

**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

**REPLY MEMORANDUM IN SUPPORT OF STATE OF VERMONT'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Proposed Findings of Fact and Conclusions of Law submitted by the State and the Respondent vividly illustrate the different approaches of the two parties to the issues in this case. Like its case in chief, the State's Proposed Findings and Conclusions focus on the care provided to the eleven patients by the Respondent. With each of the eleven patients, the State proved by at least a preponderance of the evidence that Respondent pressured all these patients into undergoing cataract surgery that was not medically indicated and crafted the patient's medical record to support the Respondent's unilateral decision to perform cataract surgery. Contrary to the practice of the seven other ophthalmologists who testified and the Preferred Practice Patterns of the American Academy of Ophthalmology, Respondent never discussed with any of the eleven patients how their vision was meeting their needs or why he believed cataract surgery was medically indicated. Respondent simply told them the procedure, its risks and benefits and sent them to the staff to be scheduled for surgery. The State's mantra

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throughout these proceedings is that the Hearing Committee must focus on the testimony of the eleven patients in determining whether Respondent engaged in unprofessional conduct as alleged in the Amended Superceding Specification of Charges.

By contrast the Respondent's approach, both in the presentation of his defense and in his Proposed Findings and Conclusions, is to attempt to reduce the experiences of the eleven patients in this case to nullity. Respondent has glutted the record with self-serving and irrelevant evidence with the hope of obscuring the testimony of the eleven patients. To further obscure the testimony of the eleven patients, Respondent has proposed findings that are based on material specifically excluded by the Committee as evidence. When Respondent does discuss the experiences of the eleven patients, he attempts to spin the experiences of the eleven patients in a manner that is directly contrary to the testimony of the eleven patients and unsupported by the evidence. Finally, the Committee must reject the Respondent's defenses of caveat emptor and the excuse that Respondent has a poor chair-side manner.

**I. RESPONDENT HAS GLUTTED THE RECORD WITH IRRELEVANT AND SELF-SERVING EVIDENCE TO OBSCURE THE EXPERIENCE OF THE ELEVEN PATIENTS.**

The Respondent's proposed findings and conclusion accurately demonstrate Respondent's strategy throughout these proceedings. Respondent hopes to obscure the experiences of the eleven patients by filling the record with irrelevant material that has no bearing on the complaints of the eleven patients. For example, a large

portion of the Respondent's proposed findings is devoted to conducting a seminar on cataracts, cataract surgery, and contrast sensitivity testing. These topics may be of some interest to the Committee and the Board for medical or social policy reasons but have nothing to do with Respondent's treatment of the eleven patients.

Further there is much in Respondent's proposed findings and conclusions that is not only irrelevant but also self-serving. There is a great deal of discussion about Respondent's general approach to cataract surgery, his approach to quality assurance, and an attempt to portray Respondent as an innovator. While it may make Respondent feel good to have just assertions in the record, they have no bearing on his care and treatment of the eleven complaining patients. Further, Respondent continues to present a defense to fraud when the State has not charges or asserted that Respondent engaged in fraud. Whether Respondent did not charge other patients for medical services or whether Respondent has no interest in money has no bearing on the central issue which the Committee must decide—*Did Respondent engage in unprofessional conduct in his treatment of the eleven patients whose cases are before the Committee?*

Respondents attempt to include in the record evidence specifically excluded by the Committee is further demonstration of the Respondent's attempted obfuscation of the testimony of the eleven patients. Notwithstanding that the Committee specifically rejected Respondent's proffer of the testimony of Brianne Chase and Ellen Flanagan, Respondent liberally cites to their federal trial testimony in order to fill the record with irrelevant self-serving testimony.

Respondent's use of testimony specifically excluded by the Committee is improper and the Committee should ignore any proposed findings of Respondent based on the testimony of Ms. Flanagan or Mrs. Chase.

**II. RESPONDENT INTERPRETS THE EXPERIENCES OF THE ELEVEN PATIENTS IN A MANNER CONTRARY TO AND UNSUPPORTED BY THE EVIDENCE.**

Sandwiched between general discussions of cataract surgery and Respondent's attempts to bolster his image are proposed findings dealing with the eleven patients. However, Respondent puts a spin on these experiences that is inconsistent with and unsupported by the evidence. While there are several instances of this spin throughout the proposed findings, two examples are important.

