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 TO STRIKE

The State of Vermont, by and through Attorney General William H. Sorrell and undersigned counsel, moves to strike various "exhibits" filed by Respondent on May 15, 2009. The State files this motion on the ground that Respondent filings are contrary to the Board's May 7, 2009 procedural order, as issued, and, specifically, constitutes a continuing effort by Respondent to ignore the provisions of the Board's procedural order and to unilaterally expand the scope of the upcoming May 20, 2009 Board hearing. Respondent's exhibits should be struck by the Board on the ground that their presentation here undercuts the Board's ability to control its docket, it own proceedings, and it use of its time and resources.

The State also addresses below, Respondent's Motion to Strike Philip Ciotti's May 6, 2009 Supplemental Affidavit.

Respondent's Prefiled Testimony

1. As of today's date, Respondent has not indicated whether or not he intends to testify at the Board's May 20, 2009 hearing. If he does not plan to testify or otherwise does not testify, his "pre-filed testimony" should be stricken, as contrary to the Board's May 7, 2009 procedural order. The procedural order provides for the acceptance of pre-filed testimony only if Respondent testifies. See Paragraph 1(c) of Procedural Order.

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Exhibit 1

2. Consistent with Paragraph 1, above, Respondent's Exhibit 1 (S.T.) should be struck on the ground that it cannot be accepted as a "supporting exhibit" if Respondent does not plan to (or refuses to) testify at the Board hearing on May 20, 2009. V.R.E. 402 (evidence which is not relevant is not admissible).

3. Further, even if Respondent does testify, Exhibit 1 lacks a proper foundation and should be struck by the Board. V.R.E. 602. Exhibit 1 purports to be an affidavit by S.T. regarding "a statement by the Board of Health". However, S.T.'s affidavit fails to identify within it the specific "statement" to which she was referring and fails to attach the questioned writing as an exhibit to her affidavit. As such, neither the Board nor the State can know with certainty precisely what S.T. looked at or in what circumstances, resulting in confusion and ambiguity for both the Board and the State. V.R.E. 403 (evidence may be excluded if probative value, if any, is outweighed by danger of confusion, unfair prejudice, or waste of time).

4. If Respondent actually does testify, the affidavit of S.T. is an attempt to improperly bolster Respondent's credibility with written testimony from another witness before any attempt has been made to impeach his credibility. Respondent unfairly attempts to do so by means of an affidavit and testimony that cannot be tested and clarified through cross-examination by the State. As such, the affidavit should be excluded as an attempt to avoid compliance with the Board's procedural order by presenting bolstering testimony from an additional witness, specifically one who would not be subject to cross examination.

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Exhibit 2

5. Consistent Paragraph 1, above, Respondent's Exhibit 2 (P.L.) should be struck on the ground that it cannot be accepted as a "supporting exhibit" if Respondent does not plan to (or refuses to) testify at the Board hearing on May 20, 2009. V.R.E. 402 (evidence which is not relevant is not admissible).

6. Further, even if Respondent does testify, Exhibit 2 lacks a proper foundation and should be struck by the Board. V.R.E. 602. Exhibit 2 purports to be an affidavit by P.L. in which she states, "I reviewed this May Ciotti affidavit potion that only relayed to me." P.L.'s affidavit fails to identify within it the specific affidavit to which she was referring and also failed to attach the questioned writing as an exhibit to her affidavit. Moreover, the affidavit by P.L. is unclear and confusing as she has written it. Neither the Board nor the State can know with certainty precisely what writing P.L. looked at and in what circumstances. Moreover, it is also unclear what she was seeking to say in her affidavit, resulting in further confusion and ambiguity for both the Board and the State. V.R.E. 403 (evidence may be excluded if probative value, if any, is outweighed by danger of confusion, unfair prejudice, or waste of time).

7. If Respondent does testify, the affidavit of P.L. should be excluded on relevance grounds. V.R.E. 402 (evidence which is not relevant is not admissible). The affidavit by P.L. is largely testimony by her regarding Respondent's character, which is not at issue in the May 20, 2009 hearing. Respondent unfairly attempts to place this statement before the Board by means of an affidavit and testimony that cannot be tested and clarified through cross-examination by the State. As such, the affidavit should be excluded as an

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attempt to avoid compliance with the Board's procedural order by presenting testimony from an additional witness, specifically one who would not be subject to cross-examination.

Exhibit 3

8. Respondent's Exhibit 3, a letter by [redacted], should be struck on the ground that it cannot be accepted as a "supporting exhibit" if Respondent does not plan to (or refuses to) testify at the Board hearing on May 20, 2009. V.R.E. 402 (evidence which is not relevant is not admissible).

9. Further, even if Respondent does testify, Exhibit 3 should be struck on relevancy grounds because the writer's letter is based entirely on his knowledge of Respondent within the Vermont correctional system and by its own terms, such knowledge ended in August 2007. The State has not charged Respondent with misconduct within the operations of the Department of Corrections. Rather, the State's charges are limited to Respondent's prescribing of controlled substances and his care of patients in his private practice. As such, the letter by [redacted] contains little or no relevant content and should be excluded. V.R.E. 402 and V.R.E. 403.

10. The letter by [redacted] also represents an attempt by Respondent to place in evidence opinion regarding Respondent's character, and to do so by means of a letter that cannot be tested and clarified through cross examination by the State. Respondent's character is not at issue in this hearing. As such, the letter should be excluded on relevance grounds.

Exhibit 4

11. Respondent's Exhibit 4, a letter by [redacted] should be struck on

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the ground that it cannot be accepted as a "supporting exhibit", if Respondent does not plan to (or refuses to) testify at the Board hearing on May 20, 2009. V.R.E. 402 (evidence which is not relevant is not admissible).

