804(b)(1). The State has failed to satisfy its burden for admission on either of the two bases. Moreover, given the significant interests of Dr. Chase that are at stake here, the State's undisputed efforts to discourage witnesses from speaking with Dr. Chase or his attorneys, and Mr. Green's apparent and sudden claim that he was refusing to take any further action in the Board matter, principles of prudence and fundamental fairness dictate that Mr. Green's depositions not be admitted in the Board proceedings.

II. Factual Background.

Stephen Green was hired as Dr. Chase's office manager in June 2003. He has no medical degree or training. After working for Dr. Chase for only a few weeks, Mr. Green noticed that Dr. Chase employed different vision tests and cataract screening techniques than the other ophthalmologists for whom he had worked. Without speaking with Dr. Chase about those tests or attempting to educate himself on their purpose or scientific validity, Mr. Green concluded that Dr. Chase was recommending unnecessary cataract surgery to his patients. Mr. Green did not raise his questions or concerns with Dr. Chase. Instead, he secretly went directly to the Medical Practice Board and disclosed confidential patient medical information to the Board's investigator in an effort to shut down Dr. Chase's practice. The conclusions that Mr. Green reached and shared with the Board were mistaken in virtually every important respect.

Mr. Green has been deposed twice. The first deposition was taken on February 18, 2004 in the context of Joseph and Judith Salatino's private class action lawsuit against Dr. Chase and

Brianne Chase (“Salatino Deposition”), in which the Salatinos seek money damages. This deposition was noticed by the Salatinos’ counsel for plaintiffs’ purposes, and most of the questioning during this deposition was done by plaintiffs’ counsel. While Dr. Chase’s attorney attended, he conducted only a very limited examination of Green aimed at the class certification issues then pending before the Court, rather than the merits of the plaintiffs’ claims.

The second deposition was taken on March 4, 2004, in connection with this Board’s proceedings (“March 2004 Deposition”). This deposition was taken for discovery purposes only. During the examination, defense counsel’s primary motive was to learn the basis of Mr. Green’s concerns about the way Dr. Chase was operating his practice. Dr. Chase did not challenge Mr. Green’s credibility or attempt to impeach him with information inconsistent with the hasty and uninformed opinions he had formed. Many lines of questioning were pursued, and many were intentionally left open to pursue with Mr. Green after additional discovery was conducted and during his live trial testimony. Neither the State nor Dr. Chase had any reason to believe that Mr. Green, one of Dr. Chase’s chief accusers, would not testify at trial.

Since the March 2004 Deposition, Dr. Chase received substantial additional discovery from the federal and state prosecutors pursuing the government’s unsuccessful criminal case. Much of that discovery, and the analysis that Dr. Chase has performed of the information provided by the government, directly contradicts Mr. Green’s deposition testimony.

In preparation for the originally scheduled merits hearing in this matter, Dr. Chase asked the State to provide him a signed copy of Mr. Green’s testimony. According to the Affidavit of Jean Kennedy submitted by the State, in late July or August 2004, Mr. Green affirmatively refused to even review his Board deposition transcript, much less sign it. The State made no more attempts to secure Mr. Green’s signature. In late August 2004, the State attempted to contact Mr. Green to confirm whether or not he would voluntarily return to Vermont to testify at

a Board hearing, leaving one more phone message for Mr. Green at a residence where he no longer lived. It made no other attempt whatsoever to bring him to Vermont for the merits hearing. In the nearly two years that have passed since August 2004, the State has apparently made absolutely no new efforts to contact Mr. Green or to discern his willingness and ability to appear at the merits hearing.

In direct violation of applicable rules, the State has now moved to admit the deposition testimony of Mr. Green in lieu of his live testimony at trial, despite the fact that he has refused to review, much less swear to the accuracy, of that testimony. The Board should reject the State's ill-conceived attempt to present unreliable and false information to the tribunal.

III. Discussion.

Courts recognize a preference for live testimony because cross-examination is “the greatest legal engine ever invented for the discovery of truth.” *White v. Illinois*, 502 U.S. 346, 356 (1992) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). “Thus courts have adopted the general rule prohibiting the receipt of hearsay evidence,” in lieu of live testimony. *Id.* Only in limited circumstances, where proffered hearsay has sufficient guarantees of reliability, are such statements admissible under applicable procedural rules. *See* V.R.E. 804; V.R.C.P. 15(h); V.R.C.P. 32(a).

