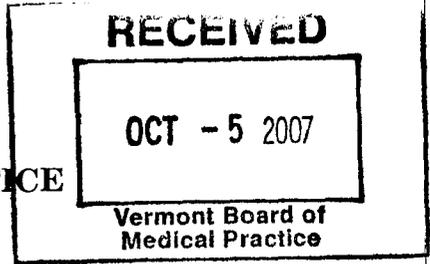


STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE



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

**RESPONSE OF STATE OF VERMONT TO  
RESPONDENT'S EXCEPTIONS**

**INTRODUCTION**

The Respondent's Exceptions to the Hearing Committee Report (hereinafter cited to as "Resp. Exs.") contains a host of reasons why the Respondent objects to the report of the Hearing Committee ("Committee") appointed by the Board of Medical Practice ("Board"). In its argument in response the State will address the legal issues raised by Respondent. Other issues, such as Respondent's Motion to Dismiss (Resp. Exs., pp. 49-50) and the exclusion of certain evidence (Resp. Exs., pp. 31-32, 43-44), have already been briefed or argued by the parties and need not be revisited.

The remaining issues raised by the Respondent, to wit: – findings and conclusions regarding Respondent's use of the term "dense" and his communication (or lack thereof) with patients regarding surgery (Resp. Exs., pp. 10-14, 16-25); findings related to Respondent's general practice Resp. Exs., pp.

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43-44) ; and findings related to determination of the Respondent's and witnesses' credibility (Resp. Exs., pp. 32-42) – are essentially an attack on the Committee's function as the fact finder in this case. In performing the function of fact finder neither the Board nor the Committee is required to analyze credibility in a particular manner as argued by Respondent. Nor are the Board and the Committee required to rule on every proposed finding submitted by the parties.

Reduced to their essence, Respondent's complaints regarding the Committee's fact finding are variations on the same theme, that is, -- Respondent disagrees with the Committee's findings and conclusions that disfavor him. However, simply because the Committee did not agree with Respondent's characterization of the evidence is not legal error. As long as the evidence supports the findings of the Committee the findings are legally proper. As argued below, and in the State's previous submission, the evidence that was presented at the hearing supports the findings and conclusions of the Committee.

#### ARGUMENT

##### **I. THE COMMITTEE'S REPORT IS NOT AN EXONERATION OF RESPONDENT.**

The State has argued in previous submissions that Respondent's defense was based on the creation of an alternate reality. In Respondent's version of reality, his treatment of the eleven patients in these cases was not a gross failure to use the degree of care commonly provided by the ordinary skillful, careful, and prudent ophthalmologist (as found by the Committee in ten of the eleven cases) or a failure to practice competently (as found by the Committee in seven of those

same ten cases). Instead, Respondent, in his closing argument before the Committee, idealized himself as the Copernicus or Galileo of the practice of ophthalmology, bringing innovation to the field. Consistent with these attempts to create an alternate reality, Respondent attempts to portray the Committee's report as an exoneration of the charges against him and a refutation of the allegations that led to Respondent's summary suspension. Resp. Exs., pp. 4-5. Respondent's fanciful portrayal of the Committee's report is nothing more than wishful thinking on the part of Respondent.

Far from refuting the allegations that led to these charges and the Respondent's summary suspension, the findings and conclusions of the Committee demonstrate why the summary suspension was necessary and justified. Three of the patients in these cases – Judith Salatino, Margaret McGowan, and Susan Lang – were scheduled for surgery the day after the Board issued its summary suspension. The Committee found in all three of these cases that Respondent did not engage in discussions with the patients to determine the relationship between their vision and their quality of life. Hearing Committee Report, Findings of Fact, ¶168 (Judith Salatino); ¶¶200, 204, 213 (Susan Lang); ¶336 (Margaret McGowan) (hereinafter cited to as "Rep."). The Committee also found that the records of all three patients contained substantive information regarding symptoms that, at the very least, was inaccurate. Rep., Findings of Fact, ¶¶162, 170 (Judith Salatino); ¶¶209, 215 (Susan Lang); ¶¶332,333 (Margaret McGowan). In all three cases the Committee found that Respondent

improperly discouraged these surgical patients from obtaining second opinions and also improperly informed the patients that he (Respondent) possessed some special expertise. Rep., Findings of Fact, ¶¶169, 170 (Judith Salatino); ¶¶214, 215 (Susan Lang); ¶334 (Margaret McGowan). In all three cases the Committee concluded that Respondent's treatment of the surgical patients constituted both a gross failure to use the degree of care commonly provided by the ordinary skillful, careful, and prudent ophthalmologist and a failure to practice competently. Rep., Conclusions of Law, ¶¶23, 24 (Judith Salatino); ¶¶37, 38 (Susan Lang); ¶¶80, 81 (Margaret McGowan). Had the Board not summarily suspended Respondent's license these three patients would have undergone surgery without a proper determination by the Respondent that such surgery was medically indicated.

