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**Vermont Board of
Medical Practice**

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 148-0803
	)	MPC 126-0803	MPC 209-1003
	)	MPC 90-0703	MPC 106-0803
	)	MPC 89-0703	MPC 87-0703
	)	MPC 122-0803	
David S. Chase)		
)		
Respondent)		

**STATE OF VERMONT'S MEMORANDUM IN SUPPORT OF REQUEST TO
AMEND REPORT OF HEARING COMMITTEE**

BACKGROUND

On July 16, 2007, The Hearing Committee ("Committee") appointed by the Vermont Board of Medical Practice ("Board") issued its report (cited to as "Rep.") in the above-captioned cases pursuant to 26 V.S.A. §1355(b). Of the eleven individual cases heard by the Committee, the Committee found that Respondent David S. Chase ("Respondent") had engaged in unprofessional conduct in the care of patients in ten of the cases. The Committee concluded Respondent had engaged in seventeen counts of unprofessional conduct.

The Committee concluded that Respondent's conduct with respect to the ten patients constituted a gross failure to use on a particular occasion that degree of care, skill, and proficiency which is commonly exercised by the ordinary, skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions under 26 V.S.A. §1354(a)(22). The Committee also concluded

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with respect to seven of the same ten patients that Respondent's conduct constituted both a performance of unacceptable patient care and a failure to conform to the essential standards of acceptable and prevailing practice, thereby constituting a failure to practice competently under 26 V.S.A. §1354(b).¹

The Committee also concluded with regard to an additional fifty-two counts that Respondent's conduct, while constituting unprofessional conduct under 26 V.S.A. §1354(a)(22) and, in some cases, under 26 V.S.A. §1354(b), did not constitute immoral, unprofessional or dishonest conduct under 26 V.S.A. §1398 or unfitness to practice medicine in violation of 26 V.S.A. §1354(a)(7).² The Committee did not, however, dismiss these fifty-two counts. Instead, the Committee reasoned in each of the ten cases where unprofessional conduct was found that "[t]he several statutes that the State has charged Respondent with having violated set forth different categories of unprofessional conduct and serve different functions." See, e.g., Rep., Conclusions of Law, ¶¶ 1, 2, 3. With respect to the allegations under 26 V.S.A. §1398 and 26 V.S.A. §1354(a)(7), the Committee concluded that Respondent's conduct is best addressed under 26 V.S.A. §1354(a)(22), and, where applicable, failure to practice competently under 26 V.S.A. §1354(b). See, e.g., Rep., Conclusions of Law, ¶¶ 1, 2, 3, 7, 8, and 9.

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¹ The State did not allege violations of 26 V.S.A. §1354(b) with respect to those patients whose encounters with Respondent occurred prior to the effective date of that statute.

² Though the Amended Specification of Charges and the Report of the Hearing Committee both refer to "dishonest conduct" the statute actually says "dishonorable" conduct.

Although the Committee determined Respondent engaged in unprofessional conduct and found material entries in the patients' records to be untrue, the Committee did not, however, conclude that Respondent willfully made or filed a false report or records in his practice as a physician in violation of 26 V.S.A. §1354(a)(8). Instead, the Committee concluded that what it described as the "inaccuracies, misunderstandings, or overstatements" present in the patients' medical records were not "deliberate falsifications." See, e.g., Rec., Conclusions of Law, ¶3.

The Committee also concluded that with respect to the three patients who underwent surgery -- Judith Salatino (Patient#2), Susan Lang (Patient #4), and Margaret McGowan (Patient #11) -- that the evidence did not support the State's allegation that the surgery was "unnecessary." Rec., Conclusions of Law, ¶20 (Patient #2), ¶33 (Patient #4), ¶78 (Patient #11).

ARGUMENT

The State contends that, for the most part, the Committee's findings of fact are supported by the evidence and that the Committee's conclusions regarding unprofessional conduct under 26 V.S.A. §1354(a)(22), and, where applicable, under 26 V.S.A. §1354(b), are reasonably supported by the findings.

However, the State respectfully takes exception to the Committee's conclusion that the false entries present in the patients' medical records were only inaccuracies, misunderstandings, or overstatements. The State contends that the Board can reasonably conclude that the false material statements in the patients'

records were willfully made and filed false reports or records done in violation of 26 V.S.A. §1354(a)(8).

