

"may accept, reject or modify" any proposed content within this preliminary recommendation. 26 V.S.A. § 1355(b). The State urges the Board to exercise this authority in the matter at hand.

3. The State's fundamental disagreement with the Hearing Committee Report is with regard to the sanction proposed. The proposed sanction, a mere ten-day suspension, is an insignificant "slap on the wrist" given the gravity of Respondent's misconduct and his contempt for his legal obligations to the Board of Medical Practice, to his patients, and the public. See Discussion regarding sanctions beginning on Page 13 of these Exceptions.

II. Exceptions to the Findings Proposed by the Hearing Committee

A. Proposed Findings 1 through 3.

4. The State accepts proposed Findings 1 and 2. However, the State regards proposed Finding 3 as largely unsupported by the evidence and otherwise lacking in relevance.¹

B. Proposed Findings 4 through 7.

5. The State accepts proposed Findings 4 through 7, but with requests for revision. The language of these proposed findings fails to clearly state and acknowledge that the Stipulation and Consent Order in this matter was entered as an order of the Board of Medical Practice upon its approval. Respondent expressly agreed to be bound by the requirements of the Stipulation and Consent Order, acknowledged that the Board could enforce the terms of the agreement, and agreed that "any failure" by him to comply with the agreement, including its "educational and record keeping requirements" could result in further disciplinary action by the Board. The State requests that Findings 4 through 7 be revised accordingly.

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1. The Hearing Committee Report was overly generous in characterizing Respondent as "dedicated". The evidence during the merits phase of the hearing may have established that Respondent practiced as a physician for many years. But his recent misconduct as a professional raises legitimate questions as to whether he has acted consistent with professional dedication. While Respondent did solicit the opinions of some patients during the separate "sanction phase" of the hearing, this testimony was to be received solely regarding the sanction to be imposed on Respondent and not as evidence regarding the State's charges against Respondent. See State's Motion in Limine of October 19, 2006 and Transcript of Hearing of October 30, 2006 at 94-96 (referred to hereinafter as "Tr. at ___").

C. Proposed Finding Number 8.

6. The State generally accepts proposed Finding Number 8 as written. However, the State requests that the following language be added as the two final sentences of proposed Finding Number 8, "Even after the State filed with the Specification of Charges in January 2005 against Respondent, for his failure to comply with the Stipulation and Consent Order, he nonetheless delayed for more than another year before he finally attended the remedial coursework that was required by the agreement. Respondent's failure to attend the coursework in a timely manner was knowing, intentional, and demonstrated indifference to his obligations to the Board of Medical Practice and to his profession."

D. Proposed Finding Number 9.

7. The State takes exception to proposed Finding Number 9 as written. The proposed finding repeats the unconvincing and absurd "explanations" offered by Respondent for his failure to attend and complete the required educational coursework within the time period specified by the Board-approved Stipulation and Consent Order. The proposed finding fails to indicate whether the Hearing Committee found Respondent's vague and self-serving explanations to be credible. They were not credible, as the record demonstrates. For example, Respondent's "explanation" referring to his brother's injuries in an automobile accident in 2004 provided no detail and wholly failed in any way to address the fact that Respondent chose not to attend the Board-required coursework during the entire remainder of 2004 and during all of 2005. It was not until May 2006 that he finally attended the required coursework.

8. Nor did Respondent's explanation about his personal choice to attend a different course in December 2003 address why he also failed to attend the Board-ordered coursework during all of 2004 and 2005. The State requests that proposed Finding Number 9 be revised to

include an express finding that Respondent's explanations for his failure to attend promptly the required coursework were not credible or convincing.

E. Proposed Finding Number 10.

9. The State takes exception to proposed Finding Number 10 as written. The State requests that the first sentence of the proposed finding be revised to indicate that Respondent "unilaterally chose to attempt to find a course that would be accepted by the Board as a substitute for the course that was expressly required by the Board order." The State also requests for accuracy and clarity that the following sentence be inserted following the first sentence of proposed Finding Number 10, "The Stipulation and Consent Order included no provision authorizing Respondent to unilaterally substitute any other coursework for that specifically required by Paragraphs 26 through 28 of the agreement."

