STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

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

DISCOVERY ORDER IN RESPONSE TO
DR. MITCHELL R. MILLER'S MOTION TO COMPEL DISCOVERY FROM THE STATE

Introduction

Pursuant to the Stipulated Discovery Schedule in this docket, on August 21, 2009, Respondent filed Respondent's First Set of Discovery Requests, which consisted of 39 interrogatories and 52 requests to produce, most with numerous subparagraphs. On the same day, the State responded by letter to Respondent's attorney arguing at length that "such discovery is not provided for by the Board's rules or statute," and refusing to answer any of the questions. After consultation between the parties which did not result in agreement, on September 11, Respondent filed the above referenced motion to compel. Both the State and Respondent filed further responses on September 18 and September 22 respectively.

Conclusions of Law

The State contends that because interrogatories and requests to produce are not specifically mentioned in the Board's rules or the governing statutory provisions, that they are not permitted, and that the only discovery method allowed to the Respondent are depositions, the production of the Board's investigative file, and the right to view and copy any other of the Board's records permitted by 23 V.S.A. §1318(c). The State's legal analysis is not persuasive. Review of the applicable law suggests that this view is overly restrictive.

Although the Board's enabling statute does not specifically reference discovery methods other than those already mentioned, it does include a catch-all provision giving the Board the power to "undertake any such other actions and procedures specified in, or required or appropriate to carry out, the provisions of this chapter." 26 V.S.A. §1353(4). The Board's powers under this provision are properly implemented in Board Rule 16.2 which provides that the Board shall have the authority to regulate "*discovery* and depositions, scheduling, motions by the parties, and *such other matters as may be necessary to ensure orderly preparation for hearing*." [Emphasis added]. This interpretation is supported by Vermont Supreme Court cases that repeatedly refer to the Board's broad powers of investigation and adjudication. See, e.g., *In Re Appeal of David Chase, M.D.* 2009 VT 94, ¶6, and cases cited therein.

Moreover, the Court has established a general principle of "fairness" that is required of an administrative agency's conduct of contested cases:

> Critical to a determination of whether the procedure was fair is whether or not the parties were given an adequate opportunity to *prepare* and respond to the issues raised in the proceeding [Emphasis added].

In re Twenty-Four Electric Utilities, 160 Vt. 227, 234 (1993).

There is no good reason to suppose that the Board lacks the authority to permit any appropriate form of discovery, including interrogatories and requests to produce, that would help to ensure a fair process. Accordingly, there is no legal impediment to the use of these discovery methods in this docket.

However, the parties do raise some significant practical issues in support of their positions. The Respondent expresses concern that the State's litigation strategy "is to attempt to gain an unfair advantage through surprise." Mitchell R. Miller's Reply to the State's Response to Respondent's Motion to Compel Discovery at 3. The State, for its part, is concerned about "the wide-ranging, burdensome, and time-consuming" nature of the Respondent's interrogatories. State's Responses to Respondent's Motion to Compel Discovery at 2. The Board is mindful of these concerns in making the following rulings.

Respondent is entitled to be made aware of all the individuals, documents, and other materials that may be used in the prosecution of the charges against him. However, whether by inadvertence or design, his interrogatories and requests to produce, which are lengthy, unduly repetitive, and larded with unnecessary boilerplate, go far beyond what is necessary for him to prepare his response to the Charges (which, contrary to Respondent's assertions, are quite detailed and provide a complete notice of the case against him).

Decision

The State is required to respond to Respondent's discovery requests as follows:

1. As the State points out, the Respondent's instructions and definitions broaden the discovery beyond what is necessary to prepare an adequate defense. His definition of "the State," "You," and "Your" is so broad as to refer to every state agency, state employee, state contractor, and vendor, not only in conjunction with their work for the State, but in other spheres as well. The Board hereby limits this definition to information known to those persons involved in the investigation, preparation, and prosecution of the Charges, since material of which these individuals are unaware can hardly be used by them against the Respondent. The requirement that the answers be supplemented will assure the Respondent that he is kept current and not subject to surprise. This paragraph does not require the disclosure of any privileged information.

2. The State does not have to list, describe, or produce any materials or information about individuals that were provided by the Respondent (or his office) or have already been identified or provided to the Respondent in the Board's investigative file, unless the State has additional information about the individual or material that is not contained in either of these sources, in which case the State shall provide that additional information. If the State has no more information responsive to the interrogatory, the State can answer simply by stating that all the

information of which it has knowledge is included in the file. The State shall not be required to undertake any special research to learn additional information about individuals that is not already known to the State, subject to supplementation if additional information comes to the State's attention.

