Court of Appeals No. 47727-1-II
Consolidated With Court of Appeals No. 47367-4-II

COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

DALE E. ALSAGER, D.O., Ph.D.,

APPELLANT,

v.

BOARD OF OSTEOPATHIC MEDICINE AND SURGERY; *et al.*,

RESPONDENTS.

APPELLANT DALE ALSAGER'S MAIN BRIEF

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I. INTRODUCTION

A. Main Question On Appeal

Is the licensee in a quasi-criminal professional license disciplinary action entitled to the same Fourth and Fifth Amendment protections and privileges, as appropriately enhanced by the Washington State Constitution, as the accused in a criminal case, regarding the absolute right to remain silent and privilege against self-incrimination without risk of sanction and adverse inference, and the protection of testimonial private records absent a search warrant?

B. Why Quasi-Criminal Actions Are Considered As Criminal Cases For Purposes Of The Fourth And Fifth Amendments

Almost 130 years ago, the U.S. Supreme Court recognized and ingrained in the constitutional common law the unique attributes of quasi-criminal actions and the reasons why they are co-equal with criminal cases as to certain fundamental constitutional rights, privileges and protections.

> [This case of forfeiture of private property to the government for claimed non-payment of import duties is] not technically a criminal proceeding, and neither, therefore, within the literal terms of the fifth amendment to the constitution any more than it is within the literal terms of the fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both. We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the unreasonable searches and seizures condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the fifth amendment, throws light on the question as to what is an unreasonable search and seizure within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private

> books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear meaning and intent of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal [and held to be] quasi-criminal [that] are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, and we are further of opinion that a compulsory production of the private books and papers of the owner of the goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment of the constitution, and is the equivalent of a search and seizure - and an unreasonable search and seizure - within the meaning of the fourth amendment.

Boyd v. United States, 116 U.S. 616, 633-34, 6 S. Ct. 524, 29 L. Ed. 746 (1886). Under and pursuant to *Boyd*, as constitutional precedent under the Supremacy Clause and Wash. Const. art. I, § 2, actions recognized as quasi-criminal are entitled to much more protection than simply due process.

C. The Four Concrete Pillars Of Common Law And Constitutional Law Upon Which Dr Alsager's Appeal Is Firmly Supported

Since day one of the commencement of the DOH investigation, Dr Alsager has respectfully but firmly stood on four concrete pillars of common law and constitutional law in asserting his rights and privileges that are and must be recognized in this quasi-criminal action.[1] They are:

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[1] Because Dr Alsager asks this Court to review not only the Board's Final Order of Permanent Revocation of his professional license but also the Prehearing Orders and Orders on Reconsideration that all relate to the issues raised by him in this Appeal and erroneously decided by Review Judge/Presiding Officer Kuntz, a full copy of each of the challenged Orders is presented in the APPENDIX. *See* APP. at 1. RAP 10.3(g); RAP 10.3(h); RAP 10.4(c).

1. The common law pillar that Washington courts have long held that professional license disciplinary proceedings are quasi-criminal actions;

2. The constitutional law pillar that quasi-criminal actions are entitled, just as in criminal cases, to the full and blanket protection of the U.S. Const., Amend. V right to remain silent and privilege against self-incrimination, unfettered and without risk of sanctions for their assertion and without adverse inference;

3. The constitutional law pillar that U.S. Const., Amends. IV and V as enhanced by the increased protection afforded private affairs and personal privacy by Wash. Const. art. I, §§ 7 and 9, prevents government agencies from obtaining private and personal medical records, including prescription records, from any source absent patient consent without probable cause and a validly issued search warrant; and

4. The common law pillar that, in quasi-criminal actions, documents obtained by an unlawful search and seizure are not competent evidence and are subject to the exclusionary rule as fruit of the poisonous tree.

The DOH and Board took their jack hammer and destroyed each and every one of these concrete common law and constitutional law pillars and in so doing imposed the ultimate punishment on Dr Alsager, the permanent revocation of his professional license as an Osteopathic Physician and Surgeon without any chance for reinstatement – the administrative death penalty. His right to remain silent and privilege against self-incrimination were cast aside and ignored as the prosecution was permitted to query an empty chair and the Panel was allowed to draw an adverse inference from Dr Alsager's standing on his constitutional rights. He was charged with and found guilty of unprofessional conduct for his failure to cooperate, again by standing on his constitutional rights. Alleged prescription records were obtained by DOH

admittedly without patient consent and without a search warrant supported by probable cause. Alleged prescription records obtained without authority of law and without any chain of custody and authentication were admitted over Dr Alsager's continuing objections. Rather than being declared inadmissible and excluded from the record as they should and must have been, all of the DOH-illegally obtained records were admitted over repeated objections and used as the sole basis for the Board Panel's erroneous findings and conclusions that Dr Alsager violated its 2008 Final Order.[2] All of the DOH and Board's cited legal authority stems from purely civil actions and on their face are clearly distinguishable and irrelevant to our case, and do not deserve any detailed analysis or further mention hereinafter. Here, quasi-criminal is not a mere talisman as the State so fervently labors to have it characterized, it is dispositive! As further and persuasively noted in *Boyd*:

