

1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**  
2 **OF THE STATE OF NEVADA**

3 \* \* \* \* \*

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5 **In the Matter of Charges and** ) **Case No. 12-18246-1**  
6 **Complaint Against** )  
7 **MICHAEL L. FISHELL, M.D.,** )  
8 **Respondent.** )

**FILED**

**MAR 12 2012**

NEVADA STATE BOARD OF  
MEDICAL EXAMINERS

By: 

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11 **SETTLEMENT AGREEMENT**

12 **THIS AGREEMENT** is entered into by and between the Investigative Committee (IC) of  
13 the Nevada State Board of Medical Examiners (Board), composed of Theodore B. Berndt, M.D.,  
14 Valerie J. Clark, BSN, RHU, LUTCF, and Michael J. Fischer, M.D., by and through  
15 Edward O. Cousineau, J.D., Deputy Executive Director for the Board and counsel for the IC, and  
16 Michael L. Fishell, M.D. (hereinafter Respondent), by and through his counsel,  
17 L. Kristopher Rath, Esq., as follows:

18 **WHEREAS**, on or about January 11, 2012, the Board's IC filed a formal Complaint in the  
19 above-referenced matter charging Respondent with engaging in conduct that is grounds for  
20 discipline under Chapter 630 of the Nevada Revised Statutes (NRS), to wit: a one count violation of  
21 NRS 630.301(4); and

22 **WHEREAS**, Respondent has received and reviewed a copy of the Complaint, understands  
23 it, and has consulted with competent counsel, L. Kristopher Rath, Esq., concerning the nature and  
24 significance of the Complaint, and Respondent is fully advised concerning his rights and defenses to  
25 the Complaint as well as the possible sanctions that may be imposed if the Board finds and  
26 concludes that he has engaged in conduct that is grounds for discipline pursuant to the Medical  
27 Practice Act (NRS Chapter 630); and

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1           **WHEREAS**, Respondent understands and agrees that he has certain rights under the United  
2 States Constitution and the Constitution of the state of Nevada, as well as under the Medical Practice  
3 Act and the Nevada Administrative Procedures Act (NRS Chapter 233B), including but not limited  
4 to the right to a formal hearing on the charges against him, the right to representation by counsel in  
5 the preparation and presentation of his defense, the right to confrontation and cross-examination of  
6 witnesses against him, the right to written findings, conclusions and order regarding a final decision  
7 by the Board, and the right to judicial review of any final decision by the Board that is adverse to  
8 him; and

9           **WHEREAS**, Respondent, based on his understanding of the relevant facts and  
10 circumstances, and subject to the conditions set forth in this Agreement, desires to waive all of his  
11 rights under the United States Constitution, the Constitution of the state of Nevada, the Medical  
12 Practice Act and the Nevada Administrative Procedures Act, including but not limited to the right to  
13 a hearing on the charges and written findings of fact, conclusions of law and order, and he desires to  
14 settle and resolve the matter of the formal Complaint against him by way of and in accordance with  
15 this Settlement, Waiver and Consent Agreement; and

16           **WHEREAS**, Respondent understands and agrees that this Agreement is entered into by and  
17 between himself and the Board's IC, and not with the Board, but that the IC will present this  
18 Agreement to the Board for consideration in open session at a regular meeting duly noticed and  
19 scheduled, and that the IC will advocate approval of this Agreement by the Board, but that the Board  
20 has the right to decide in its own discretion whether or not to approve this Agreement; and

21           **WHEREAS**, Respondent understands and agrees that if the Board approves the terms,  
22 covenants and conditions of this Agreement, then the terms, covenants and conditions enumerated  
23 below shall be binding and enforceable upon him; and

24           **WHEREAS**, Respondent understands and agrees that, if the Board does not approve the  
25 terms, covenants and conditions of this Agreement, then the terms, covenants and conditions  
26 enumerated below shall not be binding and enforceable upon him except the provisions as to  
27 disqualification of adjudicating panel members in paragraph number 9, and he will be provided with

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1 an opportunity to defend himself against the charges against him at a regularly scheduled hearing in  
2 accordance with all applicable laws.

