

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
Respondent	)		MPC 87-0703

**STATE OF VERMONT'S MOTION IN LIMINE AND SUPPORTING
MEMORANDUM**

NOW comes William H. Sorrell, Attorney General, and on behalf of the State of Vermont ("State") and by and through undersigned counsel, moves the Hearing Committee ("Committee") appointed by the Vermont Board of Medical Practice ("Board") to make the following evidentiary rulings in the above-captioned matters:

1. Exclusion of witnesses disclosed by Respondent February 8, 2006;
2. Limitation of expert testimony of James Freeman, MD;
3. Exclusion of expert testimony of: David Evans, PhD; Arthur Ginsberg, PhD; and Jonathan Javitt, MD;
4. Exclusion of testimony of former patients as not relevant to the twelve cases that are the subject of the Amended Superceding Specification of Charges;

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109 State Street
Montpelier, VT
05609

5. Admission of trial transcripts in lieu of live testimony, subject to challenges of relevancy;
6. Admission of records of second-opinion doctors in lieu of live testimony;
7. Admission of statements of Respondent's counsel in these proceedings and in other proceedings as admissions by a party opponent.

SUPPORTING MEMORANDUM

BACKGROUND

Pending before the Hearing Committee ("Committee") appointed by the Vermont Board of Medical Practice ("Board") in the above-captioned matters are 118 counts of unprofessional conduct alleged against Respondent David S. Chase ("Respondent"). The counts are based on Respondent's treatment of twelve individual patients. The counts of unprofessional conduct and supporting allegations are set forth the State's Amended Superceding Specification of Charges, filed with the Board on March 16, 2006. The State's original Superceding Specification of Charges was filed on or about December 1, 2003.

The original Superceding Specification of Charges filed in December of 2003 contained allegations of unprofessional conduct based on the complaints of thirteen patients and allegations of a pattern and practice of unprofessional conduct based on statements from former staff of Respondent and other ophthalmologists in the greater Burlington area. The Amended Charges filed in March of 2006 deleted only

the allegations and counts related to a pattern and practice of unprofessional conduct and allegations of unprofessional conduct based on Respondent's treatment of Patient #6, who is now deceased. The State determined that the Respondent's treatment of the twelve remaining patients, standing alone, provided sufficient evidence of unprofessional conduct to support revocation of Respondent's license. The State also determined that deleting the allegations of pattern and practice would provide the Board a less complex and time-consuming hearing. It is for this purpose that the State files its motion in limine.

ARGUMENT

The State's motion in limine addresses both the exclusion and admission of certain evidence. The State seeks to exclude testimony of those witnesses disclosed by Respondent February 8, 2006, including the testimony of Dr. James Freeman, an expert not previously disclosed by Respondent. The disclosure by Respondent of these witnesses, unaccompanied by any explanation of the reasons for delay, was more than year and a half after discovery in these cases closed and the matters had been scheduled for a hearing on the merits. Alternatively, the State requests in its motion that, should the Committee allow the testimony of the late-disclosed witnesses, the expert testimony of Dr. Freeman be limited to testimony regarding the twelve cases before the Committee.

The testimony of Respondent's three remaining experts (Arthur Ginsberg, PhD; David Evans, PhD; and Jonathan Javitt, MD) should be excluded entirely. Based on their deposition testimony in these matters, it is clear none of these

experts can offer relevant opinions as to Respondent's treatment of the twelve patients involved. Therefore, the testimony of these three experts fails to meet the second prong of the *Daubert* test for the admissibility of expert testimony and the testimony of Respondent's experts should be excluded.

The Committee should also exclude testimony of former patients absent a showing by Respondent that such testimony is relevant to the twelve cases at issue. While the testimony of former patients may have been relevant to rebut allegations of a pattern and practice of unprofessional conduct, the State has deleted those allegations. Therefore, unless Respondent can demonstrate that the testimony of former patients is relevant to the twelve cases before the Committee, the testimony should be excluded as irrelevant.

In order to simplify these proceedings the State requests the Committee to admit trial testimony of relevant witnesses and admit records of second-opinion doctors in lieu of live oral testimony. The admission of this evidence will shorten considerably the length of the hearing and will not prejudice Respondent. The State also requests that statements of counsel in these proceedings and in other proceedings be admitted into evidence as admissions of a party opponent.