> It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* [resist the first approaches or encroachments]. We have no doubt that the legislative body is actuated by the same motives; but the

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[2] These provide more than sufficient legal grounds for this Court to vacate the Board's Final Order and direct the Board to reinstate Dr Alsager's license as an Osteopathic Physician and Surgeon. RCW 34.05.570(3)(a), -(c), -(d), -(e), -(f), -(g), -(h), -(i).

> vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

Boyd, 116 U.S. at 634-35. Nothing, absolutely nothing, argued by the DOH and Board should be allowed to dissuade this Court from fully applying these foregoing legal principles and fundamental constitutional protections set forth in *Boyd* accorded the accused (here Dr Alsager), and private/personal records wherever located and by whomever kept (here private medical records including prescriptions), in quasi-criminal actions (here, the professional license disciplinary proceedings against Dr Alsager seeking, and obtaining, the forfeiture of his professional license and livelihood).

II. ISSUES PRESENTED FOR REVIEW

This appellate review presents significant and far reaching legal issues under and pursuant to the federal and State Constitutions and State statutes including, *inter alia*:

1. Whether in the Board's quasi-criminal action against Dr Alsager and his professional license he is entitled as a matter of law to the blanket assertion and protection of his absolute U.S. Const., Amend. V right to remain silent and privilege against self-incrimination unfettered and without sanction or adverse inference?[3]

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[3] *See* U.S. Const., Amends. IV, V, and XIV; Wash. Const. art. I, §§ 2, 3, 7, 9, and 29; *Boyd*, 116 U.S. at 634-35; *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967); *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487, 491 (Fla. 1973); *State Bar of Michigan v. Woll*, 194 N.W.2d 835 (Mich. 1972). Washington case law holding that professional license disciplinary proceedings are quasi-criminal actions, *see Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983); *In re Revocation of License of Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958); *Nguyen v. Department of Health Medical* (continued...)

2. Whether because Wash. Const. art. I, §§ 7 and 9, rights and privileges are greater and more protective of private affairs than U.S. Const., Amend. IV and V, especially medical information and prescription records that have been afforded privacy protection since before statehood, there is no required records exception under Washington law and no patient medical information and/or prescription records, wherever located and by whomever kept, may be accessed by any government agency personnel without a search warrant, and all such records obtained by or subsequently discovered without a search warrant is not competent evidence and is subject to the exclusionary rule, omitted from the record, and not given any consideration?[4]

3. Whether in light of Dr Alsager's fundamental constitutional rights and privileges pursuant to U.S. Const., Amends. IV, V, and XIV, and Wash. Const. art. I, §§ 2, 3, 7, 9, and 29, the following State statutes are unconstitutional and unenforceable in professional license disciplinary quasi-criminal actions; *to wit*: RCW 18.130.050(7), RCW 18.130.180(8), RCW 18.130.230(1), RCW 70.02.050(2)(a), and RCW 70.225.040(3) (the latter two in the absence of a search warrant)?[5]

4. Whether in considering sanctions, the Board Panel as a matter of law can order ***permanent*** revocation of a license ***only if it specifically and expressly finds and concludes*** that Dr Alsager can ***never*** be rehabilitated or can ***never*** regain the ability to practice with reasonable skill and safety (*see* RCW 18.130.160; WAC 246-16-800(2)(b)(ii))?

5. Whether the Board's Final Order issued in 2008 was intended to and in fact only restricted the prescribing of Schedule II and III controlled

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[3](...continued)
Quality Assurance Commission, 144 Wn.2d 516, 29 P.3d 689 (2001); *Clausing v. Department of Health*, 90 Wn. App. 863, 955 P.2d 394 (1998). *See also* RCW 18.130.100; RCW 34.05.020; WAC 10-08-220.

[4] This particular issue addresses the greater protection afforded private affairs and testimonial physical records under the Washington Constitution, including a reasonable expectation of privacy in physician prescription records that was recognized as an integral part of Washington law at and even prior to statehood.

