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9
10 **BEFORE THE NEVADA STATE BOARD OF DENTAL EXAMINERS**

11
12 NEVADA STATE BOARD OF DENTAL
EXAMINERS,

13 Complainant,

14 vs.

15 ANTONINA CAPURRO, DMD,

16 Respondent.
17
18

CASE NO.: LL-384-14-1978

Motion for Leave to File (1) Motion to Dismiss for Violations of Nevada Law, Regulations, and Board Policies; (2) Motion to Dismiss Count I for Mootness; (3) Motion to Dismiss for Fifth Amendment Violations; (4) Motion to Exclude Evidence Not Produced Prior to Commencement of Hearing; and (5) Motion to Compel Production of Documents

19 Respondent Antonina Capurro, DMD (“Dr. Capurro” or “Respondent”), by and through
20 undersigned counsel, respectfully files this motion seeking leave from the Nevada State Board of
21 Dental Examiners (the “Board”) to file and have considered certain motions in this proceeding.

22 **I. Introduction**

23 Through this Motion, Dr. Capurro makes one narrow request: that the Board grant “leave,”
24 or permission, for her to file certain motions in this proceeding, so that the Board can simply
25 consider the evidence contained in them. To be clear, a grant of this Motion does not result in any
26 decision on the five motions filed by Dr. Capurro; it only permits Dr. Capurro to raise important
27 issues in this proceeding, so that the Board can make a determination of them, once it has ample
28 time to review and consider the evidence. As such, the Board can either: (i) grant Dr. Capurro

1 leave to file the motions and review the evidence contained therein—much of which goes directly
2 to whether due process has been afforded to Dr. Capurro, and has implications for the Board’s
3 disciplinary processes overall—or (ii) deny this Motion, decline to even consider the issues raised
4 in Dr. Capurro’s motions, and turn a blind eye to evidence which may show that Board
5 representatives have acted in violation of law, risking that Dr. Capurro is deprived of a fair hearing,
6 and risking that these missteps repeat themselves in matters involving other licensees.

7 For the avoidance of doubt, Dr. Capurro there is no prejudice or harm to the Board if leave
8 is granted. In fact, the prosecutors have already provided detailed responses to each of the motions,
9 and Dr. Capurro simply requests that the Board consider the issues raised in the motions, fully
10 addressed by both parties and render an independent opinion on their merit.¹

11 **II. Legal Argument**

12 Under NRS Chapter 622A, a respondent in a contested case before an administrative
13 agency may file certain types of motions both before and after a formal hearing. *See generally*
14 *NRS 622A.360(1)-(6)*. But the Board may also allow any type of motion to be filed, provided that
15 it grants “leave,” or permission, for the respondent to file the motion. *See NRS 622A.360(5)(b)*.
16 Dr. Capurro has filed five motions with the Board, each of which discusses a different issue in this
17 proceeding, and certain missteps that Board representatives have either taken, or are in the process
18 of taking, which deserve to be at least considered by the Board, before the Board takes further
19 action in this matter. The motions raise important issues, giving leave to have the motions filed
20 and heard by the Board does not prejudice the Board or the prosecutor, but rather protects against
21 prejudice to Dr. Capurro. To the contrary, not considering the serious issues raised in the motions
22 directly harms Dr. Capurro’s ability to have a fair hearing. Each of the motions, along with the
23 reasons that leave should be granted to file the same, are summarized below.

24 . . .

26 ¹ The prosecutors have argued that Dr. Capurro failed to seek leave to file her motions, and that the
27 Board should therefore refuse to entertain them. This is simply untrue. As set forth in **Exhibit 1**, attached
28 hereto, Dr. Capurro’s counsel requested leave at the time of filing, and the prosecutors had notice of such
filing, along with the intent to seek leave, in connection with the same.

1 **A. The Board Should Grant Leave for Dr. Capurro to File her Motion to Dismiss**
2 **for Violations of Law, Regulations, and Board Policies.**

3 An agency’s actions are void and must be set aside if the agency “failed to meet statutory,
4 procedural, or constitutional requirements.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401
5 U.S. 402, 413-14 (1971). The first of the motions at issue addresses this requirement, by pointing
6 out a variety of ways in which the Board’s representatives failed to comply with applicable laws
7 and long-standing Board policies. The motion details the steps that the Board has taken over the
8 last six years, to correct its previous deficiencies regarding its investigatory and disciplinary
9 processes. It then goes through how, in this proceeding, the policies adopted by the Board,
10 including those which are required by statute, were **not** followed by the Board’s Executive Director
11 and counsel. By way of example, this includes the Executive Director and Board Counsel Phil Su
12 reaching out to third parties to obtain documents regarding Dr. Capurro, prior to the Board even
13 authorizing an investigation in this case²; the Board’s refusal to appoint an investigator or
14 Preliminary Screening Consultant, to conduct an independent and neutral investigation of this
15 matter; and Board members making statements to the public regarding their conclusions of the
16 legal and factual issues in this matter, before the hearing even started.

