

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re: Mitchell R. Miller, M.D.

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Docket No.: MPC 76-1100

**RESPONDENT'S OPPOSITION TO STATE'S MOTION TO STRIKE
AND MOTION IN LIMINE AND RESPONSE TO THE STATE'S "ANSWER AND
OPPOSITION" TO RESPONDENT'S LETTERS TO THE DIRECTOR OF THE
MEDICAL PRACTICE BOARD**

Dr. Mitchell R. Miller, by and through counsel, Sheehy Furlong & Behm P.C., hereby opposes the State's Motion to Strike and Motion in Limine and responds to the State's "Answer and Opposition" to Respondent's letters to Director Wargo. In support of this Opposition and Response, Dr. Miller relies on the following incorporated Memorandum of Law and Fact.

Memorandum of Law and Fact

The State's Motion to Strike, Motion in Limine, and "Answer and Opposition" are desperate attempts by the State to subvert the truth-seeking function of this Board by seeking to prevent the Board from even reviewing,¹ much less considering highly relevant information for the sole reason that such information contradicts the State's slanted portrayal of Dr. Miller to this Board. The State only wants this Board to hear its version of events. The State's Motion to Strike and Motion in Limine are factually and legally deficient and for the many reasons specifically set forth below, both Motions should be denied.

While the State's latest round of filings further demonstrates the State's complete disregard for the due process rights of Dr. Miller, this Board cannot so readily dispense with these bedrock principles of fairness. This Board has an obligation to ensure that its proceedings are fair and that actions it takes against physicians are necessary and appropriate under the

¹ In his filing letter to Mr. Wargo of May 15, 2009, the Assistant Attorney General states that he objects to the "Board's members being sent or exposed to this document," referring to Respondent's filing earlier in the day.

circumstances. As this Board has acknowledged before, “[p]art of the Board’s responsibility in accomplishing its duty of public protection, is to ensure that its procedures are carried out without even the appearance of questionable standards, and its actions have the complete faith and confidence of the public as well as individuals who come before the Board.” *In re Chase*, Docket No. MPC 12-2303, Decision on Respondent’s Motion To Reinstate License and Dismiss Superceding Specification of Charges, March 31, 2004, at 3. Granting the State’s Motions would effectively prevent Respondent from challenging in any meaningful way the State’s claim of an emergency situation and the lack of evidence to support that claim. To continue to allow only the State to present its exaggerated version of events and unsupported claims that imminent harm can be inferred, while giving the Respondent no real chance to respond, would clearly call into question the fairness of any proceeding before this Board.

I. The State’s Motion To Strike Should Be Denied.

The State’s Motion to Strike should be denied as to each and every claim. The Board’s May 8 Order permitted Respondent to only testify on matters referenced in Investigator Ciotti’s prefiled testimony and only allowed Respondent to provide his testimony in prefiled format. Respondent understands that under the Board’s Order, he will not be permitted to present live testimony at the May 20 hearing. The prefiled written testimony *is* Dr. Miller’s testimony. It should therefore go without saying that the filing of the prefiled testimony was notice to the Board and the State of Dr. Miller’s intent to testify.

Exhibits 1-6 submitted by Respondent on May 15, 2009 are to respond to the testimony provided by Investigator Ciotti on April 1, 2009, or prefiled testimony as the Board refers to it. Exhibits 1 and 2 are affidavits of two former patients of the Respondent who are included in the patients listed in the Specification of Charges. These affidavits respond to inaccurate statements

made in Mr. Ciotti's Supplemental Affidavit of May 6, which he incorrectly attributes to these patients. There is no reason why this Board should consider affidavits of Mr. Ciotti and not affidavits of those individuals he purports to have obtained information from, particularly, where, as here, the affidavits coming directly from the patients demonstrate that the information in Mr. Ciotti's Supplemental Affidavit is not reliable. Exhibits 1 and 2 will be used to cross examine Mr. Ciotti and have been provided in advance of the hearing to comply with the Board's May 8 Order.

The arguments the State sets forth as the basis on which to strike the two former patient affidavits are inapposite and should be rejected. Exhibits 1 and 2 are highly relevant to the instant matter as they directly contradict what Mr. Ciotti has told this Board these patients told him regarding the Respondent. They are not attempts, improper or otherwise, to bolster Dr. Miller's testimony. Further, there is no requirement that an affidavit demonstrate a proper foundation, nor are V.R.E. 403 concerns implicated here. Upon review of Exhibits 1 and 2 it is immediately clear that these patients are responding to the statements Mr. Ciotti claims they made in his Supplemental Affidavit.