[5] Consolidated with this appeal is Case No. 47367-4-II (on appeal from the Superior Court's dismissal of Dr Alsager's action against the Respondents for Declaratory Judgment and Injunctive Relief challenging the constitutionality of these State statutes (stemming from discovery, now added RCW 70.225.040(3)) in the investigative/pre-charging document phase of the DOH/Board's quasi-criminal professional license disciplinary action against him and his professional license). *See* **Certified Administrative Record (CAR)**, at 709-15.

substances in the narcotic/opioid family for the sole purpose of pain management?[6]

Of particularly important note, Issues #1 - 4 (preserved for judicial review throughout all the investigative, pre-trial, and trial phases of the Department of Health (DOH) and Board actions) directly affect not only Dr Alsager and his professional license, but also directly affect all those other professional licensees who are being, or will *in futuro* be, investigated and then tried for alleged unprofessional conduct by the many State licensing agencies/boards whose disciplinary proceedings have been determined by the Washington Supreme Court and our Court of Appeals to be quasi-criminal actions.[7] *As for Dr Alsager's situation, the Statement of Charges never should have gone to trial and should have been dismissed as a matter of constitutional law based on his prehearing motions.* CAR, at 920, 959, 997.

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[6] CAR, at 91. This specific issue was presented to the Board for it to address in Dr Alsager's Petition for Declaratory Order dated August 14, 2013. CAR, at 1903-16. The Board declined to issue a Declaratory Order to address this issue raised in good faith by Dr Alsager. CAR, at 1918-20; APP, at 122-24. Not as any form of admission and solely for the purpose of considering appropriate sanctions, if and as necessary, the Board cannot place sole responsibility for any well-founded uncertainty regarding this matter on Dr Alsager, as it refused to clarify its 2008 Final Order upon proper request thus rendering the Board's intent as to scope of its coverage subject to Dr Alsager's good faith interpretation based on pharmacists' unanimous acceptance. CAR, at 118-21, 125-29 (Show Cause Hearing Brief excerpts).

[7] ***See* fn. 21 and 31, *infra* (professions include, *inter alia*, medical doctors, osteopathic physicians, and attorneys).** However, neither the DOH nor the Board recognize that their action taken against Dr Alsager and his professional license constitutes a quasi-criminal action that as a matter of well-established and long-standing constitutional law accords and affords the targeted licensee and his/her private records the full and blanket protection of U.S. Const., Amends. IV, V, and XIV; Wash. Const. art. I, §§ 2, 3, 7, 9, and 29; and RCW 34.05.020; thus rendering the challenged statutes herein unconstitutional as applied to quasi-criminal actions. A final judicial decision on the foregoing issues of law in his favor will not only afford Dr Alsager the reinstatement of his professional license, but will also protect all professional licensees in the State of Washington from further abject deprivation of their fundamental constitutional rights and privileges.

III. ASSIGNMENTS OF ERROR

Based on the patently willful and stubbornly unyielding violations of Dr Alsager's well-established constitutional rights and privileges under and pursuant to U.S. Const., Amends. IV, V, and XIV, and Wash. Const. art. I, §§ 2, 3, 7, 9, and 29, and pursuant to his Petition for Judicial Review in accordance with RCW 34.05.570, Dr Alsager assigns error to, objects to, and challenges for this Court's review and disposition all of the following:[8]

A. Under and pursuant to his Petition for Judicial Review and RCW 34.05.570(3) and RCW 34.05.546(4), Dr Alsager seeks this Court's review and appropriate disposition of his constitutional and statutory challenges and objections raised in his Motions and erroneously denied in each of the following identified Prehearing Orders entered by the Review Judge/Presiding Officer John Kuntz in Master Case No. M2013-514.[9] (Issues #1, 2, 3 and 5.)

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[8] In accordance with RAP 10.3(g), RAP 10.3(h), and RAP 10.4(c), Dr Alsager references his Assignments of Error to both the Certified Administrative Record (CAR) as well as to the full copy of each Prehearing Order, Final Order, and Orders on Reconsideration included in the APPENDIX (*see* APP, at 1) to this Main Brief.