F. Proposed Finding Number 11.

10. The State accepts proposed Finding Number 11 as written.

11. However, the State requests entry of an additional finding by the Board regarding Respondent's failure to timely attend the Board-required coursework:

In December 2004, Board investigator Ciotti spoke with Respondent by telephone about the Board-required coursework. Tr. at 41-44; 70-71. Respondent admitted that he spoke with investigator Ciotti in December 2004 about the unattended coursework. Tr. at 41-42. Investigator Ciotti testified that he asked Respondent if he had attended the Board-required coursework in December 2004. Tr. 41-42; 70-71. Respondent admitted to Ciotti that he had not attended the course. Tr. at 42. The investigator testified that Respondent told him that he (Respondent) had already made it quite clear he did not intend to take the course. Tr. at 70. Respondent testified, however, that he told the investigator during this conversation that he would attend "the next scheduled course." Tr. at 43-44. Nonetheless, Respondent admitted that he did not attend the Board-required course when it was next offered on May 11-14, 2005. Tr. at 43. Respondent did not attend the required coursework until almost a year- and-a-half after he had spoken with

the Board investigator. Tr. at 43. The Board credits investigator Ciotti's testimony in this regard and finds that Respondent did not act in good faith with regard to his obligations to the Board, following his conversation with the Board's investigator in December 2004.

G. Proposed Finding Number 12.

12. The State accepts proposed Finding Number 12 but requests that the finding expressly state that Respondent's non-attendance of the required coursework was "willful and knowing" and that his explanations for his non-attendance were "not credible or convincing".

13. The State requests entry by the Board of the following additional finding regarding Respondent's failure to timely attend the Board-required coursework:

Respondent agreed in the Board-approved Stipulation and Consent Order, as a remedy, to attend and successfully complete within one year the four-day intensive course in controlled substance management at the School of Medicine at the Case Western Reserve University. This coursework included the development of treatment plans and record keeping. As a remedy, this coursework is analogous to continuing medical education (CME) intended to maintain and improve physician competency and optimize patient care. Respondent's willful failure to attend this remedial coursework in a timely manner meant that his patients and his profession were denied the benefits of the teaching and training offered by the course. This protracted non-compliance was wholly inconsistent with what Respondent had promised to do and what the Board relied on in settling with him and approving the Stipulation and Consent Order in this matter. The requirement for remedial coursework was not imposed as an empty gesture or punishment--the Board intended that Respondent would attend the coursework in a timely manner and receive whatever benefit he could. Respondent's willful failure to attend the required coursework in a timely manner was intentional and a material breach of the requirements of his Stipulation and Consent Order with the Board of Medical Practice.

H. Proposed Finding Number 13.

14. The State takes exception to proposed Finding Number 13 as written. The State requests that the proposed finding be revised to state:

Neither the Board nor its investigator was required by any of the terms of the Stipulation and Consent Order to provide advance notice of a visit to Respondent's office to inspect records that Respondent was required to keep. In fact, the provisions of the agreement were expressly to the contrary. The Stipulation and Consent Order required that patient records and documentation related to Respondent's prescribing of controlled substances "be promptly made available for review by the Board", stated that such records might "be reviewed forthwith and at any time", and required that the records "be made available for review by the Board or its agents, at any time and without prior notice." See Paragraphs 22 through 24 of Stipulation and Consent Order.

15. The State also requests that the following sentences be inserted for completeness and accuracy before the final sentence of proposed Finding Number 13:

Dr. O'Rourke had never mentioned any such file of prescriptions to Ms. Lewis, his office bookkeeper. When Ms. Lewis promptly contacted Dr. O'Rourke by telephone regarding Mr. Ciotti's request for the required records, Dr. O'Rourke understood what Ms. Lewis was talking about. During the conversation with Ms. Lewis, however, Dr. O'Rourke did not explain where any such file of records could be found, nor did Ms. Lewis ask if the file existed." Tr. at 161-168.