I. TESTIMONY OF RESPONDENT'S LATE-DISCLOSED WITNESSES MUST BE EXCLUDED AS PREJUDICIAL.

As the Committee will recall, hearing on these matters had originally been scheduled to begin on September 20, 2004. The parties had conducted discovery and were prepared for hearing. The State had even submitted to Respondent the State's proposed exhibits, as directed by the Presiding Officer.¹ Literally days before the hearing was scheduled to begin, Respondent moved for a stay of the Board proceedings based on Respondent's anticipated indictment on federal charges. Though the State opposed the motion, the Board granted a stay on September 16, 2004. The stay was effective until the conclusion of Respondent's federal criminal proceedings.

Respondent was acquitted of federal charges in December of 2005 and the criminal proceedings officially came to conclusion in January of 2006. In a letter dated February 8, 2006, Respondent disclosed as witnesses an additional expert (James Freeman, M.D.), one former staff member, eight former patients and another physician. See, Letter of Eric S. Miller, Esq. To Joseph L. Winn, February 8, 2006 (submitted as Exhibit 1). In his letter of February 8, 2006, Respondent provides no explanation or excuse as to why there has been a delay in disclosing these witnesses. Further Respondent does not identify why the testimony of the expert and additional fact witnesses has any relevance.

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109 State Street
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05609

¹ Respondent did not comply with the Presiding Officer's request.

The Committee must exclude the testimony of the witnesses disclosed by Respondent in his letter of February 8, 2006. As previous decisions of the Board indicate, though the Board has not adopted the civil rules of discovery, such rules are appropriate guidelines for the Board in deciding discovery issues. A party has an obligation to seasonably update discovery. *White Current Corporation v. Vermont Electrical Cooperative*, 158 Vt. 216, 22-23 (1992). When, as here, a party, with no articulable reasons, identifies fact and expert witnesses a year and a half after discovery was closed and the parties were fully prepared to go to hearing, the prejudice to the opposing party is manifest and the Committee is well within its discretion in excluding the testimony of such witnesses. *White Current Corp. v. Vermont Electrical Cooperative*, 158 Vt. at 223 (reasonable for court to exclude testimony of witnesses where disclosure not seasonable).

II. ALTERNATIVELY, TESTIMONY OF LATE-DISCLOSED EXPERT SHOULD BE LIMITED TO OPINIONS ON THOSE PATIENTS WHO ARE THE BASIS FOR THE AMENDED SPECIFICATION OF CHARGES AND CONSISTENT WITH EXPERT'S TESTIMONY AT TRIAL.

Should the Committee allow the testimony of Dr. Freeman, the Committee should limit the testimony of Dr. Freeman to those specific patients who are the basis of the Amended Specification of Charges and consistent with his testimony at Respondent's federal trial. In his letter of February 8, 2006, Respondent asserted that the testimony of Dr. Freeman at hearing would be address "the same subjects" and be "consistent with [his] trial testimony." Exhibit 1, p.2. While Dr. Freeman offered opinions on Respondent's treatment of a number of patients in his direct

testimony, Dr. Freeman proffered opinions involved only three of the patients that form the basis of the Amended Specification of Charges (Patient #4, Patient #13, and Patient #14). Under *Daubert*, the testimony of Dr. Freeman should be limited to opinions of Respondent's treatment of these three patients.

The Vermont Supreme Court has adopted the test set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) for determining the admissibility of expert testimony. *State v. Brooks*, 162 Vt. 26, 30 (1994). The *Daubert* test for admissibility of expert testimony requires that such testimony be both reliable and relevant. *USGEN New England, Inc. v. Town of Rockingham*, 177 Vt. 193, 199, 862 A.2d 269, 274, 2004 VT 90, ¶15 (2004). Whether expert testimony is relevant is determined by considering if the testimony will help the trier of fact to understand or determine a fact in issue. *Id.* at 200, 862 A.2d at 275, 2004 VT at ¶16 (*internal quotations and citation omitted*).

With respect to the first prong of the *Daubert* test, the State has considerable concerns regarding the reliability of Dr. Freeman's testimony. Based on his trial testimony, it appears to the State that Dr. Freeman has based his opinions almost entirely on Respondent's medical records. However, the State has alleged the Respondent's records contain false and/or misleading information. If the Committee determines that the evidence supports the State's allegations then the reliability of Dr. Freeman's testimony is clearly in question. The Committee cannot, however, make a determination of the reliability of Dr. Freeman's testimony until after completion of the hearing.