[9] Including each of the following: (a) Prehearing Order No. 1: Order On Motions (CAR, at 279-88; APP, at 29-38; *see* CAR, at 104-10, 96-101, 114-230 (Dr Alsager's underlying pleadings and briefs)); (b) Prehearing Order No. 2: Order On Motions (CAR, at 289-94; APP, at 39-44; *see* CAR, at 270-78 (Dr Alsager's underlying motions and briefs)); (c) Prehearing Order No. 4: Order On Show Cause (CAR, at 300-306; APP, at 45-53; *see* CAR, at 398-514 (Dr Alsager's underlying briefs, memoranda, and full Exhibits)); (d) Prehearing Order No. 5: Order Denying Motion For Reconsideration Of Show Cause (CAR, at 539-47; APP, at 54-62; *see* CAR, at 531-38 (Dr Alsager's underlying motions and briefs)); (e) Prehearing Order No. 6: Order Denying Motion For Continuance (CAR, at 727-33; APP, at 63-69; *see* CAR, at 555-68, 570-74, 678-82 (Dr Alsager's underlying motions and briefs)); (f) Prehearing Order No. 7: Order Denying Motion For Reconsideration Of Prehearing Order No. 6 (CAR, at 1060-66; APP, at 70-76; *see* CAR, at 735-41, 1022-26 (Dr Alsager's underlying motions and briefs)); (g) Prehearing Order No. 9: Order Denying Motion To Disqualify Board Members (CAR, at 1435-41; APP, at 77-83; *see* CAR, at 945-54 (Dr (continued...)

B. Dr Alsager assigns error, challenges and objects to the Board's Final Order as to the following Findings of Fact (CAR, at 1705-12; APP, at 12-19) **in their entirety**: Part I - Paragraphs 1.2; 1.3; 1.5; 1.5(A) through 1.5(T), inclusive; 1.6; 1.7; and 1.10, as all are legally erroneous and insufficient/ incompetent to support the Final Order of guilty of unprofessional conduct and permanent revocation of Dr Alsager's professional license. RCW 34.05. 570(3).[10] Further assignment of error, challenges and objections are made to the Board's Final Order's **Sanction Findings**, Part I - Paragraph 1.10, on grounds that such Finding omits critical reference to the parties' Prehearing Stipulations set forth in Paragraph 2 thereof and specific findings of fact as to reasons and rationale that Dr Alsager can never be rehabilitated or never regain the ability to practice safely.[11] RCW 34.05.570(3). CAR, at 1446.

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[9](...continued)
Alsager's underlying motions and briefs)); (h) Prehearing Order No. 10: Order Denying Motion In Limine To Suppress; Order Denying Motion To Dismiss Statement Of Charges Paragraph 2.1 (CAR, at 1452-66; APP, at 84-98; *see* CAR, at 920-40, 959-92, 997-1003 (Dr Alsager's underlying motions and briefs)); (i) Prehearing Order No. 11: Order Defining Conduct Of Hearing; (CAR, at 1627–32 (adverse evidentiary rulings); APP, at 99-104; *see* CAR, at 1043-55 (Dr Alsager's trial brief)); and (j) Prehearing Order No. 12: Order Denying Motion For Reconsideration (CAR, at 1633-45 (admitting all of DOH exhibits over Dr Alsager's objections); APP, at 105-117; *see* CAR, at 1067-75, 1622-26 (Dr Alsager's underlying motions and briefs)).

[10] Further errors, challenges and objections are made to the Board's Final Order as to the following Findings of Fact **in part**: Part I - Paragraphs 1.1 (as to coverage of 2008 Final Order); 1.4 (misstates the amount of the monetary fine); 1.8 (omitted the accepted Stipulation of the parties as to the legal grounds for Dr Alsager not providing the requested information), 1 9 (omitted the accepted Stipulation of the parties as to the legal grounds for Dr Alsager not providing the requested information). RCW 34.05.570(3).

[11] Omitted thereby is the fact of completion of the pain management course (CAR, at 201-14) is disputed and that no evidence relevant thereto would be provided during the course of the hearing, thus it is patently erroneous to make a Finding of Fact that "there is no rehabili-
(continued ..)

(Issues # 1, 2, 3, 4 and 5.)

C. Dr Alsager assigns error, challenges and objects to the Board's Final Order as to the following Conclusions of Law (CAR, at 1712-15; APP, at 19-22) **in their entirety**: Part II - Paragraphs 2.5 (a clear violation of Dr Alsager's constitutional rights and privileges); 2.6 (unsupported by any Findings of Fact that must in turn be supported by substantial and competent, clear, cogent and convincing evidence); 2.7 (the Board Panel is not free to simply use its own judgment to determine sanctions independent of required considerations mandated by statute to support the Permanent Revocation of Dr Alsager's professional license); 2.8 (no mitigating factors were considered); and 2.9 (only aggravating factors were considered). RCW 34.05.570(3).[12] Further errors, challenges and objections are made to the following Conclusions of Law regarding **Sanctions**: Part II - Paragraphs 2.7, 2.8, and 2.9, as there was no due and fair consideration of mitigating circumstances,

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[11](...continued)
tation plan that will ensure [Dr Alsager's] compliance"; (2) there is absolutely no reference to and fair consideration of Dr Alsager's Sanctioning Brief and the content thereof, including Exhibits and the undisputed fact that his patients (*i.e.*, members of the public) have tremendous love and respect for him and his care and treatment of them; and (3) there is absolutely no express finding therein that Dr Alsager can never be rehabilitated or can never regain the ability to practice safely.