17 Because these matters are crucial in determining whether Dr. Capurro was afforded the
18 protections to which she is entitled, and because the Board should be apprised of the manner in
19 which its representatives have applied—or misapplied—its governing rules and regulations, the
20 Board should grant Dr. Capurro leave to file this motion.

21 **B. The Board Should Grant Leave for Dr. Capurro to File her Motion to Dismiss**
22 **Count I for Mootness.**

23 The second motion at issue is Dr. Capurro’s motion to dismiss Count I of the First
24 Amended Complaint (the “Complaint”), because it is moot. Essentially, Count I seeks a very

25 ² To be clear, this was after a Nevada state court issued an order for the Board to afford Dr. Capurro
26 due process in this matter, which requires that the Board—at a minimum—follow the law. This is important
27 for the Board and licensees in general, because if the Board condones these actions, it essentially permits
28 itself to investigate *any* licensee at will, by seeking documents from that person’s employer and other third
parties, prior to an investigation being authorized in a public meeting. This would inescapably be an affront
to the rights of licensees, an abuse of the Board’s power, and a clear violation of Nevada law.

1 narrow form of relief, insofar as it seeks to revoke Dr. Capurro’s license because, as alleged, she
2 no longer qualifies for the same. But her license expired on June 30, 2021, and thus, the Board
3 does not have jurisdiction, nor does it have a practical ability to revoke a license that no longer
4 exists.

5 The prosecutors’ rebuttal to this argument demonstrates another case of the Board’s clear
6 misapprehension of its own statutes. For example, the prosecutors argue that under NRS 631.330,
7 Dr. Capurro’s license is only administratively suspended, rather than expired. But this ignores the
8 fact that NRS 631.271 clearly states that a limited license expires after one year, and that NRS
9 631.330 only administratively suspends licenses that are valid for two years, where they are not
10 renewed within that time period.³ Once again, the Board has an interest in reviewing these issues,
11 (1) to make sure that Dr. Capurro obtains a fair hearing (in this case, because the Board does not
12 even have authority to revoke an expired license), (2) to ensure that the Board’s representatives
13 are acting in compliance with applicable law, in their treatment of Board licensees, and (3) because
14 these issues, if decided under the law, could impact the further length of these proceedings, the
15 duration of which has already apparently frustrated members of the Board.

16 As a final note, Dr. Capurro respectfully requests—in the event the Board hears this
17 motion—that it strike the prosecutors’ statements in their opposition, accusing Dr. Capurro of
18 “gaming the system” for months, by intentionally delaying these proceedings for the purpose of
19 filing a motion on the issue of mootness. *See, e.g.*, opposition to motion regarding mootness, at p.
20 8. First, the statements are so far afield of the professionalism expected of Board counsel and
21 inappropriate, insofar as the Board and its prosecutors are tasked with enforcing the law, while
22 upholding the integrity of the process—not making *ad hominem* attacks on licensees. Second, the
23 statements are simply untrue. While there have been delays in the continuation of this hearing, the
24

25 ³ NRS 631.330 provides that, “[e]xcept as otherwise provided in NRS 631.271 . . . [a] licensee must
26 comply with the provisions of this subsection and subsection 1 [governing renewals] on or before June 30.
27 Failure to comply with those provisions by June 30 *every 2 years* automatically suspends the license.” NRS
28 631.330(2)(b) (emphasis added). But NRS 631.271 provides that a limited license expires in one year, and
so there is no way the suspension provision in NRS 631.330 can apply to a limited license, because it has
already expired before the two-year timeline runs.

1 Board and Dr. Capurro have both had scheduling conflicts that pushed the hearing out well past
2 June, and fairness and honesty dictate that the Board recognize the shared responsibility for the
3 duration of the proceedings. Dr. Capurro respectfully submits that the motion should be heard,
4 because the Board no longer has jurisdiction to adjudicate Count I of the Complaint.⁴

5 **C. The Board Should Grant Leave for Dr. Capurro to File her Motion to Dismiss**
6 **for Fifth Amendment Violations.**

7 It is undisputed that a direct reference by a prosecutor to a defendant's decision not to
8 testify is always a violation of the Fifth Amendment of the United States Constitution. *See Griffin*
9 *v. California*, 380 U.S. 609 (1965). This is because the Constitution affords a person the right to
10 not "be compelled in any criminal case to be a witness against [herself]"; this right also applies to
11 civil and administrative proceedings, where the proceedings or testimony being elicited may lead
12 to criminal prosecution against a witness. *See Rudin v. Nev. Real Est. Advisory Comm'n*, 86 Nev.
13 562, 566 (1970).

