

**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 PROPOSED FINDINGS AND CONCLUSIONS OF  
LAW**

In the above-captioned matters the State of Vermont ("State") originally filed a Specification of Charges in MPC 15-0203 against Respondent David S. Chase ("Respondent") on July 24, 2003. The State then filed a Superceding Specification of Charges on December 1, 2003 that added charges based on complaints from twelve additional patients. On September 20, 2004, the Vermont Board of Medical Practice ("Board") issued a stay of the proceedings pending the resolution of criminal charges against Respondent handed down by a federal grand jury. After Respondent was acquitted of the federal criminal charges in December 2005, the Board's stay of its proceedings was lifted. On March 16, 2006 the State filed an Amended Superceding Specification of Charges deleting those allegations and counts asserting that Respondent engaged in a pattern or practice of unprofessional conduct.

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

The Board appointed a hearing committee ("Committee") pursuant to 26 V.S.A. §1355(b) to hear the evidence and make recommendations to a hearing panel.

The Committee consisted of the following members: Dewees Brown, M.D., ad hoc physician member appointed by the Commissioner of Health pursuant to 26 V.S.A. § 1355(b); Sharon Nicol, Public Member; Alexander Northern, Public Member; and Philip Cykon, Esq., Presiding Officer. Hearings on the above-captioned matters were conducted on the following days: September 11, 12, 21, 25 and 26, 2006; October 2, 3, 24, 25, 27, 2006; November 8, 20, 21, and 30, 2006; December 4 and 18, 2006; January 4, 8, 9, and 30, 2007. The State was represented by Assistant Attorneys General Joseph L. Winn and Michael O. Duane. Respondent was represented by Eric Miller, Esq. and Jeffrey Behm, Esq., of Sheehy, Furlong, and Behm of Burlington, Vermont. Based on the evidence presented at the hearings, the Committee makes the following Recommendation for Findings and Conclusion to the full hearing panel.

### **FINDINGS REGARDING CATARACT SURGERY**

1. The parties have stipulated that the Preferred Practice Pattern (“PPP”) of the American Academy of Ophthalmology (“AAO”), issued in 1996 and 2001 (Exhibits 503a and 503b) are the appropriate standards for determining when cataract surgery is indicated. The Committee will rely on the 2001 version of the PPP (Exhibit 503B) in its findings.
2. The primary indication for surgery is when a patient’s “visual function no longer meets their needs.” Exhibit 503b, p. 15.
3. Contraindications for surgery under the AAO Preferred Practice Patterns, relevant to these cases, are that the patient does not wish

surgery, glasses or contacts are meeting the patient's needs, and the quality of the patient's life has not been compromised. Exhibit 503b, pp. 15-16.

4. There is no single test that adequately describes the effect of cataract on a patient's visual status or functional ability. Exhibit 503b, p. 12.
5. Questionnaires regarding the patient's functional vision are not intended to be the basis for determining the need for surgery and should not be used to set a threshold for surgery. Exhibit 503b, p. 13.
6. The Committee finds that in deciding whether a patient should undergo cataract surgery, a reasonably prudent ophthalmologist should engage in a collaborative process between the physician and the patient to determine whether the patient's vision (with or without glasses or contact lenses) is meeting his or hers needs and the extent to which vision may be compromising a patient's quality of life. The Committee's finding is based on the following evidence adduced at hearing:

- a. The AAO PPP states that a patient should be asked specifically about near and far vision in varied lighting conditions for activities the patient views as important. Exhibit 503b, p. 13.
- b. The AAO PPP also states that in an ophthalmic evaluation, an important aspect of the patient's history is a patient's assessment of his or hers functional status. Exhibit 503b, p. 13.

- c. Dr. Thomas Cavin, an ophthalmologist who has practiced in Vermont since 1985, testified that the starting point for determining whether cataract surgery is indicated is “what the patient's needs are and what they're able to do with their current level of vision.” Hearing Transcript, In re: David S. Chase, MPC 15-2003, et al., October 23, 2006, Testimony of Thomas Cavin, M.D., p. 132. (Hereinafter citations to transcript will be “Tr., \_\_/\_\_/06, (witness name) Test., p. \_\_”).
- d. Dr. Edwin Guilfoyle, a retired ophthalmologist who practiced in Essex, Vermont for many years, testified that when determining the need for cataract surgery he would conduct an interview with the patient and “as part of the interview process I'd routinely ask a patient if they're having any visual difficulties, any problems with their visual function, any things they couldn't do like they used to do.” Tr., 10/24/06, Guilfoyle Test., p. 132.
- e. Dr. James Watson, an ophthalmologist who practices in Stowe and South Burlington and prior to that in the states of Texas and Washington, testified that as part of his routine eye exam “the first thing that you do with any patient is find out why they're there, discuss with them the problems that they're having, explore those problems that they have.” Tr., 10/26/06, Watson Test., p. 106. Dr. Watson further testified that a decision as to whether surgery is

necessary is the patient's decision, not the doctor's. Tr., 10/26/06, Watson Test., p. 107.

- f. Dr. Karen Cleary, an ophthalmologist who has practiced in Shelburne, Vermont since 1992 and practiced in New York State and Chicago prior to 1992, testified that the process for determining whether cataract surgery is indicated is "fairly complex. I think that I evaluate the patient complaints, the patient's visual acuity, and then we have a discussion regarding their visual needs and their visual goals to see if we can meet those with something such as glasses, and failing that, if there is a significant cataract, we will discuss cataract surgery." Tr., 11/8/06, Cleary Test., p. 9.
- g. Dr. Alan Irwin, an ophthalmologist who has practiced in Vermont and has been a member of the faculty of the University of Vermont Medical School since 1977, testified that he determined whether a patient's vision was meeting his or hers needs as follows: "I talk to the patient and say, is there anything that you would like to do that you can't do because of your vision." Tr., 11/20/06, Irwin Test., p. 13.
- h. Dr. Geoffrey Tabin, an ophthalmologist who has taught cataract surgery in Nepal and taught ophthalmology at the University of Vermont Medical School and is currently teaching ophthalmology

at the University of Utah Medical School, testified that in determining whether cataract surgery is indicated for specific patients that the “key word” for him was “specific patients.” Tr., 11/30/06, Tabin Test., p. 17. “[U]sually, you know, I listen to the patient's complaint, and if a patient doesn't complain of their vision, I would usually not recommend any type of surgical intervention. Usually the patient tells me they can't see and they want to have something done.” Tr., 11/30/06, Tabin Test., p. 17-18.

Dr. Tabin went on to give specific examples:

I have some patients, very low visual needs and I say, Do you do everything you want to do? And they will say yes. I will say, Are you having any problems with your vision? And they will say no. And they will have a reasonably advanced cataract and I say, What do you do? And they say, Well, I love to play my bingo and I see all my bingo cards just fine and I love everything I do. I would say, Great, we'll see you again in another six months. You've got some changes in your lenses and if your vision bothers you, we may be able to do something about it. And similarly, I may have someone who has 20/20 Snellen acuity who complains that they can't do their job because they can't drive at night because of overwhelming glare. And I see on exam a post subcapsular cataract right at the edge of their visual axis. And I will say, I think that glare is because of your cataract. They say, Let's fix it, Doc. And I will say, Fine, we will try to schedule your surgery as soon as we can.

Tr., 11/30/06, Tabin Test., pp. 18-19.

- i. Dr. Patrick Morhun, an ophthalmologist practicing in Lebanon, New Hampshire since 1997 and licensed in the State of Vermont,

testified cataract surgery is indicated when a patient's vision no longer meets their needs for their activities of daily living and he believes surgery will help solve the patient's problems. Tr., 12/4/06, Morhun Test., p. 12. Dr. Morhun will then discuss the risks and benefits of cataract surgery "and then see how the patient feels about the idea of cataract surgery and present the alternatives to cataract surgery to the patient as well." Tr., 12/4/06, Morhun Test., p. 13.

- j. Dr. James Freeman, Respondent's expert, explained his approach to determining whether cataract surgery is indicated as follows:

Well, I look at the history, what they've told the technician at the beginning and if they list trouble driving at night or this type of thing I ask about it. I say, well, how much trouble are you having? Is it just that, you know, when it rains you're having trouble seeing the lane markers at night, is it just like everybody else around you? Are you having more trouble than that? Sometimes they say, well, I told them that but it's not causing me problems, it's not keeping me from doing anything I need to do. I say, well, that's fine and sometimes they won't complain about much and I'll see a cataract clinically and I'll ask. I'll say, are you having any trouble? No.

And then the explanation is -- and I give all these speeches a lot every day -- is, well, you have a little bit of a cataract, you know, in your right eye or both eyes or whatever. I said, a little cataract is like a little gray hair. It's not a big deal. You don't have to do -- you don't need surgery just because you have a cataract. When you start to have trouble doing what you need to do that's the time when you talk about surgery.

Tr., 12/18/06, Freeman Test., pp. 98-99.

7. The Committee finds that in determining whether to undergo cataract surgery a patient should feel free to obtain a second opinion and further finds that no reasonably prudent physician would discourage a patient from seeking a second opinion. The Committee believes this finding to be axiomatic not only to the practice of ophthalmology but also to the practice of medicine in general. However, the Committee's finding is also supported by the following evidence adduced at hearing.

a. Dr. Cavin testified that discouraging a patient from getting a second opinion is inappropriate and explained that:

Well, if a patient asks me if -- if -- or I get the sense that maybe they'd be interested in another -- in another opinion that tells me that they may not have -- they may not feel comfortable with either the recommendation, or with me, or something about that, and then I -- I routinely would encourage them to -- to get a second opinion.

Tr., 10/23/06, Cavin Test., p. 135.

b. Dr. Guilfoy testified that in his opinion it was inappropriate for a physician to discourage second opinions and stated that he “generally welcomed second opinions because if I was doing my job properly it would only increase their confidence in me to have that second opinion so I encouraged it. If they brought it up, I said absolutely.” Tr., 10/24/06, Guilfoy Test., pp. 131-132.

c. Dr. Watson also testified that discouraging a patient from seeking a second opinion was inappropriate explaining that “the patient is

entitled and, in fact, if they're facing major surgery, they probably would be wise to get a second opinion. Definitely would not want to discourage it.” Tr., 10/26/06, Watson Test., pp. 108-109.