12. Further, even if Respondent does testify, Exhibit 4 should be struck on relevancy grounds because the writer's letter is based entirely on his knowledge of Respondent within the Vermont correctional system: "I have no experience or opinion about how Dr. Miller practices outside [the Prison Health Service]" and, further, "I did not directly work with him". The State has not charged Respondent with misconduct within the operations of the Department of Corrections. Rather, the State's charges are limited to Respondent's prescribing of controlled substances and his care of patients in his private practice. As such, the letter by [redacted] contains little or no relevant content and should be excluded. V.R.E. 402 and V.R.E. 403.

13. The letter by [redacted] also represents an attempt by Respondent to place in evidence opinion regarding Respondent's character, and to do so by means of a letter that cannot be tested and clarified through cross examination by the State. Respondent's character is not at issue in this hearing. As such, the letter should be excluded on relevance grounds.

Exhibit 5

14. Respondent's Exhibit 5, a letter by [redacted] should be struck on the ground that it cannot be accepted as a "supporting exhibit" if Respondent does not plan to (or refuses to) testify at the Board hearing on May 20, 2009. V.R.E. 402 (evidence which is not relevant is not admissible).

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15 Further, even if Respondent does testify, Exhibit 5 should be struck on relevancy grounds because the writer's letter is based entirely on her knowledge of Respondent within the Vermont correctional system. The State has not charged Respondent with misconduct within the operations of the Department of Corrections. Rather, the State's charges are limited to Respondent's prescribing of controlled substances and his care of patients in his private practice. As such, the letter by [redacted] contains little or no relevant content and should be excluded. V.R.E. 402 and V.R.E. 403.

16. The letter by [redacted] also represents an attempt by Respondent to place in evidence opinion testimony regarding Respondent's character, and to do so by means of a letter that cannot be tested and clarified through cross examination by the State. Respondent's character is not at issue in this hearing. As such, the letter should be excluded on relevance grounds.

Exhibit 6

17. Respondent's Exhibit 6, a letter by [redacted], should be struck on the ground that it cannot be accepted as a "supporting exhibit" if Respondent does not plan to (or refuses to) testify at the Board hearing on May 20, 2009. V.R.E. 402 (evidence which is not relevant is not admissible).

18. Further, even if Respondent does testify, Exhibit 6 should be struck on relevancy grounds because the writer's letter is based entirely on her knowledge of Respondent in his role at the Gill Odd Fellows Home. The State has not charged Respondent with misconduct within the operations of the Gill Odd Fellows Home. Rather, the State's charges are limited to Respondent's prescribing of controlled substances and his

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care of patients in his private practice. As such, the letter by [redacted] contains little or no relevant content and should be excluded. V.R.E. 402 and V.R.E. 403.

19. The letter by [redacted] also represents an attempt by Respondent to place in evidence opinion regarding Respondent's character, and to do so by means of a letter that cannot be tested and clarified through cross examination by the State. Respondent's character is not at issue in this hearing. As such, the letter should be excluded on relevance grounds.

Exhibit 7

20. Exhibit 7 is an unsigned writing. Exhibit 7 also appears to have had a date inserted on its first page at a later time, perhaps by another individual. Respondent has presented no foundation for acceptance of this unsigned writing and it should be excluded on that ground. V.R.E. 602. Further, Respondent has presented no evidence to establish the authenticity of this writing or identify what it purports to be, as a basis for acceptance. V.R.E. 902. Finally, without cross-examination, the State will have no opportunity to test the authenticity of this item or its admissibility.

Respondent's Motion to Strike the Ciotti Affidavit

21. The May 6, 2009 Supplemental Affidavit by the Board's investigator has already been accepted by the Board and now is properly before the Board in these proceedings. The investigator will be present during the May 20, 2009 hearing and can be cross-examined regarding his affidavit. Notwithstanding Respondent's many objections, the affidavit of May 6, 2009 was prepared and submitted at the request of the Board of Medical Practice in an effort to establish its own record in this matter, prior to making a final

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decision. For example, the transcript of the Board's suspension hearing on April 1, 2009 includes the following by Board Member Webber: (1) "So I was just interested in, say, the last month of what activities you've found out about the doctor, and his prescribing of narcotics." And (2) "I think it might be useful if you filed a supplemental affidavit and included that information [recent prescribing]."

22. Respondent's citation of authority in her motion to strike is inapposite and misleading. The cited case, *Conservation Law Foundation v. Burke,* 162 Vt. 115, 128 (1993), involved a procedurally complicated case in which the Agency of Natural Resources refused to reopen the record of a matter and proceeded to decision. The Vermont Supreme Court found there was no "after-the-fact reason" for the Agency's decision. The information necessary for the decision was already before the Agency prior to it having rendered its final decision. *Id.* at 128. Here, the Board has made the procedural choice to take more evidence regarding it decision to suspend Dr. Miller's medical license. The Board has not closed the record. It has either reopened the record or treated the record as still open. In either alternative, the Board is properly seeking information prior to the final closing of the record in the summary suspension hearing.

23. The Board requested the supplemental affidavit from investigator Ciotti, and he responded to that request. All of Respondent's other objections go to the weight to be given the affidavit, not its admissibility. Respondent's motion to strike should be denied by the Board.

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Dated at Montpelier, Vermont, this 17th day of May 2009.

STATE OF VERMONT

WILLIAM H. SORRELL
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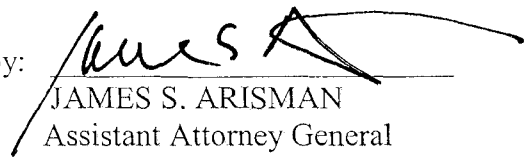
by: 
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