14 Count II against Dr. Capurro alleges that Dr. Capurro practiced dentistry outside the scope
15 of her license. *See Complaint* ¶¶ 39-48. This is conduct that the statute states is a crime and can
16 be charged as a felony offense. NRS 631.400. As such, Dr. Capurro has a right to refrain from
17 testifying in this matter, without penalty (meaning, without the Board holding it against her), under
18 the Fifth Amendment. But the prosecutors intentionally have attempted to penalize Dr. Capurro
19 for invoking her Fifth Amendment, by (i) spotlighting her invocation of the Fifth Amendment in
20 the Complaint; and (ii) suggesting, on several occasions during the formal hearing in this matter,
21 that Dr. Capurro is hiding information or otherwise being evasive, based on her refusal to testify
22 in this matter and preventing the Board from finding the truth in this matter. Those assertions are
23 entirely improper under the circumstances and violate Dr. Capurro's Fifth Amendment rights,
24 which, by law, render these proceedings irreparably tainted.

25
26

⁴ It is important to note that this motion does not seek to dismiss Count II of this proceeding. It seeks
27 the narrow relief of dismissing Count I, because Count I only desires to revoke a license that no longer
28 exists. Moreover, leave is appropriate in this instance, because the motion could not have been filed prior
to the commencement of the hearing.

1 The prosecutors' opposition to the motion misstates applicable law, which would allow the
2 Board to consider Dr. Capurro's invocation of her Fifth Amendment rights, with respect to a
3 *specific piece of evidence* that was introduced by a third party, and that Dr. Capurro does not rebut.
4 It does not provide a prosecutor with *carte blanche* to parade Dr. Capurro's invocation of her Fifth
5 Amendment rights or to make attacks on her for generally refusing to testify, and urging the Board
6 to infer guilt from the same. In this regard, the prosecutors have irretrievably tainted this
7 proceeding by making incessant and unnecessary references to Dr. Capurro's invocation of her
8 Fifth Amendment rights, in violation of the United States Constitution. This issue is so serious
9 under the law of the court in this country and this state that at a minimum it deserves this Board's
10 fulsome consideration of the issue before proceeding further in this case.

11 **D. The Board Should Grant Leave for Dr. Capurro to File her Motion to Exclude**
12 **Evidence Not Produced Prior to Commencement of Hearing.**

13 The primary requirement for due process in an administrative proceeding is for a
14 respondent to be given notice of the charges against her, and an opportunity to defend against the
15 same. *See Dutchess Business Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 711 (2008).
16 To ensure this requirement in front of the Board, a licensee is permitted to request all documents
17 and a list of witnesses that will be used against her in a formal hearing; if such a request is made,
18 the information and documents must be given to the licensee.

19 The Board—through its counsel and Executive Director—investigated this matter between
20 at least January 7, 2021 (once again, prior to even having authority to do so), and the formal hearing
21 on May 21, 2021. Dr. Capurro made a request for the documents and witnesses that made be used
22 against her during the hearing, and the Board provided that information to her, in accordance with
23 its obligations under NRS 622A.330(1). Notwithstanding this fact, the prosecutors have continued
24 to unnecessarily investigate this matter by issuing additional subpoenas and filing motions in a
25 related district court proceeding, to obtain *even more* documents to use against Dr. Capurro. But
26 this flies in the face of the Board's obligation to provide Dr. Capurro with notice of the materials
27 that will be used against her, and an opportunity to prepare a defense against the same. If the
28 Board is able to spring new documents on Dr. Capurro in this proceeding—as the prosecutors seek

1 to do—Dr. Capurro will be deprived of her ability to prepare a defense to those documents, and
2 any testimony elicited in connection with the same. The prosecutor has this obligation given the
3 charges that have been leveled against Dr. Capurro and should not be allowed to once again blame
4 or punish Dr. Capurro for the prosecution team’s failures to comply with Board policy. The
5 prosecutor could have subpoenaed the documents long before and only chose to do so in the second
6 month of the hearing. Accordingly, the Board should review this matter and prevent any such
7 deprivation of Dr. Capurro’s rights from occurring. At the end of the day, the Board’s duty is to
8 uphold the processes and protections in place for the respondent in this and other investigations.

9 **E. The Board Should Grant Leave for Dr. Capurro to File her Motion to Compel**
10 **Production of Documents.**

11 As set forth above, the Board had a duty to provide Dr. Capurro with adequate notice of
12 the factual materials that will be used against her in this proceeding, so that she could prepare a
13 defense regarding the same. *See Dutchess*, 124 Nev. at 711. Dr. Capurro issued subpoenas to
14 several individuals in this case, including the Board’s in-house counsel and Executive Director—
15 two out of the three persons responsible for the investigation of this case—to review documents
16 relating to the investigation. But Board Counsel and the Executive Director withheld a variety of
17 documents in this proceeding, on the basis of attorney-client privilege and the “attorney work
18 product” doctrine. Dr. Capurro asked the prosecutor for these documents before the hearing and
19 the request was ignored and the documents were kept hidden from Dr. Capurro. Only after filing
20 the motion did the prosecutor finally give Dr. Capurro two of the requested documents. The Board
21 should grant leave for the motion to be filed so that the rest of the documents to which Dr. Capurro
22 is entitled are given as well.