- d. Dr. Cleary testified that she would always encourage a patient to get a second opinion and that a second opinion should not be discouraged “[b]ecause if a patient expresses the desire for a second opinion, they clearly would like either more information or confirmation of the diagnosis and the treatment plan, and I think it would be inappropriate to deny them the opportunity to have that additional information.” Tr., 11/8/06, Cleary Test., p. 10.
- e. Dr. Irwin testified that he generally advises patients to get a second opinion if it occurs to them to get one and also stated he “can think of no reason to discourage somebody from getting a second opinion. In general it only reinforces what you've told them. If you're doing the right thing, you will be reinforced and the patient comes back more confident in your -- the advice you've given them. If you've given them bad advice, then maybe the patient's better off.” Tr., 11/20/06, Irwin Test., pp. 13-14.
- f. Dr. Morhun testified that if patients asked about getting a second opinion, he would encourage them to do so because “it's important for the patient to have as much information as possible at their disposal to make a decision and -- and I think that -- that would be

always a useful piece of information, to get another opinion from another doctor.” Tr., 12/4/06, Morhun Test., p. 13.

g. Dr. Freeman testified that “to tell a patient, forbid a patient, or try to keep a patient from seeing another physician would certainly be inappropriate.” Tr., 1/8/07, Freeman Test., p. 101.

8. The Committee finds that a reasonably prudent physician, as part of a regular eye examination, attempts to determine a patient’s best-corrected vision, and does so without the use of glare or dilation. The Committee bases this finding on the following evidence:

a. Dr. Cavin testified that performing a normal eye exam he and his technicians would first check the patient’s vision and what correction they might have with a Snellen test. Then, depending on the circumstance, Dr. Cavin might perform glare testing. Dr. Cavin would then dilate the eye and perform a slit-lamp examination. Tr., 10/23/07, Cavin Test., pp. 128, 154-55.

b. Dr. Guilfooy testified he would use a Snellen test to “check their glasses to see what their current refraction was and then rerefract them to see how compared to what they walked in with.” Dr. Guilfooy would then dilate the patient to view the optic nerves. Tr., 10/24/07, Guilfooy Test., pp. 133, 154-55.

c. Dr. Cleary testified that she ascertained a patient’s best corrected vision by performing a Snellen exam to test the patient’s visual

acuity and, if warranted, performing a refraction to see if the patients' vision improved with a change of glasses. Tr., 11/08/07, Cleary Test., pp. 6, 7. Dr. Cleary testified that she used neither glare nor dilation to determine a person's best corrected vision because, in her opinion, a person's best vision is going to be in a nonglare situation and in an undilated state. Tr., 11/08/07, Cleary Test., p. 8.

- d. When asked if he used glare to determine a person's best-corrected vision, Dr. Irwin testified that he did not routinely use glare testing and would only use such testing to confirm complaints the patient may be having. Dr. Irwin testified that he did not use dilation to determine a person's best-corrected vision because:

I want to know what the patient can see in real life, and the dilation alters several things within the eye. It makes them more sensitive to light, lets in a lot more light, paralyzes their ability to focus, and so it doesn't give me a readout of what the patient will see in real life.

Tr., 11/21/07, Irwin Test., p. 10.

- e. Dr. Morhun testified that he would not use glare to test for a patient's best-corrected vision because "glare would decrease the patient's ability to see." Tr., 12/4/07, Morhun Test., p. 6. Dr. Morhun would not use dilation to test for a person's best corrected vision because "[w]hat I'm trying to look at is their -- is their functional vision in -- in their day-to-day life and dilating --

patients aren't walking around dilated, so that wouldn't be a -- a fair test of what their vision is." Tr., 12/4/07, Morhun Test., p. 6.

- f. There was no evidence presented that either glare or dilation are used in determining a patient's best-corrected vision.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN MPC 15-0203 --  
HELENA NICOLAY (NORDSTROM) (PATIENT #1)**

**FINDINGS OF FACT**

9. Ms. Nicolay saw Respondent only once on Friday, January 17, 2003. Ms. Nicolay was having problems with eyestrain and wanted to have the problems corrected as soon as possible. Tr., 10/23/06, Nicolay Test., p. 5 .
10. Respondent told Ms. Nicolay that she had cataracts and had her scheduled for a pre-operative appointment the following Monday and the first surgery scheduled for the following week. Tr., 10/23/06, Nicolay Test., p. 7,9, 1-HN-1-002. Though Ms. Nicolay had not asked about a second opinion, Respondent looked straight at Ms. Nicolay's and told Ms. Nicolay that she should not get a second opinion and told Ms. Nicolay that he (Respondent) was the only physician in Vermont who could do this procedure. Tr., 10/23/06, Nicolay Test., p. 8.
11. Respondent gave Ms. Nicolay an order for a blood sugar test. Exhibit 705. Neither Respondent nor anyone in his office told Ms. Nicolay she needed to have the test performed before her pre-op visit the following Monday nor did Respondent or anyone in his office tell Ms. Nicolay that

whether surgery would occur was dependent on the results of the blood sugar test. Tr., 10/23/06, Nicolay Test., pp. 9-10.

12. Ms. Nicolay was upset regarding the diagnosis of cataracts and could not reconcile the diagnosis with the fact that she “saw fine.” Tr., 10/23/06, Nicolay Test., p. 10.
13. There is neither testimony nor any indication in Ms. Nicolay’s records that Respondent discussed with Ms. Nicolay whether her vision, with glasses, was meeting her needs or whether her vision was compromising her lifestyle.
14. Respondent’s chart for Ms. Nicolay contains a diagnosis of “dense central nuclear cortical cataracts os [left eye] > od [right eye].” 1-HN-1-002.
15. Despite her testimony that she “saw fine” when she went to Respondent, Respondent had his staff write in Ms. Nicolay’s chart that Ms. Nicolay was “unable to see to drive clearly at night.” 1-HN-1-001. Ms. Nicolay did not remember saying that she was unable to see to drive clearly at night and testified that “normally, I see fine at night.” Tr., 10/23/06, Nicolay Test., p. 20.
16. Ms. Nicolay’s chart also states that she was given a second opinion. 1-HN-1-002.
17. Ms. Nicolay immediately sought a second opinion from her optometrist, Dr. Eriksson. Tr., 10/23/06, Nicolay Test., p. 11. Dr. Eriksson saw Ms.

Nicolay the following Thursday and told her she did not have cataracts.  
Tr., 10/23/06, Nicolay Test. pp. 11,77.

18. At the request of the Board, Ms. Nicolay saw Dr. Patrick Morhun on June 30, 2003. Tr., 12/4/06, Morhun Test., p. 14. Dr. Morhun's examination of Ms. Nicolay found her vision to be 20/15 in each eye (with correction) which is considered "superb" vision." Tr., 12/4/06, Morhun Test., p. 15. Dr. Morhun also found Ms. Nicolay's lenses to be normal and without cataracts. Tr., 12/4/06, Morhun Test., p. 16.
19. Because Ms. Nicolay was highly myopic, she had an increased risk of having a retinal detachment after cataract surgery. Tr., 12/4/06, Morhun Test., p. 19.
20. The Committee finds that the diagnosis of dense central nuclear cortical cataracts recorded in Ms. Nicolay's chart is false. Subsequent examinations of Ms. Nicolay by an optometrist and an ophthalmologist demonstrate that Ms. Nicolay had no cataracts, let alone dense cataracts.
21. Further, even assuming Ms. Nicolay had cataracts, the Committee finds Respondent's explanation of the entry to not be credible. Respondent admits that when he performed his slit lamp exam he did not observe a dense cataract. Tr., 9/11/06, Chase Test., p. 193. Instead, the Respondent states that he used the term "dense" to describe a cataract that, to Respondent was "visually significant." Id. However, Respondent never provided to the Committee a satisfactory explanation as to how he

determined that a cataract was visually significant. As noted in ¶12, above, Respondent's determination of a visually significant cataract was not based on a discussion with Ms. Nicolay about her vision and how it was affecting her ability to function, contrary to the AAO PPP standard and the practice of a reasonably prudent physician as described in ¶6, above.

22. The Committee rejects Respondent's argument that his use of the term "dense" as a diagnosis is justified because the grading of a cataract contains a certain element of subjectivity. There is, in any medical diagnosis, a certain element of subjectivity. Were the Committee to endorse the Respondent's argument it would in essence be giving license to all physicians to write any diagnosis they wished in a patient's chart, no matter how false or inaccurate, because such a diagnosis was subjective. The Committee finds that Respondent used the term "dense" in order to create a false diagnosis that would have justified cataract surgery.

23. Similarly, the Committee finds that the entry of "unable to see to drive clearly at night" in Ms. Nicolay's chart is a false entry. The entry is contrary to Ms. Nicolay's sworn testimony and Respondent has not provided a satisfactory explanation for this entry. The Committee finds Respondent made this entry so that Ms. Nicolay's record would justify cataract surgery.

24. The Committee also finds that the entry in Ms. Nicolay's chart of "second opinion given" to be a false entry on its face. Any reasonable reader reading the phrase "second opinion given" would conclude that at some point in Ms. Nicolay's treatment a second opinion was given by another physician—as to the need for cataract surgery. The Committee does not find credible Respondent's explanation of the entry of "second opinion given."

25. The Committee finds that the manner in which Respondent recorded vision scores of Ms Nicolay was designed to create a misleading record to support cataract surgery by indicating the Ms. Nicolay's vision was worse than it actually was. This finding is based on the following evidence:

- a. According to Respondent, Ms. Nicolay was administered a Snellen Vision test without glare and without dilation. Tr., 9/11/06, Chase Test., p. 181. According to Respondent, the results of this Snellen test were recorded on post-it note paper and then thrown away, Id.
- b. Respondent did not offer a credible explanation as to why the results of the Snellen test performed without glare or dilation were thrown away. Respondent's explanation was as follows:

It was -- it was done by the technicians. Tech -- since I wanted to determine what my own Snellen vision was and since I felt mine was the one that mattered, that's the one that's on the chart. The one that the technician put on the sticky and I threw the sticky away after I looked at it, I wanted to know what it was, but I threw it away

after I looked at it, that's the technician's impression of what the Snellen vision was.