Further, the State also respectfully proposes that the Board can, based on the Committee's findings, conclude that in the same ten cases where unprofessional conduct was determined to exist, that Respondent also engaged in conduct that constituted immoral and/or dishonest conduct under 26 V.S.A. §1398. The findings of the Committee, when viewed *in totum*, reasonably support the conclusion that Respondent engaged in acts of unprofessional conduct in addition to that determined by the Committee.

Finally, the State respectfully submits that the Committee erred in concluding that the evidence did not support the State's allegations that the surgeries performed on Judith Salatino, Margaret McGowan, and Susan Lang were unnecessary. The findings of the Committee clearly demonstrate that Respondent performed these surgeries without adhering to the Preferred Practice Patterns ("PPP") of the American Academy of Ophthalmology ("AAO"). The Committee's conclusions with respect to the evidence of unnecessary surgery are inconsistent with its own findings and should therefore be amended³

³ Because the Committee is recommending that Respondent be found to have engaged in seventeen acts of unprofessional conduct in ten of the eleven cases, the State is limiting the issues to addressed in its request to amend. Such limitation by the State is not a waiver of other issues or arguments presented in prior submissions and the State encourages the Board to consider the prior submissions of the State in making its final determination in this case.

I. THE FINDINGS OF THE COMMITTEE SUPPORT THE CONCLUSION THAT THE FALSE STATEMENTS IN THE PATIENTS' RECORDS WERE WILLFULLY MADE.

In each of the ten cases where the Committee determined Respondent engaged in unprofessional conduct, the Committee also found that each of the patients' records contained what the Committee described as "inaccuracies, misunderstandings, or overstatements" and concluded that these entries were "deliberate falsifications."⁴ It is not necessary, however, for the State to prove and for the Board to find that a physician made "deliberate falsifications" in order for there to be a violation of 26 V.S.A. §1354(b). The term "deliberate falsifications" is one that has been created as a standard in this case by the Committee. The only logical and reasonable conclusion that can be drawn from the Committee's own findings is that these entries were willfully made. These same false entries were consistently made in each of the relevant patients' files and the entries dealt with substantive criteria for determining the need for cataract surgery under the Preferred Practice Patterns of the AAO.

It may be that the Committee was reluctant to find that Respondent acted "willfully" given the State's insistence throughout the proceedings that it need not prove motive. A willful act and the possible motive behind the willful act are two distinctly different legal concepts when determining whether a physician engaged in unprofessional conduct in the licensing context. To prove that Respondent acted

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⁴ Rec., *Conclusions of Law*, ¶¶ 3, 15, 27, 41, 56, 64, 74, 83, 91, 103.

willfully, the State need only prove that Respondent's conduct was intentional and not merely in error.

The term "willful [y]" is a "word of many meanings, its construction often being influenced by its context." *In re Robert C. Flanagan*, 690 A.2d 856 (Conn. 1997) (citing *Screws v. United States*, 325 U.S. 91, 101 (1945)). In the case of *Kerbins v. Wyoming State Board of Medicine*, 992 P.2d 1056 (1999) the Wyoming Supreme Court reviewed the actions of the State Board of Medicine revoking a physician's license for, among other things, willful and consistent utilization of medical services that were inappropriate or unnecessary. In response to an argument by the physician that his actions had not constituted "willful misconduct", the court discussed the difference between the term "willful misconduct" in the criminal context as generally meaning an act done with a bad purpose, and in the civil context as often denoting an act which is intentional, or knowing, or a voluntary act as distinguished from accidental.

The court in *Kerbins* also noted that in the professional licensing context the Board was not required to prove patient injury to establish willful acts, nor should the term willful be defined as in a tort action. The court ruled that it would have been inappropriate for the Board to apply definitions from either a criminal or tort context. In the professional licensing context the question on the issue of "willful" was whether the evidence establishes intentional, or knowing, or voluntary acts as distinguished from accidental. The Wyoming Supreme Court affirmed the Board's conclusion that the physician's records, along with the opinions of second opinion

physicians, did not justify the surgeries he had performed and thus his conduct exhibited willful and consistent utilization of medical services that were inappropriate and unnecessary.

