STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re: Mitchell R. Miller, M.D. a/k/a Mitch Miller	))))	Docket No.: MPC 76-1100

STATE'S MOTION IN LIMINE

The State of Vermont, by and through Attorney General William H. Sorrell, and the undersigned Assistant Attorney General, James S. Arisman, moves the Board of Medical Practice to enter an order excluding from all proceedings in this matter various categories of evidence or testimony and precluding Respondent from asking questions or otherwise soliciting evidence or making statements concerning such categories of evidence in these proceedings, until the Board has ruled on admissibility. In support of this motion, the State of Vermont submits the following memorandum of law.

MEMORANDUM

I. Evidence, questions, and comment related to the performance of Board investigator Philip Ciotti in the matter of *In re Chase* should be excluded from these proceedings because these would have the effect of confusing and misleading the Board and are not relevant to this action. V.R.E 402 & 403.

Respondent may seek to offer evidence, questions, or comment relating to the performance of Board investigator Ciotti. Such "evidence" as it is expected to be presented or alluded to is not relevant to any proper claim or argument by Respondent.

Respondent claimed in his Motion to Reconsider Summary Suspension the following, referring to the matter of *In re Chase*, "[T]his Board has already had to revise one summary suspension order because of the false information prepared by the same investigator [Mr. Ciotti] involved here." (Emphasis added.) Respondent's Motion cites as

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its basis for this claim the Board decision in the *Chase* matter. (Specific citation: "*In re Chase*, State of Vermont Board of Medical Practice, Docket No. 15-0203, Decision on Respondent's Motion to Reinstate License and Dismiss Superceding Specification of Charges, March 31, 2004.")

Respondent's claim regarding the content of the Board's order in the *Chase* matter is false and misleading.

Respondent's attorney knew or should have known that the decision by the Board of Medical Practice in *In re Chase*, which she cited, as described above, does not include any finding or language that states, characterizes, or suggests that the Medical Board concluded investigator Ciotti prepared "false information" in the *Chase* matter. Nor does the Board decision make any written finding regarding the investigator's character or reputation for truthfulness. Nor does the Board decision make any written finding regarding the truthfulness or accuracy of the affidavit in question. In fact, the Medical Board decision carefully avoids any conclusion regarding the allegations of Respondent Chase and his claim that false information was included in an affidavit. The Board decision in *Chase*, as written, entirely sidestepped inquiry on this point and resolved the matter on other grounds.

In fact, the Board in *Chase* found that "there is not a sufficient connection between the questionable affidavit and the allegations set forth in the [State's] Superceding Specification of Charges to warrant dismissal".[1] Board Decision at 2 (emphasis added). In

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1. The Board decision in *Chase* inartfully and unhelpfully employs the term "questionable affidavit" to refer to the document to which Respondent Chase objected. However, without additional explanation or clarification within the decision itself, this use of language appears simply to be a misnomer. In context, it appears that the Board's decision more accurately meant to describe the document as "questioned", i.e., questioned by Respondent

reality, the Board decision set aside the summary suspension of Respondent Chase on policy grounds, not on the basis of fact or law. The Board explained, "[A] majority of the Board is not satisfied that the [Chase] summary suspension order is completely free from the appearance of the reliance on questionable material, even if partial. For that reason, a majority of the Board (4-2) feels that the summary suspension order should be lifted." Board Decision at 3.

It is clear from a fair reading of the decision in *Chase* that the Board entered a carefully written and nuanced order. The use of the word "appearance" by the Board's decision is instructive. The decision did not find the investigator's affidavit contained "false information" and did not suggest that this might be the case. The only party to use the word "false" was Respondent Chase in his allegations, not the Board. Moreover, the Board's decision made clear that it was setting aside its summary suspension of Respondent Chase for the policy purpose of "ensuring that its procedures are carried out without even the appearance of questionable standards, and [ensuring the Board's] actions have the complete faith and confidence of the public as well as the individuals who come before the Board." This is a policy choice by the Board— no facts or conclusions are embraced by the Board's decision. It bears repeating that the Board made no finding that the questioned affidavit was "false" or that the investigator acted with falsity. Accordingly, any such claim, suggestion, or innuendo by Respondent Miller and counsel in the instant proceedings cannot be relevant and should be excluded under V.R.E. 402. *See* V.R.E. 402 (irrelevant evidence is inadmissible).