Tr., 9/11/06, Chase Test., p. 181. However, Respondent consistently relied on the technicians' results of the Contrast Sensitivity Test ("CST") with Brightness Acuity Testing ("BAT"), the test Respondent asserts was the test more indicative of a patient's functional vision.

c. Ms. Nicolay was administered a CST with BAT. Testimony throughout these proceedings established that Respondent always administered the BAT on the highest setting. The results of the CST with BAT were entered in the portion of Ms. Nicolay's record under vision. Tr., 9/11/06, Chase Test., p. 181, 1-HN-1-001. Based on its findings in Paragraph 8, the Committee finds that the results of the CST with BAT do not reflect Ms. Nicolay's best-corrected vision.

d. Ms. Nicolay was also administered a Snellen test by Respondent after her pupils were dilated. Tr., 9/11/06, Chase Test., p. 181. The results of the Snellen Test, which showed better vision than the CST with BAT result, were not recorded on Ms Nicolay's chart in the section marked vision but instead recorded on the Ms. Nicolay's CST test-result sheet. 1-HN-1-013.

e. Respondent did not offer a credible explanation of why the CST with BAT result, to the exclusion of the two other Snellen results,

was placed in the section of Ms. Nicolay's record designated as vision. Respondent testified that recording all the results would be "confusing at best and messy at worst." Tr., 9/11/06, Chase Test., p. 161. The Committee does not find Respondent's explanation credible.

f. Further, as noted in Paragraph 25(b) above, Respondent asserted that the CST with BAT result was more indicative of the patient's functional vision. However, Respondent never explained how he determined the relationship between the CST with BAT result and the patient's functional vision. As has been found previously by the Committee, Respondent did not engage in any meaningful discussion with Ms. Nicolay regarding how her vision was meeting her needs. Therefore, Respondent could not have had a basis for determining that the CST with BAT result was indicative of the patient's functional vision.

g. Respondent relied exclusively on the CST with BAT result to determine a patient's functional vision yet Respondent testified that he had no knowledge as to how the test was administered. Respondent testified as follows regarding the administration of the CST with BAT:

Yeah. This test -- I never did this test, by the way, contrary to testimony by one of the -- I don't know if it's in this group, but one of the group testified that I administered the test to her. I never did that because I

don't even know how to administer it. In fact, I'm just beginning to focus on how it's laid out here.

Tr., 9/11/06, Chase Test., p. 129. Respondent testified that he “could have figured it out” but “I just didn’t want to.” Tr., 9/11/06, Chase Test., p. 130.

26. The Committee finds that Respondent did more than “offer” or recommend” cataract surgery to Ms. Nicolay. Without any conversation with Ms. Nicolay about the degree to which her vision was meeting her needs, Respondent told Ms. Nicolay she had cataracts when she did not, scheduled her for her first surgery within two weeks of the date of her appointment, and told her that she should not get a second opinion and that he was the only physician in Vermont that could do the procedure. Respondent pressured Ms. Nicolay to make a decision regarding cataract surgery leading her to believe the surgery was necessary and urgent.

#### CONCLUSIONS OF LAW

27. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts I-IV), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count V), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count VI), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts VII–X). Respondent misrepresented in Ms. Nicolay’s chart that she had dense cataracts, and told Ms. Nicolay she had cataracts when in

fact she had no cataracts, that a second opinion was given when none was given, and that Ms Nicolay was unable to drive at night. As found by the Committee all of these misrepresentations were made to support surgery when no surgery was indicated. Respondent's attempt to discourage Ms. Nicolay from obtaining a second opinion by asserting he was the only qualified physician also demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct. Respondent also falsified his records by using CST with BAT results as the sole indicator of Ms. Nicolay's most accurate vision and recording a Snellen result performed after dilation and discarding the result of a Snellen test performed without glare and without dilation. Respondent recorded his test results in this fashion to justify his surgical decision by making it seem Ms. Nicolay's vision was worse than it actually was.

28. Based on the findings and the Committee's conclusion in Paragraph 27, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count XI) and/or a failure to practice competently under 26 V.S.A. §1354(b) (Count XII). Respondent's failed to explain or even determine why cataract surgery was medically indicated for Ms. Nicolay. The AAO Preferred Practice Patterns, and every other physician who testified about the process for determining the need for cataract surgery,

establishes a standard that requires a discussion with the patient about the effect of their on their activities of daily living with the final decision ultimately resting with the patient. Even assuming that Ms Nicolay had cataracts, there is no evidence to support the conclusion that Ms. Nicolay's vision, with glasses, no longer met her needs or that her quality of life was compromised by her vision. More importantly, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Nicolay's vision was meeting her needs as set forth in the AAO Preferred Practice Patterns and as practiced by other physicians. The decision regarding cataract surgery was Respondent's, and Ms. Nicolay was pressured into being scheduled for surgery that was not indicated. Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
REGARDING MPC 208-1003 - JUDITH SALATINO (PATIENT #2)**

**FINDINGS OF FACT**

29. Judith Salatino was a long-time patient of Respondent. Tr., 10/26/06, Salatino Test., p. 5. Ms. Salatino saw Respondent on June 11, 2003 because she thought she needed a new prescription for her glasses. Tr., 10/26/06, Salatino Test., p. 6.

30. When Ms. Salatino saw Respondent on June 11, 2003 she felt she was seeing fine, was driving both at night and in the day and was doing all the things she likes to do. Tr., 10/26/06, Salatino Test., p. 6-7.
31. At the appointment, Respondent told Ms. Salatino that she did not need glasses but instead needed cataract surgery. Tr., 10/26/06, Salatino Test., p. 10. Respondent showed Ms. Salatino her CST with BAT results (1-JS-1-064) and told her that the results indicated her vision was so bad that if she were a truck driver she would not be allowed to drive. Tr., 10/26/06, Salatino Test., p. 11.
32. When Ms. Salatino asked about obtaining a second opinion, Respondent told Ms. Salatino that he was an expert in the field and that he was giving her a second opinion that the surgery needed to be done. Tr., 10/26/06, Salatino Test., p. 12.
33. When Ms. Salatino asked if surgery could be delayed for just eighteen months until she became eligible for Medicare, Respondent told Ms. Salatino that the surgery needed to be done right away and she should not wait to have it done. Tr., 10/26/06, Salatino Test., p. 12.
34. Ms. Salatino agreed to have the surgery because Respondent told her she needed the surgery and she trusted Respondent. Tr., 10/26/06, Salatino Test., p. 12.
35. Ms. Salatino's underwent surgery on her right eye on July 15, 2003 and was scheduled to undergo surgery on left eye on July 22, 2003 but

Respondent's license was summarily suspended the previous day. 1-JS-1-015, Tr., 10/26/06, Salatino Test., p. 14.

36. Ms. Salatino's chart for June 11, 2003 states that Ms. Salatino is "unable to see clearly to drive in glare HS [at night]." 1-JS-1-013. The Committee find this entry in Ms. Salatino's chart to be false. The entry is contrary to Ms. Salatino's sworn testimony. As noted above, Ms. Salatino was driving in day time and at night. Further, Ms. Salatino did not tell Respondent nor anyone at his office that she was unable to see clearly to drive at night. Tr., 10/26/06, Salatino Test., p. 13.

37. Ms. Salatino's chart also indicates that she was given a diagnosis of dense central nuclear cortical cataracts in both eyes. The Committee finds this entry in Ms Salatino's chart to be false for the reasons previously state in its findings in MPC 15-0203 at Paragraphs 20 and 21.

38. Ms. Salatino's record for June 11, 2003 indicates that Ms. Salatino was given a second opinion. 1-JS-1-014. The Committee finds this entry in Ms Salatino's chart to be false for the reasons previously state in its findings in MPC 15-0203 at Paragraph 24.

39. In the section designated as "vision" Respondent has entered Ms. Salatino's CST with BAT score (20/100 in both eyes) as the only indicator of Ms. Salatino's vision notwithstanding that her Snellen result, even with dilation, indicated a considerably better vision of 20/30 in the left eye and 20/25 in the right. 1-JS-1-064. In Ms. Salatino's record of June

11, 2003, there are no results for CST or Snellen test performed without glare and without dilation. The Committee finds, for the reasons stated in MPC 15-0203 at Paragraphs 25 (a)-(g), that Respondent recorded Ms. Salatino's vision scores in manner to indicate that Ms. Salatino's vision was worse than it actually was in order to justify his decision to perform surgery.

40. Ms. Salatino was examined by both Dr. Irwin and Dr. Morhun. Dr. Irwin saw Ms. Salatino on July 25, 2003. Tr., 11/20/06, Irwin Test., p. 15. On that day Ms. Salatino's Snellen results with correction were 20/20 plus 2 in the unoperated left eye. Tr., 11/20/06, Irwin Test., p. 16. Upon performing a slit lamp examination, Dr. Irwin found a bare trace of cortical opacity in Ms. Salatino's left eye. Tr., 11/20/06, Irwin Test., p. 18. Dr. Irwin found nothing that would indicate a dense cataract. Tr., 11/20/06, Irwin Test., p. 18. Based on these results Dr. Irwin concluded that surgery on Ms. Salatino's left eye was not indicated. Id.
41. Ms. Salatino was examined by Dr. Morhun on September 5, 2003 at the request of the Board. Tr., 12/4/06, Morhun Test., p. 24. The results of Dr. Morhun's exam found Ms. Salatino's vision in the unoperated left eye to be 20/30 minus 2 with correction and Dr. Morhun was able to refract Ms. Salatino to 20/20 in the unoperated left eye. Tr., 12/4/06, Morhun Test., p. 25. In performing a slit lamp exam of Ms. Salatino's unoperated left eye, Dr. Morhun found "early nonvisually significant cataract." Tr.,

12/4/06, Morhun Test., p. 26. Based on these results Dr. Morhun concluded that surgery on Ms. Salatino's left eye was not indicated. Tr., 12/4/06, Morhun Test., p. 27.

