BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NEVADA

** **

In the Matter of Charges and ) Case No. 12-18246-1
Complaint Against )

MICHAEL L. FISHELL, M.D., )
Respondent. )

FILED
MAR 12 2012
NEVADA STATE BOARD OF MEDICAL EXAMINERS

By:

SETTLEMENT AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. **Consent to Entry of Order.** In order to resolve the matter of these disciplinary proceedings pending against him without any further costs and expense of providing a defense to the
Complaint, Respondent hereby agrees\(^1\) and does not contest that an order may be entered herein by
the Board against him finding that Respondent engaged in conduct that is grounds for discipline
pursuant to the Medical Practice Act, to wit: one count of malpractice related to his care and
treatment of the patient at issue in the associated underlying Complaint (specifically, inadvertently
leaving a needle catheter in place in the patient's coccygeal area after being summoned away from
the treatment area to attend to another patient experiencing a life threatening medical emergency), a
violation of NRS 630.301(4), that Respondent shall be publicly reprimanded, and that Respondent
agrees to reimburse the Board the reasonable costs and expenses incurred in the investigation and
prosecution of this case, the current amount being $3,499.91. This amount does not include the
further costs that may be incurred by the Board to conclude the matter. Respondent agrees to pay
these additional costs, in addition to the aforementioned amount, to the Board within ninety (90)
days of the acceptance, adoption and approval of this Agreement by the Board.

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

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

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

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

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

10. **Binding Effect.** Respondent covenants and agrees that this Agreement is a binding and enforceable contract upon Respondent and the Board’s IC, which contract may be enforced in a court or tribunal having jurisdiction. Additionally, upon receipt of credible information that Respondent has failed to comply with any term or condition of the aforementioned order, the Board shall be authorized to immediately suspend Respondent’s license to practice medicine until Respondent complies with the term or condition. Further, 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 NRS 630.3065(2)(a). And, any failure to pay any fine, fee, or cost ordered herein may also result in such legal action as determined to be necessary to collect the unpaid fine, fee, or cost.

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

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

Dated this 16th day of February, 2012. Dated this 9th day of February, 2012.

By: [Signature] By: [Signature]

Edward O. Cousineau, J. D. L. Kristopher Rath, Esq.
Attorney for the Investigative Committee Attorney for Respondent
of the Nevada State Board of Medical Examiners

UNDERSTOOD AND AGREED:

[Signature]

Michael L. Fishell, M.D., Respondent
Dated this 8th day of Feb., 2012.
IT IS HEREBY ORDERED that the foregoing Settlement, Waiver and Consent Agreement is approved and accepted by the Nevada State Board of Medical Examiners on the 9th day of March 2012, with the final total amount of costs due of $3,499.91.

[Signature]

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