

STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE

In re: William A. O'Rourke, Jr., M.D.            )            Docket No.: MPN 19-0302  
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**RESPONDENT WILLIAM A. O'ROURKE, JR., M.D.'S  
CONDITIONAL EXCEPTIONS TO THE HEARING COMMITTEE REPORT**

NOW COMES Respondent, William A. O'Rourke, Jr., M.D., by and through counsel, and submits his Conditional Exceptions to the Hearing Committee' Report. Although Dr. O'Rourke is prepared to "take his medicine" and see this matter come to an end by accepting the 10-day suspension recommended by the Hearing Committee, unfortunately the State is unwilling to abide by that decision. The State's challenge to the Hearing Committee's recommendations leaves Dr. O'Rourke with no alternative but to present, conditionally, the following exceptions.

**MEMORANDUM**

**I. Factual Background**

Dr. O'Rourke has practiced internal medicine with a subspecialty in infectious disease in Rutland, Vermont, for nearly fifty years. He has served the people of Rutland County in many capacities, including as a physician, City Health Officer, and in numerous educational and charitable capacities. Aside from this situation, Dr. O'Rourke has never had any difficulty with or faced charges by the Vermont Board of Medical Practice. On the contrary, many years ago Dr. O'Rourke served as a member of this Board.

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This case has weighed heavily on Dr. O'Rourke for over four years, beginning with Investigator Ciotti's unilateral decision to open a complaint against Dr. O'Rourke, concerning his one-time renewal of a prescription for pain medicine for the spouse of a fellow Rutland physician ("Patient A"). There was nothing inappropriate, much less harmful, in Patient A receiving that medication. Neither the pharmacist, the patient, nor the patient's physician husband registered *any* complaint regarding the renewal of that prescription. Indeed, at the outset of the October 30, 2006 Hearing, the State withdrew and dismissed Count V of the Amended Specification of Charges (alleging deficient care and record keeping regarding Patient A), effectively conceding that it could not prove unprofessional conduct as to Dr. O'Rourke's limited involvement with Patient A.

Nonetheless, in an effort to bring closure to the investigation generated by Mr. Ciotti's internal complaint, Dr. O'Rourke entered into a Stipulation and Consent Order dated November 5, 2003, where he agreed to attend a course at Case Western Reserve University. Dr. O'Rourke's plan was to take the course when initially available in May 2004, but that was derailed when his brother sustained life threatening injuries in an automobile accident requiring Dr. O'Rourke's attendance and subsequent assistance during his brother's lengthy rehabilitation. Thereafter, the Case Western course dates conflicted with an Infectious Disease course that Dr. O'Rourke felt obliged to attend as the sole practitioner in that field in his community. Dr. O'Rourke repeatedly tried to demonstrate to the North Investigative Committee that the Infectious Disease course was vitally important to the Rutland community, but his pleas fell on deaf ears. On December 22, 2004, Investigator Ciotti telephoned Dr. O'Rourke and was informed by Dr. O'Rourke that he planned to attend the Case Western course when it was next offered (in May 2005). The State's reaction was to jump the gun and

file on February 10, 2005 a Specification of Charges against Dr. O'Rourke for failure to attend the course.<sup>1</sup>

In May 2005, the State filed yet more charges against Dr. O'Rourke, alleging improper record keeping as to other patients to whom Dr. O'Rourke prescribed pain medication, and failure to timely turn over such records when requested to do so by the State (Counts 6 and 7). These charges resulted from a visit to Dr. O'Rourke's office by Mr. Ciotti at a time when Mr. Ciotti knew or should have known that Dr. O'Rourke and his nurse (who happens to be his wife) were in Florida. At that visit, Mr. Ciotti entered Dr. O'Rourke's office and intimidated his bookkeeper, leaving her in tears. The fact and nature of the charges that were filed by the State as a result of that conduct by Mr. Ciotti demonstrates the methods to which the State has resorted in its pursuit of Dr. O'Rourke.<sup>2</sup>

Thus, for over four years, what began as "detective work" by an over-zealous investigator who opened a complaint against Dr. O'Rourke without the courtesy of ever speaking with him, has mushroomed into the saga presently before the Board. From a simple misunderstanding concerning a prescription renewal, Dr. O'Rourke over time has been confronted with a prosecution which borders on a vendetta. The time has come to end this ordeal. The State's charges should be dismissed.