42. The Committee finds, based on the above, that Respondent performed cataract surgery on Ms. Salatino that was not medically indicated. Respondent pressured Ms. Salatino into agreeing to surgery by leading Ms. Salatino to believe that such surgery was indicated and that such surgery was urgent.
43. The Committee finds as misplaced Respondent's reliance on the fact that a registered nurse was hired to explain the informed consent procedure. The hiring of the nurse is not a defense to nor mitigation of Respondent's pressuring Ms. Salatino into surgery that was not medically indicated. No matter how much of a patient advocate the registered nurse was, Respondent had already made the decision to perform cataract surgery and Ms. Salatino had agreed to undergo the surgery before Ms. Salatino saw the nurse. The decision had been made and the informed consent procedure, no matter how detailed the form or professional the presentation by the nurse, was a mere formality.

#### CONCLUSIONS OF LAW

44. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts XIII-XVI), willful

misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count XVII), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count XVIII), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts XIX–XXII). There are misrepresentation in Ms. Salatino’s chart regarding dense cataracts in both eyes when in fact the cataract in the left eye was an early cataract and not visually significant. There are misrepresentations regarding a second opinion given when none was given and regarding Ms. Salatino’s inability to drive at night that support the Committee’s conclusions that Respondent engaged in unprofessional conduct of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s attempt to discourage Ms. Salatino from obtaining a second opinion by asserting he was an expert in the field and that he would give Ms. Salatino a second opinion demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct.

45. Respondent’s use of CST with BAT results as the sole indicator of Ms. Salatino’s most accurate vision and use of Snellen vision tests performed after dilation also supports the Committee’s conclusion that Respondent created a false record. Respondent recorded the results of the CST with BAT as Ms. Salatino’s vision and the Snellen test result with dilation in

order to create a record that indicated Ms. Salatino's vision was worse than it actually was in order to justify surgery. Further, Respondent's use of the CST with BAT result to persuade Ms. Salatino that her vision was so bad as to require surgery also supports the Committee's conclusion that Respondent's conduct demonstrates unfitness to practice, dishonest, immoral or unprofessional conduct, and willful misrepresentation in treatment.

46. Based on the findings and the Committee's conclusion in Paragraphs 44 and 45, the Committee concludes that Respondent's conduct was a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count XXIII) and/or a failure to practice competently under 26 V.S.A. §1354(b)(Count XXIV). Respondent made no attempt to evaluate the relationship between Ms. Salatino's every-day functioning and her vision. Indeed, had Respondent conducted the type of inquiry recommended in the AAO Preferred Practice Outlines and as described by the other physicians at hearing, Respondent would have found that Ms. Salatino's vision was meeting her needs and therefore surgery was not indicated. Instead, Respondent simply showed a single test result to Ms. Salatino without any explanation of what the test indicated. Respondent then told Ms. Salatino that if she were a truck driver she would be allowed to drive. The Committee concludes the findings and conclusions

support the conclusion that the decision regarding cataract surgery was Respondent's and Ms. Salatino was pressured into undergoing surgery and that Respondent performed surgery when not medically indicated. Further Respondent, by refusing to allow Ms. Salatino to wait to undergo surgery as she requested, Respondent misled Ms. Salatino into believing the surgery was urgent. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

**PROPOSED FINDINGS AND CONCLUSIONS REGARDING MPC 148-0803 --  
SUSAN LANG (PATIENT #4)**

**FINDINGS OF FACT**

47. Susan Lang was also a long-time patient of Respondent. Tr., 10/2/06, Lang Test., p. 7.
48. At her appointment with Respondent in July of 2002, Respondent told Ms. Lang in what she described as an agitated state, that he could understand why Ms. Lang did not have complaints about her vision and that he could not recommend surgery if she did not have complaints. Tr., 10/2/06, Lang Test., p. 11. Respondent also informed Ms. Lang that she had repeatedly failed the cataract test. Id. Respondent then showed Ms. Lang the results of a previous CST test. Tr., 10/2/06, Lang Test., p. 12. Respondent never explained the results of the CST test but simply told Ms. Lang that if she were applying for a truck driver's license she would

fail. Tr., 10/2/06, Lang Test., p. 13. Ms. Lang could not understand why she was not having complaints when she had repeatedly failed the cataract test. Tr., 10/2/06, Lang Test., pp. 13-14.

49. Ms. Lang then saw Respondent in June of 2003. Tr., 10/2/06, Lang Test., p. 15. On this day Ms. Lang informed Respondent that she having a particular problem with blurriness and working with an instrument at her job. Tr., 10/2/06, Lang Test., p. 15-16. Based on what Respondent had told her at the previous appointment, Ms. Lang wondered if the problem was related to the cataracts. Tr., 10/2/06, Lang Test., p. 16. Respondent said the blurriness was related to cataracts and the problem could be corrected with surgery. Id. Respondent did not ask Ms Lang about how her vision was affecting other aspects of her life nor did he discuss glasses as an alternative to solving her problem with blurriness. Tr., 10/2/06, Lang Test., p. 17.

50. When Ms. Lang asked about getting a second opinion, Respondent said loudly she should not, showed her a plaque and told her he was the only physician in Vermont that was a member of a particular group. Tr., 10/2/06, Lang Test., pp. 17-18. Ms. Lang interpreted this to mean that Respondent was more qualified than other physicians. Tr., 10/2/06, Lang Test., p. 18. Ms. Lang agreed to surgery based on what Respondent had told her at the 2002 appointment and the blurriness problem and her trust in Respondent. Tr., 10/2/06, Lang Test., p. 16.

51. Respondent performed surgery on Ms. Lang's right eye on July 15, 2003.
52. Respondent's records for Ms. Lang's visit in June of 2003 contain a diagnosis of dense central nuclear cortical cataracts in both eyes. 1-SL-1-1-019. For reasons explained in MPC 15-0203 at Paragraphs 21 and 22, the Committee finds this entry to be false.
53. Ms. Lang's records also indicate that a second opinion was given. Id. For reasons explained in MPC 15-0203 at Paragraph 24, the Committee finds this entry to be false.
54. Respondent has recorded in Ms. Lang's record that Ms. Lang "can't see to drive safely HS [at night] due to glare from cataracts." 1-SL-1-1-019. The Committee finds this entry to be false. Ms. Lang never told Respondent that she could not see to drive safely at night, and in fact her vision was not affecting her ability to drive. Tr., 10/2/06, Lang Test., p. 18-19.
55. In the portion of the record designated as "vision" the only result recorded is the CST with BAT result (20/100 right eye-20/70 left eye). For reasons explained in MPC 15-0203 at Paragraph 25(a)-(g), the Committee finds this entry to be false.
56. Dr. Geoffrey Tabin examined Ms. Lang on July 24, 2003. 1-SL-1-2-000. At that examination Ms. Lang's vision in her unoperated left eye was 20/25 plus one with correction and did not improve with refraction. Tr., 11/30/06, Tabin Test., p. 28-29. Dr. Tabin performed a slit lamp exam and diagnosed Ms. Lang with a trace cortical cataract in the unoperated

left eye. Tr., 11/30/06, Tabin Test., p. 29. Based on these results and because Ms. Lang was “able to function extremely well with her visual function” Tr., 11/30/06, Tabin Test., p. 31. Dr. Tabin advised against surgery in the left eye. Tr., 11/30/06, Tabin Test., p. 31.

#### CONCLUSIONS OF LAW

57. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts XXV-XXIX), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count XXX), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count XXXI), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts XXXII–XXXVI). There are misrepresentations in Ms. Lang’s chart regarding dense cataracts in both eyes when in fact the cataract in the left eye was a trace cataract not affecting her visual functioning. There are misrepresentations regarding a second opinion given when none was given and regarding Ms. Lang’s inability to drive at night that support the Committee’s conclusions that Respondent’s conduct demonstrates unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398. Respondent’s attempt to discourage Ms. Lang from obtaining a second

opinion by telling Ms. Lang not to get a second opinion and referring to his membership in an organization demonstrates unfitness to practice and dishonest, immoral or unprofessional conduct.

58. Respondent's use of CST with BAT results as the sole indicator of Ms. Lang's most accurate vision also supports the Committee's conclusion that Respondent made a false record. Respondent recorded the results of the CST with BAT as Ms. Lang's vision and recorded only the Snellen results with dilation. Further, Respondent's use of the CST with BAT result to persuade Ms. Lang that her vision was so bad as to require surgery not only supports the State's claim of making a false record but also demonstrates unfitness to practice, dishonest, immoral or unprofessional conduct, and willful misrepresentation in treatment.
59. Based on the findings and the Committee's conclusions in Paragraphs 57 and 58, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count XXXVII) and/or a failure to practice competently under 26 V.S.A. §1354(b)(Count XXXVIII). Respondent failed to evaluate the relationship between Ms. Lang's every-day functioning and her vision. The very type of assessment that Dr. Tabin performed and suggested by the AAO Preferred Practice Patterns. The findings above support the Committee's conclusion that the decision

regarding cataract surgery was Respondent's, that Ms. Lang was pressured into undergoing surgery and that Respondent performed surgery when not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC  
106-0803 -- MARYLEN GRIGAS (PATIENT #5)**

60. Marylen Grigas was a patient of Respondent for about eleven years. Tr., 11/8/06, Grigas Test., p. 143. Ms. Grigas had an appointment with Respondent on Monday, September 9, 2002. Tr., 11/8/06, Grigas Test., p. 143.
61. After Respondent examined Ms. Grigas, Respondent and Ms Grigas were talking about her cataracts and about the cataracts would be removed at some point in the future. Tr., 11/8/06, Grigas Test., pp. 143-144. Respondent then told Ms. Grigas that he had an opening the next day. Tr., 11/8/06, Grigas Test., p. 144. Ms. Grigas was directing a play for the South End Art Hop and had rehearsal on Tuesday afternoon. Tr., 11/8/06, Grigas Test., p. 144. Respondent told Ms. Grigas she could still conduct rehearsal on Tuesday afternoon. Id. Respondent did not discuss with Ms. Grigas how her vision was affecting her life nor why surgery was indicated.