The State, as the proponent of Mr. Green's deposition testimony, bears the burden of first establishing his unavailability. *See State v. Lynds*, 158 Vt. 37, 41 (1991). Vermont Rule of Evidence 804(b)(1)¹ provides that where the declarant is shown to be unavailable, “former testimony” is not excluded by the hearsay rule. Former testimony includes “testimony given . . . in a deposition taken in ***compliance with law*** in the course of the same or another proceeding, if

¹ The Vermont Administrative Procedure Act, 3 V.S.A. § 810(1), makes the Vermont Rules of Evidence generally applicable to this proceeding.

the party against whom the testimony is now offered . . . had an *opportunity and similar motive* to develop the testimony by direct, cross, or redirect examination.” V.R.E. 804(b)(1) (emphasis added). Accordingly, in order to gain admission of the Green depositions transcripts, the State must prove: (1) that Mr. Green is unavailable as defined by Rule 804(a); (2) that the depositions comply with all legal requirements; and (3) that Dr. Chase had an opportunity and similar motive to develop testimony at those depositions as he does at the merits hearing. For each of the reasons discussed below, the State has failed to satisfy its burden.

A. The State Has Not Satisfied Its Burden Of Establishing That Mr. Green Is “Unavailable” For Purposes Of V.R.E. 804(a).

The State claims that “[t]he fact that Mr. Green resides out-of-state and [is] not susceptible to service of process and has refused to testify makes him unavailable under Rule 804(a)(5).” The State’s definition of unavailability is directly at odds with the Rule and the caselaw interpreting it. According to V.R.E. 804(a)(5), a witness is unavailable if the declarant “is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process *or other reasonable means*.” V.R.E. 804(a)(5) (emphasis added).² The Vermont Supreme Court has held that this definition imposes significant obligations on the proponent to secure the witness’s live trial testimony. In *State v. Lynds*, 158 Vt. at 40, the State sought to introduce the deposition of its witness based on its claim that the witness was unavailable. *Id.* The issue before the Court was whether the “other reasonable means” language required the State to do more to secure the witness’s attendance at trial in order to justify its request. *Id.* at 40-41. The State’s efforts included “an initial letter followed by several phone calls.” *Id.* at 41. The State claimed that the phone calls satisfied the mandate that the State utilize “other reasonable means.” The Vermont Supreme Court rejected the State’s position,

² A witness is also “unavailable” if he or she “persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so.” V.R.E. 804(a)(2).

holding that the trial court had erred in admitting the deposition of the witness and concluding that the State's efforts were not "sufficiently diligent to satisfy the unavailability requirement." *Id.* at 41-42. In reaching its holding, the Court stated, that, "a witness who will be inconvenienced by appearing, *Topping v. People*, 793 P.2d 1168, 1171 (Colo. 1990), or proves evasive, *United States v. Lynch*, 499 F.2d 1011, 1024 (D.C.Cir. 1974), is not unavailable." *Id.* at 41.

Under this standard, the State has not begun to meet its burden of proving that Mr. Green is unavailable. To the contrary, the Affidavit of Jean Kennedy weighs strongly against it. According to the Kennedy Affidavit, the State had a single phone contact with Mr. Green sometime in late July or early August of 2004, and then left a single phone message for Mr. Green at a residence he apparently no longer occupied. The State did not send him any correspondence, certified or otherwise. Despite its awesome investigative resources, it made no effort to discern his current residency, whether inside or outside of Vermont. Instead, it gave up after two phone calls. This effort was woefully inadequate, even when compared to the skimpy procedures found to be deficient by the *Lynds* Court.

Moreover, the excuse given by Mr. Green for his refusal to sign the deposition - that he had been greatly inconvenienced by his involvement in the case and therefore wants nothing more to do with it - is precisely the sort of reason that the *Lynds* Court found insufficient to justify a finding of unavailability. Evasiveness and reluctance to testify due to inconvenience does not constitute unavailability under the Rule. *Id.* at 41. The fact that Mr. Green voluntarily played a significant role in initiating this disciplinary proceeding renders his excuse all the more inadequate and, indeed, offensive, both to Dr. Chase's rights and this Board's process.

Finally, the State's last contact with Mr. Green was almost two years ago. At that time, because Mr. Green was not actually reached, the State did not even ask him to testify. Neither

the Board nor the parties have any idea whether Mr. Green lives inside or outside of Vermont or is now willing to voluntarily fulfill his duty to testify and face cross-examination. The State has made no effort, much less a reasonable effort, to get him to do so.

B. Even If The Board Found Mr. Green Unavailable, Because Neither The Salatino Deposition Nor The March Deposition Are “Former Testimony” As Defined By The Rule, They Are Not Admissible.

The State must next prove that the proffered deposition transcripts are “former testimony” under the Rule. As noted above, former testimony is defined as “testimony given . . . in a deposition taken in *compliance with law* in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an *opportunity and similar motive* to develop the testimony by direct, cross, or redirect examination.” V.R.E. 804(b)(1) (emphasis added). The State has not satisfied any of these requirements.

1. The March 2004 Deposition Was Not Taken In Compliance With The Law And The Reasons Given For Mr. Green’s Refusal To Review And Sign The Deposition Require Rejection Of The Deposition In Whole.

