

STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
David S. Chase,	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
Respondent.	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
	)		MPC 87-0703

**OPPOSITION OF RESPONDENT DR. DAVID CHASE TO VERMONT ATTORNEY
GENERAL'S OFFICE'S MOTION TO STRIKE**

Respondent, Dr. David Chase, by and through his attorneys, respectfully submits this Opposition to the Vermont Attorney General ("AGO") Motion to Strike His Reply to the AGO's Sanction Memorandum. The AGO makes the odd argument that Respondent's Reply should be stricken because the Board did not first expressly state that such a Reply could be filed, although it concedes there was no order prohibiting the Reply. The Board's practice in this proceeding, like the uniform practice of civil courts under the Vermont Rules of Civil Procedure, has been that parties may file a responsive pleading to a motion, memorandum or other request for relief by the opposing party in the absence of some express Board order to the contrary. Respondent was simply following that well-established and reasonable procedure in submitting its Reply to the AGO's Sanction Memorandum. Accordingly, the AGO's strangely reasoned Motion to Strike should be rejected, as it is badly out of step with practice under both Vermont's Rules of Civil Procedure and the Board's practice in this matter.

The AGO argues that Dr. Chase should be sanctioned further with a permanent license revocation because he has not “cooperated” in fashioning a sanction for his conduct. In truth, Dr. Chase’s position is that the punishment already inflicted upon him in this matter has been more than sanction enough. The Board’s summary suspension and subsequent actions toward Dr. Chase destroyed his medical career and reputation; he has not practiced medicine for four and one half years and it is certain that he will never re-open his practice. The AGO’s vindictiveness towards Dr. Chase, however, apparently knows no bounds. It wants even more punishment for Dr. Chase and, in fact, it wants the greatest additional sanction that this Board can impose. Respondent’s refusal to cooperate with the AGO in fashioning that unwarranted sanction is reasonable and will continue.

The AGO again faults Dr. Chase for defending against its overbroad specification of charges even though this Board concluded that over 80 percent of the State’s charges were completely spurious. It suggests that other physicians charged with unprofessional conduct accepted responsibility for the charged conduct and were treated leniently by the Board. However, if leniency before this Board is dependent, as the AGO advocates, upon the physician falsely confessing to specious charges specified by the AGO and rejected by the Board, then that is leniency not worth having.

The AGO’s Sanction Memorandum required a Reply for a variety of reasons, including that it improperly made blatant pattern and practice arguments directly contrary to its prior representations to the Board. In its Motion to Strike, the AGO makes the remarkably disingenuous argument:

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 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.

AGO Motion to Strike, p. 4, note 2. In fact, the transcript of the proceedings reveal numerous instances of the State making contrary representations. Just for example, in opposing the admission of the Respondent's statistical evidence at the merits hearing the Assistant Attorney General said,

The State's case is that in these 11 cases Dr. Chase engaged in unprofessional conduct. We're not here to prove fraud. We're not here to prove a pattern or practice of behavior based on these 11 people.¹

Several weeks earlier, in successfully opposing Respondent's attempt to elicit testimony from two of his former nurses regarding the thoroughness of Dr. Chase's informed consent procedures, the same Assistant Attorney General flatly stated, "the practice isn't at issue. Its Dr. Chase's interaction with these 11 patients" that's at issue.² Now, having successfully precluded the introduction of Dr. Chase's pattern and practice evidence, the State claims, for the first time, that it is free to argue pattern and practice and, moreover, have pattern and practice serve as a primary basis for Dr. Chase's punishment. Unfortunately, such litigation tactics are all too typical of the AGO's prosecution of this case.

The AGO then attempts to scare the Board from holding an evidentiary hearing by threatening to call many witnesses of its own. Although it has no real intent to do so, the short answer to the AGO's threat is that they waived that right by failing to call those witnesses at the merits hearing as they were free to do. The hearing panel, while excluding expert witnesses, lay patient witnesses, employee witnesses and statistical evidence offered by Respondent, did not limit the AGO's evidentiary presentation. The evidence that the Respondent now seeks to offer

¹ January 30, 2007 Hearing, p. 107. Appended as Exhibit A.