[12] Further errors, challenges and objections are made to the Board's Final Order as to the following Conclusions of Law **in part**: Part II - Paragraphs 2.2 and 2.3 (there is absolutely no legal uncertainty as the standard of proof is clear, cogent and convincing and anything to the contrary is misleading and severely prejudicial to the rights of Dr Alsager and his professional license); 2.4 (there is absolutely no statement as to the Board Panel individual Member's "experience, competency and specialized knowledge" relevant to having any bearing on the issues presented in this case and thus rendered permissible in their evaluation of the evidence -- RCW 34.05.461(5)). RCW 34.05.570(3).

regarding which the Board Panel admitted that "there were no mitigating factors considered."[13] The omission of the foregoing mitigating circumstances (improperly ordered removed from Dr Alsager's Sanctioning Brief and stated by the Board Panel that no "mitigating factors" were considered and that it considered only "aggravating factors" in its determination of sanctions) is erroneous and severely adversely prejudicial leading to the Board Panel's imposition of the death penalty by its patently erroneous and unlawful permanent revocation of Dr Alsager's professional license and right to continue practice as an Osteopathic Physician and Surgeon.[14] RCW 34.05. 570(3). (Issues # 1, 2, 3, 4 and 5.)

D. Dr Alsager assigns error, challenges and objects to the Board's Final Order as to its **Order of Permanent Revocation** (CAR, at 1715; APP,

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[13] Not as any form of or intended admission but grounded on undisputed facts, stemming from the testimonial evidence presented in cross-examination of Hoyle that none of the alleged prescriptions in issue were for Schedule II opioid substances and that the alleged prescriptions in issue were all filled by pharmacies and pharmacists without objection (*see* CAR, at 2087-89, 2085-86), for the Board to disregard this exculpatory evidence and overlook its own complicity in failing to provide Dr Alsager clarification when in good faith requested as mitigating factors is an absolute travesty of justice. *See* CAR, at 1903-16, 1918-20.

[14] It is unfathomable to understand how the Board Panel came to their conclusion that Dr Alsager was ***unwilling to comply*** with the Board's 2008 Final Order and that absolutely no mitigating factors were considered by them in ordering the death penalty on Dr Alsager's practice. Part of the full record of this action before the Court is Dr Alsager's Show Cause Hearing Brief and Exhibits dated October 9, 2013. CAR, at 114-230. The undisputed facts presented therein show Dr Alsager's good faith understanding of and conformance with all aspects of the 2008 Final Order. Not as any admission, but any and all beliefs held in good faith but nevertheless legally erroneous have been corrected long ago and no longer hold sway. There are absolutely no grounds for any Finding or Conclusion that Dr Alsager has been "unwilling to comply with the Board's Orders." Because the foregoing known facts in the Board record were overlooked, or at worst disregarded under bias, there are no substantial competent grounds on which the Board Panel can legally permanently revoke Dr Alsager's professional license to practice as an Osteopathic Physician and Surgeon. (Issues # 4 and 5.)

at 22) with no opportunity for reinstatement: Part III - Paragraphs 3.1 and 3.2 in their entirety, as the Final Order is legally defective and deficient, and in violation of Dr Alsager's constitutional and statutory rights and privileges, as its Order of Permanent Revocation is contrary to law and unsupported by Conclusions of Law which must in turn be supported by substantial competent evidence that is clear, cogent and convincing. RCW 18.130.160; WAC 246-16-800(2)(b)(ii); RCW 34.05.570(3). (Issues # 1, 2, 3, 4 and 5.)

E. Dr Alsager assigns error, challenges and objects to the Presiding Officer's **Order Denying Dr Alsager's Request For Reconsideration of the Board's Final Order** (CAR, at 1810-13; APP, at 25-28), as such Order was an abuse of discretion, legally erroneous, and wholly inadequate in overlooking Dr Alsager's clear grounds supporting his Petition for Reconsideration. *See* CAR, at 1723-38. RCW 34.05.570(3). (Issues # 1, 2, 3, 4 and 5.)