Under Rule of Evidence 804, the State must first prove that the proffered deposition transcripts comply with the law. The Vermont Rules of Civil procedure set forth the rules for taking depositions upon oral examination. V.R.C.P. 30. According to V.R.C.P. 30(e), when deposition testimony is fully transcribed, “the deposition *shall* be submitted to the witness for review unless such review is waived by the witness and the parties The deposition . . . *shall then be signed* by the witness” V.R.C.P. 30(e) (emphasis added). A declarant may refuse to sign a deposition, but per Rule 30(e), the reporter or officer must then state on the record the witness’s refusal and the reason for such refusal if any is given. *See id.* A deposition that a witness refuses to sign may still be used as though signed “unless on a motion to suppress under Rule 32(d)(4) the Presiding Judge holds that the reasons given for refusal to sign require rejection of the deposition in whole or in part.” *Id.*

Mr. Green's March 2004 Deposition was not taken in compliance with law because it was never reviewed by Mr. Green and never signed by him. The review and signature requirement is not a mere technicality. To the contrary, suppression of an unreviewed and unsigned deposition transcript is appropriate "when there has been a refusal by the deponent to sign it and the reasons given for such refusal require rejection of the deposition in whole or in part." *Klorer v. Block*, 717 S.W.2d 754, 757 (Tex. App. 1986) (quoting *Bell v. Linehan*, 500 S.W.2d 228, 230 (Tex. Civ. App. 1973)). A lack of signature requires suppression when the failure to sign "may impugn the verity or reliability of the deposition." *Id.* (quoting *Bell*, 500 S.W.2d at 230).

Here, the circumstances surrounding Mr. Green's refusal to sign raise multiple and serious questions about the reliability and verity of his deposition testimony. Mr. Green, who initially sought out the Board to present his unfounded and uneducated concerns about Dr. Chase, just suddenly decided that he will no longer participate in Board proceedings. He has refused, not just to sign, but to even review his deposition testimony. His refusal may be the product of a realization that his efforts to ruin Dr. Chase's career were mistaken. It may be the product of fear that he will be aggressively cross-examined on the fact that he formed and communicated his conclusions after only a few weeks on the job and out of ignorance of the scientific and medical validity of Dr. Chase's testing methods. It may be that he is fearful of being confronted with the evidence that directly contradicts his opinions as stated in his deposition. Whatever the reason, Mr. Green's suspicious refusal robs the March 2004 Deposition of any reliability it may otherwise have had. Because the March Deposition was not taken in compliance with the law, and Mr. Green's refusal to review and sign it raises serious questions about its reliability, it should be suppressed and not considered as former testimony under Rule 804(b)(1).

2. At The Salatino Deposition, Dr. Chase's Opportunity And Motive To Develop Mr. Green's Testimony Was Not Similar To The Motive To Examine Him At Trial.

For a deposition to be considered former testimony under V.R.E. 804(b)(1), the party against whom the testimony is now offered must have had an “*opportunity and similar motive* to develop the testimony by direct, cross, or redirect examination.” The Salatino Deposition was not taken in the course of the Board proceeding and Dr. Chase’s counsel did not have a similar motive or opportunity to develop the testimony of Mr. Green as they would in the context of the Board merits hearing. Instead, the Salatino Deposition was noticed by plaintiffs’ attorneys, and it was plaintiffs’ counsel who conducted the majority of the examination. Although Dr. Chase’s attorney attended, he conducted only a very limited examination of Green aimed at class certification issues rather than the merits of the plaintiff’s claim. Of course, the merits of the Board action were not at issue at all in the Salatino Deposition.

3. At The 2004 March Deposition, Dr. Chase's Motive And Opportunity To Develop Mr. Green's Testimony Was Not Similar To The Motive To Examine Him At Trial.

Similarly, at the March 2004 Deposition, Dr. Chase’s motive and opportunity to develop Mr. Green’s testimony was not similar to his motive to cross-examine Mr. Green at trial. The March Deposition was taken for discovery purposes. Dr. Chase’s motive was to gather information and, generally, to learn as much as possible about what Mr. Green viewed as problematic in the way Dr. Chase conducted his medical practice. It was not the Respondent’s motive during the March Deposition to challenge the bases of Mr. Green’s opinions, his credibility, or his confidence in his assertions to the Board regarding Dr. Chase. Indeed, defense counsel left open many questions and inconsistencies in Mr. Green’s testimony, preferring to close such inquiries at trial. In this regard, Dr. Chase’s motive for cross-examination at trial is entirely different than the motive for examination during a discovery deposition at which all

parties fully expected Dr. Chase's counsel would have the opportunity to further examine Mr. Green again at trial.

