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 |

# RESPONDENT DR. DAVID CHASE'S OPPOSITION TO THE STATE'S MEMORANDUM IN SUPPORT OF THE SANCTION OF REVOCATION

Respondent David Chase, M.D., by and through his attorneys, Sheehey Furlong & Behm, P.C., respectfully submits this Opposition to the State's Memorandum In Support of the Sanction of Revocation ("AGO Sanction Motion"). The State misguidedly asks this Board to impose the most severe sanction against Dr. Chase, permanent license revocation, on three separate grounds. First, it falsely argues that Dr. Chase mounted a vindictive, hostile defense to the Attorney General's Office's ("AGO") charges that manifests a failure by him to acknowledge responsibility for his actions. It also erroneously claims that Dr. Chase's "misconduct" was "not isolated," and represented a continuing course of improper practice. Third, the AGO illogically claims that because the hearing panel found one aspect of Dr. Chase's four days of testimony to be not credible, Dr. Chase must have his license revoked. In addition to being erroneous, the AGO's claims require this Board to hold a hearing to admit and consider Dr. Chase's additional evidence on new issues raised by the AGO in its Sanction Motion.

## I. Dr. Chase Mounted A Vigorous Defense That Was Fair, Professional And Made Necessary By The AGO's Own Heavy Handed Prosecution And Deficient Presentation Of Evidence

In contending that Dr. Chase's defense was vindictive and hostile, the AGO neglects to mention, let alone address, that the Board rejected 90 of the State's 110 charges against Dr. Chase, including the most serious charges that he committed unnecessary surgeries and that he

intentionally falsified his patients' medical records. Absent a vigorous defense, many of the AGO's 90 meritless, rejected charges would likely have been adopted by the Board in reliance upon the AGO's misleading and slip-shod presentation of the evidence. Respondent had a right to defend himself against the AGO's charges, and the AGO's attempt to punish his exercise of that right, particularly when the defense employed was necessitated by the AGO's own improper, overbroad changes, is both cynical and hypocritical. Moreover, the AGO's allegation that Respondent's defense was vindictive and hostile is groundless and lacks candor. To the contrary, the cross-examination of the patient and physician witnesses was thorough, searching and not infrequently adverse, but, as demonstrated by the transcript record, it was conducted in a professional, dignified and proper manner.[1]

The particular need in this case for thorough cross-examination is evident from even a cursory examination of the circumstances existing at the commencement of the evidentiary proceedings. Dr. Chase's medical license had been summarily suspended upon the basis of an affidavit putatively given by an affiant (Amy Landry) who later testified that it had been fabricated by the State's investigator, and upon information given by an ophthalmologist (Dr. Morhun) whose diagnosis of patient Helena Nordstrom was based on symptoms Ms. Nordstrom said she had fabricated at the behest of the State. Nordstrom's false statement to Morhun that she had no visual symptoms when examined by Dr. Chase, according to Morhun, misled him into providing information to this Board that deprived Dr. Chase of a "fair shake" at the summary suspension hearing. All of these improper actions were sponsored by the State and

[1] Cross-examination is frequently referred to, such as in both the United States and Vermont Constitutions, as a right of confrontation. It often involves, as the name implies, confrontational questioning designed to test the credibility of adverse witnesses. Strong, *McCormick on Evidence*, (4th Ed. 1992) at §245. The pre-eminent legal scholar on evidence, John H. Wigmore, described cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 *Wigmore on Evidence*, note 16, at p. 32 (Chadbourne rev. 1976).

were instrumental in utterly ruining Dr. Chase's reputation and destroying his long, distinguished career.

Furthermore, at the start of the evidentiary proceedings, the Respondent had already been victimized by the AGO's incontrovertibly unethical attempts to obstruct his discovery of evidence,[2] and his attorneys were aware that three of the AGO's witnesses had given testimony at the federal trial that had been necessarily rejected by the federal jury in reaching its verdict.[3] All of the State's 11 patient witnesses had inexplicably refused to cooperate with Respondent Counsel's requests for interviews and to permit an independent ophthalmologist to examine their eyes. At least one of the State's physician witnesses (Dr. Alan Irwin) admitted that he functioned as an investigative agent for the AGO, exaggerated to the Board evidence adverse to Dr. Chase, minimized evidence that was favorable to Dr. Chase, and testified that he did not know whether he had been fair to Dr. Chase in communicating information to the Board. The sad irony is that the AGO engaged in patently unprofessional conduct while prosecuting Dr. Chase for violating the rules of his own profession. Under all of these circumstances, as well as others, any attorney representing Respondent would have been professionally remiss if he had failed to conduct a thorough and probing cross examination of the AGO's witnesses.