Interrogatories

3. Respondent refers to the nonspecific nature of many of the allegations and charges, but references only one, the allegation in paragraph 16 of the Charges that the Respondent "acted in 'bad faith.'" This allegation is followed by a series of other general allegations which, according to the Charges, are based on the treatment history of ten individual patients, who are the subject of more specific charges in later paragraphs. Insofar as Paragraph 16, et seq., are simply legal conclusions based on the more specific factual allegations to come, the State is not required to answer. However, if they do include allegations that are not more particularly developed elsewhere in the Charges, the State shall answer those interrogatories that pertain to such allegations.

4. Interrogatories 15-18, 27-31, and 39 deal with standards of medical care. The application of appropriate standard standards is within the expertise of the Board. *In Re Appeal of David Chase, M.D.* 2009 VT 94, ¶6. To the extent that the State intends to bring expert witness testimony on these standards as they relate to Respondent's practice, the discovery relating to experts is controlled by the Stipulated Discovery Schedule approved by the Board on June 12, 2009. Therefore, the State does not have to respond to these interrogatories except where they ask for factual material about the Respondent's practices that are not provided in the Board's investigative file or in response to other interrogatories, or that are in the Respondent's own possession. To the extent that Interrogatory 26 applies to an expert witness, no response is necessary because it is covered by the Stipulated Discovery Schedule.

5. Interrogatory 37 asks for a list of witnesses for the State. The State does not have to answer this interrogatory at this time. Instead, the parties shall agree on a date or dates for the exchange of non-expert witness lists and the subject matter of each witness's testimony. (See below ¶11.)

Requests to Produce

6. Paragraph 2 of this Decision shall also apply to the production of documents. However, if the Respondent is aware of any of his records of which he no longer has copies that are in the possession of the State, he may specifically identify and make a request for those particular records. Further, the State shall not be required to produce any records described in specific interrogatories that it is not required to answer (see above, ¶¶3 and 4), except when those records are otherwise identified by the State in response to other interrogatories.

7. Request 52 relates to expert witnesses. These materials shall not be required to be produced before October 9, 2009 (or such other time as shall be agreed upon in the Revised Discovery Schedule; see below ¶11), at which time the State's expert witness reports are due in

accordance with paragraph 4 of the Stipulated Discovery Schedule. This Request shall be applicable to both parties and may be modified by agreement between them.

Further Discovery Procedures

8. It is the intent of this order to make sure that the Respondent has all the information he needs to defend against the Charges and that is the spirit in which it should be read. The Board will not be sympathetic to unduly technical readings of its ruling that would deprive the Respondent of material to which he is entitled. Nor will the Board be receptive to another set of lengthy discovery requests such as those which are the subject of this decision.

9. In the unlikely event that there should be further discovery disputes, after good faith attempts by the parties to resolve the issue, the aggrieved party shall file with the Board a letter requesting a discovery conference. The letter shall be no longer than two pages, and shall include a plain statement of the problem, with no legal argument, and a list of times when both parties can be available for a conference call. The letter shall be accompanied by any documents which may need to be reviewed before the conference. If any response is necessary, it shall be by letter, no longer than one page, and may be accompanied by necessary documents. No other responsive pleadings may be filed.

10. To facilitate the State's response to Respondent's discovery requests, Respondent shall provide the State with an electronic copy of the requests in a common word processing format with all numbering hard coded.

11. In view of the delay caused by this discovery dispute and the requirements of this decision, the parties shall confer and file a Revised Stipulated Discovery Schedule on or before October 12, 2009.

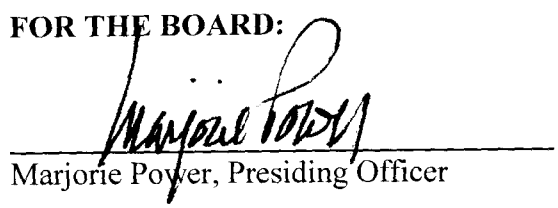
ORDER

1. The Respondent's Motion to Compel is hereby GRANTED IN PART subject to the conditions set out above.

2. The parties shall file a Revised Stipulated Discovery Schedule by the close of business on October 12, 2009, which shall include a date for the exchange of witness information as required in paragraph 5.

3. Any further discovery disputes shall be subject to the procedure set out in paragraph 8 above.

FOR THE BOARD: **DATE:**



Marjorie Power, Presiding Officer

October 2, 2009

EFFECTIVE DATE: October 2, 2009

DATE OF ENTRY: October 2, 2009