In *Commonwealth, State Board of Nurse Examiners v. Rafferty*, 499 A.2d 289 (Penn. 1985) the Pennsylvania Supreme Court affirmed the revocation of a nurse's license for failing to undertake procedures she was qualified to perform. In discussing whether the nurse's actions were a "willful" violation of the applicable nursing regulations, the Supreme Court of Pennsylvania ruled that "willful" meant an intentional, designed act and one without justifiable excuse, and that the Board did not need to prove a specific intent to violate the regulations in order to establish a willful violation. The court ruled that as patient care is the pre-eminent interest of the Board an interpretation of the term "willful" which incorporates an element of the nurse's motivation would effectively subordinate the interest in patient care to that of policing a nurse's conduct. *Id.* at 292. (*cf. Sande v. State*, 440 N.W.2d 264(N.Dak. 1989)(failure to renew nursing license not a willful *and* repeated violation); *Kansas State Board of Nursing v. Burkman*, 531 P.2d 122 (Ks. 1975)(practicing with a lapsed license not a willful or intentional violation)).

When the findings of the Committee in this case are viewed as a whole, there can be no doubt that the Respondent intentionally made (or caused to be made) false entries in the patients' records. With respect to the false entries in the patients' records the Committee made the following findings:

- In nine of the ten patients' records there was an entry that the patient had been given a second opinion when in fact no second opinion had been given.⁵
- Nine of the ten patients' records contain a diagnosis of dense cataracts that in each case the Committee found to be contradicted by the examinations of other physicians. For two of these nine patients – Susan Lang (Pt. #4) and Margaret McGowan (Pt. #11) - the diagnosis of dense cataracts was recorded for more than one appointment.⁶ The tenth patient was diagnosed with glaucoma – a diagnosis that was contradicted by another physician.⁷

⁵ Rec., Findings of Fact, ¶¶ 138, (Pt. #1), 170 (Pt. #2), 215 (Pt. #4), 245 (Pt. #5), 286 (Pt. #8), 349 (Pt. #11), 363 (Pt. #12), 383 (Pt. #13), 405 (Pt. #14)

⁶ Rec., Findings of Fact, ¶¶ 129, 130 (Pt. #1), 164, 188 (Pt. #2), 197, 206, 211, 224 ((Pt. #4), 236, 241, 252 (Pt. #5), 279, 301 (Pt. #8), 330, 349 (Pt. #11), 261, 373 (Pt. #12), 379, 393 (Pt. #13), 401, 413, 416 (Pt. #14).

⁷ Rec., Findings of Fact, ¶¶ 324, 325 (Pt. 10).

- In eight of the ten patients' records there are symptoms recorded (sometimes by Respondent himself) indicating visual problems that the patients never reported to Respondent or anyone in his office. The recorded symptoms indicated some activity (usually driving at night) that was being hampered by compromised vision.⁸
- In five of the ten patients' charts there are entries in Respondent's own handwriting stating that the patient wanted cataracts removed when the patient never stated and, in fact, did not want cataracts removed.⁹

As fact finders, the Board is free to draw rational inferences from the evidence in the record. See *State v. Durenleau*, 163 Vt. 8, 12, 652 A.2d 981, 983 (1994) ("In assessing circumstantial evidence, the fact-finder may draw rational inferences to determine whether disputed ultimate facts occurred."); *State v. Paradis*, 146 Vt. 345, 347, 503 A.2d 132, 133 (1985) ("[P]roof of facts includes reasonable inferences properly drawn therefrom."). Based on the findings summarized above, the rational inference that can be drawn from the evidence is

⁸ *Rec., Findings of Fact*, ¶¶ 162, 164 (Pt. #2—"unable to see clearly to drive in glare at night"), 209 (Pt. #4—"can't see to drive safely at night due to glare from cataracts"), 240 (Pt. #5—"can't see to drive at night in glare due to cataracts"), 276 (Pt.#8—"bothered by glare when driving on wet roads at night"). 314, 316 (Pt. #10—"bothered by lights and was fearful when driving at night"), 332, 333, 335 (Pt. #11—"couldn't see to drive safely at night"), 365,369 (Pt. #12—"not seeing clearly due to cataracts, interferes with life"), 406, 409 (Pt. #14—"couldn't see to drive safely at night due to cataracts").