62. Ms. Grigas then spoke with nurse about scheduling surgery and began to become nervous and concerned at the speed with which events were unfolding. Tr., 11/8/06, Grigas Test., p. 145. Ms. Grigas asked the nurse if she could still conduct a rehearsal in a field the afternoon after her surgery. Tr., 11/8/06, Grigas Test., p. 145. The nurse informed Ms. Grigas that most people usually sleep all day after the surgery. Id. Ms. Grigas informed the nurse that she did not want to go through with the surgery. Tr., 11/8/06, Grigas Test., p. 145.
63. The nurse then informed Respondent of Ms. Grigas's decision not to have surgery and Respondent came into the room and told Ms. Grigas in an authoritative tone that there was not going to be a problem. Tr., 11/8/06, Grigas Test., p. 145. Ms. Grigas returned home and then called Respondent's office and cancelled the surgery. Tr., 11/8/06, Grigas Test., p. 146.
64. Ms. Grigas's record for September 9, 2002, contains a diagnosis of dense central nuclear cataracts in both eyes. 1-MG-1-022. For reasons discussed at Paragraphs 21 and 22 of MPC 15-0203, the Committee finds this entry to be a false entry.
65. Ms. Grigas's record for September 9, 2002, states that Ms. Grigas was given a second opinion. 1-MG-1-022. For reasons discussed at Paragraph 24 of MPC 15-0203, the Committee finds this entry to be a false entry.

66. Respondent wrote in Ms. Grigas’s record for September 9, 2002 “can’t see to drive safely [at night] in glare due to cataracts.” The Committee finds this entry to be false. Ms. Grigas did not tell Respondent or anyone in his office that she could not see to drive safely at night due to glare. Tr., 11/8/06, Grigas Test., p. 147. In fact, Ms. Grigas was routinely driving between Vermont and New Hampshire. Tr., 11/8/06, Grigas Test., p. 146.
67. Dr. Thomas Cavin examined Ms. Grigas on September 12, 2003. Tr., 10/24/06, Cavin Test., p. 138. Dr. Cavin performed a slit lamp exam and concluded that Ms. Grigas’s cataracts were clinically relatively insignificant in both eyes. Tr., 11/8/06, Cavin Test., p. 141. Based on his exam Ms. Grigas reports that she was currently doing well with her present vision, Dr. Cavin did not recommend cataract surgery. Tr., 11/8/06, Cavin Test., p. 141.

**CONCLUSIONS OF LAW**

68. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts XXXIX-XLI), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count XLII), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count XLIII), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts XLIV–XLVI). The Committee bases its

conclusions on the misrepresentations in Ms. Grigas's chart regarding dense cataracts in both eyes and Ms. Grigas's inability to drive at night, and pressuring Ms. Grigas to undergo surgery the next day when surgery was not medically indicated.

69. Based on the findings and the Committee's conclusions in Paragraph 68, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count XLVII) and/or a failure to practice competently under 26 V.S.A. §1354(b)(Count XLVIII). Respondent's failed to make a determination or to discuss with Ms. Grigas the relationship between her vision and her ability to do the things she likes to do. Respondent's pressuring of Ms. Grigas to undergo surgery the next day when informed by the nurse that Ms. Grigas did not want surgery is contrary to the AAO Preferred Practice Patterns. The Committee concludes that the decision regarding cataract surgery was Respondent's, and that he attempted to pressure Ms. Grigas into undergoing surgery when such surgery was not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

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

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC  
122-0803 -- DONALD OLSON (PATIENT #7)**

## FINDINGS OF FACT

70. Donald Olson is a retired professor of dentistry who moved to Vermont from Maryland thirteen years ago. Tr., 10/2/06, Olson Test., pp. 97-98.
71. Dr. Olson had an appointment with Respondent on September 9, 1995. Tr., 10/2/06, Olson Test., p. 99. After being tested by Respondent's technicians, Dr. Olson saw Respondent. Tr., 10/2/06, Olson Test., p. 100. Respondent told Dr. Olson he had cataracts and when Dr. Olson asked how severe the cataracts were Respondent informed Dr. Olson that if he were a truck driver he would not be allowed to drive. Tr., 10/2/06, Olson Test., p. 100.
72. Dr. Olson was surprised by Respondent's diagnosis because no other physician had previously told him of cataracts. Tr., 10/2/06, Olson Test., pp. 100. According to Dr. Olson, Respondent advised him to have cataract surgery and did not present surgery as optional. Tr., 10/2/06, Olson Test., pp. 100-101.
73. When Dr. Olson saw Respondent in 1995 his glasses were meeting his needs and his quality of life was not compromised by his vision. Tr., 10/2/06, Olson Test., p. 104. Dr. Olson did not have surgery. Tr., 10/2/06, Olson Test., p. 101.
74. Dr. Olson saw Dr. Guilfooy on January 20, 1998. Tr., 10/24/06, Guilfooy Test., p. 142. Dr. Guilfooy's examination of Dr. Olson found to have 20/20 vision in the right eye and a "fuzzy" 20/25 in the left eye, with refraction.

Tr., 10/24/06, Guilfoy Test., p. 143. Dr. Guilfoy performed a slit lamp examination and found Dr. Olson to have a moderate nuclear sclerosis on both eyes. Tr., 10/24/06, Guilfoy Test., p. 143. Dr. Guilfoy concluded that Dr. Olson's cataracts were of no "particular visual significance." 1-DO-2-009. Dr. Guilfoy did not recommend surgery because Dr. Olson's visual acuity was too good to undergo the risks and costs of surgery. Tr., 10/24/06, Guilfoy Test., p. 144.

75. The Committee finds that Respondent did more than "offer" or "recommend" cataract surgery to Dr. Olson. There is no evidence that Respondent engaged in any discussion with Dr. Olson regarding his vision and its relationship to Dr. Olson's quality of life. Respondent merely examined Dr. Olson and told him he cataracts. Respondent led Dr. Olson to believe the cataracts were of a more serious nature than they actually were by telling him he would be unable to be licensed as a truck driver.

#### CONCLUSIONS OF LAW

76. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts XLIX-L), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count LI), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts LII-LIII). The Committee bases its conclusions on

its findings that Respondent misrepresented to Dr. Olson the severity of his cataracts and attempted to have Dr. Olson undergo surgery when such surgery was not indicated

77. Based on the findings and the conclusions in Paragraph 76, the Committee concludes that Respondent's conduct constituted a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count LIV). Further supporting the Committees conclusion is Respondent's failure to make a determination or to discuss with Dr. Olson the relationship between his vision and its affect on Dr. Olson's quality of life, contrary to the AAO Preferred Practice Patterns.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC  
110-0803 -- JANE CORNING (PATIENT #8)**

**FINDINGS OF FACT**

78. Jane Corning saw Respondent on June 30, 2000 for a routine check-up. Tr., 10/3/06, Corning Test., p. 223.

79. After being tested by Respondent's staff, Ms Corning met with Respondent. Tr., 10/3/06, Corning Test., p. 225. Respondent informed Ms. Corning that she had cataracts in both eyes and that he could schedule her for surgery the following Tuesday. Tr., 10/3/06, Corning Test., p. 225.

80. Respondent told Ms. Corning of his accreditation in a particular group and of his qualifications to perform surgery. Tr., 10/3/06, Corning Test.,

p. 225. Respondent then sent Ms. Corning to a staff to have the surgery scheduled for the following Tuesday. Tr., 10/3/06, Corning Test., p. 226-227.

81. Ms. Corning felt pressured by the facts that things were moving so quickly. Tr., 10/3/06, Corning Test., p. 227 . Ms. Corning felt she did not have time to formulate questions about the surgery. Tr., 10/3/06, Corning Test., p. 227. Ms. Corning was alarmed by the process of being put on the surgical schedule so quickly. Tr., 10/3/06, Corning Test., p. 227 . Further, Ms. Corning was surprised that she was not experiencing any symptoms from the cataracts. Tr., 10/3/06, Corning Test., p. 226.

82. When Ms. Corning met with Respondent's staff for scheduling she informed them she needed time to think about the surgery. Tr., 10/3/06, Corning Test., p. 228.

83. Ms. Corning's record for June 30, 2000 contains a diagnosis of dense central nuclear cortical cataracts in both eyes. 1-JC-1-003. The Committee find this entry to be false for reasons stated in Paragraphs 21 and 22 in MPC 15-0203.

84. Ms. Corning's record for June 30, 2000 also indicates that Ms. Corning was given a second opinion. 1-JC-1-003. The Committee find this entry to be false for reasons stated in Paragraph 24 in MPC 15-0203.

85. Ms. Corning's record also indicates in Respondent's handwriting that Ms. Corning "wants cataracts removed." 1-JC-1-004. The Committee finds

this entry to be false based on Ms. Corning's testimony that the entry "want cataracts removed" is a false statement. Tr., 10/3/06, Corning Test., p. 229.

86. In the portion of the record designated as "vision" the only result recorded is the CST with BAT result (20/32 right eye-20/63 left eye). For reasons stated in Paragraph 25 (a)-(g) in MPC 15-0203, the Committee finds this entry to be false.
87. On October 5, 2000, Ms. Corning was examined by Dr. Alan Irwin. Tr., 11/20/06, Irwin Test., p. 25. When refracted, Ms. Corning's vision tested 20/20 in the right eye and 20/25 in the left eye. Tr., 11/20/06, Irwin Test., p. 26. In examining the lenses of Ms. Corning, Dr. Irwin found a trace cortical cataract. Tr., 11/20/06, Irwin Test., p. 27. Dr. Irwin did not recommend surgery because Ms. Corning had good vision and, in talking with Ms. Corning, determined that Ms. Corning did not believe that her problems driving at night in the rain warranted surgery. Tr., 11/20/06, Irwin Test., p. 28.
88. The Committee finds that Respondent did more than "offer" or "recommend" surgery. Respondent attempted to quickly schedule Ms. Corning for surgery without a discussion as to how Ms. Corning's vision was affecting her life or an explanation as to why surgery was indicated. Respondent pressured Ms. Corning into undergoing surgery that was not medically indicated.