3 **NOW THEREFORE**, in order to resolve the pending Complaint and charges brought  
4 against him by the Board's Investigative Committee in the above-captioned matter, Respondent and  
5 the IC hereby agree to the following terms, covenants and conditions:

6 1. **Jurisdiction**. Respondent is, and at all times mentioned in the Complaint filed in the  
7 above-captioned matter was, a physician licensed to practice medicine in the state of Nevada,  
8 subject to jurisdiction of the Board to hear and adjudicate charges of violations of the Medical  
9 Practice Act, and to impose sanctions as provided by the Act.

10 2. **Representation by Counsel**. Respondent is represented by counsel herein, whom  
11 Respondent covenants and agrees is fully capable, competent and fully advised in these  
12 circumstances, and Respondent further covenants and agrees that he enters into this Agreement  
13 knowingly, willingly, and intelligently after full consultation with and upon the advice of counsel.

14 3. **Waiver of Rights**. In connection with this Agreement, and the terms, covenants and  
15 conditions contained herein, Respondent knowingly, willingly and intelligently, with the advice of  
16 above-identified counsel, waives all rights arising under or pursuant to the United States  
17 Constitution, the Constitution of the state of Nevada, NRS Chapter 630 and NRS Chapter 233B that  
18 may be available to him or that may apply to him in connection with the proceeding on the  
19 Complaint filed herein, the defense of said Complaint, the adjudication of the charges in said  
20 Complaint and the imposition of sanctions, and Respondent further agrees that the matter of the  
21 disciplinary action commenced by Complaint herein may be settled and resolved in accordance with  
22 this Agreement without a hearing or any further proceeding and without the right to judicial review.

23 4. **Acknowledgement of Reasonable Basis to Proceed**. Respondent covenants and  
24 agrees that the Board's IC has a reasonable basis to believe that Respondent engaged in one or more  
25 instances of conduct that is grounds for discipline pursuant to the provisions of the Medical Practice  
26 Act.

27 5. **Consent to Entry of Order**. In order to resolve the matter of these disciplinary  
28 proceedings pending against him without any further costs and expense of providing a defense to the

1 Complaint, Respondent hereby agrees<sup>1</sup> and does not contest that an order may be entered herein by  
2 the Board against him finding that Respondent engaged in conduct that is grounds for discipline  
3 pursuant to the Medical Practice Act, to wit: one count of malpractice related to his care and  
4 treatment of the patient at issue in the associated underlying Complaint (specifically, inadvertently  
5 leaving a needle catheter in place in the patient's coccygeal area after being summoned away from  
6 the treatment area to attend to another patient experiencing a life threatening medical emergency), a  
7 violation of NRS 630.301(4), that Respondent shall be publicly reprimanded, and that Respondent  
8 agrees to reimburse the Board the reasonable costs and expenses incurred in the investigation and  
9 prosecution of this case, the current amount being \$3,499.91. This amount does not include the  
10 further costs that may be incurred by the Board to conclude the matter. Respondent agrees to pay  
11 these additional costs, in addition to the aforementioned amount, to the Board within ninety (90)  
12 days of the acceptance, adoption and approval of this Agreement by the Board.

13 6. **Release From Liability.** In execution of this Agreement, Respondent, for himself,  
14 his executors, successors and assigns, hereby releases and forever discharges the state of Nevada,  
15 the Board, the Nevada Attorney General, and each of their members, agents and employees in  
16 their individual and representative capacities, from any and all manner of actions, causes of  
17 action, suits, debts, judgments, executions, claims and demands whatsoever, known and  
18 unknown, in law or equity, that Respondent ever had, now has, may have or claim to have,  
19 against any or all of the persons or entities named in this paragraph arising out of or by reason of  
20 this investigation, this disciplinary action, this Agreement or its administration.

21 7. **Procedure for Adoption of Agreement.** The IC and counsel for the IC shall  
22 recommend approval and adoption of the terms, covenants and conditions contained herein by  
23 the Board in resolution of the disciplinary proceedings pending herein against Respondent  
24 pursuant to the formal Complaint. In the course of seeking Board approval, adoption and/or  
25 acceptance of this Agreement, counsel for the IC may communicate directly with the Board staff  
26 and members of the panel of the Board that would adjudicate this case if it were to go to hearing.

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28 <sup>1</sup> All admissions made by Respondent are solely for final disposition of this matter and any subsequent related  
administrative proceedings or civil litigation involving the Board and Respondent. Therefore, said admissions by  
Respondent are not intended or made for any other use, such as in the context of another state or federal government  
regulatory agency proceeding, state or federal civil or criminal court proceeding, or any other state or federal court.