Nor did Dr. Chase have the same opportunity to cross-examine Mr. Green at his March 2004 Deposition. Since that deposition, Dr. Chase has received voluminous discovery material from the State and federal officials who unsuccessfully attempted to criminally prosecute him. He has conducted substantial additional investigation and depositions. Much of the resulting information directly contradicts some of Mr. Green's most important, and otherwise inculpatory, deposition testimony. That information was unavailable to Dr. Chase at the time of the March 2004 Deposition, further reducing his opportunity to aggressively and completely cross-examine Mr. Green at that time and further casting in doubt the value and verity of his deposition testimony. If Mr. Green appears at trial, Dr. Chase will have the opportunity to cross-examine him on the basis of all of the available evidence. But if the deposition transcripts are admitted, Mr. Green's mistaken testimony will go unchallenged, to the detriment of Dr. Chase and the Board's search for the truth. For this reason, too, the March 2004 Deposition may not be admitted.

C. Unreviewed And Unsigned Statements By Witnesses Are Not The Type Of Evidence Commonly Relied Upon By Reasonably Prudent People In The Conduct Of Their Affairs And Would Greatly Prejudice Dr. Chase.

In a single paragraph of its Motion, the State claims that the Board should admit Mr. Green's depositions under 3 V.S.A. § 810(1), which permits the Board to admit evidence that might otherwise be inadmissible under the Rules of Evidence. In full, 3 V.S.A. § 810(1) provides:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. 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. Agencies shall give effect to the rules

of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form

3 V.S.A. § 810(1).

In a single sentence, the State makes the conclusory claim that, “Mr. Green’s two depositions, given under oath and providing Respondent’s counsel more than ample opportunity to examine Mr. Green qualify the depositions as documents that would be relied upon by reasonably prudent people.”

Even under 3 V.S.A. § 810(1), it would be an abuse of discretion to admit the March 2004 Deposition testimony. First, the State has not established that Mr. Green’s testimony is “necessary to ascertain facts not reasonably susceptible of proof” under the Rules of Evidence. As discussed above, despite the State’s claim that he is unavailable, to Respondent’s knowledge, the State has not taken any recent, reasonable measures to secure Mr. Green’s live testimony. Moreover, there are other witnesses Dr. Chase expects the State will call who can testify to Dr. Chase’s general office practices and other subjects to which Mr. Green testified at deposition. Those witnesses can be cross-examined at trial.

Second, Mr. Green’s testimony is riddled with hearsay and double hearsay. Although nothing prevented Mr. Green from sharing this hearsay at deposition, it is clearly inadmissible at trial. This hearsay and double hearsay render the deposition even less reliable.

Third, it defies reason to suggest that reasonably prudent persons in the conduct of their affairs would rely on statements made by an individual who then later refuses to verify the accuracy of such statements or vouch for them. To the contrary, logic and common sense all weigh against relying on such statements where the very individual making them has refused to confirm their accuracy. No member of the Board would rely on such information in conducting

any of his or her own affairs. Accordingly, the Board cannot rely upon it when adjudicating Dr. Chase's important constitutional rights.

Fourth, and perhaps most importantly, Dr. Chase would be "prejudiced substantially" by the admission of either deposition, in direct violation of 3 V.S.A. § 810(1). Mr. Green is one of Dr. Chase's chief accusers. His report to the Board's investigator played a significant role in initiating this case. His deposition testimony addresses the very heart of the State's allegations – whether Dr. Chase was recommending and performing unnecessary cataract surgery. Mr. Green's opinions were not founded on any medical training and were uninformed by conversations with Dr. Chase or any other medical doctor. The opinions have been proven false by other evidence in this case. Yet, the State wishes to present Mr. Green's mistaken testimony to the Board without allowing any cross-examination. The unfairness and prejudice that would result from the State's position is manifest.

D. The Admission Of Mr. Green's Deposition Testimony Would Violate Due Process.

To admit these depositions under 3 V.S.A. § 810(1) for the reasons claimed by the State would render meaningless the statute's clear preference for complying with evidentiary rules and greatly reduce the fairness of the Board proceedings, in violation of due process. 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 (1st Cir. 1992). "The 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). Indeed, "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*, 410 U.S. at 295), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 35 (2004).

The Salatino Deposition was not taken in the context of these proceedings and did not concern the State’s allegations. Both depositions were taken several years ago were for purposes of discovery only. Dr. Chase has not had the opportunity to confront and cross-examine Mr. Green at trial or with the information or motive that would attend his trial testimony. To admit Mr. Green’s depositions would deny Respondent his fundamental due process right to confront and cross-examine witnesses at trial.

IV. Conclusion.

For the above reasons, Dr. Chase respectfully requests that the Board not admit the depositions of Stephen Green, and that it suppress the March 2004 Deposition pursuant to V.R.C.P. 32(d)(4).

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

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