For example, Mr. Ciotti states that P.L. told him, "she was probably better without the narcotics because she gets really depressed in the winter and has Seasonal Affective Disorder and the drugs made her even more depressed." In her Affidavit, Exhibit 2, P.L. states that, "I have reviewed this May Ciotti Affidavit portion [sic] that only related to me." She goes on to say, "[t]he percent [sic] was not making me more depressed losing my mate did that - I also do have SAD." Mr. Ciotti, purporting to relay information about a time P.L. and Dr. Miller had coffee, states, "She said she asked him a lot of questions but that he was evasive." P.L. states, "I don't believe that this statement accurately portrays how I feel. Dr. Miller never was evasive with me

I may have been evasive with Philip Ciotti about my conversing with Dr. Miller. I believe that a lot of this statement was taken out of context.”

Upon review of Exhibit 1, it is also clear that S.T. is referring to statements Mr. Ciotti claims she made to him in his Supplemental Affidavit. For example, former patient S.T. states that, “I read a statement (the statement was only about me) typed by the Board of Health there are some things that were not my words and it seems like they were more opinions and his words (Philip Ciotti) exactly, not my exact words.” (emphasis in the original). In his Supplemental Affidavit, purporting to relay a conversation he had with S.T. about an appointment she had on March 12 with Dr. Miller, Mr. Ciotti states, “She said that he [Dr. Miller] had called her to come down and he could see me really quick.” S.T. states in her Affidavit, “I never said he called me, I did say Dr Miller told me he would be in his office later in the Afternoon and he would let me know when he was at the office. I then said, I was getting my children at school and saw his car at his office, so when I got home I called Dr Miller’s office and asked if it was okay for me to come see him! Dr Miller said yes you can come down, I’m here. I never said he called me.”

The State’s claims as to why this Board should strike the letters provided from Dr. Miller’s colleagues are equally irrelevant and unpersuasive, and thus, should be rejected by this Board. Again, the State’s arguments are thinly veiled attempts to prevent this Board from getting any information that contradicts the State’s account and portrayal of Respondent as a dangerous and irresponsible doctor. Among other things, these letters are relevant as they make clear that Dr. Miller’s dwindling private practice accounted for only a small fraction of the medical care he provided. His primary work as of March 2009 was caring for inmates in this State’s correctional facilities and the elderly patients confined to the Gill Odd Fellows Home (“GOFH”) in Ludlow. These letters also contain information regarding the constraints on the

prescribing and administration of medications in the incarcerative setting. Accordingly, these letters directly contradict the State's wholly speculative claim made in its Motion for Summary Suspension that because of alleged deficient prescribing practices for the 10 patients in the Charges, Dr. Miller is "a danger to the many individuals whose medical care is provided or overseen" by him in the correctional system.

Despite this conjecture about the "danger" Dr. Miller presents to patients in the correctional setting, in seeking to strike the letters from his former coworkers within DOC, the State claims the letters are irrelevant because the Specification of Charges does not relate to care of any patients at either the Gill Odd Fellows Home or within the correctional system. The State's argument demonstrates the very point made by Respondent that summarily suspending his license based on claims about 10 patients, most of whom he was no longer treating as of March 2009, was overbroad and completely unwarranted. If Dr. Miller's care of patients in the DOC and GOFH facilities was not being challenged by the State, which it wasn't, why did the State request and this Board approve a complete summary suspension of his license and thereby prohibit him from continuing to provide care in these facilities?

Again, in seeking to strike these letters, the State complains that it will not be able to cross examine the writers of these letters. At the same time, ironically, it expects this Board to admit the Supplemental Affidavit of Investigator Ciotti (and strike the affidavits of two former patients) when Respondent will have no opportunity to examine or cross examine witnesses on the many statements Ciotti says they made to him. If this Board intends to strike the letters submitted by Respondent on the grounds that cross examination cannot occur, likewise, all statements in the Supplemental Affidavit purportedly based on information provided by others must also be stricken, to the extent the Supplemental Affidavit is considered at all.

Finally, the State's alleged concern that the letters will confuse the Board is baseless. The State's real concern is that these letters contradict the story the State has spun about Dr. Miller in its Motion for Summary Suspension and 66 pages of Charges. The State's claim that Dr. Miller's character is not at issue is also completely disingenuous. Throughout both the Charges and the Motion for Summary Suspension, the State has assaulted Dr. Miller's character.