To give credence to Respondent's description of the Committee's Report as an exoneration truly requires what Coleridge called the willing suspension of disbelief. The Committee concluded in ten of the eleven cases before it that Respondent's conduct constituted a gross failure to use the degree of care commonly provided by an ordinary skillful, careful, and prudent ophthalmologist. In seven of those same ten cases, the Committee concluded that Respondent failed to practice competently. The Committee's conclusions cannot be reconciled with the term exoneration.

Moreover, the Committee's report did not find in Respondent's favor on many of the other counts. The Respondent was charged with 110 Counts of unprofessional conduct involving 11 patients. The Committee found and

concluded that the Respondent did not engage in unprofessional conduct in 41 Counts. The Committee found and concluded, however, that Respondent engaged in the conduct which was the basis of 52 additional Counts of unprofessional conduct and that were best addressed and subsumed into 17 Counts of unprofessional conduct involving 10 of the 11 patients which the Committee concluded that the Respondent had violated.

The Committee's hearing report simply cannot be accurately described as an exoneration of the charges filed against him or a refutation of the grant of summary suspension. The Hearing Committee Report supports the fundamental charges brought by the State.

**II. VERMONT LAW IS CLEAR THAT DETERMINING WHETHER A PROFESSIONAL'S CONDUCT IS A GROSS FAILURE TO EXERCISE REASONABLE JUDGMENT IS FOR THE FACT FINDER TO DETERMINE.**

Respondent argues that 26 V.S.A. §1354(a)(22) incorporates the civil malpractice standard of 12 V.S.A. §1908 and is tantamount to a gross negligence standard. Resp. Exs., pp. 5-6. Whether the statute in fact encompasses these various legal standards is an issue that the Board need not address. The issue before the Board is whether Respondent's conduct was a gross failure to exercise the care, skill and proficiency of a prudent physician in his treatment of the ten patients. The Vermont Supreme Court has made clear that the determination is for the fact finder (in this case, the Board) and that such determination will be upheld if supported by substantial evidence.

In the case cited by Respondent, *Braun v. Board of Dental Examiners*, 167 Vt. 110 (1997), the Vermont Supreme Court observed that “there is no clear dividing line between ordinary and gross negligence.” *Braun*, at 114. For this reason the Court affords deference to the fact finder in determining whether particular behavior rose to the level of gross negligence. *Id.* The Court also noted that additional deference is required where the action, like the instant action, arose out of an administrative proceeding “in which a professional’s conduct was evaluated by a group of his peers.” *Braun*, at 114. The fact finder’s determination as to gross negligence will be upheld if supported by substantial evidence, i.e. evidence that is “relevant and a reasonable person could accept as adequate to support the particular conclusion.” *Id.*

Substantial evidence supports the Hearing Committee’s determination that Respondent’s conduct in ten cases demonstrated both a gross failure to exercise the care, skill and proficiency of a prudent physician and a failure to practice competently. Practicing in a manner contrary to the opinions of all the State’s physician witnesses, the testimony of Respondent’s own expert, Dr. James Freeman, and contrary to the accepted professional standards of the Preferred Practice Patterns of American Academy of Ophthalmology (which Respondent himself introduced as evidence of the standard of care), Respondent failed to engage these ten patients in any meaningful medical discussion regarding the relationship between each patients’ vision and each patients’ quality of life and yet he was ready and willing to perform cataract surgery on them. Practicing in

a manner that was contrary to the opinion testimony of all the physicians, and contrary to basic medical ethical tenets of the profession, Respondent discouraged his patients from obtaining second opinions, and he attempted to persuade his patients that he possessed some special expertise that other physicians did not. A reasonable person could clearly accept such evidence as adequate to support the conclusion that Respondent's conduct demonstrated both a gross failure to exercise the care, skill and proficiency of a prudent physician and a failure to practice competently.