⁹ *Rec., Findings of Fact*, ¶¶ 287 (Pt. #8), 333, 335 (Pt. #11), 365, 368 (Pt. #12), 384 (Pt. #13), 496, 409 (Pt. #14).

that the consistent false statements recorded in the patients' records were willfully made by the Respondent.

Supporting this inference is the fact that the false entries in the patients' records pertain to substantive criteria for determining when cataract surgery is indicated and wrongly creates the impression that a second opinion was given justifying such surgery. In this case, the Preferred Practice Patterns of the American Academy of Ophthalmology¹⁰ has been stipulated to by the parties as the governing standard for patient treatment for cataract surgery. A written notation in a patient's file, by an ophthalmologist specializing in cataract surgery, that the patient "wants cataracts removed," or is suffering symptoms compromising their lifestyle (e.g. driving), or has a dense cataract, or has been given a "second opinion," are not passing or casual comments to be blithely made. They are substantive criteria under the PPP and are material considerations with regard to the decision by the physician and the patient in determining whether to have eye surgery performed. Given the critical importance of these entries with regard to the decision to have cataract surgery, the false entries in the patients' records should not be found to be merely "inaccuracies," or an "overstatement," or a "misunderstanding," and thus an "erroneous conclusion" by the Respondent. The only findings and conclusion that should be made from the evidence is that the false entries were made willfully as that term is used in 26 V.S.A. §1354(a)(8).

¹⁰ The AAO 1996 and 2001 editions were deemed applicable to the dates of treatment.

II. THE FINDINGS OF THE COMMITTEE SUPPORT THE CONCLUSION THAT RESPONDENT'S CONDUCT WAS DISHONEST AND IMMORAL AS WELL AS UNPROFESSIONAL.

It is certainly true, as the Committee noted in all ten cases, that "[t]he several statutes that the State has charged Respondent with having violated set forth different categories of unprofessional conduct and serve different functions." However, it does not follow that the "different categories" and "different functions" are mutually exclusive. The same conduct the Committee determined to be unprofessional conduct under 26 V.S.A. §1354(a)(22), and, where applicable, failure to practice competently under 26 V.S.A. §1354(b), should also be determined to be dishonest and/or immoral conduct under 26 V.S.A. §1398.

The State has argued above in Section I that the findings support a rational inference by the Board that Respondent willfully made false records with respect to ten patients in violation of 26 V.S.A. §1354(a)(8). The Board can also conclude, based on the same findings, that Respondent engaged in dishonest or immoral conduct under 26 V.S.A. §1398 based on the Respondent intentionally making misrepresentations regarding criteria for cataract surgery and the existence of a second opinion.

Other findings by the Committee also support the inference that Respondent was not honest with his patients, and the findings allow the Board to conclude that Respondent engaged in dishonest or immoral conduct under 26 V.S.A. §1398. Specifically, the Committee found that with eight of the ten patients, Respondent actively discouraged the patients from obtaining a second

opinion and he represented to these eight patients that he possessed a special expertise in the area of cataract surgery.¹¹ In these eight cases, the Committee found Respondent's explanations of his conversations with his patients regarding a second opinion not credible, and it also found Respondent's representations with respect to a second opinion to these eight patients "misleading, confusing, and improper"¹² or "confusing and improper."¹³

The Committee's own findings clearly support the conclusion that Respondent's representations regarding a second opinion were dishonest and/or immoral. It is unreasonable to conclude that an experienced physician who was found to have consistently discouraged patients from seeking a second opinion and who led patients to believe he possessed some special expertise was not dishonest conduct under 26 V.S.A. §1398. Indeed, the fact that the Committee found the Respondent's sworn testimony with respect to the second-opinion conversations to be not credible supports the conclusion that Respondent *intended* to discourage patients from seeking a second opinion. The Board should conclude that Respondent engaged in immoral and/or dishonest conduct in his falsification of records and his representations to patients regarding second opinions in violation of 26 V.S.A. §1398.