The manifest need for Respondent's counsel to be vigilant and comprehensive during cross examination was underscored again as soon as the AGO began examining patient witnesses. It conducted misleadingly truncated examinations of its witnesses and introduced selectively culled segments of their patient records in an unexplained and highly obfuscatory

---

[2] The Assistant Attorney General who engaged in the offending conduct initially denied that his patently unethical conduct was in fact unethical. Although he eventually abandoned his attempts to justify his conduct, he never corrected his erroneous defense to the Board (unless he did so ex parte) and he never apologized to Dr. Chase for infringing his right to obtain evidence to defend himself.

[3] Judith Salatino, Margaret McGowan, and Susan Lang all testified before the federal jury that they had received unnecessary cataract surgery; in acquitting Dr. Chase, the jury necessarily and forcefully rejected that testimony by acquitting Dr. Chase of every single charge related to those three patient witnesses. Several other witnesses, Helena Nordstrom, Marilyn Grigas, Jan Kerr, and William Augood-Pierson, testified at the federal trial, but the charges relating to them were dismissed by the trial judge and were not submitted to the jury.

manner. By contrast, Respondent's counsel provided complete records to the Panel and asked questions to ensure physician witnesses fully explained their examinations and practices and that patient witnesses fully explained their visual symptoms and interactions with physicians. Respondent also introduced visual and oral presentations explaining the physiology of the eyes and the ophthalmology procedures pertinent to the proceeding, and Dr. Chase, at considerable expense, provided interactive visual systems that enabled the hearing panel (and the AGO) to view the relevant medical records during the witnesses' testimony. The hallmark of Respondent's defense was a comprehensive presentation of evidence that was crucial to the Panel's accurate understanding of this case because of the large, significantly misleading gaps in the AGO's evidentiary presentation.

It is inexcusably wrong for the AGO, having lost over 80 percent of its 110 specified charges, to argue that Dr. Chase should not have mounted a vigorous defense against those charges. To accept the AGO's specious argument would require Board respondents to either timidly acquiesce to the AGO's entire specification of charges, no matter how meritless, or receive an enhanced punishment for daring to defend themselves against the AGO's excessive and baseless accusations.

Furthermore, with all due respect to the Board's decision regarding the patients' credibility, Respondent maintains that the cross examination of the patient witnesses fatally undermined their credibility on material issues.[4] The AGO's claim that the defense compared

---

[4] As an example, Patient Judith Salatino denied during her testimony that she had told Dr. Chase during his June 2003 examination of her eyes that she was having difficulty seeing at night to drive (a key indicator that a cataract was compromising her vision), even though Dr. Chase's medical records demonstrated she had reported this problem to him and his staff on several occasions during the preceding four years. In addition, Ms. Salatino told Dr. Irwin's staff during a July 2003 examination that she had been having difficulty seeing to drive at night before Dr. Chase operated on her eye. In short, Ms. Salatino, like many of the other patient witnesses, displayed a lack of credibility in that, at the very least, she was unable to accurately recollect material facts regarding her visual symptoms and eye examinations in 2003. Those symptoms and problems were critically important to Dr. Chase's diagnosis and recommendation.

Dr. Chase to Galileo or Copernicus is yet another wholly false argument,[5] and its allegation that Respondent characterized the AGO's ophthalmologist witnesses as incompetent or old fashioned is substantially false. It is true that some of those ophthalmologists testified they would not perform cataract surgery unless the patient had a corrected Snellen vision of 20/40 or worse, which is an obsolete standard discarded by the ophthalmology profession in the early 1990's. Still other doctors testified that their decision to operate depended upon the appearance of the cataract, a surgery criterion that is out of step with modern ophthalmology.[6] And, other than Dr. Chase, only Dr. Morhun employed contrast testing in his diagnostic procedures, and he had adopted it only after the summary suspension of Dr. Chase's license. While Respondent pointed out that these outmoded views weakened aspects of those doctors' opinions regarding the appropriateness of Dr. Chase's cataract surgery recommendations, Respondent did not label them as incompetent or even suggest that, in their overall practices, they were anything other than competent ophthalmologists.

