

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

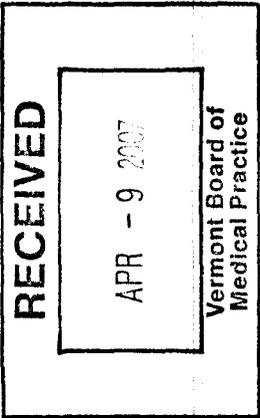
In re: William A. O'Rourke, M.D.

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MPN 12-0302

**STATE'S MOTION TO STRIKE  
IMPROPER E-MAIL COMMUNICATION BY  
RESPONDENT'S ATTORNEY AND TO PROHIBIT  
FURTHER E-MAIL COMMUNICATION IN THIS MATTER**

The State of Vermont, by and through Attorney General William H. Sorrell and undersigned Assistant Attorney General, James S. Arisman, moves the Board of Medical Practice to strike certain improper E-mail communications regarding this matter that were sent by Respondent's attorney to the Board's presiding officer. The State further moves that the Board prohibit all further E-mail communication regarding this matter when sent directly to the presiding officer by either of the parties. The State moves that this motion be granted for the reasons set forth below and for such other reasons as may be presented at any hearing on this motion.



**I. Background.**

1. The Board of Medical Practice entered its final order in this matter on March 20, 2007. E-mail transmissions of the final order and other related communications were sent to the wrong address for the undersigned and not received by the Office of the Attorney General in a timely manner. However, on March 26, 2007, the undersigned learned (a) the Board had entered its final order in this matter; (b) Respondent was seeking alteration of the Board's final order; and (c) Board staff already had scheduled a hearing on Respondent's request without communicating with the undersigned.

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2. In light of the above circumstances, the State filed a motion to continue to a later date the Board hearing that had been scheduled for March 27, 2007. The State's motion to continue the matter was granted by the Board panel on the ground that the State had been denied notice and an opportunity to be heard. Respondent's counsel was directed to file a written motion with the Board, rather than E-mails.

3. As directed by the presiding officer, counsel for Respondent on or about March 29, 2007 filed by E-mail a "motion" with the Board. Staff of the Board forwarded a copy of this pleading to the undersigned by facsimile on March 29, 2007. On April 5, 2007, the State timely filed with the Board of Medical Practice its written reply and opposition to Respondent's motion to alter the Board's final order. See V.R.C.P. 6(a) (addressing computation of filing times).<sup>1</sup> The State's written reply, as filed with the Board, included citation of legal authority, recitation of pertinent facts, and analysis. See V.R.C.P. 7(b) (motion shall be in writing and state with particularity grounds for the motion "including a concise statement of the facts and law relied on").

## **II. Respondent's E-Mail Communications to Presiding Officer.**

### **A. March 29, 2007.**

4. After having filed his motion with the Board, Respondent's attorney improperly communicated by E-mail on March 29, 2007 with the presiding officer regarding the pending matter, stating, "I hope and expect that [Mr. Arisman] will respond by Friday so that the Board can promptly address the issue." Respondent's attorney knew

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1. Should Respondent seek to assert untimeliness regarding the State's reply, review of the record and V.R.C.P. 6(a) will make clear that the State's pleading was timely filed. However, any argument on this point may be readily resolved under V.R.C.P. 6(b), in the unlikely event that this might be necessary, by enlargement of time by the Board so as to permit consideration of the facts and authorities cited by the State in its reply. The State so requests, should this be deemed necessary.

or should have known that the presiding officer had no authority to alter the filing timeline that the Board had set for the State to reply to Respondent's motion to alter the Board's final order. The State did not respond to the improper E-mail sent by Respondent's attorney, and the presiding officer also appears not to have responded.

5. Respondent's attorney never filed a proper written motion with the Board to request an expedited filing date for the State's reply.

**B. April 6, 2007.**

6. On April 6, 2007, Respondent's attorney twice wrote by E-Mail to the Board's presiding officer, Mr. Cykon. Respondent's attorney commented upon and made certain assertions regarding the State's April 5, 2007 written filing with the Board. Respondent's attorney urged the presiding officer that the State's reply filing "not be submitted to the Board." This communication by Respondent's attorney was improper.

7. Respondent's attorney is an experienced legal professional and knew or should have known that the presiding officer has no authority to prohibit submission to the Board of the State's reply filing or to prevent the Board from determining the timeliness of the filing. Respondent's attorney was well aware that he needed to file a written motion with the Board if he was seeking to assert that the State's reply was untimely and should not be considered by the Board.