Exhibit 7 is a letter from patient S.T. Its relevance is obvious from the prefiled testimony of Dr. Miller. Investigator Ciotti claimed that Dr. Miller provided a double dosage of medication to this patient on March 12. Dr. Miller's prefiled testimony makes clear that this claim is not correct. Exhibit 7 supports what Dr. Miller has stated he understood at the time, i.e., that due to a limited supply of medications at the pharmacy and because of vacation schedules, a second prescription was necessary to provide the patient with medication until he could see her again. Exhibit 7 should be admitted.

II. The State's Motion In Limine Should Be Denied.

In its Motion in Limine, the State seeks to limit the Respondent's cross examination of Board Investigator Ciotti. The Motion should be denied. That this Board has previously had to question the truthfulness, accuracy and reliability of the information Investigator Ciotti provides to this Board goes directly to issues of his credibility. Rule 607 expressly provides for challenging a witness's credibility. V.R.E. 607.

Questions about Investigator Ciotti's credibility and investigative tactics have come up in other proceedings as well. See *In re O'Rourke*, Docket Number MPN 19-0302, Respondent William A. O'Rourke, Jr., M.D.'s Conditional Exceptions to the Hearing Committee Report, January 16, 2007, at 2-3. Indeed, there are serious questions in the instant matter about how reliable any aspect of Ciotti's Supplemental Affidavit is given the obvious inconsistencies

between what he reports he was told and what at least two former patients have stated they actually told him. As well, the reliability of any information included in the Supplemental Affidavit should be questioned given the fact that both former patient affiants report they were not clearly advised by Mr. Ciotti as to who he was or what his purpose was in talking to them.²

III. Response To State's "Answer And Opposition"

Contrary to the State's claim, Respondent's Motion to Reconsider is not part of a "strategy of complication and convolution." Respondent has requested that his license be reinstated because it was not properly summarily suspended, and the immediate ramifications of that overbroad action have devastated his career.

The State repeatedly states that all the due process Respondent is due will be provided at the merits hearing. The State is wrong. At every step, when it is restricting or retracting a protected right, such as a license to practice, this Board must adhere to basic requirements of due process. See e.g., *In Re Licensing Appeal of J.H.*, 2008 VT 97, ¶ 15. The State's later statement that Respondent has been provided all the process due to him because the Board had a pre-suspension hearing is disingenuous at best. Whether the Board relies on principles of due process, as it must, or common sense, as it surely does, it simply defies credulity to suggest a decision making process is fair when the individual harmed by the Board action is given no opportunity to defend himself before devastating action is taken against him.

The State writes, "The Board, as an administrative body should be concerned as to the finality of its decisions and the unbridled consumption of its own time and resources." As Respondent stated at the beginning of this Memorandum, this Board must ultimately be

² In her Affidavit, Exhibit 1, S.T. stated, "...I didn't realize the Medical Board was Philip Ciotti..." Similarly, in her Affidavit, Exhibit 2, P.L. stated, "As I stated before, I am honest and some of this conversation was taken out of context. I am very unhappy about this being used without telling me what he [Ciotti] was going to do with it."

concerned with ensuring that in seeking to protect the public, it treats those physicians who come before it fairly. Efficiency is not a ground on which to dispense with due process. *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972) (“A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.”).

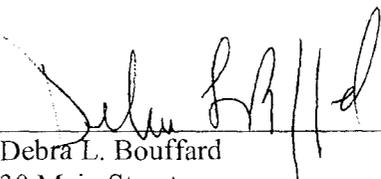
The State would have this Board gloss over the serious deficiencies in the State’s proof that there is any imperative threat of harm that requires emergency action with a promise of a “prompt hearing” on the merits of the Charges. The State repeatedly berates Respondent for not having requested the prompt hearing that, in fact, the Board has stated it will schedule “as soon as practicable by the Board.” That months from now Respondent will have a hearing on the merits of the Charges against him cannot remedy the unwarranted request of the State and decision by this Board to summarily suspend Dr. Miller’s license. In sum, this Board cannot simply do as the State has requested, i.e., to merely draw inferences from alleged facts and unreliable testimony from the Board’s investigator to suspend a physician’s license and then allow the State to attempt to prove the legitimacy of the suspension months later. As set forth in Respondent’s Motion to Reconsider, to ensure that devastating mistakes are not made by issuing an unwarranted suspension, the State needs to prove – before the license is suspended – that but for summary suspension of the license imminent harm to the public will ensue. The State has not even begun to make that showing here.

WHEREFORE, for the reasons set forth above the State's Motion in Limine and Motion to Strike must be denied.

Dated at Burlington, Vermont this 19th day of May, 2009.

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By: _____


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