

**Before the  
New Hampshire Board of Medicine  
Concord, New Hampshire 03301**

In the Matter of:  
Christopher Clough, P.A.  
License No.: 0441

Docket #: 14-03

and

John J. Schermerhorn, M.D.  
License No.: 5682  
Docket No. 14-03

**PREHEARING CONFERENCE ORDER**

A prehearing conference was held on August 28, 2014 in the above captioned matter. Attending the hearing were counsel for the Respondents: Attorney John Durkin, representing Mr. Christopher Clough; and attorneys Cinde Warmington and William Christi, representing Dr. John Schermerhorn. Attorneys Matthew Mavrogeorge and Michelle Heaton of the Administrative Prosecution Unit ("APU"), acting as hearing counsel, were also in attendance. The presiding officer, Edmund J. Waters, Jr., public Board member conducted the hearing. Board Counsel, Attorney Lynmarie Cusack of the Attorney General's Office and Board Executive Director Sarah Blodgett also attended.

The prehearing conference was convened pursuant to N.H. Admin. R. 206.06 and procedural order dated August 18, 2014. At the hearing, the presiding officer addressed a number of issues including presentation of evidence, number of witnesses, potential settlement, recusal and length of hearing. The bulk of the hearing, however, focused on the Parties' request for continuance and to a lesser degree the Respondents' Motion for Discovery.

Each of the issues discussed will be addressed herein. At the outset it should be noted that the presiding officer did, however, conditionally grant the request for a continuance prior to the adjournment of the August 28, 2014 hearing. A new hearing date is preliminarily set for

November 5, 2014 commencing at 9:00 a.m. The second hearing date is preliminarily set for November 7, 2014 at 9:00 a.m.

I. **Matters Addressed Pursuant to RSA 206.06 (b) and the August 18, 2014 Order**

The Parties indicated that they had engaged in preliminary settlement discussions, although, settlement seems unlikely. APU counsel indicated that they intended to call Dr. Fanciullo as a witness in their case in chief and would also call both Respondents. However, it was also indicated that the parties would attempt to streamline the testimony of the Respondents by allowing Respondents' counsel to complete a direct examination and the APU to cross-examine, although the evidence presented would still be deemed to be part of the APU case in chief. Respondents indicated that in addition to testimony from the Respondents they would also be calling the seven (7) patients whose records were reviewed by Dr. Fanciullo, their own expert (although, at present, no such expert had been retained), and the complainant. Respondent Clough would also be calling two (2) individuals to provide testimony regarding billing records and electronic medical records ("EMR").

The presiding officer asked the parties to stipulate to as much "patient" testimony as possible, as the type of testimony from the patients related to their satisfaction with Mr. Clough's care has little to no relevance or materiality to the issues of concern addressed in the August 11, 2014 Notice of Hearing. Additionally, after some discussion related to discovery issues (see below), the Respondents indicated that Dr. Greenspan, the complainant, would not be called.

Respondents stated they believed the hearing would take upwards of ten (10) days. Upon further inquiry it was revealed that the direct examination of each Respondent could take two hours for each patient. Ten to fourteen hours of direct testimony from both Respondents equates to almost 3 days of testimony simply on the direct exam of these two witnesses. While the Board will not tell the parties how to try their respective cases, it has the discretion to manage the docket. As such, the Board strongly encourages the parties to work together to

stipulate to as many facts as possible so as to avoid a protracted hearing. The Board will not prevent a full-disclosure of the facts necessary for a full hearing, but it does possess the discretion to determine the scope of testimony. *See e.g. In Re Sprague*, 132 N.H. 250, 260 (1990).

With this in mind, and the Board's desire to efficiently work through the evidence, the Parties are instructed to come up with an Agreed Stipulation as to witness testimony and present that to the Board at a prehearing conference that will be held on October 22, 2014. Likewise, the parties are also instructed to, as soon as possible, but no later than September 12, 2014 provide the Board with additional days that they are available to continue with the hearing between the period of November 6, 2014 and November 21, 2014. Once those days are submitted, the Board will endeavor to schedule additional days during November for subsequent hearing days.

The presiding officer also addressed any potential recusal issues. It was noted that Physician Board Member, Dr. Robert Andelman, had previously been in practice with Dr. Schermerhorn, decades ago, and had also provided some treatment to Dr. Schermerhorn's family members. The Board did not believe a conflict necessitating recusal existed, but allowed the parties an opportunity to object. Neither Respondents nor the APU stated a concern, nor objected to Dr. Andelman's participation.

## **II. Motions**

The more controversial portion of the hearing and that which predominated discussion related to issues surrounding the production of patient records and the Parties concerns/allegations that they 1) were not working from the same patient records as each other; 2) were not working from the same patient records as those provided to Dr. Fanciullo, the investigative expert; and 3) were not working from a complete set of patient records for the patients selected as the representative class. It was these issues regarding the common set of

medical records that prompted the August 22, 2014 filing of a Partially Assented-To Joint Expedited Motion for Continuance and Partial Reconsideration of the Board's Notice of Hearing.