First, Respondent insists that his treatment of the eleven patients was consistent with the Preferred Practice Patterns of American Academy of Ophthalmologists. This is, quite simply, not the case. The PPPs state clearly that cataract surgery is indicated when the patient's vision no longer meets the patient's needs. Throughout his proposed findings Respondent justifies his decision to perform cataract surgery based on the fact that the patients had symptoms of cataracts. Yet there is no evidence that Respondent made any meaningful attempt to determine whether these symptoms were resulting in vision that no longer met the patient's needs. In order for the Committee to find that Respondent acted in accordance with the PPPs, the Committee would have to adopt Respondent's approach to determining whether cataract surgery was indicated by equating mere

symptoms with vision that no longer meets the patient's needs. For the Committee to so find would result in rendering meaningless the PPPs and the practice of the reasonably prudent ophthalmologists who testified at hearing.

Second, the Respondent insists on characterizing his discussions with the eleven patients regarding surgery as offers or recommendations of surgery. Such a characterization is wholly at odds with the testimony of the eleven patients. The evidence is clear that Respondent did much more than offer or recommend surgery. Respondent pressured each of these patients into undergoing surgery by leading them to believe surgery was medically indicated when it was not and that there was an immediate need for such surgery. Respondent's attempt to minimize his conduct must be rejected by the Committee.

### **III. COMMITTEE MUST REJECT RESPONDENT'S DEFENSES OF CAVEAT EMPTOR AND ALLEGED POOR COMMUNICATION SKILLS OF RESPONDENT.**

There are two particular aspects of the Respondent's defense that the Committee must reject as a matter of policy. The first is Respondent's arguments with respect to the three surgical patients (Susan Lang, Judith Salatino, and Margaret McGowan) that, in essence, would apply a principle of caveat emptor ("let the buyer beware") to surgical patients. The second is Respondent's attempt to minimize his conduct by asserting that the complaints of the eleven patients are simply a result of the alleged poor communication skills of Respondent. For the Committee to give credence to these aspects of the Respondent's defense would result in physicians never being accountable for their conduct.

The Respondent has made much of the fact that he hired a registered nurse to explain the informed consent process to patients. Respondent uses the registered nurse and informed consent sheet signed by the three surgical patients to assert that each of the patients gave informed consent to their surgery and their surgery is therefore justified. The Respondent's argument totally ignores the interaction between the doctor and the three surgical patients prior to their encounter with the nurse. By the time the three surgical patients saw the nurse, the decision to undergo surgery had already been made by the patients as a result of Respondent's pressure to undergo surgery. The subsequent encounter with the nurse, no matter how caring or how much of a patient advocate, cannot mitigate the Respondent's conduct in pressuring the three patients into having surgery. If the Committee were to accept Respondent's assertion of caveat emptor, the Committee would be allowing physicians to engage in any conduct to convince a patient to have surgery and be insulated from accountability because a nurse later explained informed consent.

Second, the Committee cannot accept the Respondent's assertion that these complaints are simply a result of Respondent's poor communication skills. This argument is sheer minimizing on the part of Respondent. What happened with these eleven patients was not the result of poor communication. Respondent made a concerted effort to pressure all eleven patients into undergoing surgery that was not medically indicated. For the Committee to write such conduct off as "poor chair-

side manner” would allow physicians an easy excuse to avoid accountability for unprofessional conduct.

For reasons argued above and in previous submissions of the State, the Committee should adopt the State’s Proposed Findings and Conclusions as its recommendation to the Board.

Dated at Montpelier, Vermont this 16<sup>th</sup> day of March, 2007.

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



\_\_\_\_\_  
Joseph L. Winn  
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Date 10/23/06 Age 59 Name Frank Cole

CC/HPI \_\_\_\_\_ as recorded today (see questionnaire) Sent by \_\_\_\_\_ MD NP OD

Working for town (morning)  
Distance VA has improved, near  
vision a little worse  
Using +1.50 magnifiers to read -  
they work well.

- Eye meds
- Alphagan
  - Azopt
  - Cosopt
  - Doxycycline
  - pred. acetate
  - tears
  - timolol gel
  - TobraDex
  - Xalatan

No meds or new med dx's

F/U:

- |  |  |   |
|--|--|---|
| <input type="checkbox"/> amblyopia       | <input type="checkbox"/> epiretinal membrane | <input type="checkbox"/> PC opac.             |
| <input type="checkbox"/> anatomic NA     | <input type="checkbox"/> glaucoma 1° NT susp | <input type="checkbox"/> post-op cataract     |
| <input type="checkbox"/> ARMD            | <input type="checkbox"/> iritis              | <input type="checkbox"/> pseudoexfoliation    |
| <input type="checkbox"/> blepharitis     | <input type="checkbox"/> keratitis sicca     | <input type="checkbox"/> pseudophakia         |
| <input type="checkbox"/> cataract        | <input type="checkbox"/> lattice degen.      | <input type="checkbox"/> PVD                  |
| <input type="checkbox"/> chalazion       | <input type="checkbox"/> lid lesion          | <input type="checkbox"/> ptosis               |
| <input type="checkbox"/> conjunctivitis  | <input type="checkbox"/> ocular HTN          | <input type="checkbox"/> BRVO                 |
| <input type="checkbox"/> DM /retinopathy | <input type="checkbox"/> pig. disp. syndrome | <input type="checkbox"/> strabismus           |
| <input type="checkbox"/> drusen          | <input type="checkbox"/> pinguecula          | <input type="checkbox"/> transient vis. obsc. |
|  |  | <input type="checkbox"/> vitreous opacity     |