² December 18, 2006 Hearing, p. 222. Appended as Exhibit B.

was evidence that was excluded by the Hearing Panel. The witnesses identified by the AGO were witnesses it was free to call at the hearing but voluntarily chose not to call—presumably because they would not support the AGO’s charges.

Dated at Burlington, Vermont, this 13th day of February, 2008.

SHEEHEY FURLONG & BEHM P.C.
Attorneys for DAVID S. CHASE, M.D.

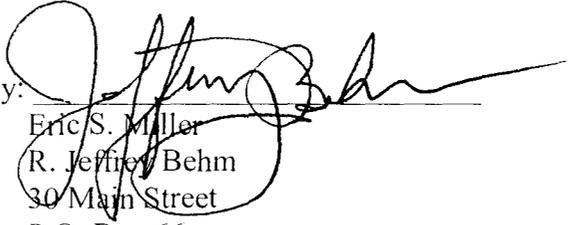
By: 
Eric S. Miller
R. Jeffrey Behm
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891
emiller@sheeheyvt.com
jbehm@sheeheyvt.com

EXHIBIT A

1 surgery outweigh the risks. So if you say to
2 somebody else I told you you need cataract surgery,
3 they'll say nobody needs cataract surgery. And I'm
4 saying nobody needs cataract surgery.

5 Second of all, other people in town are
6 likely to tell you to wait until the cataract gets
7 worse. That's a reasonable thing to do but for many
8 people they can have substantially better quality of
9 life if the doctor's taken care of it. Have I
10 answered your question?

11 I think so.

12 PRESIDING OFFICER: Eric, it's not
13 time for lunch. Would it be prudent to
14 quit now or do you want to I think
15 finish up your direct and then
16 break?

17 MR. MILLER: Well, it would be
18 prudent to break now. I am very quickly
19 coming up the issue of the summary
20 charts, Exhibits 650 and 651 that we
21 would like to put in through evidence.
22 And just to give the panel a sense of
23 how -- there are several options how to
24 do it, assuming you allow them to come
25 in. One is we could break up Doctor

1 performed by Doctor Chase between
2 January 1st, 2000 and July 21st, 2003,
3 the day his license was suspended.
4 That's Exhibit 650. And then the second
5 one, 651, talks about simply during the
6 same period all of the people he
7 diagnosed during that period for whom he
8 didn't offer cataract surgery.
9 So what we think it shows and what
10 we're confident it shows is, No. 1, it
11 puts in context these 11 pages -- I'm
12 sorry, 11 patients that the State is
13 relying on to support its charges. And
14 context is a very important factor in
15 considering any item of evidence. So we
16 think that in that regard it's very
17 important and I think this particular
18 context shows a very strong correlation
19 between the contrast sensitivity test
20 scores that were received and the
21 decision or the decision to offer or not
22 to offer cataract surgery. So that's an
23 important fact and that goes to rebut I
24 think the State's charges that Doctor
25 Chase was behaving and practicing

1 Javitt's testimony and have Kelly who
2 put them together get on the stand and
3 just tell you how she put them together,
4 that's the only purpose of her testimony
5 is to just to develop a foundation for
6 the summary charts or you can accept our
7 proffer that they have been put together
8 by Kelly collecting data from charts, we
9 can have Doctor Javitt testify and Kelly
10 can then come on after he's done and
11 tell you exactly how they were put
12 together but I am coming up on that
13 point of the direct pretty quickly. I'm
14 also getting fairly well near the end of
15 the direct.

16 PRESIDING OFFICER: Could you just
17 briefly explain to the committee the
18 purpose of these exhibits and then give
19 the State a chance to object.