IV. STATEMENT OF THE CASE

Before having his professional license permanently revoked by the Board, with no opportunity for reinstatement, Dr Alsager was an Osteopathic Physician and Surgeon with his private rural family practice located in Maple Valley, Washington. CAR, at 1963-90. Based on a prior Order of the Board entered in 2008, Dr Alsager was prohibited from prescribing Schedule II and III controlled substances until he completed a one year program in pain management. CAR, at 91. *But see* fn. 6, 13, and 14, supra. That Board Order did ***not***, however, require Dr Alsager to submit to warrantless search and

seizure of prescription records wherever located and by whomever kept, nor were his patients given notice thereunder that their private prescription records would be subject to search and seizure without their consent.[15]

Based on a complaint against Dr Alsager in 2012 that was ***not*** brought by a patient but, on information and belief, by a non-patient individual based on protected health information that contained ***no*** allegations of any purportedly improper prescribing practices, the Board commenced an investigation. CAR, at 1858, 1862. The DOH Investigator, Trish Hoyle, sent a letter to Dr Alsager demanding the production of private medical records as well as a written statement from him answering the allegations in the complaint under threat of monetary penalties and sanctions for noncompliance (redacted by Stipulation; CAR, at 1447 ¶ 4, 2067).[16] As with all demand letters sent by DOH as an investigative agency, the licensee under investigation for alleged

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[15] Compare the absence of such significant intrusion on his private practice and affairs with the fact that the Board's Order required Dr Alsager's x-ray equipment to undergo inspection and that certain patient imaging he produced be overread by an outside consultant. In fact, there is absolutely no evidence that the DOH or the Board either requested Dr Alsager to produce any prescription records, or themselves had any cause to suspect possible improper conduct by him, during the entire period from 2008 through 2013 – leading Dr Alsager to very reasonably and in good faith believe and rely on the fact that there were no issues with his prescribing practices by either the DOH or the Board following the 2008 Final Order.

[16] Promptly upon receipt of the DOH demand letter, Dr Alsager, by and through his counsel, (1) responded to the demand letter with the assertion of his constitutional rights and privileges, and (2) in accordance with law, petitioned the Board to issue a Declaratory Order to address, *inter alia*, the applicability of those statutes relied on by DOH to support its demands as, in light of Dr Alsager's clear and unequivocal constitutional rights and privileges, such statutes are unconstitutional. CAR, at 1864-84; Issues #1, #2, and #3, *supra*. The Board declined to issue a Declaratory Order as properly requested by Dr Alsager, leaving unresolved substantial and significant issues. CAR, at 1886-87 (Dr Alsager sought review of the issues raised in the federal courts (in particular, Issues #1 and #3, *supra*); they declined under prudential considerations of the *Younger*, 401 U.S. 37 (1971), abstention doctrine deferring resolution of these issues to the State courts)

unprofessional conduct is given a written mini-Miranda statement; significantly absent from which is the targeted licensee's Fifth Amendment right to remain silent and privilege against self-incrimination without risk of punishment. *See* CAR, at 56; RCW 18.130.095(2)(a). Standing firm on his federal and State constitutional rights and privileges, Dr Alsager declined to answer the complaint and provide any records as the DOH had demanded.

Following this skirmish and conducted as a fishing expedition, as there were no allegations relating to prescriptions and no probable cause, without obtaining a search warrant and, moreover, without first obtaining Board authorization and grounded solely on a request from the DOH's attorney, *see* CAR, at 30, 51, in May 2013 Hoyle submitted a query run against the Washington State Prescription Monitoring Program (PMP) database (*but see* CAR, at 974-92, 998-1003) and obtained a listing of what were alleged to be Dr Alsager's prescribed medications to his patients, including certain Schedule 2 and 3 controlled substances that were allegedly subject to restriction pursuant to a Board Order issued in 2008. CAR, at 1846, 2068, 2073-74, 1922-28 (PMP Query Output); APP, at 118. Based solely on the information unlawfully obtained from the PMP database, the DOH itself filed with the Board a complaint against Dr Alsager and subsequently obtained Board authorization to conduct an investigation regarding prescriptions. CAR, at 1890; APP, at 119. Without obtaining a search warrant and without following any chain-of-custody and authentication protocol, Hoyle contacted various pharmacies