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¹¹ Rec., Findings of Fact, ¶¶ 131 (Pt. #1), 170 (Pt. #2), 214 (Pt. #4), 317 (Pt. #10), 334 (Pt. #11), 262 (Pt. #12), 382 (Pt. #13), 404 (Pt. #14).

¹² Rec., Findings of Fact, ¶¶ 138 (Pt. #1), 170 (Pt. #2), 215 (Pt. #4), 363 (Pt. #12), 383 (Pt. #13), 405 (Pt. #14).

¹³ Rec., Findings of Fact, ¶¶ 317 (Pt. #10), 334 (Pt. #11).

III. THE COMMITTEE'S FINDINGS SUPPORT THE CONCLUSION THAT THE SURGERIES PERFORMED ON JUDITH SALATINO (PATIENT #2), SUSAN LANG (PATIENT #4), AND MARGARET MCGOWAN (PATIENT #11) WERE UNNECESSARY.

Of the eleven patients that were the subjects of the hearing, three actually underwent cataract surgery—Judith Salatino (Pt. #2), Susan Lang (Pt. #4), and Margaret McGowan (Pt. #11). The State charged in each of these three cases that Respondent engaged in dishonest, unprofessional, or immoral conduct in violation of 26 V.S.A. §1398 by performing unnecessary cataract extraction. Amended Superceding Specification of Charges, Counts XX, XXXIII, and LXXXVI. The Committee concluded with respect to these counts that the Respondent did not engage in unprofessional conduct because “the evidence does not support the allegation that the cataract extraction was unnecessary.” Rec. Conclusions of Law, ¶¶ 20, 33, and 78. The Committee’s conclusions with respect to these counts are not supported by the findings and these Counts should be amended.

The Committee found that the Preferred Practice Patterns of the American Academy of Ophthalmology provides guidance for the pattern of practice regarding treatment and care of cataracts. Rec., Findings of Fact, ¶11. Using the PPP, the Committee found that cataract surgery is appropriate when the patient’s visual function no longer meets the patient’s needs and cataract surgery offers a reasonably likelihood of improvement. Rec., Findings of Fact, ¶66. The Committee further found that cataract surgery should not be performed where the patient does not desire surgery, where glasses or visual aids provide vision that meets the patient’s needs, where surgery will not improve visual function, and

where the patient's quality of life is not compromised by his or her vision. Id., ¶68. In order to determine if cataract surgery is appropriate there should be a thorough collaborative process between the physician and the patient. Id., ¶73.

With respect to each of the patients in this consolidated matter who underwent surgery by the Respondent, the Committee found that vision was meeting the patient's needs and the patient's life style was not compromised by vision.¹⁴ The Committee also found that Respondent did not engage in the thorough collaborative process with the three surgical patients described by the Committee in its findings.¹⁵ The Committee's findings demonstrate that the surgery performed on the three surgical patients was contraindicated by the standards of the profession --- standards the Respondent stipulated to as controlling. The Respondent therefore knew that the surgery on the three surgical patients was contraindicated. Respondent's performance of cataract extraction in contravention of known standards of the profession was unprofessional, dishonest and immoral within the meaning of 26 V.S.A. §1398.

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¹⁴ Rec., *Findings of Fact*, ¶¶ 162 (Pt. #2), 202, 209 (Pt. #4), 332, 333 (Pt. #11).

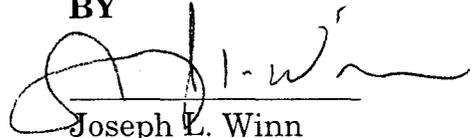
¹⁵ Rec., *Findings of Fact*, ¶¶ 168 (Pt. #2), 200, 204, 213 (Pt. #2), 336 (Pt. #11).

CONCLUSION

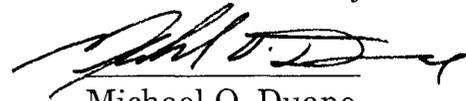
For all the reasons argued above and in previous submissions, the State's Request to Amend Report of Hearing Committee should be **GRANTED**, in whole or in part.

Dated at Montpelier, Vermont this 7th day of September, 2007.

**WILLIAM H. SORRELL
ATTORNEY GENERAL
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BY**



Joseph L. Winn
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