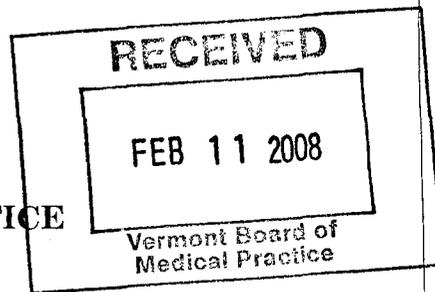


STATE OF VERMONT
BOARD OF MEDICAL PRACTICE



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)

STATE OF VERMONT'S MOTION TO STRIKE

Now comes the State of Vermont in the above-captioned cases and moves the Board of Medical Practice ("Board") to strike the Respondent's Opposition to the State's sanction memorandum. The Board's order regarding sanction memoranda from the parties did not provide an opportunity for response and the Respondent did not file a motion to submit an opposition memorandum and therefore Respondent's unauthorized filing should be stricken and not considered by the Board.

ARGUMENT

On December 10, 2007, the Board issued Findings of Fact, Conclusions of Law and Order on the charges of unprofessional conduct against the Respondent. In that order the Board requested that, within thirty days, the parties submit memorandum outlining their respective positions as to the appropriate sanction. Neither the Board nor the parties requested responsive filings to the Board's requested memorandum. Notwithstanding the provisions of the Board's request,

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Respondent filed an Opposition to the State's sanction memorandum on February 5, 2008 at the end of the business day on the eve of the Board's monthly meeting when the issue of sanctions may very well have been considered.¹

The Respondent's motion should be stricken and not be considered by the Board. Had the Board wished the parties to file responses to the requested memoranda it would have made its wishes known in the December 10 order. The Board did not do so. If Respondent had thought responsive memorandum was necessary, he could have requested leave to file such memorandum. Of course, such a request would have allowed the State the same opportunity. An opportunity the State did not have when Respondent filed his motion without prior notice and without permission by the Board.

The Board's actions in a recent case support granting the State's motion to strike. In *In re: William A. O'Rourke, Jr. M.D.*, Dk. No. MPN 19-0302, the State filed a response to the Respondent's proposed findings of fact and conclusions of law and Respondent filed a motion to strike. While the Board did not formally rule on the motion, it made clear to the parties that it was only going to consider the original proposed findings and conclusions submitted by the parties. The same result should occur here.

Should the Board decide to deny the State's motion, both of Respondent's post-order filings are strong support for the State's arguments for revocation. Prevalent in both of Respondent's submissions are the Respondent's minimizing of his unprofessional conduct and Respondent's failure to accept responsibility for

¹ The February meeting of the Board was cancelled due to weather.

his actions. Respondent's failure to accept responsibility is probably most obvious in his discussion of the sanctions imposed on other physicians in prior Board cases. Ignored by Respondent in his discussion of prior Board cases is the very important fact that all the physicians that were the subject of discipline were willing to accept responsibility for their conduct and cooperate with the Board to fashion the sanction. By contrast, Respondent has not accepted responsibility for his conduct. Instead the Respondent continues to assert he has done nothing unprofessional, and continues to attempt to deflect the focus away from his conduct by focusing on his complaints of the conduct of the State -- complaints that have long since addressed by the Board and have no bearing on the central issue now before the Board.

Respondent further attempts to deflect the focus on his conduct by references to the Beaver Dam study and the innovation of contrast sensitivity testing. Respondent's consistent reliance on these general issues now and throughout the proceedings demonstrate a marked inability or refusal to understand the central focus of the Board's inquiry -- individual patient treatment. Indeed, as has been argued by the State in previous submissions, Respondent's strategy throughout has been to obscure the individual experiences of his patients or, at best, minimize those experiences.

Respondent's insistence on further evidentiary hearings is an extension of this strategy of minimizing and deflection.² Respondent's desire to cloud the

² Respondent's insistence on an evidentiary hearing stems from his mistaken notion that the State has broken a "promise" not to argue that Respondent engaged in a pattern or practice of

record with statistics and self-serving testimony of Respondent's supposed magnanimity is an attempt to deflect attention from the real issues in the proceedings. There need be no further evidentiary hearings in this matter. There is more than sufficient evidence for the Board to make its decision on the appropriate sanction. However, should the Board allow Respondent to present evidence as to mitigation, then it must allow the State the opportunity to present evidence of aggravation. Such evidence will include:

- Testimony from additional patients, not charged in this matter, as to their similar treatment by Respondent;
- Additional testimony from ophthalmologists regarding numerous patients of Respondent's who were told they needed surgery when they did not;
- Testimony from Dr. Philip Aitken as to his encounter with Respondent regarding concerns expressed by other physicians regarding Respondent's practices;
- Testimony from staff as to how they were instructed to record information, and Respondent's reactions when these staff expressed concerns about the manner in which information was recorded;

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unprofessional conduct. The State, of course, made no such promise. All the State did was dismiss the charges of "pattern or practice." The dismissal of the charges does not preclude the State from arguing that, based on the findings and conclusions of the Board, a pattern or practice of unprofessional conduct has been demonstrated that, along with a lack of insight, requires the sanction of revocation be imposed.

- Testimony from Respondent himself to determine the extent of his acceptance of responsibility and the extent of his insight into his unprofessional conduct.

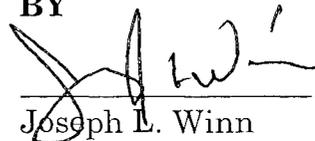
Again, the State's position is that no further evidentiary hearings are necessary to determine the appropriate sanction.

CONCLUSION

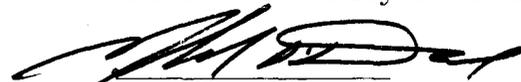
For reasons argued above, the State's motion to strike must be **GRANTED.**

Dated at Montpelier, Vermont this ___ day of February, 2008.

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



Joseph L. Winn
Assistant Attorney General



Michael O. Duane
Assistant Attorney General