As to the second prong of the *Daubert* test, Dr. Freeman's opinions as to Respondent's treatment of patients not charged in the Amended Specification are clearly irrelevant. The material issue the Committee has to determine is whether, in the treatment of these twelve patients, Respondent engaged in unprofessional conduct. Dr. Freeman's opinions as to Respondent's treatment of patients other than those charged provides no aid to the Committee in addressing the material issue. Under the *Daubert* test, Dr. Freeman's testimony, if allowed, should be limited to opinions regarding Respondent's treatment of Patient #4, Patient #13, and Patient #14.

III. UNDER *DAUBERT* TEST OPINIONS OF RESPONDENT'S THREE REMAINING EXPERTS MUST BE EXCLUDED AS IRRELEVANT.

In addition to Dr. Freeman, Respondent has identified three other individuals as expert witnesses—Arthur Ginsburg, David Evans, and Jonathan Javitt, MD. Letter of Eric S. Miller, Esq. To Joseph L. Winn, January 30, 2004 (submitted as Exhibit 2); Letter of Eric S. Miller, Esq. To Joseph L. Winn, July 2, 2004 (submitted as Exhibit 3). Applying the two-pronged *Daubert* test to the preferred testimony of these experts in their depositions, the testimony of all three should be excluded as irrelevant under the second prong of the *Daubert* test.² The proffered testimony of Respondent's three remaining experts will not assist the Committee in determining whether Respondent's treatment of the twelve patients in the Amended Specification constitutes unprofessional conduct.

The opinions of both Mr. Ginsburg and Mr. Evans are clearly irrelevant. To begin with, neither is a medical expert. Curriculum Vitae of Arthur Ginsberg (submitted as Exhibit 4); Deposition of David Evans, In re: David S. Chase, Dk. No. MPC 15-0203, et al., August 31, 2004, p. 7 (submitted as Exhibit 5 and hereinafter cited to as "Evans Dep."). Therefore neither can offer expert opinions as physicians as to whether Respondent's treatment of the twelve patients does or does not constitute unprofessional conduct in the medical field.

Moreover, neither Mr. Ginsburg nor Mr. Evans proffers any opinions regarding Respondent's treatment of any of the twelve individual patients. The essence of Mr. Ginsburg's opinion is found in his report, submitted as Exhibit 6. In that report, Mr. Ginsburg addresses the question of criterion used by Respondent in his contrast sensitivity and glare testing. Deposition of Arthur Ginsburg, In re: David S. Chase, Dk. No. MPC 15-0203, et al., June 24, 2004, p. 26 (submitted as Exhibit 7 and hereinafter cited to as "Ginsburg Dep."). However, whether Respondent's reliance on certain criteria of contrast sensitivity and glare testing might be generally appropriate is not the material issue before the Committee. The issue with respect to contrast sensitivity testing and glare testing is whether Respondent's actual use of such testing was appropriate in the twelve particular cases before the Committee. Mr. Ginsburg offers no opinion in his report or his deposition on that question. In fact, Mr. Ginsburg stated in his deposition he could

² Of course, as with the testimony of Dr. Freeman, to the extent any of the experts relied on Respondent's medical records, the reliability of their opinions is in question.

not recall the names of any individual patient files he reviewed. Ginsburg Dep., p. 8. Mr. Ginsburg can proffer no opinion as to Respondent's medical treatment of the twelve individual patients and his testimony must be excluded under *Daubert*.

The proffered testimony of Mr. Evans should be excluded for the same reason. When asked what opinions he had been asked to offer, Mr. Evans responded as follows:

Well, I don't know if he really asked me to offer -- I don't know if you call them an opinion, but it's just more of a, you know, how the test was developed and what the basis of the test design was. And based on the charts, you know, was the test being used properly and those kinds of questions.

Evans Dep., p. 34. When asked about his specific opinions with respect to the twelve individual patients in the case, Mr. Evans could offer no opinion. Evans Dep., pp. 35-37. Again the material issue relative to Mr. Evan's proffered testimony is not whether Respondent's use of contrast sensitivity and glare testing *in general* was appropriate but is whether the use of such testing with respect to the individual twelve patients was appropriate. Mr. Evan's inability to proffer an opinion on that question renders his testimony irrelevant under the second prong of the *Daubert* test and Mr. Evan's testimony should be excluded.