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Chase as part of his many allegations against the Board. Even assuming the word "questionable" was intended, its use is essentially meaningless in this context because the Board's decision does not discuss in any way how the document might be deemed "questionable" (or by whom). *See* Board Decision at 2 and 3.

Moreover, even assuming there could be some arguable relevancy in alluding to *In re Chase* in the instant proceedings, Respondent should be excluded from doing so, pursuant to V.R.E. 403. Introduction of any such evidence, questions, or comment in this regard would result in confusion and unfair prejudice. Any potential for unfair prejudice should be eliminated. In addition, introduction of evidence or questioning by Respondent regarding the investigator and the *Chase* affidavit inevitably would trigger a time-consuming mini-trial on his past investigative performance and authorship that would result in wasted time, delay, and confusion. For all the foregoing reasons, any arguable probative value on this point is heavily outweighed. "Evidence", questioning, and innuendo on *In re Chase* and allegations regarding the subject affidavit should be excluded by a Board order under V.R.E. 403.

II. Evidence, questions, and comment related to the performance of Board investigator Philip Ciotti in the matter of *In re Chase* should be excluded from these proceedings under V.R.E. 404 or, alternatively, because any arguable probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, and, finally would waste the Board's time.

Respondent in his Motion to Reconsider the Board's summary suspension of his medical license already has demonstrated at the earliest stage of these proceedings a strategy of raising misleading claims regarding the content of the Board's decision in the *Chase* matter for the purpose of attack upon the veracity and character of the Board investigator. Again, the Board should enter an order to exclude any such "evidence" or questioning on this point.

Evidence, questioning, and suggestions concerning *In re Chase* event also should be excluded in these proceedings under V.R.E. 404, which provides that "evidence" of character or past acts is not admissible to prove that an individual acted in conformity with

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this at another time. Simply put, as discussed above, Respondent cannot produce from the *Chase* decision any finding by the Board that the investigator in that matter acted with falsity or prepared "false" information. The Board made no such findings. Moreover, none of the "other purposes" listed in V.R.E. 404—proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident—have any applicability. Accordingly, "evidence", questions, and suggestions on this point should be entirely excluded.

In addition, as discussed above, any introduction of "evidence' or questioning relating to the *Chase* decision inevitably would trigger a sideshow, mini-trial relating to a variety of collateral issues, including the circumstances of the prior matter, semantic interpretation of the language and form of the decision, and speculation as to the true meaning and purpose of the decision in *Chase.* Questioning or attempts to create "evidence" on these points by Respondent would consume precious time on matters that are without relevance or and that are not probative in these proceedings. Thus, introduction of "evidence", comment, or suggestions regarding the investigator and *Chase* would result in unfair prejudice to the State, and would confuse the issues, mislead the Board, and waste its time. For all these reasons, evidence or argument in this regard should be entirely excluded.

The State of Vermont requests that its Motion in Limine be GRANTED; and that the Board enter an order excluding any further comment, evidence, questioning, or argument regarding the matter of *In re Chase,* as discussed above. In the event that the Board wishes to defer its ruling, the State moves that the Board order Respondent not to mention or refer to any of such matter prior to the Board's ruling on the State's motion. Until such order has been determined, Respondent's counsel should be required to first

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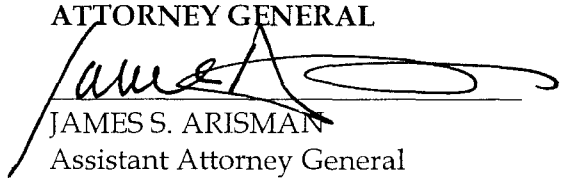
disclose her intention to present any such "evidence" and to obtain a clear ruling as to admissibility.

Dated at Montpelier, Vermont this 15th day of May 2009.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 
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