## CONCLUSIONS OF LAW

89. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts LV-LVI), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count LVII), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count LVIII), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts LIX-LX). The Committee's conclusions are based on misrepresentation in Ms. Corning's chart regarding dense cataracts when in fact she had trace cataracts, regarding a second opinion given when none was given, and regarding her desire for cataract surgery support
90. Further, Respondent's use of CST with BAT results as the sole indicator of Ms. Corning's most vision also supports the Committee's conclusion that Respondent created a false record. Respondent recorded the results of the CST with BAT as Ms. Corning's vision even though Ms. Corning's Snellen result, even with dilation, indicated better vision than the CST with BAT result.
91. Based on the findings and the conclusions in Paragraph 89 and 90, the Committee concludes that Respondent's conduct constituted a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A.

§1354(a)(22) (Count LXI). The Committee's conclusion is also supported by the Committee's findings that Respondent's failed to explain or even determine why cataract surgery was medically indicated for Ms. Corning. There is no evidence to support the conclusion that Ms. Corning's vision, with glasses, no longer met her needs or that her quality of life was compromised by her vision. In fact, Dr. Irwin's examination demonstrates the opposite. Further, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Corning's vision was meeting her needs as set forth in the AAO Preferred Practice Patterns and as practiced by other physicians. The speed with which Respondent attempted to schedule Ms. Corning for surgery supports the Committee's conclusion that the decision regarding cataract surgery was Respondent's and that Ms. Corning was pressured into being scheduled for surgery constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC  
126-0803 -- FRANKLIN COLE (PATIENT #10)**

**FINDINGS OF FACT**

92. Franklin Cole first saw Respondent in October of 1982 to have a piece of hay chaff removed from his eye. Tr., 9/26/06, Cole Test., p. 80; 1-FC-1-001. At the next visit, Respondent diagnosed Mr. Cole with glaucoma and

prescribed timoptic for the glaucoma. Tr., 9/26/06, Cole Test., p. 81. Mr. Cole continued to see Respondent until July of 1992.

93. At Mr. Cole's appointment of July 15, 1992, Respondent informed Mr. Cole for the first time that he had cataracts and that surgery could be scheduled for the following week to address both the cataracts and glaucoma. Tr., 9/26/06, Cole Test., p. 82, 83.

94. Respondent told Mr. Cole he could get a second opinion but that no other doctor would question Respondent's diagnosis. Tr., 9/26/06, Cole Test., p. 83. Mr. Cole could not believe he had cataracts because he had "no trouble seeing." Tr., 9/26/06, Cole Test., p. 82.

95. Mr. Cole's chart for July 15, 1992 indicates that Mr. Cole was "bothered by lights" and that Mr. Cole "doesn't like to drive at night." 1-FC-1-011. The Committee finds this entry in Mr. Cole's record to be false and entered in the record for the purpose of justifying surgery. Mr. Cole testified that when he saw Respondent on July 15, 1992, he had "no problems" driving and was not bothered by lights. Tr., 9/26/06, Cole Test., pp. 82, 124-125.

96. After the July 15, 1992 appointment, Mr. Cole saw Dr. Karen Cleary on February 25, 1993. Tr., 11/8/06, Cleary Test., p. 11. Dr. Cleary performed a visual acuity test on Mr. Cole with results of 20/20 and 20/20-1 which Dr. Cleary described as excellent vision. Tr., 11/8/06, Cleary Test., p. 11. Dr. Cleary examined Mr. Cole's lenses and found

cortical changes which were normal for a man of Mr. Cole's age. Tr., 11/8/06, Cleary Test., pp. 11-12. Dr. Cleary also examined Mr. Cole for glaucoma and determined he did not have glaucoma. Tr., 11/8/06, Cleary Test., p. 12. Dr. Cleary confirmed that Mr. Cole did not have glaucoma at follow up visits in September of 1993 and March of 1994 and discontinued his glaucoma medication. Tr., 11/8/06, Cleary Test., pp. 13-15.

97. Dr. Cleary has seen Mr. Cole continuously from February of 1993 until the present. Tr., 11/8/06, Cleary Test., p. 15; State's Exhibit 21. Mr. Cole's vision is currently meeting his needs and his vision does not compromise his life. Tr., 9/26/06, Cole Test., p. 86. Dr. Cleary testified that if left untreated glaucoma would cause damage to a patient that would be evident to an ophthalmologist and noted in the records. Tr., 11/8/06, Cleary Test., p. 127.

98. The Committee finds that Respondent attempted to pressure Mr. Cole into having surgery by leading him to believe he had glaucoma and cataracts and that surgery was medically indicated and urgent.

#### CONCLUSIONS OF LAW

99. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts LXX-LXXII), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14)

(Counts LXXIII-LXXIV), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count LXXV), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts LXXVI-LXXVIII). The Committee bases its conclusion on its findings that Respondent diagnosed Mr. Cole with glaucoma when he did not have glaucoma and diagnosed Mr. Cole as having cataracts that required surgery when such surgery was not medically indicated. The Committee's conclusion is further supported by its finding that Respondent falsified Mr. Cole's record to justify surgery.

100. Based on the findings and the conclusions in Paragraph 99, the Committee concludes that Respondent's conduct constituted a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count LXXIX). The Committee's conclusion is further supported by Respondent's failure to explain or even determine why cataract surgery was medically indicated for Mr. Cole. There is no evidence to support the conclusion that Mr. Cole's vision, with glasses, no longer met his needs or that his quality of life was compromised by his vision. Further, there is no evidence that Respondent made a meaningful attempt to determine if Mr. Cole's vision was meeting his needs as set forth in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Mr. Cole for surgery for

cataracts that were normal for a man of his age and for non-existent glaucoma reasonably and fairly supports the conclusion that the decision regarding surgery was Respondent's, and that Mr. Cole was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC  
209-1003 -- MARGARET MCGOWAN (PATIENT #11)**

**FINDINGS OF FACT**

101. Margaret McGowan had seen Respondent regularly since 1972. 1-MM-1-001. In August of 1997 Respondent first raised the issue of cataract surgery with Ms. McGowan. Tr., 10/3/06, McGowan Test., p. 93-94 . Ms. McGowan was surprised by the discussion of cataract surgery because she was not having problems with her vision. Tr., 10/3/06, McGowan Test., p. 94. Ms. McGowan had done extensive driving at night prior to the August 1997. Tr., 10/3/06, McGowan Test., p. 94-95. Respondent told Ms. McGowan she could get a second opinion but that he had “special teaching” and the Respondent was the only person “certified to do this.” Tr., 10/3/06, McGowan Test., p. 103. Ms. McGowan declined surgery at the August 1997 visit. Tr., 10/3/06, McGowan Test., p. 99.
102. Ms. McGowan next saw Respondent on July 9, 1999. Tr., 10/3/06, McGowan Test., p. . When Respondent administered the CST on this day

it was after Ms. McGowan had been dilated twice. Tr., 10/3/06, McGowan Test., p. 99. At this appointment Respondent again raised the issue of cataract surgery. Tr., 10/3/06, McGowan Test., p. 99. Respondent again told Ms. McGowan she could get a second opinion but that Respondent was the only one certified to do this. Tr., 10/3/06, McGowan Test., p. 102. Because Ms. McGowan had been doing extensive driving at night between her 1997 and 1999 appointments she did not believe she was having a problem and declined surgery. Tr., 10/3/06, McGowan Test., p. 100-101.

103. Ms. McGowan then saw Respondent on August 29, 2001. Tr., 10/3/06, McGowan Test. p. 103. At the August 2001 appointment Ms. McGowan's CST was again administered after she had been dilated three times. Tr., 10/3/06, McGowan Test. p. 106-107. Respondent told Ms. McGowan that her vision was getting worse and that cataract surgery would solve the problem. Tr., 10/3/06, McGowan Test. p. 107. Ms. McGowan had been doing extensive driving between her 1999 and 2001 appointments and had not had problems with her vision. Tr., 10/3/06, McGowan Test. p. 106-107. Ms. McGowan declined surgery. Tr., 10/3/06, McGowan Test. p. 106.

104. Ms McGowan's next appointment with Respondent was in June of 2003. Tr., 10/3/06, McGowan Test. p. 109. At this visit the CST was administered after Ms. McGowan had been twice dilated. Tr., 10/3/06, McGowan Test. p. 109-110. Respondent then showed Ms. McGowan the

results of the CST exam without explaining what the test represented. Tr., 10/3/06, McGowan Test. p. 111-112. Ms. McGowan believed the CST result showed her vision declining over a period of time. Tr., 10/3/06, McGowan Test. p. 112. Respondent again told Ms. McGowan she could get a second opinion but that Respondent was the only one certified to do this. Tr., 10/3/06, McGowan Test. p. 113. Because Ms. McGowan was scared after seeing the results of the CST she agreed to surgery. Tr., 10/3/06, McGowan Test. p. 112-113, 117.

105. Respondent performed surgery on Ms. McGowan's right eye on July 1, 2003. 1-MM-1-019.
106. Ms. McGowan's chart for June, 2003 contains a diagnosis of dense central nuclear cortical cataracts in both eyes. 1-MM-1-018. The Committee finds this entry to be false for reasons stated in Paragraphs 21 and 22 of MPC 15-0203.
107. Ms McGowan's chart for June, 2003 also states that Ms. McGowan received a second opinion. 1-MM-1-018. The Committee finds this entry to be false for reasons stated in Paragraph 24 of MPC 15-0203.
108. In the section of the chart designated as "chief complaint," Respondent himself has entered "can't see to drive safely in glare due to cataracts." 1-MM-1-017. The Committee finds this entry to be false. Ms. McGowan testified that she was continuing to drive a great deal at night and that

her vision was not affecting her ability to travel. Tr., 10/3/06, McGowan Test. pp. 116-117.