1 Respondent covenants and agrees that such contacts and communication may be made or  
2 conducted ex parte, without notice or opportunity to be heard on his part or on the part of his  
3 counsel, and that such contacts and communications may include, but not be limited to, matters  
4 concerning this Agreement, the Complaint, the allegations in the Complaint any and all evidence  
5 that may exist in support of the Complaint, and any and all information of every nature  
6 whatsoever related to the Complaint or the proceedings herein against Respondent.

7       8.     **Effect of Acceptance of Agreement by Board.** In the event the Board approves,  
8 accepts and adopts the terms, covenants and conditions set out in this Agreement, the Board will  
9 enter herein an order finding Respondent violated NRS 630.301(4), ordering that Respondent be  
10 issued a public reprimand, and ordering Respondent to pay the costs and expenses of the  
11 investigation and prosecution of this matter as provided herein.

12       9.     **Effect of Rejection of Agreement by Board.** In the event the Board does not  
13 approve, accept and adopt the terms, covenants and conditions set out in this Agreement, this  
14 Agreement shall be null, void and of no further force and effect except as to the following  
15 covenant and agreement regarding disqualification of adjudicating Board panel members.  
16 Respondent agrees that, not withstanding rejection of this Agreement by the Board, nothing  
17 contained herein and nothing that occurs pursuant to efforts of the IC or its counsel to seek  
18 acceptance and adoption of this Agreement by the Board shall disqualify any member of the  
19 adjudicating panel of the Board from considering the charges against Respondent and  
20 participating in the disciplinary proceedings in any role, and Respondent further agrees that he  
21 shall not seek to disqualify any such member.

22       10.    **Binding Effect.** Respondent covenants and agrees that this Agreement is a  
23 binding and enforceable contract upon Respondent and the Board's IC, which contract may be  
24 enforced in a court or tribunal having jurisdiction. Additionally, upon receipt of credible  
25 information that Respondent has failed to comply with any term or condition of the  
26 aforementioned order, the Board shall be authorized to immediately suspend Respondent's  
27 license to practice medicine until Respondent complies with the term or condition. Further,  
28 failure to comply with the terms recited herein may result in additional disciplinary action being

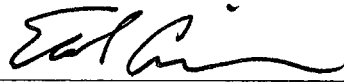
1 initiated against Respondent for a violation of an order of the Board in accordance with  
2 NRS 630.3065(2)(a). And, any failure to pay any fine, fee, or cost ordered herein may also result  
3 in such legal action as determined to be necessary to collect the unpaid fine, fee, or cost.

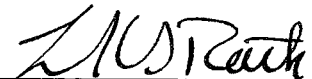
4 11. **Forum Selection Clause.** Respondent covenants and agrees that in the event  
5 either party is required to seek enforcement of this Agreement in the district court, he consents to  
6 such jurisdiction, and covenants and agrees that exclusive jurisdiction shall be in the Second  
7 Judicial District Court of the state of Nevada in and for the County of Washoe.

8 12. **Attorneys Fees and Costs.** Respondent covenants and agrees that in the event an  
9 action is commenced in the district court to enforce any provision of this Agreement, the  
10 prevailing party shall be entitled to recover reasonable costs and attorneys' fees.


11  
12 Dated this 10<sup>th</sup> day of February, 2012.

Dated this 9<sup>th</sup> day of February, 2012.

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14 By:   
15 Edward O. Cousineau, J. D.  
16 Attorney for the Investigative Committee  
17 of the Nevada State Board of Medical Examiners

By:   
L. Kristopher Rath, Esq.  
Attorney for Respondent

18 UNDERSTOOD AND AGREED:

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21 Michael L. Fishell, M.D., Respondent

22 Dated this 8 day of FEB., 2012.

1 **IT IS HEREBY ORDERED** that the foregoing Settlement, Waiver and Consent Agreement is  
2 approved and accepted by the Nevada State Board of Medical Examiners on the 9<sup>th</sup> day of March 2012,  
3 with the final total amount of costs due of \$3,499.91.

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6 Benjamin J. Rodriguez, M.D., President  
7 NEVADA STATE BOARD OF MEDICAL EXAMINERS  
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