A lack of credibility in the context of a contested legal hearing means only that the witness' testimony should not be credited as persuasive for some reason, such as a failure of recollection, the existence of other, more plausible evidence, or a failure to tell the truth. Every witness who testifies in such a hearing impliedly consents to have their credibility tested on cross examination and, contrary to the AGO's vitriolic attack on Respondent's legal defense, it was not an insult to the AGO's patient witnesses to challenge their credibility. Indeed, it was the AGO

---

[5] Dr. Brown opined that the landmark Beaver Dam ophthalmology study that supported the correctness of Dr. Chase's diagnostic criteria should not be considered because it was not published until 2006, three years after Dr. Chase's license was suspended. To demonstrate the fallacious nature of this reasoning, Respondent argued, by analogy, that if scientific evidence corroborating Galileo's theories was developed after he opined the earth was not the center of the universe, but before his ecclesiastical trial for heretically denying the centrality of the earth, it would still be relevant and admissible at the heresy trial. Transcript of Feb. 8, 2007 Hearing at 29-30.

[6] An important Ophthalmology article written by the researchers conducting the landmark Beaver Dam Study concluded that even innocuous or mild looking cataracts often cause significant visual problems. Respondent's Exhibit 819.

that first raised the importance of the credibility issue in this case, when it emphasized in its opening statement:

> **[C]redibility is going to be an important factor in this case. The stories that the patients have told or the stories that Dr. Chase has told regarding the patients are different. You will have to make a determination to the credibility of the witnesses ....**[7]

The hypocrisy inherent in the AGO's criticism of the Respondent's challenge to the patient's credibility after the AGO itself had made their credibility crucial to the determination of the case is self evident.

### II. The Board Should Admit And Consider In The Sanction Hearing Dr. Chase's Statistical Evidence Regarding His Practice And Evidence Of His Commitment To Quality Patient Care.

In its Sanction Memorandum, the AGO again makes a charade of its earlier promise to the Board that it would not argue that Dr. Chase engaged in a "pattern and practice" of unprofessional conduct, rather than the discrete acts of unprofessional conduct charged in the Amended Superceding Specification of Charges. It argues: "the Board's findings depict conduct that was serious **and not isolated...[it]found in 10 of 11 cases that Respondent had failed to determine the patients need for surgery....**[8] (AGO Sanction Motion at 2.) It makes this argument even more blatantly later in its Motion, falsely stating that the Board had accepted the AGO's arguments and the Board's findings "**chronicl[ed]** unprofessional **conduct consistently engaged in by Respondent over many years,**" and describing Dr. Chase's practice as confronting the Board with "repeated instances of unprofessional conduct." (AGO Sanction Motion at 4.)

---

[7] Transcript of Hearing, at 11 (Sept. 12, 2006).

[8] The Board's decision did not include a finding that Dr. Chase failed to determine the patients' need for elective cataract surgery. To the contrary, the Board expressly found with respect to each of the three patient witnesses who had cataract surgery that the evidence would not support a finding that the surgery was unnecessary.

The AGO initially charged that Dr. Chase with engaging in a pattern and practice of professional misconduct. In Spring 2006, it dropped that allegation and repeatedly promised the Board that it would not argue pattern and practice, and that Dr. Chase should therefore be precluded from introducing evidence of his pattern and practices that would belie the charges of the AGO. The Hearing Panel believed the AGO's promises and over Respondent's objections, excluded Dr. Chase's substantial evidence regarding his methods of practice, including his important and compelling statistical evidence. The AGO, however, repeatedly broke its promises and, as in its Sanction Motion here, argued that its 10 patient witnesses were representative of Dr. Chase's practice of engaging in professional misconduct.[9] The AGO has made pattern and practice arguments at each critical stage of the proceeding,[10] apparently believing that it is safe to do so as long as it does not actually utter the words pattern and practice and so long as the Board persists in refusing to consider Respondent's contrary evidence of Dr. Chase's practice. The AGO's dishonesty in promising one thing and doing another with pattern and practice is similar in nature to the fabricated Landry affidavit, the AGO's attempts to block Dr. Chase's access to third party witnesses, and other acts perpetrated by the AGO in its prosecution of Dr. Chase.

Furthermore, the truth regarding the alleged typicality of the ten patient witnesses hand-picked by the State is that Dr. Chase's statistical evidence demonstrates that the complaints of the 10 patient witnesses are rare and isolated when placed in the context of Dr. Chase's entire practice. Those 10 patients were culled from all patients seen by Dr. Chase during an 11 year period, a period when Dr. Chase had over 80,000 patient encounters, performed approximately

---

[9] The AGO's specification of charges alleged that Dr. Chase had improperly offered surgery to 11 patients. One patient, Donald Olson, testified that, contrary to the AGO's charges, he did not remember Dr. Chase offering cataract surgery to him in 1995. Dr. Chase's medical records indicate that he did not. All charges relating to Donald Olson were rejected by the Board.