109. In the portion of Ms. McGowan's June, 2003 chart designated as "vision" Respondent has entered 20/100 for each eye, the result of Ms. McGowan's CST with BAT that had been administered after Ms. McGowan had been dilated three times. 1-MM-1-017. Not recorded in the vision portion of the record is Ms. McGowan Snellen result of 20/25+, right eye, and 20/30+, left eye (1-MM-1-073) — a considerably better result despite the fact that Snellen was administered with dilation. For the reasons stated in Paragraph 25 (a)-(g), the Committee finds that Respondent recorded the results of vision test in such a manner as to portray Ms. McGowan's vision as worse than it actually was to justify surgery.

110. Ms McGowan was examined by Dr. Patrick Morhun on October 21, 2003. Tr., 12/4/06, Morhun Test. p. 20. Dr. Morhun's examination found that Ms McGowan's visual acuity in the unoperated left eye was 20/20 with and without refraction. Tr., 12/4/06, Morhun Test. p. 20-21. Dr. Morhun diagnosed Ms. McGowan with a "mild" posterior subcapsular cataract in the operated left eye. Tr., 12/4/06, Morhun Test. p. 20-21. Dr. Morhun would have graded the cataract less than a one. Tr., 12/4/06, Morhun Test. p. 21. Dr. Morhun did not recommend cataract surgery for

Ms. McGowan's left eye because the cataract in that eye was not "visually significant." Tr., 12/4/06, Morhun Test. p. 23-24.

111. The Committee finds that Respondent performed surgery on Ms. McGowan that was not medically indicated. Ms. McGowan's vision was meeting her needs and Respondent made no attempt to determine the effect of Ms. McGowan's vision on her quality of life. Instead, over the course of four appointments Respondent consistently told Ms. McGowan her vision was impaired by cataracts and surgery was indicated.

#### CONCLUSIONS OF LAW

112. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts LXXX-LXXXII), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Counts LXXXIII), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count LXXXIV), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts LXXXV-LXXXVII). The Committee's conclusion is based the misrepresentations in Ms. McGowan's chart regarding dense cataracts in both eyes when in fact the cataract in the left eye was an early cataract and not visually significant, regarding a second opinion given when none was given and regarding Ms. McGowan's inability to drive at night. Further supporting the Committee's conclusion is its finding that Respondent attempted on

several occasions to discourage Ms. McGowan from obtaining a second opinion by asserting he was the only person certified to do cataract surgery.

113. Further, Respondent's use of CST with BAT results, after being dilated three times, as the sole indicator of Ms. McGowan's most accurate vision also Supports the Committee's conclusion that Respondent falsified his records.. Respondent recorded the results of the CST with BAT as Ms. McGowan's vision even though her Snellen result, even with dilation, indicated much better vision than the CST with BAT result. Further, Respondent's use of the CST with BAT result to persuade Ms. McGowan that her vision was so bad as to require surgery not only supports the Committee's conclusion that Respondent falsified his records but also supports the Committees conclusion that Respondent's conduct demonstrates unfitness to practice, dishonest, immoral or unprofessional conduct, and willful misrepresentation in treatment.

114. Based on the findings and the Committee's conclusions in Paragraphs 112 and 113, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count LXXXVIII) and/or a failure to practice competently under 26 V.S.A. §1354(b)(Count LXXXVIX). Further supporting the Committee's conclusion is the failure on the part

of Respondent to evaluate the relationship between Ms. McGowan's every-day functioning and her vision. Indeed, had Respondent conducted the type of inquiry as set forth in the AAO Preferred Practice Outlines and as described by the other physicians at hearing, Respondent would have found that Ms. McGowan's vision was meeting her needs and therefore surgery was not indicated. The evidence supports the conclusion that the decision regarding cataract surgery was Respondent's, and Ms. McGowan was pressured into undergoing surgery and that Respondent performed surgery when not medically indicated. Such conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC 89-0703 -- JOSEPH TOUCHETTE (PATIENT #12)**

**FINDINGS OF FACT**

115. Joseph Touchette was a longtime patient of Respondent and saw Respondent in June of 1998 because characters on the page and on his PC were getting smaller. Tr., 10/2/06, Touchette Test., p. 143.
116. At the appointment of June 1998, Respondent told Mr. Touchette that he had cataracts and that he needed surgery. Tr., 10/2/06, Touchette Test., p. 143-144. This was the first time that Respondent had told Mr. Touchette that he had cataracts and Mr. Touchette was surprised. Tr., 10/2/06, Touchette Test., p. 144. Mr. Touchette tried to discuss the

diagnosis and surgery with Respondent but Respondent directed him to staff to schedule the surgery. Tr., 10/2/06, Touchette Test., p. 145.

117. Respondent told Mr. Touchette that it was no use to get a second opinion because Respondent was the only physician qualified. Tr., 10/2/06, Touchette Test., p. 145.
118. Mr. Touchette's chart for June 19, 1998 contains a diagnosis of dense central nuclear cortical cataracts with left eye greater than right eye. 1-JT-1-009. The Committee finds this entry to be false for reasons stated in Paragraphs 21 and 22 of MPC 15-0203.
119. Mr. Touchette's chart for June 19, 1998 also indicates that Mr. Touchette was given a second opinion. The Committee finds this entry to be false for reasons stated in Paragraph 24 of MPC 15-0203.
120. In the portion of the chart designated as "chief complaint" Respondent himself wrote that Mr. Touchette's cataracts "interfere with life" and that Mr. Touchette "wants cataracts removed." 1-JT-1-008. the Committee finds this entry to be false. Mr. Touchette testified that he never told anyone Respondent or anyone in his office that he wanted his cataracts removed. Tr., 10/2/06, Touchette Test., pp. 147-148. Mr. Touchette also testified that when he saw Respondent in June of 1998, his quality of life was not compromised by his vision. Tr., 10/2/06, Touchette Test., p. 150.
121. Dr. James Watson examined Mr. Touchette on September 28, 1998. Tr., 10/26/06, Watson Test., p. 110. Mr. Touchette's vision was 20/25 in

the right eye and 20/20 in the left eye. Tr., 10/26/06, Watson Test., p. 111. With refraction Mr. Touchette's vision improved to 20/20 in each eye. Id. In performing a slit lamp exam Dr. Watson found that Mr. Touchette had minimal cataracts, compatible with a man of his age. Tr., 10/26/06, Watson Test., p. 111. Dr. Watson did not recommend cataract surgery for Mr. Touchette because Mr. Touchette "didn't have a problem that a cataract surgery would solve and . . . didn't have a true cataract something that would be bad enough to warrant surgery." Tr., 10/26/06, Watson Test., p. 113.

122. The Committee finds that Respondent attempted to pressure Mr. Touchette into undergoing cataract surgery when such surgery was not medically indicated. Respondent made no attempt to determine the effect of Mr. Touchette's vision on his quality of life but simply made a unilateral decision to perform surgery and attempted to convince Mr. Touchette surgery was indicated and urgent by trying to schedule the surgery quickly.

#### CONCLUSIONS OF LAW

123. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts XC-XCI), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Counts XCII), willfully making a false record under 26 V.S.A. §1354(a)(8)

(Count XCIII), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts XCIV-XCV). The Committee's conclusion is supported by the Committee's findings that entries in Mr. Touchette's chart showing a diagnosis of dense central nuclear cortical cataracts, stating Mr. Touchette received a second opinion, stating that cataracts interfered with his life and that Mr. Touchette wanted cataracts are false. Respondent's statement that Mr. Touchette needed surgery and his attempts to quickly schedule Mr. Touchette for surgery also support the State's allegations of unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398.

124. Based on the findings and the Committee's conclusions in Paragraph 123, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count XCVI). The Committee's conclusion is further supported by Respondent's failure to explain or even determine why cataract surgery was medically indicated for Mr. Touchette and discouraging Mr. Touchette from getting a second opinion. Mr. Touchette's vision, with glasses, was meeting his needs and his quality of life was not compromised by his vision. Further, there is no evidence that

Respondent made a meaningful attempt to determine if Mr. Touchette's vision was meeting his needs as set forth in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Mr. Touchette for surgery for cataracts that were compatible with a man of his age and discouraging Mr. Touchette from getting a second opinion the conclusion that the decision regarding surgery was Respondent's and that Mr. Touchette was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC 90-0703 -- BILL PIERSON (AUGOOD) (PATIENT #13)**

**FINDINGS OF FACT**

125. Bill Pierson saw Respondent for the first and only time in October of 2002 for a prescription change. Tr., 10/24/06, Pierson Test., p. 5.
126. After Mr. Pierson's exam, Respondent informed Mr. Pierson that he had cataracts in each eye and that he could have surgery very soon. Tr., 10/24/06, Pierson Test., p. 6. Respondent asked Mr. Pierson if he wanted to hear about cataract surgery. Tr., 10/24/06, Pierson Test., p. 8. Mr. Pierson declined and, after a few moments, Respondent again asked if Mr. Pierson wanted to hear about surgery. Tr., 10/24/06, Pierson Test., p. 8. It was clear to Mr. Pierson that he was not going to be able to leave

until he was told about cataract surgery so Mr. Pierson agreed to listen about cataract surgery. Tr., 10/24/06, Pierson Test., p. 9.

127. Respondent told Mr. Pierson that he need not get a second opinion because Respondent was the only doctor certified to do this particular operation. Tr., 10/24/06, Pierson Test., p. 7.

128. Mr. Pierson, who is married to a medical doctor, was “shocked,” “confused,” and “frightened” by his appointment with Respondent. Tr., 10/24/06, Pierson Test., p. 6-7. When Mr. Pierson saw Respondent on October 30, 2002, his glasses were meeting his need and his quality of life was not compromised by his vision. Tr., 10/24/06, Pierson Test., p. 16.

129. Mr. Pierson’s chart for October 30, 2002 contains a diagnosis of dense central nuclear cortical cataracts in each eye. 1-WA-1-002. The Committee finds this entry to be false for reasons stated in Paragraphs 21 and 22 of MPC 15-0203.

130. Mr. Pierson’s chart also indicates that he was given a second opinion on October 30, 2002. 1-WA-1-002. The Committee finds this entry to be false for reasons stated in Paragraph 24 of MPC 15-0203.