8. The E-mails sent by Respondent's attorney on April 6, 2007 to the Board's presiding officer sought an action that he intended to be adverse to the State's position, but the attorney cited no legal authority and included no supporting factual representations. In addition to seeking an adverse disposition of the State's written filing of April 5, 2007, the

E-mails by Respondent's attorney cast aspersions on the State's motives and expressed disdain for the State's pleadings.

9. Respondent's attorney had no proper legal purpose for his E-mail communications to the Board presiding officer. The attorney's E-mail messages were not written in the form of a motion that was to be submitted to the Board for consideration and determination. Nor could the State anticipate from the form of these communications whether the State needed to respond to these E-mails as if they actually were "motions" or intended as such.

10. Respondent's attorney never filed a proper written motion with the Board seeking to exclude from consideration the State's responsive pleading.

#### **C. Motion to Strike.**

11. The State moves pursuant to V.R.C.P. 12(f) to strike any and all consideration of the improper communications of March 29, 2007 and April 6, 2007 regarding a pending matter that Respondent's attorney sent directly by E-mail to the Board's presiding officer. These communications are unsigned and otherwise legally insufficient in that they wholly fail to meet the requirements of V.R.C.P. 7(b) regarding the form and content for "Motions and Other Papers".

12. Respondent's improper E-mail communications request that the presiding officer and/or the Board take certain actions with regard to a matter pending. Because these communications urge a certain course of action they must be construed as pleadings. When measured against the requirements of V.R.C.P. 7(b), these communications are legally insufficient, must be stricken, and must be given no further attention. Further, the attorney for Respondent in these E-mails accuses the undersigned, without citation of

authority or recitation of any purported facts, of acting "intentionally" to avoid complying with the filing timeline set by the presiding officer and of filing a pleading with the Board that "includes, no great surprise, numerous inaccuracies." Such communications are bare, self-serving assertions by Respondent's counsel that are wholly unsupported and that are "immaterial, impertinent, or scandalous" and irrelevant to the matter at hand. See Nault's Auto Sales, Inc. v. American Honda Motor Company, Inc., 148 F.R.D. 25, 30&37 (1993) (given absence of facts opposing counsel should have exercised a modicum of restraint, made reasonable inquiry, or raised matter with court in language more consistent with facts and presumption of integrity to which every member of bar and litigant is entitled).

13. Given the legally insufficient and improper form of the E-mail communications of Respondent's attorney, which must be stricken under Rule 12(f), the attorney should be directed to file with the Board a written motion in proper form, if he wishes to assert his here-to-fore unsupported claims and have them considered by the Board. V.R.C.P. 7(b).

### **III. Memorandum.**

#### **A. Communication Regarding a Pending Matter.**

14. The E-mails sent directly by Respondent's attorney to the presiding officer were an improper attempt by the attorney to influence the presiding officer and affect his advice and communication to the Board regarding a pending matter. The attorney in his communications was not asking whether he might file a motion or inquiring as to procedure or asking that a status conference or hearing in this matter be set. Instead, Respondent's attorney urged the presiding officer to take a certain action on a pending matter and commented disparagingly regarding the State's legal filings. In sum, the E-mail

communication by Respondent's attorney was intended to improperly influence the Board's or the presiding officer's decision making and/or his views on a matter that was pending before the Board.

15. Respondent's attorney possesses the direct E-mail address of the Board's presiding officer and has repeatedly used it to communicate directly with the presiding officer while the O'Rourke matter has been pending. Such conduct by Respondent's attorney has placed the presiding officer in the position of receiving communications that may be procedurally improper or that are improper in content.

16. Respondent's direct E-mail communications unnecessarily have placed the Board's presiding officer in the uncomfortable (and unsought) position of receiving communications about a pending matter contrary to the statutory prohibitions of 26 V.S.A. § 813:

Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions or law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

17. Respondent's attorney sent E-mail communications directly to the presiding officer regarding a pending matter in a form that had no proper legal purpose and in doing so simply chose to disregard the ethical requirements and responsibilities of the Board's presiding officer under 26 V.S.A. § 813. The manner of communication, tone, and content of Respondent's E-mails to the presiding officer, at a minimum, have the appearance of improper ex parte communication that is violative of 26 V.S.A. § 813 and that undermines the Board's ability to provide orderly due process, impartiality, and fundamental fairness to all parties before it.