The Board stresses that as part of the investigation pursuant to RSA 329:18 it relied on Respondents' practice to properly comply with a subpoena duces tecum, dated September 24, 2013, regarding the patient records of 19 individuals. In response to that subpoena, after an extension of time to comply, on October 21, 2013 PainCare, through a Luanne F. Zaida, represented to the Board that "all medical (electronic medical records) records" had been provided by CD to the Board's investigator. Ms. Zaida also represented that the "billing records which you requested had to be printed on paper" and were also enclosed. Finally, she indicated that- "there are no records for two of the people on [the] list" but then explained "[t]here is no patient with that exact spelling on the first name, and there are two patients with the same name on the second one."

This is stressed because Respondents seem to make a claim that they are somehow prejudiced by the fact that the records their employer filed with the Board now do not seem to be complete. The Board finds this claim not only disingenuous but specious. The Board had no control over producing the records originally provided by PainCare. Respondents had every opportunity during the open investigative period to supplement patient records – but chose to ignore what they now claim is missing until the eleventh hour. It is also alarming that Respondents now claim that there are "additional" records that were not produced, even in light of the fact that a representation was made that "all" records were turned over.

As to the claim that there exists much difficulty because the Parties were not able to work off of a "common set of documents" and that the Parties were "not provided with what Dr. Fanciullo was provided" the Board finds these two arguments as baseless as the first. The Parties were provided the documents that were originally sent on disc from PainCare. Dr.

Fanciullo likewise was provided with a hard copy of what was provided from PainCare.<sup>1</sup> The hard copy sent to Dr. Fanciullo included many pages that had numbers inserted by a staff employee of the Board, as well as pages that had no numbers. The Confidential Memorandum, dated August 25, 2014, from the Board's Executive Director explained how records were managed and provided. While the parties certainly faced difficulty given the apparent difference in the number of pages associated with the various productions, they have no basis in fact to allege they had not been provided what Dr. Fanciullo had been provided. Any statement to the contrary rings hollow. At the prehearing conference the parties were offered the opportunity to review the box of documents that was sent to and then returned from Dr. Fanciullo so they can compare the production made to him and that which is on the disc hand delivered on August 25, 2014. That opportunity still exists, and the Parties may make arrangements with Penny Taylor, Board Administrator to view the records during normal business hours.

Of concern is the request by one of Respondents' counsel to supplement the patient records that were already provided with new documents that allegedly existed but were never turned over in response to the subpoena. If such records exist for any of the seven patients included in the Fanciullo report, those documents must be turned over to the Board, and counsel for the APU no later than September 16, 2014. They must be separately identified with Bates stamp numbers, along with a reference (identifier) to the fact that they are a subsequent production. Whether that identifier is a date or some other prefix is up to the Respondents' choosing.

In the motion to continue, Respondents raised several reasons for their request for a 90-day continuance, including the fact that the Board of Medicine's (Board) Notice of Hearing provided twenty-three days' notice. Both the Board's Practice Act and administrative rules require at least 15 days' written notice. This requirement has been complied with. While

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<sup>1</sup> That hard copy apparently did not have 28 pages of what appears to be workers compensation documentation on one patient. Dr. Fanciullo was subsequently forwarded those pages.

Respondents make an argument that due process requires more; due process only requires that which is reasonable. See RSA 541-A:31. While Respondents may have desired more time, given the complexity and severity of the case, the notice was lawful and not improper.

Additionally, Respondents' argument in their motion regarding their brief acquaintance with the patients at issue is unpersuasive. Both Respondents Clough and Schermerhorn received a copy of the complaint, including the names of the patients at issue, in September of 2013. They have both had access and opportunity to review the relevant records beginning in the fall of 2013. Indeed, Respondent Clough states he reviewed these records prior to drafting his response to the complaint. In his November 26, 2013 letter to the Board, he reported the following: "Obviously Dr. Greenspan did not provide you with copies of each patients' chart in conjunction with his complaint. I have had a chance to review those charts and am satisfied that all of my patients have received appropriate medical care<sup>2</sup> . . . It seems from my review of the charts that Dr. Greenspan has chosen to cherry pick a few bits of information from each patient."

While Respondent Schermerhorn may not have chosen to review each record before responding to the Board, it is clear that he had the opportunity to do so. In his November 25, 2013 letter to the Board, Respondent Schermerhorn reported the following: "I have not reviewed each of the records listed in the complaint (sic) in detail. In some cases, a review is not necessary as I personally observed the procedure identified in the complaint and can personally assure the Board they were performed appropriately."