16. The State also requests that the following sentence be added as the conclusion of proposed Finding Number 13, "After visiting Respondent's office on March 16, 2005, Mr. Ciotti subsequently directed 'several' telephone requests for the required records to Mr. Berger, the attorney for Respondent. Mr. Berger told Ciotti that he would obtain and provide the documents to the Board on behalf of his client. However, the records were not made available until June 13, 2005." Tr. at 78-81; 133-134; 155-157.²

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2. The investigator was unable to recall the dates of his requests to the attorney for the records, stating only that they had been made "while waiting for the – the documents that I had requested." Tr. at 155.

I. Proposed Finding Number 14.

17. The State takes exception to proposed Finding Number 14 as written. The State requests insertion of the following sentence immediately prior to the last sentence of the proposed finding, "The Stipulation and Consent Order did not require or provide for the Board or its agents to make repeated requests to either Respondent or his attorney for production of the required records." The State further requests that proposed Finding Number 14 conclude with the following sentences:

Almost three months passed following Mr. Ciotti's request for the records on March 16, 2005 until the required records were finally made available for production on June 13, 2005. Investigator Ciotti testified that production of the required prescribing records was a necessary starting point for a focused and organized review by the Board's investigators of Respondent's compliance with the Board-required medical record keeping pertaining to his prescribing of controlled substances." Tr. 131-135.

III. State's Exceptions to Proposed Conclusions of Law

A. Proposed Conclusions of Law: Counts 1 and 2.

18. The State accepts proposed Conclusions of Law, Counts 1 and 2, as written.

B. Proposed Conclusion of Law: Count 3.

19. The State takes exception to proposed Conclusion of Law, Count 3, as written. The evidence in the record clearly establishes that Respondent acted willfully and knowingly with regard to the agreement he signed and that the Board had entered as an order. Respondent's conduct demonstrated bad faith in his dealings with the Board. The evidence clearly establishes that Respondent simply disregarded his promises to attend and complete the required remedial coursework in a timely manner. His course of conduct was knowing, continued from 2003 until 2006, and demonstrates in these circumstances a temperament and outlook unsuited to the

practice medicine. Respondent's conduct was unprofessional under 26 V.S.A. § 1354(a)(7) (unfitness).

20. At all relevant stages of this matter, Respondent was represented by and advised by counsel, i.e., while the Stipulation and Consent Order was being negotiated, at the time he signed it, and thereafter. The conditions and requirements of the Stipulation and Consent Order were made clear to Respondent. Respondent's agreement to the Stipulation and Consent Order was knowing and voluntary. Yet, Respondent, without good or credible excuse, delayed for nearly 30 months before finally deigning to attend the remedial education course as required by the Stipulation and Consent Order. Respondent was fully aware that he was required to complete the coursework "promptly" and no later than one year after approval of the agreement. Tr. at 28-29; 44. Respondent never requested that the Board amend the requirements of his Stipulation and Consent Order to allow substitution of another course or to amend the time requirements. Tr. at 44. Respondent himself admits that his conduct does not show respect for either the profession of medicine or for the Board of Medical Practice. Tr. at 45.

21. Respondent's testimony at hearing includes no apology to his professional peers or to the Board of Medical Practice for his actions and his willfulness. Nor has he in any clear way ever accepted responsibility for his conduct and for the time spent by others in seeking to induce him to fulfill his promises and legal obligations. Respondent, through his conduct, demonstrated arrogance and indifference to his professional responsibilities, to the medical community, and to his own promises.

22. The State urges the Board to conclude from the record that Respondent's conduct in this instance has demonstrated unfitness to practice medicine. Honesty, integrity, and good

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order are fundamental to the physician-patient relationship. Respondent has clearly demonstrated his unwillingness and inability to conform his conduct to professional norms.