### **III. THE STATUTE, 26 V.S.A. §1354(b), IS NOT VOID FOR VAGUENESS.**

Respondent for the first time challenges the validity of 26 V.S.A. §1354(b) as void for vagueness. Resp. Exs., pp. 6-10. The Vermont Supreme Court has ruled that it is not necessary for a statute that regulates a professional field to detail each and every act that is prohibited. *Braun*, 167 Vt., 118 (citing *Brody v. Barasch* 155 Vt. 103, 111 (1990)). A body such as the Board must, in regulating the profession, apply "some broad and necessarily general standards." *Brody*, at 111. Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices will pass constitutional muster. *Id.*

Applying this reasoning in *Brody*, the Vermont Supreme Court found the prohibition in 26 V.S.A. §3016(10) against moral unfitness to practice psychology not unconstitutionally vague. *Brody*, 155 Vt. at 111. The Supreme Court concluded that the statute was "sufficiently clear to inform the ordinary person

that honesty and truthfulness are required attributes of one who desires to be licensed as a psychologist.” *Id.* Similarly, in *Braun*, the Court ruled that a statute declaring that a dentist will be held to degree of care and skill of the ordinarily skillful, careful, and prudent dentist was sufficiently clear to inform the ordinary person that conduct engaged in by Braun violated the statute. *Braun*, 118-19.

When measured by “common understanding and practices” 26 V.S.A. §1354(b)’s prohibition against failing to practice competently is sufficiently clear. Indeed, Respondent himself introduced the Preferred Practice Patterns of the AAO by which the Committee measured Respondent’s conduct with respect to performing cataract surgery. Based on Respondent’s own acknowledgment of the “common understanding and practices” he cannot now argue that he did not know what conduct constituted a failure to practice competently.

Moreover, the timing of Respondent’s vagueness challenge is procedurally questionable. If Respondent truly was confused concerning what conduct constitutes a failure to practice competently, he should have made his challenge long before this. Respondent made numerous and repetitive motions to dismiss this matter and never once challenged any of the relevant statutes as being unconstitutionally vague. Apparently Respondent only came to this realization after the Committee rendered its recommendation.

**IV. RESPONDENT HAS PRESENTED NO EVIDENCE THAT AN AD HOC MEMBER WAS BIASED AND THEREFORE RESPONDENT HAS NOT REBUTTED THE PRESUMPTION THAT OFFICIALS WILL DECIDE A CONTROVERSY FAIRLY AND CONSCIENTIOUSLY.**

Respondent asserts that the ad hoc member of the Committee, Dr. Dewees Brown, prejudged the issue of the validity of Respondent's use of the term "dense" to describe cataracts that were in their early stages or, in Ms. Nordstrom's case, nonexistent. Resp. Exs., pp. 14-16. In matters such as these there is a presumption that the actions of an administrative body, such as the Hearing Committee, are valid unless demonstrated otherwise by clear and convincing evidence. *Brody v. Barasch*, 155 Vt. at 109. There is also a presumption that officials will decide a controversy fairly and conscientiously. *Id.*

Respondent has produced insufficient evidence to rebut the presumption of validity of these proceedings and the fairness of Doctor Brown. Respondent relies solely on observations Dr. Brown made in the early stages of the proceeding to support his claim of bias. Those observations are merely comments on the evidence presented and not an indication of bias. Further, the Committee was comprised of two other individuals in addition to Dr. Brown. Respondent offers no evidence that the combined judgment of the Committee members was somehow tainted.

As with Respondent's vagueness challenge, the timing of Respondent's challenge to Dr. Brown's impartiality is suspect. The comments made by Dr. Brown were at the very early stages of the proceedings. Respondent raised an

issue about potential bias of Dr. Brown. The Presiding Officer invited Respondent to question not only Dr. Brown but also the other panel members if the Respondent had a concern regarding bias. The Respondent declined the Presiding Officer's invitation and never pursued the issue further. If Respondent truly believed Dr. Brown was biased, he would have pursued the issue when given the opportunity. Since Respondent did not pursue the issue of alleged bias, it is waived.