20 MR. BEHM: Well, I think the
21 exhibits -- we made the proffer of what
22 they will show so I take it the Board
23 has read the proffer and understand
24 that. The summary exhibits show, No. 1,
25 an analysis of all cataract surgeries

1 dishonestly with respect to these 11
2 patients that he was fabricating test
3 scores.
4 Now, you know there's a difference
5 between an item of proof that's
6 dispositive and an item of proof that
7 tends to make a material fact more or
8 less likely. And it's the second
9 description I just gave you which is the
10 definition of relevancy and we think
11 that this contextual evidence certainly
12 makes the allegations that Doctor Chase
13 was practicing dishonestly with respect
14 to these 11 patients and also that he
15 was fabricating test scores far less
16 likely. I think it's also important in
17 that it shows other facts such as the
18 amount of time between initial diagnosis
19 and surgery, you know, whether he really
20 was rushing people into it or whether
21 the informed consent procedure was
22 working and that really far more people
23 during this period of time were
24 diagnosed with surgery -- I'm sorry,
25 diagnosed with cataracts but not offered

1 the surgery which is very inconsistent
 2 with I think what the State is
 3 suggesting through these 11 witnesses
 4 that support its charges and we think
 5 it's very important evidence. It will
 6 take probably 10 to 15 minutes at most
 7 to introduce it's not at all prejudicial
 8 to the state and under Rule 401 of the
 9 Vermont Rules of Evidence which is what
 10 defines relevant evidence we think it
 11 makes many different material issues in
 12 this case more or less likely or more
 13 facts more or less likely which is
 14 really all the standard of relevancy is
 15 so.

16 PRESIDING OFFICER: I think that's a
 17 nice summary. Like you said, you have
 18 it in writing also so I just wanted to
 19 focus the committee on that. Joe, you
 20 want to briefly state your objection.

21 MR. WINN: Well, essentially there
 22 are three bases. One is relevancy. We
 23 don't see how -- in many ways it's the
 24 same argument we made with respect to
 25 the patient witnesses that the

1 the attorney for the Respondent and they
 2 can be geared or established in any way
 3 that's appropriate for them to do it and
 4 so as a representative model I really
 5 question how effective or representative
 6 they are. For example, do they include
 7 the patients who testified in federal
 8 trial consistent other than the 8
 9 patients who testified at the federal
 10 trial here. If they put in a summary
 11 chart of patients who were not offered
 12 surgery, can't we put in a chart
 13 representative of patients who had
 14 similar experiences to the 11 patients
 15 that we've offered?

16 It's -- to me these are extraneous
 17 issues and not at all related to the
 18 focus of what the Board should be on.
 19 And the last objection is that why would
 20 Doctor Javitt be testifying with respect
 21 to the charts when he had no
 22 participation in their creation. If the
 23 charts do go in it seems they speak for
 24 themselves and I don't know why Doctor
 25 Javitt needs to opine on them at all.

1 Respondent put on. What happened with
 2 one patient doesn't rebut or negate what
 3 happened with another patient. And what
 4 happened with several patients doesn't
 5 rebut or negate what happened to these
 6 individual patients.

7 The State isn't trying to suggest
 8 anything. The State's case is that in
 9 these 11 cases Doctor Chase engaged in
 10 unprofessional conduct. We're not here
 11 to prove fraud. We're not here to prove
 12 a pattern or practice of behavior based
 13 on these 11 people. It's only -- the
 14 inquiry should be limited to these 11
 15 patients and the State's really
 16 concerned that a lot of testimony that
 17 the Respondent has put on has been
 18 generalities that in no way direct or
 19 rebut the testimony of the 11 patients.
 20 And we think Doctor Javitt's testimony
 21 as you know from the motion in limine is
 22 an example of that and these charts are
 23 just more examples of that.