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<sup>1</sup> Notwithstanding the charges filed by the State in February 2005, and the Amended Specification of Charges filed on May 13, 2005, Dr. O'Rourke attended and satisfactorily completed the course in May 2006, thereby demonstrating his commitment to keep his word.

<sup>2</sup> As found by the Hearing Committee, there was insufficient evidence presented at the hearing to support the State's charges in Counts 6 and 7; Investigator Ciotti never requested the records directly from Dr. O'Rourke and when he finally requested them from Dr. O'Rourke's attorney, that request was promptly complied with. See Hearing Committee Report at p. 5.

## II. Discussion

As an initial matter, the Hearing Committee ignored the State's jurisdictional failure to introduce into evidence a signed and entered Stipulation and Consent Order. That, in itself, requires dismissal with prejudice of the charges in their entirety.

Even if the Board were to disregard that legal deficiency, as discussed below, the State failed to sustain its burden of proof before the Hearing Committee.

### 1. **Counts 1, 2, and 3 Should be Dismissed; Or, at Most, Dr. O'Rourke Should be Reprimanded for Failing to Comply With a Board Order as Alleged in Count 1.**

The State alleged in Count 1 that Dr. O'Rourke's failure to attend and complete the Case Western course within the time period required by the Stipulation and Consent Order constituted unprofessional conduct in violation of 26 V.S.A. § 1354(a)(25) (failure to comply with a Board Order). The State also alleged in Count 2 that the same conduct was unprofessional conduct in violation of 26 V.S.A. § 1398 (the Board may refuse a license for "immoral, unprofessional, or dishonorable conduct"). In Count 3, the State alleged that the same conduct violated 26 V.S.A. 1354(a)(7) (unfitness to practice medicine). The Hearing Committee found that Dr. O'Rourke failed to attend and complete the course "despite having several reasonable opportunities" to do so, as alleged in Counts 1 and 2, constituted unprofessional conduct in violation of 26 V.S.A. §§ 1354(a)(25) and 1398, and it recommended a ten-day license suspension. Significantly, the Hearing Committee also found that Dr. O'Rourke's conduct did not demonstrate unfitness to practice medicine as alleged in Count 3, and it appropriately recommended dismissal of that charge.<sup>3</sup>

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<sup>3</sup> The Hearing Committee initially recommended that no disciplinary action be taken regarding Count 3. *See* Hearing Committee Report dated December 20, 2006, at p. 6. The Hearing Committee Report was amended on January 15, 2007, however, to recommend dismissal.

Dr. O'Rourke acknowledges that he should have completed the Case Western course sooner than he did. It is clear, however, that Dr. O'Rourke's delay in attending the course was not "dishonorable" and he did not make "false and fraudulent representations" as alleged by the State. Additionally, the uncontested evidence as to the reasons for the delay adequately explains why Dr. O'Rourke did not take the course within the agreed-upon time. It is clear that his conduct was not unprofessional by any standard, and Counts 1, 2, and 3 should be dismissed.

Furthermore, should the Board decide otherwise, it would be fundamentally unfair and violate Due Process to punish Dr. O'Rourke for the same conduct merely by referencing it pursuant to three different statutes. By way of explanation, the State alleges in three Counts that Dr. O'Rourke's failure to attend remedial education coursework within one year of approval of the November 5, 2003 Stipulation and Consent Order, as required by Paragraphs 26-28 of that agreement was unprofessional. *Compare* Amended Specification of Charges dated May 13, 2005, at ¶¶ 26, 28, and 31. To the extent Dr. O'Rourke's failure to attend the Case Western course within one year could be considered unprofessional conduct, increased discipline cannot be imposed, as the State apparently desires, by invoking three different statutes against identical underlying conduct.

In sum, if the Board should find that such conduct violated 26 V.S.A. § 1354 (failure to abide by Board Order) as alleged in Count 1, it may not find a violation of 26 V.S.A. § 1398 as alleged in Count 2, since that section provides for discipline for "immoral, unprofessional, or dishonorable conduct," including "the practice of criminal abortion" and fraud. Additionally, as found by the Hearing Committee, Dr. O'Rourke's conduct did not demonstrate unfitness to practice medicine as alleged in Count 3.

If the Board, notwithstanding the State's failure of proof below, determines Dr. O'Rourke should face a sanction for violating 26 V.S.A. § 1354 as alleged in Count 1, it is respectfully submitted that a public reprimand would better serve the interests of justice than the unnecessary and overly punitive license suspension requested by the State.