ROS, PFS Hx Form dated \_\_\_ / \_\_\_ / \_\_\_ reviewed / updated

EXAM -neuro <sup>depression</sup> Oriented to person, place, time? (Y / N) Appropriate affect? (Y / N)

Rx 1<sup>r</sup> mos / yrs (18) PAL \_\_\_ TRI \_\_\_ -visual acuity Manifest (+0.25) Rx given

OD -1.25 20/20<sup>1</sup> J -1.25 0.50 +11 20/15

OS -1.75 20/25 J -1.50 (+0.25 x 18) 20/15-1

Rx \_\_\_ mos / yrs \_\_\_ PAL \_\_\_ TRI \_\_\_ near Intermediate / Near Rx given \_\_\_

OD 20/ J

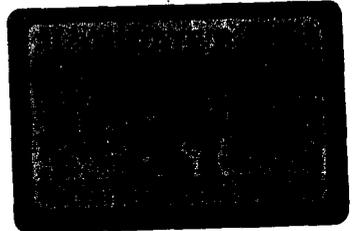
OS 20/ J

-pupils  PERRL  no APD Titmus \_\_\_ ° Ishihara \_\_\_ nml.

-motility  full  ortho 1° gaze Amsler grid \_\_\_ nml.

-visual fields  confront. Interpret: OD  full  
perimetry OS  full

IOP 18 OD  app. 2 difficult  
18 OS \_\_\_ Sch. \_\_\_ pt. unable / deferred



-adnexae \_\_\_ lids / lac. app. orbits nml. 1<sup>r</sup> blepharitis  
meib.exp. \_\_\_ clear \_\_\_ turbid \_\_\_ insp. \_\_\_ ptosis

-conjunctivae \_\_\_ nml. glob./ palp.  pinguecula \_\_\_ injection \_\_\_ hem.

-corneas  nml. epi, stroma, endo. \_\_\_ SPK \_\_\_ dystrophy \_\_\_ arcus \_\_\_ guttata \_\_\_ K spindle  
tear film  nml. \_\_\_ decreased \_\_\_ increased

Pach.        OD interpretation:        OD Goniocopy:        pig.        no PAS  
       OS correction factor/IOP        OS OD OS

-ant chambers OD        quiet        deep    mod    shallow        cells        flare  
OS        quiet        deep        mod        shallow        cells        flare

-lenses OD        clear    NS    H        CS        PSC        pseudoph; PC        clear        opac        capsulotomy  
OS        clear    NS    H        CS        PSC        pseudoph; PC        clear        opac        capsulotomy

-vitreous OD        clear floater / PVD / Weiss ring  
OS        clear floater / PVD / Weiss ring

-discs OD    sharp OS    sharp  
0.3-0.35 C/D 0.35-0.4 C/D

-retinas    dilated        declines        contra-indicated Myd 0.5 (1.0) Neo (2.5) 10

OD nml    V    M    P OS nml    V    M    P

*mottling*

       mac. drusen         
       mac. mottling         
       mac. degen.         
       AV signs HTN         
       lattice degen.       

       retina flat to periphery w/o break

N = new W = worse NI = no improvement I = improvement S = stable R = resolved

Diagnos(es):

Status:

Plan:

1. *blepharitis*        surgery recommended w. i.
2.        referral / consult.
3.        obtain / reviewed old records IOP<sup>s</sup> VF<sup>s</sup>
4.        request signed for Dr
5.        sp. service VF Pach PP Photos

Labs, Imag., Meds       

Risk/Comorbidity

- urgent
- risk of vision loss/blindness
- anticoagulated
- HTN DM dementia CA
- toxic med
- risk of death

- communicated with        MD
- UV protection
- spectacle wear
- daily lid hygiene
- cont. present eye meds
- daily multivitamin AREDS
- Amsler grid monitoring
- call immediately any new visual symptoms

F/U    (Y) M W D prn as prev. sched. VF ref. IOP/ photos Sig:       

Level    (R) G<sub>52</sub> VF<sub>2</sub> VF<sub>3</sub> Pach. P-op XO 25FB        P. Plug F. Pho. DRP Sat/after 5 Sun/Hol