C. Proposed Conclusion of Law: Count 4.

23. The State takes exception to proposed Conclusion of Law, Count 4, as written. The State moves that the words "While not an egregious act" be stricken from the second sentence of the proposed Conclusion of Law as a conclusion that is unsupported by the record. The State moves that the word "technical" be stricken from the second sentence of the proposed Conclusion of Law as unsupported by the record. The term "technical" is used there without explanation but appears to be intended to convey that the improper *ex parte* communication by Respondent is somehow insignificant or unimportant. The State respectfully disagrees.

24. Respondent knowingly chose to take matters into his own hands by improperly communicating with a Board member and seeking special treatment regarding a pending matter. The State requests that proposed Conclusion of Law Number 4 be revised by the Board to read, "Respondent's written letter to a member of the Board of Medical Practice was inappropriate and an improper *ex parte* attempt to avoid compliance with the express terms of the Board Order. Respondent's actions were knowing and intentional and undisclosed by him even to his own attorney until after the fact. Such willful conduct by Respondent constitutes a violation of 26 V.S.A. § 1398 and is unprofessional."

D. Proposed Conclusion of Law: Count 5.

25. The State agrees with and accepts proposed Conclusion of Law Number 5 as written.

E. Proposed Conclusions of Law: Counts 6 and 7.

26. The Hearing Committee Report as originally issued appeared to include a typographical error. The State's Amended Specification of Charges against Respondent did not include a "Count 8". As such, any references to a "Count 8" in the Hearing Committee's proposed Conclusions of Law are in error and require correction.

27. Proposed Conclusion of Law Number 6 erroneously misstates the State's allegations against Respondent. Count 6, as alleged by the State, actually charged Respondent only with "failure to timely produce" the Board-required documentation regarding his prescribing of controlled substances.

28. The evidentiary record clearly establishes, as discussed above, that Respondent was informed promptly by his bookkeeper of the Board's request for the required records on March 16, 2005 and that Respondent understood what the Board was requesting.³

29. The evidence in the record establishes that Respondent subsequently did not make the requested records available to the Board until June 13, 2005. As such, the evidence in this matter clearly establishes that Respondent failed "to timely produce" the required documentation regarding his prescribing and dispensing of controlled substances, exactly as charged by the State in Count 6.

30. When Respondent was asked to produce the required documentation but failed to do so until the passage of almost three full months, the Board may conclude that such dilatory production is neither prompt nor timely. Therefore, the State requests that the Board enter a

3. Respondent did not inform his bookkeeper on March 16, 2005 during conversation of the whereabouts of or of the existence of any such prescribing records. The evidence established that the bookkeeper is a responsible, knowledgeable individual with 15 years tenure in Respondent's practice. The record also established that Respondent's attorney was aware of Mr. Ciotti's visit to the office and of the Board

Conclusion of Law as to Count 6 that Respondent failed "to timely produce" the required records when requested to do so by the Board and that his conduct in this regard is unprofessional under 26 V.S.A. § 1354(a)(25).

31. The proposed Conclusions of Law for Counts 6 and 7 also errs in its discussion of the Board's request for the required records. The Hearing Committee Report errs by imposing after the fact its own requirement that the Board's request for the records should have been directed "personally" to Respondent (rather than relayed to him through staff in his office as actually happened) and that the Board was obliged to make repeated "follow-up" requests for the documents that Respondent had failed to produce. As such, this proposed conclusion imposes an obligation on the Board and its staff that is inconsistent with the actual requirements of the Stipulation and Consent Order in this matter. In so doing, the Hearing Committee Report ignores the plain evidence in the record and through strained interpretation absolves Respondent of responsibility for failing to produce the Board-required prescribing records for almost three months after they were first requested. This delay was by Respondent's own doing and the consequences of his failure to timely produce the records should be his own. Respondent's conduct was inconsistent with the Board's order in this matter and is unprofessional under 26 V.S.A. § 1354(a)(25).