**V. THE AMENDED SUPERCEDING SPECIFICATION OF CHARGES PROVIDED SUFFICIENT NOTICE THAT RESPONDENT'S FAILURE TO DETERMINE THE EFFECT OF VISION ON PATIENTS' LIFE STYLE AND RESPONDENT'S DISCOURAGEMENT OF SECOND OPINIONS WERE VIOLATIONS OF 26 V.S.A. §§1354(a)(22) AND 1354(b).**

Respondent argues that the State did not allege that Respondent's failure to determine the effect of the patients' vision on their lifestyle constituted unprofessional conduct and that the State did not allege that Respondent's discouragement of obtaining a second opinion constituted unprofessional conduct under either 26 V.S.A. §1354(a)(22) or §1354(b). Resp. Exs., pp. 20-22, 30-31. The Respondent appears to be arguing that the State failed to provide adequate notice. The Respondent's arguments are simply without merit.

In disciplinary proceedings, notice is adequate "if it fairly apprised the person of the nature of the charges so that he may prepare for the hearing and defend his position." *Braun v. Board of Dental Examiners*, 167 Vt. at 117. In the Amended Superceding Specification of Charges the State described each patient's

encounter with Respondent and alleged that each patient was not experiencing visual problems that compromised their lifestyle, notwithstanding the Respondent's entries in some of the patients' records. The State also alleged, where applicable, that Respondent discouraged patients from seeking a second opinion. In setting forth the counts of unprofessional conduct, including counts based on 26 V.S.A. §1354(a)(22) and §1354(b), the State incorporated by reference the factual allegations with respect to each patient as the basis for the count. The Amended Specification of Charges was clearly adequate to apprise the Respondent that failure to determine the effect of vision on a patient's lifestyle and discouraging patients from obtaining a second opinion were the basis of charges under 26 V.S.A. §1354(a)(22) and §1354(b).

Respondent's own evidence demonstrates that he was aware that discussions between the patient and the physician concerning the effect of vision on the patient's lifestyle was an important factor in determining the appropriateness of cataract surgery. Respondent himself introduced the Preferred Practice Patterns of the AAO which states that an important aspect of a patient's history is the patient's assessment of his or her functional status. 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. In addition, Respondent's own expert, Dr. James Freeman, emphasized the importance of the patient/physician discussion regarding the effect of vision on lifestyle. Dr. Freeman testified 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.

Transcript, 12/18/06, *In re: David S. Chase*, Dk. Nos. 12-0203, *et al.*, Testimony of Dr. James Freeman, pp. 98-99. Dr Freeman also testified that:

I explain to them sometimes it's -- you know, you need to decide what's important to you and it doesn't have to be rescuing orphans from a flood. You know, if it's important to you these are the things that drive the surgical decision. And what I see is not nearly as important as what you tell me.

Id., pp. 82-83.

Respondent's own evidence demonstrates that the Amended Superceding Specification of Charges clearly gave Respondent adequate notice that discussions with his patients regarding the effect of vision on lifestyle was an important aspect of a prudent physician's determination of the appropriateness of cataract surgery.

## VI. RESPONDENT DISTORTS THE BURDEN OF PROOF APPLICABLE TO THESE PROCEEDINGS.

Respondent argues that the Committee's recommendation "turns the burden of proof on its head" by transferring the burden to Respondent. Resp. Exs., p.46. It is, however, Respondent who turns the burden of proof on its head. The State does not have the burden of disproving the hypotheses of Respondent's defense. Further, Respondent has the burden of presenting evidence to support his theories of defense.

The State's burden is to prove its case by a preponderance of the evidence. Contrary to Respondent's assertions, there is no burden on the State to disprove the hypothetical defenses proffered by Respondent. If the State's burden was that envisioned by Respondent, Respondent could prevail by simply proposing an endless stream of hypothetical defenses without ever offering any real proof. There is simply no legal support for Respondent's view of the State's burden.

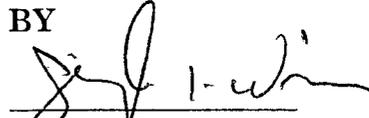
Similarly, if the Respondent wished to undercut the State's burden he must proffer evidence - not generalities and hypotheticals - to support his theory of the defense. Respondent did not do this in his case. Respondent never testified in his own case to rebut the testimony of his patients. Instead, Respondent's only relevant testimony was that of Dr. Freeman, whose opinions were based largely on Respondent's own records, which were determined by the Committee to be, at the very least, inaccurate as to substantive facts. Neither the Board nor the State can be held accountable for Respondent's failure to garner evidence to support his theories of defense.

CONCLUSION

For reasons argued above and in all previous submissions, the State's Request to Amend must be **GRANTED** and the Hearing Committee Report should be otherwise **ACCEPTED**.

Dated at Montpelier, Vermont this 5<sup>th</sup> day of October, 2007.

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