to obtain copies of alleged prescriptions purportedly written by Dr Alsager from personal private patient files. CAR, at 51, 1930-55, 2077. Based solely on the information Hoyle gleaned from the foregoing unlawful queries into private and protected prescription information, and the after-the-fact authorization by the Board to conduct an investigation, Hoyle sent a letter to Dr Alsager demanding the production of private medical records, including prescriptions, as well as a written statement from him answering the allegations in the complaint under threat of monetary penalties and sanctions for non-compliance. CAR, at 1892-93; APP, at 120-21.[17] Once more the DOH provided the mini-Miranda statement; once more absent the full advisement of Dr Alsager's Fifth Amendment rights and privileges. CAR, at 40. Again, grounded in and standing on his constitutional rights and privileges and the confidentiality and protection of his personal private patient medical records and personal files (all non-corporate records), Dr Alsager declined to provide Hoyle with the demanded documentary records and written answer to the allegations in the complaint. Based on Hoyle's investigation and Dr Alsager's refusal to provide the demanded information, the Board charged Dr Alsager

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[17] Promptly upon receipt of the DOH demand letter, Dr Alsager, by and through his counsel, again (1) responded to the demand letter with the assertion of his constitutional rights and privileges, CAR, at 1895-98; and (2) in accordance with law, petitioned the Board to issue a Declaratory Order to address, *inter alia*, the applicability of those statutes relied on by DOH to support its demands as, in light of Dr Alsager's clear and unequivocal constitutional rights and privileges, such statutes are unconstitutional. CAR, at 1903-16; Issues #1, #2, #3, and #5 *supra*. Once again, the Board declined to issue a Declaratory Order as properly requested by Dr Alsager, leaving unresolved substantial and significant issues. CAR, at 1918-20; APP, at 122-24 (that matter is the subject of a separate action on appeal and consolidated with this case; *see* fn.5, *supra*).

with two counts of unprofessional conduct in its Statement of Charges (CAR, at 4-10; APP, at 4-9).[18] Concurrent with the issuance of its Statement of Charges, the Board entered an Ex Parte Order summarily suspending Dr Alsager's license. CAR, at 11-13; APP, at 125-27. Through his attorney, Dr Alsager entered a plea of not guilty to all the allegations of unprofessional conduct set forth in the Statement of Charges pursuant to and under the express assertion and protection of his constitutional rights and privileges. CAR, at 104-10. Through his attorney, Dr Alsager also requested a Show Cause Hearing on the Ex Parte Order. CAR, at 96-101, 114-230.

By and through his attorney, Dr Alsager filed several pre-trial motions, including motions for reconsideration, addressing (1) his constitutional rights and privileges; (2) the suppression of evidence obtained by the State without a search warrant and in violation of privacy rights; and (3) recusal of the Presiding Officer and certain Board Members for bias arising from a direct pecuniary interest in the outcome of its action against Dr Alsager, prejudgment, and conflict of interest.[19] In order to focus the trial on certain specific

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[18] Namely, (1) RCW 18.130.180(8): "failure to cooperate with the disciplining authority by (a) not furnishing any papers, documents, records, or other items; [and] (b) not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority"; and (2) RCW 18.130.180(9): "failure to comply with an order issued by the disciplinary authority or a stipulation for informal disposition entered into with the disciplining authority." CAR, at 8.

[19] Dr Alsager's constitutional and statutory defenses to the Board's Statement of Charges of alleged unprofessional conduct are set forth in detail in his (a) Motion To Dismiss Statement Of Charges, ¶ 2.1 (RCW 18.130.180(8)) dated April 9, 2014 (CAR, at 920-40), (b) Motion In Limine To Suppress And Exclude All DOH Prescription-Related Documents And Evidence; **And** Motion To Dismiss Statement Of Charges, ¶ 2.1 (RCW 18.130.180(9)) dated (continued...)

matters and exclude certain irrelevant and prejudicial evidence proffered by the DOH, by and through his attorney, Dr Alsager entered into a Prehearing Stipulation with the prosecuting attorney, albeit the fulfillment thereof by the Presiding Officer is uncertain. CAR, at 1446-47, 2034-36; APP, at 2-3. Having failed in all of his proper objections to procedural matters and evidence, the Board conducted its trial against Dr Alsager, at which by and through his attorney he participated with opening and closing statements; cross-examination of the DOH witness; and fully argued, supported, asserted, and defended his full and blanket federal and State constitutional rights and privileges not to be called, not to testify, and have no adverse inference drawn therefrom in this quasi-criminal action. CAR, at 2007-125 (Verbatim Transcript). All of Dr Alsager's objections were summarily rejected by the Presiding Officer (CAR, at 2037-49) and the **prosecutor was permitted to query an empty chair** (CAR, at 2056-65) from which the Board Panel was **permitted to draw an adverse inference**. CAR, at 2065, 2123. Evidence that should have been suppressed and that was not subject to any search warrant, chain-of-custody and authentication was admitted over Dr Alsager's objections