32. As to Count 7, the proposed Conclusion of Law again errs in its discussion of the State's charges. Count 7 actually charged Respondent with failing "to maintain and/or timely produce" the required records upon request. As such, for the same reasoning and the facts set forth above, the Board should conclude that the evidence in this matter clearly establishes that Respondent failed to "timely produce" the required records when requested to do so. Such

investigator's request for the required records on March 16, 2005.

conduct is unprofessional under 26 V.S.A. § 1398 and/or 26 V.S.A. 1354(a)(7), as charged by the State in Count 7.

F. "General" Discussion, Page 5.

33. The State accepts the discussion set forth in Paragraphs G, H, and I on Page 5 of the Hearing Committee Report. The State urges that the discussion at Paragraph H, on Page 5, be expanded to address Respondent's failure to timely produce the narcotics prescribing records as required by the Stipulation and Consent Order and to characterize this as unprofessional conduct.

IV. Exceptions to Recommended Decision

34. The State takes exception to the content of the first full paragraph under the heading "Proposed Decision". The Hearing Committee Report contradicts itself by finding in Finding Number 11, Page 3, that Respondent had no "legitimate" or "acceptable" excuse for failing to attend the educational coursework as required. However, the Hearing Committee Report on Page 6 then proceeds to offer, without factual basis, its observation that Respondent's failure to attend the required coursework was merely the result of "sheer stubbornness".⁴ The State respectfully disagrees with any suggestion that "stubbornness", even if it were established by the evidence, would somehow excuse an individual from responsibility for the effects of his own decisions and actions.

35. The Hearing Committee, without explanation, has characterized Respondent's failure to attend the Board-required coursework as not "egregious" or aggravated. The State respectfully disagrees. To the contrary, Respondent's disregard of his own promises and of his

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4. No witness, including Respondent, ever described him as "stubborn" or claimed that "stubbornness" somehow excused his failure to attend the required coursework in a timely manner. It is only Respondent's attorney who sought to raise the "stubbornness defense", seemingly suggesting, without support of evidence in the record, that Respondent's misconduct should not be taken seriously. Respondent's attorney also has argued, without evidence, that the State somehow has acted improperly in seeking to require Dr. O'Rourke to honor the terms of the agreement that he signed with the Board of Medical Practice.

obligations to his profession and to the Board of Medical is serious and material. Respondent's arrogant and willful misconduct strikes at the core of the Board's ability to rely on the terms and conditions of stipulated settlements to resolve matters before the Board, to regulate the profession of medicine, and to protect patients and the public.

36. To treat willful non-compliance with clearly understood legal obligations to the Board as not serious trivializes the Board's authority and its responsibility for protection of the public and patients and for maintaining the integrity of the profession. This notion mocks the physicians who in the past have conscientiously fulfilled their obligations under settlement agreements with the Board of Medical Practice.⁵

37. Finally, the State takes its strongest exception to the sanction recommended by the Hearing Committee. For the reasons set forth above, it is the State's position that all six of the remaining counts of unprofessional conduct against Respondent have been fully proved by the evidence in this matter. The Board of Medical Practice should dismiss none of the six counts.⁶

38. The Hearing Committee has recommended that Respondent's license to practice medicine should be suspended for a mere 10 days. Respectfully, the recommended 10-day suspension would be both ineffectual and meaningless. The recommended period of suspension

5. The State moves that the reference in the Hearing Committee Report to Respondent's "exemplary professional history" be stricken as unsupported by the record, particularly in light of the conduct admitted to by Respondent in the Stipulation and Consent Order in this matter and his willful noncompliance with the terms of that agreement. See Paragraphs 5 through 15 of the Stipulation and Consent Order. Furthermore, the State respectfully disagrees with any notion that Respondent's *ex parte* contact with a Board member regarding a pending matter should be treated as insignificant or unimportant. Such contact undermines due process, fairness, and the proper conduct of the Board's investigative and disciplinary responsibilities. Respondent chose to contact a Board member directly, on his own, with no notice at the time to his own attorney or the Assistant Attorney General assigned to this matter. The Board should impose a disciplinary sanction for this improper *ex parte* communication by Respondent.