Finally, testimony of Respondent's last expert, Jonathan Javitt, MD, should also be excluded under the second prong of the *Daubert* test. Though a physician, Dr. Javitt does not proffer any opinion as to Respondent's treatment of the twelve individual patients in the Amended Specification. When asked specifically if he was asked to render an opinion as to the treatment of individual patients, Dr. Javitt

responded “[n]ot at this point.” Deposition of Jonathan Javitt, MD, In re: David S. Chase, Dk. No. MPC 15-0203, et al., July 14, 2004, p. 34 (submitted as Exhibit 8). As with the proffered opinions of Mr. Ginsburg and Mr. Evans, Dr. Javitt’s inability to proffer an opinion as to Respondent’s treatment of the twelve individual patients fails the second prong of the *Daubert* test and Dr. Javitt’s testimony should be excluded.

Of course, in his opposition to this motion, Respondent could assert that in the intervening two years from their depositions, the three experts are now able to proffer opinions as to Respondent’s treatment of the twelve individual patients. Such an assertion does not rescue their testimony from exclusion. If Respondent’s experts were going to offer opinions beyond those proffered in their depositions, then Respondent had a duty to seasonably notify the State. Respondent has not done so. Respondent’s failure to seasonably update his experts’ testimony justifies exclusion of the testimony. *Greene v. Bell*, 171 Vt. 280, 283-84 (2000) (trial court properly excluded testimony of plaintiff’s expert as exceeding the scope of subjects and opinions on which expert was expected to testify).

IV. TESTIMONY OF FORMER PATIENTS NOT SHOULD BE EXCLUDED AS IRRELEVANT.

In his various disclosures of witnesses, Respondent has identified former patients as witnesses. Exhibits 1 and 2; Letter of Eric S. Miller, Esq. To Joseph L. Winn, November 7, 2003 (submitted as Exhibit 9); Letter of Eric S. Miller, Esq. To Joseph L. Winn, January 9, 2004 (submitted as Exhibit 10). The testimony of former patients should be excluded as irrelevant.

The State assumes that Respondent is calling former patients to testify as to their subjective experiences with Respondent. Testimony is relevant if it has a tendency “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” V.R.E. 401. The only facts that are of consequence to the determination of the instant action are whether Respondent’s treatment of the twelve individual patients constituted unprofessional conduct. The fact that other former patients had no complaints or were pleased with Respondent’s care has no bearing on the experiences of the twelve patients that form the basis for the Amended Superceding Specification of Charges. *Amato v. State of New York Dept. of Health*, 229 A.D. 2d 752, 754, 645 N.Y.S.2d 600, 602 (Sup. Ct. 1996) (testimony of other patients generally irrelevant in physician discipline case); see also *Matter of Moreland v. Ambach*, 111 A.D. 2d 533, 534, 489 N.Y.S.2d 403, 405 (Sup. Ct. 1985) (citing J. Prince, Richardson on Evidence, §4, at 3[10th ed. 1973]); 70 CJS, Physicians and Surgeons, §67 (West 2006)(Attached hereto as Attachment A).

Further, allowing the testimony of former patients will only result in an inordinately lengthy hearing. For every patient the Respondent calls, the State would be required to call patients who would testify as to their negative experiences with Respondent. None of this testimony would tend to make more probable or less probable the determination of Respondent's alleged unprofessional conduct with respect to the twelve individual patients. The testimony of former patients is irrelevant and should be excluded by the Committee.

V. TRIAL TESTIMONY OF RELEVANT WITNESSES SHOULD BE ADMITTED IN LIEU OF LIVE TESTIMONY AND RECORDS OF PHYSICIANS WHO PROVIDED SECOND OPINIONS SHOULD BE ADMITTED WITHOUT CROSS EXAMINATION.

Though the rules of evidence apply to Board proceedings (3 V.S.A. §810(1)), the Vermont Administrative Procedures Act ("VAPA") allows the Board to admit otherwise inadmissible evidence "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). Based on this provision, the State moves that prior trial testimony of relevant witnesses be admitted in lieu of live testimony and that patient records of physicians who provided second opinions be admitted without being subject to cross examination. The Committee will streamline the hearing process by admitting trial testimony and physician records without prejudice to Respondent.