131. Mr. Pierson’s chart of October 30, Respondent wrote that Mr. Pierson “wants cataracts removed.” 1-WA-1-001. The Committee finds this entry to be false. Mr. Pierson is “100 percent sure” he did not tell Respondent or anyone in his office that he wanted his cataracts removed. Tr., 10/24/06, Pierson Test., p. 13.

132. Mr. Pierson was examined by Dr. Thomas Cavin on October 6, 2003. Tr., 10/23/06, Cavin Test., p. 149. Dr. Cavin determined that Mr. Pierson's vision on this day was 20/20 in each eye with correction. Tr., 10/23/06, Cavin Test., p. 150. Dr. Cavin examined Mr. Pierson's lenses and found "very mild" cataracts. Tr., 10/23/06, Cavin Test., p. 150. Dr. Cavin did not recommend that Mr. Pierson undergo cataract surgery because Mr. Pierson was "happy with his vision" and surgery was not medically indicated. Tr., 10/23/06, Cavin Test., p. 151.

133. The Committee finds that Respondent attempted to pressure Mr. Pierson into undergoing cataract surgery when such surgery was not medically indicated. Respondent made no attempt to determine how Mr. Pierson's vision was affecting his quality of life. Respondent made the unilateral decision to perform surgery and attempted to pressure Mr. Pierson into agreeing to surgery by attempting to mislead Mr. Pierson into believing such surgery was indicated and urgent.

#### CONCLUSIONS OF LAW

134. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts XCVII-C), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Counts CI), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count CII), and dishonest, immoral or unprofessional conduct under 26

V.S.A. §1398 (Counts CIII-CVI). The conclusions is based on the Committee's findings that entries in Mr. Pierson's chart showing a diagnosis of dense central nuclear cortical cataracts, stating Mr. Pierson received a second opinion, and stating that Mr. Pierson wanted cataracts are false. Respondent's attempts to quickly schedule Mr. Pierson for surgery and telling Mr. Pierson he did not a second opinion also support the Committee's conclusion that Respondent's conduct demonstrates unfitness to practice medicine under 26 V.S.A. 1354(a)(7), willfully making a false record under 26 V.S.A. §1354(a)(8), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398.

135. Based on the findings and the Committee's conclusions in Paragraph 134, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count CVII) and/or a failure to practice competently under 26 V.S.A. §1354(b) (Count CVIII). The Committee's conclusions is also supported by the Committee's finding that Respondent's failed to explain or even determine why cataract surgery was medically indicated for Mr. Pierson. Mr. Pierson's vision, with glasses, was meeting his needs and his quality of life was not compromised by his vision. Further, there is no evidence that

Respondent made a meaningful attempt to determine if Mr. Pierson's vision was meeting his needs as set forth in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Mr. Pierson for surgery for cataracts that were very mild and not interfering with his vision supports the conclusion that the decision regarding surgery was Respondent's and that Mr. Pierson was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

**PROPOSED FINDINGS AND CONCLUSIONS WITH RESPECT TO MPC 87-0703 -- JANET KERR (PATIENT #14)**

**FINDINGS OF FACT**

136. Janet Kerr saw Respondent on November 20, 2002 to get a prescription update for her contact lenses. Tr., 10/3/06, Kerr Test., p. 8. During Respondent's examination of Ms. Kerr, Respondent used the term "opaque" when speaking to his scribe. Tr., 10/3/06, Kerr Test., p. 10. A
137. After the examination Ms. Kerr asked Respondent about his use of the term "opaque." Tr., 10/3/06, Kerr Test., p. 10-11. Respondent informed Ms. Kerr that there was a problem with her cataracts and that she should have surgery soon and that she should book the surgery with the scheduler. Tr., 10/3/06, Kerr Test., p. 11.

138. Ms. Kerr, who is a registered nurse, was “shocked” and “surprised” by Respondent’s diagnosis. Tr., 10/3/06, Kerr Test., p. 11.
139. When Ms. Kerr raised the possibility of getting a second opinion, Respondent informed Ms. Kerr that a second opinion wouldn’t be necessary because Respondent was the most qualified in the area. Tr., 10/3/06, Kerr Test., p. 11. Ms. Kerr did not schedule her surgery. Tr., 10/3/06, Kerr Test., p. 12.
140. Ms. Kerr’s chart for November 20, 2002 contains a diagnosis of dense central nuclear cortical opacity in both eyes. 1-JK-1-002. The Committee finds this entry to be false for reasons stated in Paragraphs 21 and 22 of MPC 15-0203.
141. Ms. Kerr’s chart for that day also indicates Ms. Kerr was given a second opinion. 1-JK-1-002. The Committee finds this entry to be false for reasons stated in Paragraph 24 of MPC 15-0203.
142. Respondent himself wrote in Ms. Kerr’s chart for November 20, 2002 that Ms. Kerr “can’t see to drive safely hs [at night] due to cataracts, wants cataracts removed.” 1-JK-1-001. The Committee finds these entries to be false. When Ms. Kerr saw Respondent on November 20, 2002 she was not having problems driving safely at night and she did not want her cataracts removed. Tr., 10/3/06, Kerr Test., pp. 16-18.
143. In the portion of her record designated as “vision” the sole indicator of Ms. Kerr’s vision are the results of Ms. Kerr’s CST with BAT (20/100

right eye, 20/70 left eye). I-JK-1-001. Not recorded in the vision portion of the chart are Ms. Kerr's Snellen results (20/30 in both eyes) even though the results indicate much better vision, even with dilation. 1-JK-1-011. For reasons stated in Paragraph 25(a)-(g) of MPC 15-0203, the Committee finds that Respondent recorded vision scores in this manner to make it appear that Ms. Kerr's vision was worse than it actually was in order to justify surgery.

144. Ms. Kerr was examined by Dr. Alan Irwin on January 15, 2003. Tr., 11/30/06, Irwin Test., p. 23. Dr. Irwin determined that Ms. Kerr had 20/20 vision in each eye with refraction. Tr., 11/30/06, Irwin Test., p. 24. In performing his slit lamp exam, Dr. Irwin found early cataracts. Tr., 11/30/06, Irwin Test., p. 24. Dr. Irwin concluded that surgery was not indicated for Ms. Kerr because, with refraction, Ms. Kerr had 20/20 vision and her visual problems were described by Ms. Kerr as mild. Tr., 11/30/06, Irwin Test., p. 25.

145. Ms. Kerr was examined by Dr. Edwin Guilfoyle on March 19, 2003. Tr., 10/24/06, Guilfoyle Test., p. 134. Dr. Guilfoyle found Ms. Kerr's visual acuity to be 20/13 in each eye. Tr., 10/24/06, Guilfoyle Test., p. 135. When Dr. Guilfoyle performed a slit lamp exam he did not see a cataract. Tr., 10/24/06, Guilfoyle Test., p. 136. Dr. Guilfoyle did recommend surgery for Ms. Kerr because she did not have visible cataracts and her visual acuity was "excellent." Tr., 10/24/06, Guilfoyle Test., p. 136.

146. The Committee finds that Respondent attempted to pressure Ms. Kerr into undergoing cataract surgery when such surgery was not medically indicated. Respondent made no attempt to determine how Ms. Kerr's vision was affecting her quality of life. Respondent made the unilateral decision to perform surgery and attempted to pressure Ms. Kerr into agreeing to surgery by attempting to mislead Ms. Kerr into believing such surgery was indicated and urgent.

#### CONCLUSIONS OF LAW

147. Based on the findings above, the Committee concludes that the State has proven by a preponderance of the evidence those counts alleging unfitness to practice medicine under 26 V.S.A. 1354(a)(7) (Counts CIX-CXI), willful misrepresentation in treatment under 26 V.S.A. §1354(a)(14) (Count CXII), willfully making a false record under 26 V.S.A. §1354(a)(8) (Count CXIII), and dishonest, immoral or unprofessional conduct under 26 V.S.A. §1398 (Counts CXIV-CXVI). The Committee's conclusion is based on its findings that Ms. Kerr's chart showing a diagnosis of dense central nuclear cortical cataracts, stating Ms. Kerr received a second opinion, stating that Ms. Kerr could not see to drive safely at night, and stating that Ms. Kerr wanted cataracts removed supports are false entries. The Committee's conclusion is further supported by its findings that Respondent's attempted to quickly schedule Ms. Kerr for surgery and told her she did not need a second opinion.

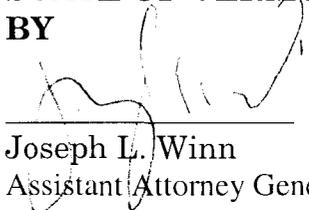
148. Respondent's use of CST with BAT results as the sole indicator of Ms. Kerr's most accurate vision also supports the Committee's conclusion that Respondent falsified Ms. Kerr's record State's claims of making a false record.

149. Based on the findings and the Committee's conclusions in Paragraphs 147 and 148, the Committee concludes that Respondent's conduct constitutes a gross failure to exercise the care, skill and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician under 26 V.S.A. §1354(a)(22) (Count CXVII) and/or a failure to practice competently under 26 V.S.A. §1354(b) (Count CXVIII). The Committee's conclusion is also supported by its finding that Respondent failed to explain or even determine why cataract surgery was medically indicated for Ms. Kerr. Ms. Kerr's vision, with glasses, was meeting her needs and her quality of life was not compromised by his vision. Further, there is no evidence that Respondent made a meaningful attempt to determine if Ms. Kerr's vision was meeting her needs as set forth in the AAO Preferred Practice Patterns and as practiced by other physicians. Respondent's attempt to schedule Ms. Kerr for surgery for cataracts that Dr. Irwin described as early supports the conclusion that the decision regarding surgery was Respondent's and that Ms. Kerr was pressured into being scheduled for surgery that was not medically indicated, constituting a gross failure to exercise the care, skill and proficiency

commonly exercised by the ordinary skillful, careful, and prudent physician and/or a failure to practice competently.

Dated at Montpelier, Vermont this 7<sup>th</sup> day of March, 2007.

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



---

Joseph L. Winn  
Assistant Attorney General

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