[10] It first broke its promise and made this argument at its first opportunity to do so — its opening statement. There, it said "one or two cases, might be explained as an honest disagreement among physicians, but when you have 11 cases of these kinds of discrepancies, the only logical conclusion is that either Dr. Chase did not know what he was doing or he knew exactly what he was doing." Transcript of Sept. 11, 2006 hearing at 9.

3,000 cataract surgeries and diagnosed but did not operate on nearly 6,000 cataract patients. In the three and one-half years preceding the July 2003, suspension of his license, Dr. Chase diagnosed and operated on 1125 cataracts, offered cataract surgery to approximately 200 patients who declined to have it, and diagnosed 1632 cataracts in patients to whom he did not offer cataract surgery. Placing those 10 patients among the 80,000 patient encounters Dr. Chase had during the 11 year period from which they were culled, or even placing them among the approximately 10,000 cataract patients Dr. Chase treated during that same period, demonstrates the highly infrequent and isolated nature of their complaints.

The State has placed squarely into evidence the rarity or and/or typicality of the 10 patients' experiences with Dr. Chase, and Respondent's statistical evidence, as well as testimonial evidence regarding his standard practices, previously excluded by the Hearing Panel is clearly relevant to that issue and should be admitted and considered at the sanction hearing. In addition, the AGO maintains that Dr. Chase should lose his license to practice because he has a callous disregard for the care and well being of his patients, which the AGO argues is evidenced by Dr. Chase's practices with its 10 patient witnesses and the defense he mounted against the AGO's spurious charges. Accordingly, Dr. Chase should be permitted to introduce evidence at the sanction hearing demonstrating the compassion and commitment Dr. Chase had to delivering quality patient care. That evidence includes: (1) his written policy of never denying care to a patients who could not pay; (2) providing free care to a multitude of destitute patients, treating inmates in state prisons when no other ophthalmologist would do so and, in some instances, actually paying for an economically deprived patient to see another eye specialist; (3) investing an inordinate amount of money on staff, staff education and training (including his own) and ophthalmology equipment to ensure that his patients had the finest care; and (4) testimony from

his wife and informed consent nurses regarding his complete commitment to patient care to the exclusion of all other activities and interests.

At the merits hearing, the panel commented, in preventing Dr. Chase from presenting such evidence at that time, that it was evidence that may very well be relevant in the sanction hearing. In fact, it is now relevant, and Dr. Chase should be permitted to present witnesses and documentary evidence to address these issues.

## III. The Board's Finding that Dr. Chase's Testimony Was Not Credible With Respect To One Aspect of His Four Days Of Testimony Hardly Supports The Draconian Sanction of License Suspension

The AGO contends that the Board's finding that Dr. Chase's description of his practice in discussing second opinions with four of the 11 patients was not credible, and this finding standing alone requires permanent revocation of Dr. Chase's license to practice medicine. The AGO erroneously equates a finding that certain testimony is not credible with a finding that the witness lacked candor when, in fact, testimony may be found not credible on a number of grounds not implicating candor, e.g., the fact finder could conclude the witness had a faulty recollection, the testimony might be contradicted by more witnesses with a superior recollection, the testimony might be less plausible than other alternative testimony, etc.

Here, each of the four patient witnesses testified that they had a specific recollection of what was said by Dr. Chase with respect to the second opinions. Dr. Chase, of course, was unable to specifically recall what he said regarding the topic with respect to the particular patients because he had interacted with approximately 10,000 such cataract patients during the relevant period. He therefore testified to his purpose and practice with respect to discussing second opinions, and it was contradicted by the testimony provided by the four patients based upon their specific recollections. Given the competing versions of what was said, and that the four patients stated they had a specific recollection of the exchange while Dr. Chase admittedly

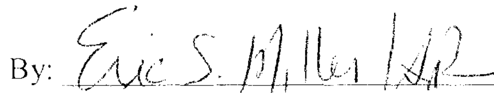
did not, the Board found the version of the witnesses to be credible and Dr. Chase's version to be not credible. That finding does not depend upon a lack of candor and, indeed, neither the Hearing Panel nor the Board made any finding that Dr. Chase's testimony lacked candor.

## IV. Conclusion

For all of the above stated reasons, the AGO's Sanction Motion should be rejected.

Dated at Burlington, Vermont, this 5th 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

H:\wpdocs\C\ChaseDavidMD\MedPrBd\Pleadings\Opposition to State's Memo re Sanction.doc