**2. Dr. O'Rourke's Letter to Patricia King, M.D., was *De Minimis*, Warranting Dismissal of Count 4.**

The State in Count 4 alleged that Dr. O'Rourke's July 15, 2004, letter to Patricia King, M.D., was a "dishonorable and/or unprofessional" attempt to avoid attending the Case Western course. Amended Specification of Charges at ¶ 33. The Hearing Committee found the communication was "not an egregious act," more in the line of a "technical violation" rather than a sanctionable offense, and, accordingly, recommended no disciplinary action.<sup>4</sup> Any technical violation resulting from Dr. O'Rourke's letter, however, was *de minimis* at most, thereby warranting dismissal of Count 4.<sup>5</sup>

An *ex parte* communication between an *attorney* and a board member made in bad faith might be worthy of rebuke. *C.f. Burrows v. Redbud Community Hosp. Dist.*, 187 F.R.D. 606, 610 (N.D. Cal. 1998) (*ex parte* communication between attorney and Court was inadvertent error and not made in bad faith, and therefore was not inappropriate). The evidence is undisputed that Dr. O'Rourke's entreaty to Dr. King was sincere, made in good faith, and designed not to personally benefit Dr. O'Rourke, but the people of Rutland County. Thus, Dr. O'Rourke's action, although perhaps naïve, was certainly not unprofessional conduct within

<sup>4</sup> The Hearing Committee initially recommended dismissal of Count 4. *See* Hearing Committee Report dated December 20, 2006, at p. 6. The Hearing Committee Report was amended on January 15, 2007, to recommend that no disciplinary action should be taken with regard to Count 4.

<sup>5</sup> As noted by the United States Supreme Court, the venerable maxim *de minimis non curat lex* ("the law cares not for trifles") is "part of the established background of legal principles," *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S.Ct. 2447, 2458 (1992), and justifies dismissal of inconsequential matters. *Deutsch v. U.S.*, 67 F.3d 1080, 1083 (3rd. Cir 1995).

the meaning of Section 1398, which provides for the State to suspend, refuse, or revoke a license to practice medicine for “immoral, unprofessional, or dishonorable conduct,” including “the practice of criminal abortion” and fraud. Count 4 should be dismissed in its entirety.

**3. The Hearing Committee Correctly Found That the State Failed to Prove Counts 6 and 7.**

The State alleges in Counts 6 and 7 that Dr. O’Rourke failed to maintain and timely produce records that were required to be kept under the Stipulation and Consent Order. The Hearing Committee correctly found that Investigator Ciotti’s verbal demand for the records from Dr. O’Rourke’s bookkeeper when Dr. O’Rourke was in Florida was a totally insufficient basis for the resulting charge filed by the State. Dr. O’Rourke was never asked for the records personally, nor was he personally contacted in follow up to the Investigator’s visit. Hearing Committee Report at p. 5. Once Dr. O’Rourke’s attorney was contacted, the State’s request for records was promptly complied with. *Id.* There is no evidence supporting the charges brought by the State in Counts 6 and 7, and they should be dismissed in accordance with the Hearing Committee’s recommendations.

**III. Conclusion**

In the final analysis, even if the Board were to put aside the State’s jurisdictional failure to introduce into evidence a signed and entered Stipulation and Consent Order, no further punishment of Dr. O’Rourke is warranted. For fifty years the practice of medicine and service to his community has brought Dr. O’Rourke joy. The last four years have, speaking bluntly, been hell. A fair review of the record shows that this prosecution has taken on a life of its own far beyond the conduct and interest at stake. As stated at the outset, Dr. O’Rourke desires closure and was prepared to accept the recommended ten-day license suspension notwithstanding his strong feeling that it is unnecessary and excessive. However, the State’s

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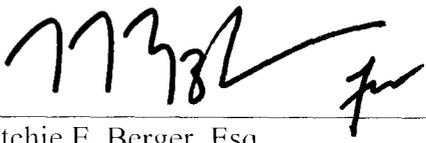
announced plan to reject the Hearing Committee's recommendation demonstrates to Dr. O'Rourke that the same lack of sense of proportion will continue. The time has come for this matter to be closed and the State's charges dismissed.

WHEREFORE, Respondent William A. O'Rourke, Jr., M.D., respectfully requests that the State's Amended Specification of Charges be dismissed with prejudice, or, in the alternative, that the Board of Medical Practice refuse to impose any further punishment.

DATED at Burlington, Vermont this 16<sup>th</sup> day of January, 2007.

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