

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE BOARD OF MEDICAL PRACTICE

In the Matter of the Medical License of  
M.L., M.D.

**PREHEARING ORDER**

A telephone conference was held in this matter on November 23, 2004, to discuss scheduling and Respondent's Motion to Compel Discovery. Daniel L. Scott, Larson King LLP, 2800 Wells Fargo Place, 30 E. 7<sup>th</sup> Street, St. Paul, MN 55101, appeared for Respondent M.L., M.D. Peter Krieser, Assistant Attorney General, Suite 1400, 445 Minnesota Street, St. Paul, MN 55101-2131, appeared for the Complaint Review Committee of the Board of Medical Practice (the Committee).

Immediately following the conference, the Committee faxed a copy of certain pages of the

Investigative Report of Margaret Swanson to the Administrative Law Judge as was directed during the conference. On November 29, 2004, Respondent mailed and emailed a supplemental brief in support of his motion to compel discovery, as had been allowed at the prehearing conference.

Based upon the documents and argument presented, and pursuant to authority granted by Minn. Stat. § 13.03, subd. 6, and Minn. R. 1400.6700, the Administrative Law Judge makes the following:

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The hearing is rescheduled to commence January 24, 2005, at 9:00 a.m., at the Office of Administrative Hearings in Minneapolis and continue through January 28, 2005, as necessary. Portions of the hearing will be held in Pipestone, Minnesota, for the convenience of witnesses. Counsel shall cooperate in scheduling witnesses.

2. Respondent shall make his expert witness available for deposition without further delay. (Ten days was allowed at the November 23, 2004, conference.)

3. As the Committee agreed during the conference, it shall provide to Respondent the tapes of the Investigator's and the Committee's interviews of Respondent and all documentation it has regarding any form of guidelines, advice,

seminars, courses, and the like relating to chronic pain assessment and management that the Board sponsored or recommended to physicians during the relevant time.

4. Within five days, the Committee shall provide to Respondent a copy of all documents and papers in its possession relating to Respondent, including the Investigative Report of Margaret Swanson, an Investigator from the Office of Attorney General, except that the Committee shall redact any information that would identify any specific person as having filed a complaint with the Board and shall redact any the opinions, conclusions, legal theories, or mental impressions of the Committee, counsel for the Committee, and the Investigator.

5. Within ten days, the Committee shall make the Investigator available for deposition by Respondent. Respondent may question her about any factual information she gathered other than information that would identify any specific person as having filed a complaint with the Board. Respondent may not question the Investigator regarding the opinions, conclusions, legal theories, or mental impressions of any the opinions, conclusions, legal theories, or mental impressions of the Committee, counsel for the Committee, or the Investigator.

6.

Any not public data provided under this Order shall not become public data as a result of its disclosure under this Order. Such data shall be disclosed by Respondent only to Respondent and his counsel, and to witnesses and employees of counsel as necessary for preparation and presentation of Respondent's case.

Dated this 6<sup>th</sup> day of December, 2004.

/s/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

### MEMORANDUM

The Committee opposes the Investigator's deposition and production of documents on the ground that internal investigations performed in support of anticipated litigation are privileged attorney work product under *Upjohn Co. v U.S.*, 449 U.S. 383 (1981); *Gagnon v Sprint Corp.*, 284 F.3d 839 (8<sup>th</sup> Cir. 2002); and *Gundacker v Unisys Corp.*, 151 F.3d 842 (8<sup>th</sup> Cir. 1998).

The investigation of Respondent was not an internal corporate investigation like the ones conducted in *Upjohn*, *Gagnon*, and *Gundacker*. The policy behind those cases of encouraging self-investigation and self-reporting does not apply where the state is investigating a licensee. Nonetheless, the attorney work product privilege applies in Minnesota. In *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn., 1986), the Court stated:

"Work product" is defined as an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial. See *National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979). It has long been the rule in Minnesota that such work product is not discoverable. See *Brown v. St. Paul City Railway*, 241 Minn. 15, 35, 62 N.W.2d 688, 701 (1954); Minn.R.Civ.P. 26.02(3). However, materials prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product and are discoverable under Minn.R.Civ.P. 26.02(3). Discovery of trial preparation materials requires of the party requesting them a showing of substantial need and inability to obtain the information by other means. *Id.*

The work product privilege has been applied in administrative proceedings in Minnesota.<sup>[1]</sup>

As explained in *Dennie*, the privilege does not apply to materials other than the opinions, conclusions, legal theories, or mental impressions of counsel. Much of information and materials the Investigator and Committee possess are, therefore, not protected by the work product privilege.

Minn. R. Civ. P. 26.02(3) requires a showing of substantial need and inability to obtain the information by other means. Licensee has very limited ability to gather the information the Investigator has gathered, other than the medical records of his own patients. Moreover, as Respondent points out, Minn. Stat. § 147.01, subd. 4(a), requires the Board, upon request of a party in a disciplinary proceeding, to produce and permit the inspection and copying of any designated documents or papers relevant to the proceedings. This statute does not require a showing of inability. But it does not negate the work product privilege.

The Minn. Stat. § 147.01, subd. 4(a), procedure is similar to discovery procedures in felony and gross misdemeanor cases under Minn. R. Crim. P. 9. That rule requires the prosecution to disclose, upon request, factual information, documents, and exculpatory information, subject to the work product privilege as to the prosecutor, prosecutor's staff, and agencies participating in the prosecution. It makes reports made for the prosecution not discoverable except as to the factual information, documents, and exculpatory information required to be disclosed.

In order to allow Respondent to defend himself in this matter, he is entitled to depose the Investigator, except as to the opinions, conclusions, legal theories, and mental impressions of the Committee, counsel, and the Investigator, and to receive copies of all documents in the Board and Committee's files that relate to him, other than the opinions, conclusions, legal theories, and mental impressions of the Committee, counsel, and the Investigator.

S.M.M.

---

<sup>[1]</sup> Beck, *Minnesota Administrative Procedure*, Second Ed. (1998), §9.3.3.