6. Correction of Errors in Hearing Committee Report as Originally Issued. The State on January 12, 2007 requested correction of certain material typographical errors appearing in the Hearing Committee Report as originally issued. For the purposes of these Exceptions, the State will assume that these errors already have been corrected in a revised Hearing Committee Report.

is so insignificant that it would fail to convey any serious disapproval of Respondent's conduct or lead him to reflect upon his willful misconduct. In short, a 10-day suspension would be no more than a slap on the wrist even after Respondent has shown contempt for his own word of honor and for his obligations to the profession of medicine.⁷

39. The Hearing Committee Report offered the following commentary at Paragraph I on Page 5, "Compliance with Board orders must be respected and enforced. The protection of the public and the credibility of the statutory scheme would be rendered ineffectual if a licensee could fail to comply with the Board's order without the consequence of any disciplinary action." The State agrees with this reasoning. Licensees must be held to their promises and legal obligations to the profession of medicine and to the Medical Board. Those physicians who dishonor their promises and obligations must accept that significant disciplinary action will follow.

40. In this case, Respondent O'Rourke treated with disdain his legal obligations. In turn, the disciplinary consequence for such conduct cannot be trivial or meaningless. Professional discipline must convey seriousness of purpose if the regulatory function of the Board of Medical Practice is to be regarded as credible. Professional discipline should also contribute to self-correction and reflection. A mere 10-day suspension would signify little or nothing to Respondent, the profession, or the public. In fact, such an insignificant sanction would suggest to Respondent and others that the Board of Medical Practice does not attach importance to the terms of ^{its} settlement agreements or to its own orders. Such a perception of fecklessness would do lasting harm to the Board's reputation and to the Board's future ability to fulfill its statutory responsibilities.

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7. The Hearing Committee Report fails even to admonish or reprimand Respondent for his unprofessional conduct.

41. At the evidentiary hearing in this matter, the State asked that Dr. O'Rourke be suspended from practice for at least 90 days.⁸ The State reiterates that request here. The State also urges that the sanction imposed on Dr. O'Rourke include remedial coursework.⁹ Imposition of a sanction requiring a 90-day suspension, remedial education, and a public reprimand would convey the Board's serious disapproval and concern regarding Respondent's misconduct and lack of personal responsibility.

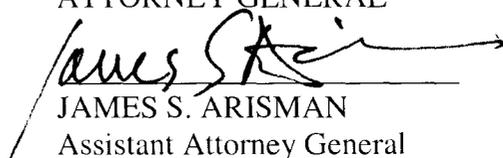
WHEREFORE, the State of Vermont respectfully moves the Board of Medical Practice to (a) accept the above statement of exceptions as supported by the hearing evidence as to the unprofessional conduct of Respondent O'Rourke; and (b) to enter findings and conclusions of law consistent with these exceptions. The State urges the Board of Medical Practice to enter affirmative conclusions of law and an order consistent with the State's allegations and citations of authority as set forth in Counts 1, 2, 3, 4, 6, and 7 of the Amended Specification of Charges in this matter and to enter the sanction requested herein.

Dated at Montpelier, Vermont, this 15th day of January, 2007.

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8. Any period of suspension should begin within 10 days of entry of the Board's order and should require that the suspension be served without interruption on consecutive days.

9. The State recommends the following as appropriate remedial offerings available at the Case Western Reserve University School of Medicine: (1) Intensive Course in Medical Ethics, Boundaries, and Professionalism (March 1-2, 2007; 17 AMA PRA category 1 credits); and (2) Intensive Course in Medical Record Keeping with Individual Preceptorship (June 7-8, 2007; 17.5 AMA PRA category 1 credits (coursework plus 3 and 6 month post-reviews)).