23 The main problem with the prosecution’s assertion of these privileges, is that many of the
24 documents that were withheld were in no way protected by the asserted privileges.⁵ Their
25 withholding of the documents was thus improper, and Dr. Capurro is entitled to receive the non-

26
27 ⁵ Some of the documents withheld showed that the Board reached out to Dr. Capurro’s employer,
28 seeking records in relation to this matter, weeks before the Board gave itself authority to conduct an
investigation into Dr. Capurro’s conduct.

1 privileged documents which are responsive to her subpoena. Because the motion deals with Dr.
2 Capurro's rights to obtain documents in this proceeding, which were unlawfully withheld from
3 her, the Board should grant her leave to file the motion and obtain any documents which are not
4 privileged from production.

5 **III. Conclusion**

6 In the context of this administrative hearing, the Board should allow the serious, substantial
7 and important issues Dr. Capurro raises in her motions to be heard. The motions go to the heart
8 of the issues before the Board, whether the Board should even be proceeding further with this
9 hearing that has spanned months and appears set to continue into August. The matters are fully
10 briefed and granting leave for them to be heard and issuing rulings on the motions themselves will
11 help ensure the integrity of this process. For the foregoing reasons, Dr. Capurro respectfully
12 requests that the Board grant her leave to file the motions discussed above.

13 Dated: July 15, 2021.

14 SKLAR WILLIAMS PLLC

15 /s/ David B. Barney

16 Crane M. Pomerantz, Esq.

17 Nevada Bar No. 14103

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23 Las Vegas, NV 89145

24 *Attorneys for Respondent*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Sklar Williams PLLC, and that on the 15th day of
3 July, 2021, I caused to be served a true and correct copy of the foregoing **Motion for Leave to**
4 **File (1) Motion to Dismiss for Violations of Nevada Law, Regulations, and Board Policies;**
5 **(2) Motion to Dismiss Count I for Mootness; (3) Motion to Dismiss for Fifth Amendment**
6 **Violations; (4) Motion to Exclude Evidence Not Produced Prior to Commencement of**
7 **Hearing; and (5) Motion to Compel Production of Documents,** to the following persons at the
8 e-mail addresses set forth below:

9 **VIA ELECTRONIC MAIL:**

10 Rosalie Bordelove, Esq.
11 Deputy Attorney General
12 Office of the Nevada Attorney General
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27 SKLAR WILLIAMS PLLC

28 /s/ Nadia Ahmed

Nadia Ahmed

EXHIBIT 1

From: [Nadia Ahmed](#)
To: "[Rosalie M. Bordelove](#)"
Cc: [Brown, Ogonna](#); [Crane Pomerantz](#); [David Barney](#); [Hess, Jennifer](#)
Subject: NSBDE v Dr. Capurro, LL-384-14-1978
Date: Friday, July 2, 2021 7:40:00 PM
Attachments: [Motion to Dismiss - Mootness \(7.2.21\) Filed.pdf](#)
[Motion to Dismiss - Violations of Law \(7.2.21\) Filed.pdf](#)
[Motion to Dismiss - Fifth Amendment - Filed 07021.pdf](#)

Dear Ms. Bordelove,

Attached please find Motion to Dismiss Count I for Mootness, Motion to Dismiss for Violations of Law, and Motion to Dismiss for Fifth Amendment Violation hereby filed by Respondent in the above-referenced case. To the extent leave is needed to file said motions, Respondent respectfully requests such leave and, if required, will put forth on the record the grounds in support thereof at the hearing.

Yours respectfully,
Nadia Ahmed

Nadia Ahmed

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From: [Nadia Ahmed](#)
To: ["Rosalie M. Bordelove"](#); [Brown, Ogonna](#)
Cc: [Crane Pomerantz](#); [David Barney](#)
Subject: NSBDE v. Dr. Capurro, LL-384-14-1978
Date: Thursday, July 8, 2021 3:35:00 PM
Attachments: [Motion to Exclude Documents Not Previously Produced Filed 070821.pdf](#)
[Motion to Compel Filed 070821.pdf](#)

Dear Ms. Bordelove,

Attached please find Dr. Capurro's (1) Motion to Compel and (2) Motion to Exclude Documents Not Previously Produced Filed filed and served via this email. To the extent leave is required for filing we are prepared to make statements in support of the basis for such leave on the record. Thank you!

Yours respectfully,
Nadia Ahmed

Nadia Ahmed

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