24 The second basis is the fact that
 25 these charts have been put together by

1 MR. BEHM: Well, I would say -- let
 2 me address the points Joe raised. He
 3 says just because one other patient had
 4 an experience different from the 11
 5 patients that doesn't necessarily mean
 6 anything. But we're not -- these charts
 7 don't address one other patient. They
 8 address to be exact 1,430 other patients
 9 during a specific period of time. Every
 10 single patient who had cataract surgery,
 11 every single patient who was diagnosed
 12 with cataracts and wasn't offered
 13 surgery and so from that broad of a base
 14 you certainly can extrapolate and draw
 15 reasonable inferences. So that would be
 16 the first point.

17 The second point is under any test of
 18 authentication or reliability these
 19 charts are admissible and, in fact, were
 20 admitted on Ms. Hamel's testimony in the
 21 federal case. And Joe says well we
 22 could -- if they can do it, we can do
 23 it. Yeah, you certainly could have done
 24 it. You certainly could have gone and
 25 analyzed all of the patient charts for a

Page 110

1 given period of time and if your
 2 protocols had integrity to them you
 3 could have put together summary charts.
 4 And if the results of the summary charts
 5 were relevant, that is, tended to make a
 6 material fact more or less likely you
 7 could have introduced the summary charts
 8 just like the federal government
 9 introduced summary charts in the federal
 10 case. This is done all the time. And
 11 then once those facts are put into
 12 evidence it's perfectly appropriate
 13 because they are now evidence to have an
 14 expert witness who has expertise in the
 15 area addressed by the charts to give
 16 opinions on them. And that's what
 17 Doctor Javitt proposes to do and what we
 18 propose to do. So these charts are
 19 highly probative. They're clearly
 20 relevant. It's not going to take very
 21 much time to put them into evidence.
 22 They are not prejudicial to the State
 23 and they have been compiled according to
 24 protocols that have integrity and Ms.
 25 Hamel will testify to those. And it

Page 111

1 would be I think a big evidentiary
 2 mistake not to introduce them into
 3 evidence.
 4 Now, somebody may say, well, what
 5 weight should we give these. We would
 6 say as a matter of relevant evidence
 7 that these are quite probative and
 8 entitled to great weight but you can
 9 disagree with that and once they're into
 10 evidence if you look at them and say
 11 they really don't to me prove that much
 12 or if you look at them and say they
 13 prove a lot or if you look at them and
 14 say they prove something in between,
 15 that's the type of determination that
 16 the fact finders I think ought to be
 17 making with respect to these items of
 18 evidence which I know I've said it
 19 already but I would submit once again
 20 are relevant.
 21 MR. WINN: If I could speak to the
 22 prejudicial aspect of it. It does
 23 prejudice the State's case because it
 24 totally diverts the committee's
 25 attention away from the relevant issues

Page 112

1 in the case and that is the experience
 2 of the 11 patients. And as I said,
 3 we're getting -- I get more and more
 4 concerned that the committee's focus is
 5 being diverted away from what it should
 6 be diverted or focused on and that is
 7 the experience of the 11 patients.
 8 These generalities have no relevance to
 9 that inquiry.
 10 MR. BEHM: Well, I would say it's not
 11 the patient's experience to be
 12 technical. It's Doctor Chase's conduct
 13 with respect to those 11 patients that
 14 is the relevant evidence. And what he
 15 was doing cannot with those particular
 16 patients based solely on what those
 17 particular patients may say cannot be
 18 judged in isolation and we think that
 19 this contextual evidence really gives
 20 you a very extensive and solid basis
 21 from which to judge what those patients
 22 say their experiences were and which to
 23 judge what Doctor Chase said he was
 24 doing when he treated those patients.
 25 It's useful evidence but, as I say, you