Respondents' claims that fundamental fairness and due process would be denied if a continuance is not granted are not substantiated by the arguments made both in the motion and at the prehearing. In evaluating whether a continuance is warranted the presiding officer reviewed whether any injury to the moving party outweighs any detriment to be suffered by any

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<sup>2</sup> Respondent Clough should have also reviewed the records submitted in response to the subpoena in an effort to ensure the statement that "all records" were turned over. If he legitimately believed some records were missing, this was the opportunity he had to ensure completeness of the documentary evidence.

other party or the public interest responsibilities of the Board. See Med 203.02. In weighing this balance the presiding officer recognized the significant interest in Respondents' property rights and weighed it against the significant concern for patient and public health and safety. See e.g. *Appeal of Plantier*, 126 N.H. 500, 507-08 (1985). The Board's primary responsibility and obligation is to protect the public by ensuring high quality medical care. See RSA 329:1-aa.; see also *Plantier*, at 508. The presiding officer did not believe that the alleged fairness issue over documents outweighed the serious concerns of the public, but where the Respondents have agreed to enter practice restrictions, it was determined that from a logistical and efficiency perspective that a 60 day continuance would be prudent.

As such, the hearing in this matter will occur on November 5, 2014 at 9:00 a.m. and continue on November 7, 2014 at 9:00 a.m., and continue thereafter from time to time, as needed in November. As stated above, the Parties are to provide the Board with mutually agreeable dates that testimony will continue. The Board will issue a further notice when an appropriate schedule is developed.

The continuance is conditioned on the following practice restrictions:

- A. Dr. Schermerhorn will not provide supervision to Mr. Clough or any other PA associated, affiliated or employed with PainCare, Pinewood Medical or its affiliates.
- B. Christopher Clough, P.A., will have all procedures preapproved by his new Registered Supervisory Physician (RSP) of record, or a newly named Alternate Registered Supervisory Physician (ARSP). Preapproval by the RSP or ARSP shall consist of the following:
  - a. Review of the patient's history and physical, including verification of all physical findings;
  - b. Review of any and all diagnostic imaging and pertinent laboratory data;
  - c. Review of a documented proposed plan of action which must include the following:

- i. The specific block to be performed;
  - ii. The intended position of the needle;
  - iii. The potential risks and complications of the procedure;
  - iv. The anticipated outcome of the procedure;
  - v. The use and retention of imaging during the procedure;
  - vi. The type and amount of local anesthetic and/or corticosteroid, etc. to be used; and
  - vii. The use of contrast during the procedure.
- d. A telephonic or face to face consultation with Mr. Clough of all of the above referenced issues;
  - e. Documentation by the RSP or the ARSP of the above, which shall be included in the patient's medical record.

C. All prescriptions written by Christopher Clough will be reviewed, in writing, post issuance by the RSP or ARSP.

D. Any additional changes to the RSP or ARSP must be approved by the Board.<sup>3</sup>

Additionally, the Board's investigator will do random spot checks of medical records to ensure compliance with the above conditions.

Respondents also filed a motion for discovery. For the reasons articulated in the APU objection and as stated by the APU at the prehearing conference, the request for discovery is denied. Moreover, RSA 329:18 contemplates that an expert may be obtained to assist with any investigator. Dr. Fanciullo's assistance was requested by the medical review subcommittee. The engagement of his services was simply to investigate possible misconduct/unprofessional practice. A deposition to further determine opinions held by Dr. Fanciullo is unnecessary as his opinions have been adequately disclosed to Respondents and the due process requirements

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<sup>3</sup> See Med 602.04. The Respondent must also comply with the Board's practice act and administrative rules, including but not limited to Med 603.01.



binding on administrative proceedings are quite different from those binding on the judicial process. See *Plantier*, 126 N.H. at 512; see also *Appeal of Morgan*, 144 N.H. 44, 55 (1999) (when considering propriety of investigation – only the conduct, not motivation is relevant and discretion exercised properly in denying opportunity to depose investigator). Additionally, counsel for APU represented at the prehearing conference that Respondents have been provided with a *curriculum vitae* of Dr. Fanciullo.

Given that neither side believes the testimony of Dr. Greenspan is warranted, the request for discovery from the APU relative to Dr. Greenspan is moot.

Finally, Respondents asked for a continuance so that they could have the opportunity to obtain their own expert. Given that the continuance has been granted, the Board need not address this request. The Board understands that the Respondents will likely present testimony of their own expert. Any such expert opinions must be turned over to counsel for the APU no later than October 20, 2014.

It should be noted, however, there is no due process violation by not providing time for Respondents to engage their own expert. The Board is made up of members with specialized knowledge and expertise. They are well equipped to understand medical testimony presented and to review medical records as exhibits. *Appeal of Boulard*, 165 N.H. 300, 305 (2013) (expert not needed where the standard of care to be applied is well within the competence of the board). As such, if Respondents desire to engage their own expert, they may do so, but in doing so, they must understand that the testimony may be limited by the Board.

BY ORDER OF THE PRESIDING OFFICER\*/

Dated: 9/4/2014

  
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Penny Taylor, Administrator  
Authorized Representative of the  
New Hampshire Board of Medicine

\*/Amy Feitelson, M.D. and Lou Rosenthal, M.D., Board Members, recused.