In this case many of the witnesses identified by the State (including patients, physicians and former staff) have testified in Respondent's criminal trial. The testimony provided by these witnesses in the criminal trial is essentially the same as the testimony that would be elicited were these witnesses to testify in this

proceeding. The Board can truncate the length of the hearing and reduce the inconvenience to witnesses by admitting trial testimony. Other jurisdictions have allowed such testimony in disciplinary proceedings as probative and have ruled that the admission of previous trial testimony does not prejudice the Respondent. *In the Matter of Segal*, 430 Mass. 359, 364-65, 719 N.E.2d 480, 486 (1999) (not improper for bar disciplinary committee to rely on criminal trial transcripts in attorney disciplinary hearing because such transcripts contained sufficient indicia of reliability --witnesses testified under oath and were subject to vigorous cross examination); *Eichberg v. Maryland Board of Pharmacy*, 50 Md. App. 189, 194-95, 436 A.2d 525, 529 (Md. App. 1981).

Similarly probative and admissible under VAPA are the records of physicians who provided second opinions to the twelve individual patients. In *Richardson v. Perales*, 402 U.S. 389 (1971), the United States Supreme Court ruled that reports of physicians, without being subject to cross examination, were admissible in an administrative proceeding and could constitute substantial evidence upon which a hearing officer could base a finding. *Perales*, 402 U.S. at 403. The Court cited a number of factors supporting its decision including the “reliability and probative worth of written medical reports even in formal trials.” *Id.* at 405. The Court also concluded that the admission of physician reports is consistent with the tenets of due process enunciated in *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Perales*, 402 U.S. at 406-7.

The Committee should adopt the reasoning of the *Perales* decision and allow the admission of the records of the second-opinion physicians without cross-examination. The admission of these records will not prejudice Respondent. Respondent has indicated in his witness disclosures that he intends to call the second-opinion physicians as witnesses in his case. See Exhibit 9. Respondent can therefore examine the second-opinion physicians regarding the records in the presentation of his case.

VI. COMMITTEE SHOULD ADMIT AS EVIDENCE STATEMENTS MADE BY RESPONDENT'S ATTORNEYS AS ADMISSIONS OF PARTY OPPONENT.

In the course of their representation of Respondent in these proceedings, the federal criminal trial, and the numerous lawsuits brought against Respondent, Respondent's attorneys have made statements regarding both Respondent's specific treatment of the twelve patients and Respondent's approach to practicing medicine that would be relevant to Respondent's treatment of the twelve patients. For example, Respondent's attorney, not Respondent, responded to the initial complaints of many of the twelve patients. Respondent's attorney made statements in opening and closing arguments in the federal trial regarding his approach to treating cataracts. At the last hearing before the Board on Respondent's motion to dismiss, Respondent's attorney made statements regarding what Respondent told all his patients (including, presumably, the twelve patients in the Amended Specification of Charges) regarding second opinions. The Committee should admit these statements and other factual statements made by Respondent's attorneys

regarding Respondent's practice as admissions of a party opponent under V.R.E. 801(d)(2)(D).

According to V.R.E. 801(d)(2)(D), " a statement by [a party's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship" is admissible as an admission of a party opponent. In *Contractor's Crane Service v. Vermont Whey Abatement Authority, et al.*, 147 Vt. 441 (1986), the Vermont Supreme Court ruled that letters written by a party's attorney were admissible as admissions under V.R.E. 801(d)(2)(D) in the absence of evidence that the attorney was not representing the party. *Contractor's Crane*, 147 Vt. At 451; *See also* 32 CJS, Evidence, §451 (West 2005)(attached hereto as Attachment B). Any statements made by Respondent's attorneys regarding his medical practice, such as the ones described above, should be admitted as admissions of a party opponent.

CONCLUSION

For all the reasons argued above, the State's Motion in Limine should be **GRANTED** in totum.

Dated at Montpelier, Vermont this 25th day of May, 2006.

**WILLIAM SORRELL
ATTORNEY GENERAL
STATE OF VERMONT
BY**



Joseph E. Winn
Assistant Attorney General

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609