**B. Vermont Rules of Professional Conduct.**

18. The E-mail communications from Respondent's attorney also appear to be in violation of the Vermont Rules of Professional Conduct which state, "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with a judge or other person acting in a judicial or quasi-judicial capacity in a pending adversary proceeding, except as permitted by law or the Code of Judicial Conduct; and (c) engage in undignified or discourteous conduct which is degrading or disrupting to a tribunal." See Vermont Rules of Professional Conduct, Rule 3.5. Impartiality and Decorum of the Tribunal (internal numbering and inapposite content omitted). As discussed above, Respondent's attorney had no proper legal purpose for his E-mail communications of March 29 and April 6, 2007 to the Board's presiding officer regarding a matter pending before the Board.

**C. Hereafter, the Board Should Limit and Control E-mail Communications Regarding Pending Matters.**

19. E-Mail communication is often treated with a seeming informality that is misleading and can easily undermine due process. For example, an E-mail to Board staff or the presiding officer that requests a certain action may or may not be treated by the Board as a "motion" that results in scheduling, filing of pleadings, hearings, etc. Yet, the rules that govern motion practice are intended to require that the pleadings of parties be made in a form that is consistent with due process and that reliably supports the decision making process of the tribunal. Thus, a legally proper motion is in writing, states "with particularity" the facts and law relied upon, clearly states the action or relief that is being sought, is properly captioned, and is signed by the moving party with the implicit certification that it is not presented for an improper purpose and that it is well-founded.

See V.R.C.P. 7(b); V.R.C.P. 11(b)&(c). A request presented in this form complies with accepted legal standards and does not require guessing as to whether or not it is a "motion", what it is seeking, or what legal support there is for the basis is for the action that is requested.

20. An E-mail message by a party to the Board's presiding officer that does not meet the legal standard discussed above may nonetheless improperly convey the views, opinions, or wishes of the sender to the presiding officer or the Board. The opposing party is disadvantaged and left to speculate as to the purpose of the message and how it may be treated by the Board. Should the opposing party respond? In what form? Should an E-mail reply be sent or should a formal written pleading or motion be filed? If the message includes disparaging or improper content, what effect will it have on the presiding officer or the Board? Should the opposing party respond to this content?

21. The rules that govern motion practice are intended to regularize the form and filing of pleadings by the parties. To permit direct E-mail contact with the presiding officer or the Board on pending matters invites an unruly, free-for-all approach to litigation of Board cases that is inconsistent with ordered due process and respect for the tribunal. The events in the O'Rourke matter also have demonstrated the inadvisability of permitting parties to initiate or seek actions or orders of the Board by merely sending E-mails or directing telephone calls to staff.

22. The State requests that as a matter of general procedure that hereafter the Board (1) prohibit parties from direct communication, by E-mail or otherwise, with the presiding officer or Board members regarding matters pending before the Board;<sup>2</sup> (b)

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2. The Vermont Supreme Court has proposed that the direct E-mail addresses and telephone numbers of judges and court personnel be withheld "to prevent ex parte communication with

require that parties seeking an action, order, or hearing before the Board do so only by formal filing with the Board's director written hard copy of its pleading, making such a request in proper form, with a hard copy also being promptly sent or delivered to the opposing party. Board staff should be directed to notify parties in writing of the filing, to inform the parties as to how the Board intends to decide the matter, and to indicate when responsive pleadings will be due.<sup>3</sup>

**WHEREFORE**, the State of Vermont respectfully moves the Board of Medical Practice to consider and weigh the above reasoning and citation of authority and to deny Respondent's motion with regard to the Board's final order of discipline.

Dated at Montpelier, Vermont this 9<sup>th</sup> day of April 2007.

**STATE OF VERMONT**

**WILLIAM H. SORRELL  
ATTORNEY GENERAL**

By   
**JAMES S. ARISMAN  
Assistant Attorney General**

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Judges and other inappropriate direct contact" because such communications cannot be "screened To protect against such misuse and other inappropriate attempts to influence the actions of court personnel". See 2004 Order Promulgating Amendments to the Vermont Rules for Public Access to Court Records.

3. The Board, of course, could adopt other procedures for those matters that might involve exigent or emergency circumstances, such as directing counsel to file with the Director a signed description and certification as to the circumstances.