Page 113

1 can accord it what way you choose to
 2 accord it but it certainly is relevant
 3 to those issues. And you can't simply
 4 take what the State is trying to do here
 5 and what they've tried to do
 6 throughout. Oh, we're withdrawing our
 7 allegations about pattern and practice.
 8 We only want to talk about what these 11
 9 patients say and we only want to talk
 10 about what went on in that room at that
 11 particular time and you have to rely
 12 entirely on what those particular
 13 patients say. And that's not the case
 14 at all. Those patients could be
 15 mistaken, their impressions could be
 16 different and you have to rely on what
 17 Doctor Chase says. I mean, you have to
 18 consider it and you have to consider
 19 what the records show and you have to
 20 consider what his practices were, and
 21 you have to consider what his motives
 22 and what his purposes were. When you
 23 get down to the specification of charges
 24 and you decide was he acting
 25 dishonestly, was he fabricating charts,

1 was he acting professionally or was he
2 acting in his patient's best interest,
3 was he attempting to deliver the best
4 care he could, was that care consistent
5 with modern norms of practice. Those
6 are the things you have to consider. So
7 that's my view of it.

8 PRESIDING OFFICER: That's a good
9 summary and just one question I have
10 just to make sure. There's not a fact
11 that this was prepared at the 11th. You
12 had notice of it?

13 MR. WINN: I had notice obviously.
14 We went over the proposed exhibits in
15 July, which time I noted my objection
16 to the

17 PRESIDING OFFICER: Okay.

18 MR. MILLER: The 11th hour issue has
19 to do with giving it with the committee
20 three days before the last day
21 evidence and that goes with the proffer
22 as to the two witnesses as you. There
23 was advance notice to the respondent
24 that these were going to be objected,
25 why wait until three days before the

1 the situation and we'll take it up. How
2 about 1:15, be back ready to roll.

3 (Recess)

4 PRESIDING OFFICER: This is
5 concerning the two proposed exhibits,
6 No. 649 and 651 which I'll represent
7 are summary charts prepared by the
8 Respondent. Committee has considered
9 it, considered the written material that
10 was submitted on those two exhibits,
11 considered the oral presentations prior
12 to lunch. The committee has weighed
13 both interests and all the competing
14 interests involved there, feels that it
15 has received the essence of that
16 evidence from the individual witnesses,
17 the individual patients the Respondent
18 has introduced, has called earlier and
19 they have testified and for that reason
20 the Board feels that would be
21 cumulative and, therefore, will exclude
22 them from the evidence at this point in
23 time.

24 BY MR. MILLER:

25 Q. Doctor Javitt -- Phil, are you ready to-- may

1 final day of hearing to address these
2 issues.

3 MR. BEHM: I guess what I would say
4 about that is there was advanced notice
5 by the State by the own admission in
6 July that these items of evidence were
7 going to be introduced and they were
8 made part of our exhibit list, they were
9 introduced in the federal trial and
10 we've always intended to introduce them,
11 why wait until now for you to bring
12 them? Why can't you file a motion in
13 limine if that --

14 MR. WINN: The difference -- but this
15 is important. The difference is I
16 objected to a lot of exhibits and not
17 all of them have been attempted to be
18 put into the record by counsel. So it
19 seems to me if they want something into
20 evidence it's up to them to do it, to
21 put forward the evidence and to do it
22 timely and I don't believe it was done
23 timely.

24 PRESIDING OFFICER: All right. I
25 think the committee's got the idea of

1 I proceed?

2 PRESIDING OFFICER: Yes please.

3 BY MR. MILLER:

4 Q. Doctor Javitt, I want to clarify something you
5 said just before we broke for lunch so the
6 Board understand. You spoke of wet and dry
7 refractions earlier in your testimony. Can you just
8 clarify what you meant by wet and what you meant by
9 dry?

10 A. Sure. I apologize for using ophthalmology
11 slang. A dry refraction is one where no drops have
12 been given to the patient to dilate the eye. And a
13 wet refraction is one that is performed after drops
14 which are wet were given to the patient to dilate
15 the eye.

16 Q. I'm going to bring up a medical record again
17 just as an example so we can talk about a medical
18 issue. Can we bring up JS 1-13, Kelly. Can you
19 focus on the top of the page. This is a page from
20 medical record of one of the complaining witnesses
21 Doctor Javitt and I'm going to focus your attention
22 on this where it says, "Unable to see clearly to
23 drive in glasses at night," do you see that?

24 A. Yes.

25 Q. And have you seen that in other of Doctor

EXHIBIT B

1 to, bringing people into the office to
2 look at their charts, look at their
3 procedures and look at their patients.
4 And she was also involved in all the
5 hiring and firing decisions. In fact,
6 she made the hiring and firing decisions
7 around the office, hiring people like
8 Ellen Flanagan, again a lot of
9 information that speaks very strongly to
10 any lack of intent by Doctor Chase to
11 railroad patients into surgery. A lot
12 of information that shows in a larger
13 sense that Doctor Chase's office was
14 providing really high quality, really
15 comprehensive care to his patients which
16 is really fundamentally the issue that
17 the State has decided to attack in this
18 case.

19 I think it's very interesting Brianne
20 Chase is on the State's witness list.
21 Now they're coming in and saying she's
22 irrelevant and that we shouldn't call
23 her. I suggest that calls into question
24 whether the state really believes she's
25 relevant or not or whether they're just

Green Mountain Reporters (802)229-9873

1 concerned you're going to hear evidence
2 that helps our theory of the case and
3 damages theirs. She's just going to be
4 able to give a much more complete
5 picture of the practice than anybody's
6 going to be able to do because as you're
7 going to hear Doctor Chase was
8 single-mindedly focussed on the care of
9 his patients and didn't deal with these
10 other issues that really do bear on the
11 quality of care that his office was
12 giving.

13 MR. WINN: The practice isn't at
14 issue. It's Doctor Chase's interaction
15 with these 11 patients and especially in
16 light of the ruling this morning I'm
17 really concerned that the committee is
18 under the impression that due process
19 requires Doctor Chase be allowed to
20 bring in every person he thinks will
21 give him good testimony and that's not
22 the case. It has to be relevant and
23 there has to be some parameters to the
24 testimony that is proffered by the
25 Respondent. And these two people have

Green Mountain Reporters (802)229-9873

1 nothing to do with the 11 patients that
2 have testified in this case.

3 MR. MILLER: We've put on one witness
4 so far and the State is -- and I don't
5 know how many hearing days we've had but
6 they've all been consumed with the
7 State's witnesses. I think it's a
8 little premature for the State to come
9 in and say that they're concerned about
10 us believing we're able to call every
11 person that might have relevant
12 evidence. That certainly is not the
13 case and we certainly wouldn't put these
14 people in the beginning of our case when
15 we're trying to give you what we think
16 is important if we thought it was going
17 to waste your time. I'd submit that if
18 these folks don't have relevant
19 testimony to give, any disadvantage is
20 ultimately going to come back to us
21 because we have an obligation to use
22 your time wisely. We think we will be
23 using your time wisely by putting them
24 on.

25 PRESIDING OFFICER: Anything else?

Green Mountain Reporters (802)229-9873

1 MR. WINN: Just that it's not an
2 indictment as Mr. Miller keeps referring
3 to it. It's a specification of charges.

4 MR. BEHM: It feels like one.

5 MR. MILLER: Feels like it.

6 MR. WINN: It's not and the
7 distinction is an important one.

8 PRESIDING OFFICER: I think the
9 committee is aware it's not a criminal
10 indictment.

11 MR. MILLER: Just one more thing.
12 I'm sorry. You know, the State is
13 trying to really draw false -- they're
14 setting up a false dichotomy of people
15 who either dealt directly with patients
16 and people who didn't deal directly with
17 patients. The fact of the matter is
18 that the quality of the care the
19 patients got in Doctor Chase's office
20 was a function in part of the people
21 they saw while they were there, in part
22 of the practices and procedures that
23 were put in place, and in part of larger
24 issues like the validity of contrast
25 sensitivity like the validity of glare

Green Mountain Reporters (802)229-9873