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[14](...continued)
April 12, 2014 (CAR, at 959-92); and (c) Addendum To Motion In Limine To Suppress And Exclude All DOH Prescription-Related Documents And Evidence; **And** Motion To Dismiss Statement Of Charges, ¶2.1 (RCW 18.130.180(9)) dated April 14, 2014 (CAR, at 997-1003). Additional pre-trial briefs and motions for reconsideration are found in the CAR, at 270-78, 531-38, 555-68, 678-82, 735-41, 945-54, 1022-26, 1043-55, 1067-75, 1622-26 (includes reference to *State v Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and a basic analysis as to greater protection given private records under Wash. Const. art. I, §§ 7 and 9). The relevant disposition of these pre-trial motions was made by the Presiding Officer/Review Judge in Prehearing Order Nos. 10, 11, and 12. *See* APP, at 84-98, at 99-104, at 105-117.

(CAR, at 959-92, 997-1003, 1622-26, 1633-45, 2073-85) and Dr Alsager's Sanctioning Brief was at the last second improperly pared by the Presiding Officer (CAR, at 1631 ¶ 5(E), 1956-2006, 2012-21) all resulting in the Board Panel issuing its Final Order finding Dr Alsager guilty of unprofessional conduct and imposing the ultimate administrative death penalty on him and his professional career and livelihood, the permanent revocation of his professional license with absolutely no opportunity for reinstatement. CAR, at 1703-17; APP, at 10-24. Dr Alsager's Petition for Reconsideration of the Board's Final Order (CAR, at 1723-38) was summarily rejected by Presiding Officer/Review Judge Kuntz. CAR, at 1810-13; APP, at 25-28.[20]

V. STANDARD OF REVIEW

A professional license disciplinary proceeding is a quasi-criminal action, *Johnston*, 99 Wn.2d at 474;[21] and as observed by the Washington Supreme Court "[a professional license revocation proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose." *In re Kindschi*, 52 Wn.2d at 10-11. And as occurred in our case, a disciplinary proceeding's ultimate sanction imposed by the State for unpro-

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[20] With the publication of this result by DOH on its Internet websites, Dr Alsager has since been rejected time and again by possible employers for professional job opportunities. Not only have his patients been severely harmed by the DOH and Board actions removing from service to them an attentive, caring and loving caregiver, but Dr Alsager and his family have been professionally and financially devastated by the Board's flawed decisions.

[21] Citing, *e.g.*, *In re Ruffalo*, 390 U.S. at 551 (attorney disbarment); *In re Kindschi*, 52 Wn.2d 8 (physician discipline). *See also Clausing*, 90 Wn. App. at 874 (osteopathic physician).

fessional conduct is the revocation of the professional license -- an administrative death sentence.[22] "*Johnston* and *Kindschi* are unquestionably the law of this jurisdiction."[23]

The Court reviews the Board's Orders under the Administrative Procedure Act (APA). RCW 34.05.570(3); *Clausing*, 90 Wn. App. at 870. The Court reviews the findings and conclusions of the Board and must grant relief if the Board's Order "violates the constitution, exceeds statutory authority, is the result of faulty procedure, involves an error in interpreting or applying the law, is not supported by substantial evidence, omits issues requiring resolution, involves improper rulings on disqualification issues, is inconsistent with an agency rule, or is arbitrary or capricious." *Clausing*, 90 Wn. App. at 870. The standard of proof applied is that the conclusions of law must be based on findings of fact that are in turn based on evidence that is clear, cogent and convincing. *Nguyen*, 144 Wn.2d at 534.[24] Where the evidentiary standard is clear, cogent and convincing, the Court must determine that the competent evidence is substantial enough to allow it to conclude that

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[22] "[R]evocation of a [professional] license is much like the death penalty in criminal law -- it is not imposed to reform the particular person involved." *In re Revocation of the License to Practice Dentistry of Flynn*, 52 Wn.2d 589, 596, 328 P.2d 150 (1958).

[23] *Nguyen*, 144 Wn.2d at 528. Thus the foundation is laid for application of absolute, blanket Fifth Amendment rights to quasi-criminal actions. *Cf. Washington v. Ankney*, 53 Wn. App. 393, 397, 766 P.2d 1131 (1989) (citing *Boyd* as authority for making co-equal quasi-criminal and criminal actions with respect to the privilege against self-incrimination).

[24] "*Nguyen* is the law of this state, whether one agrees with it or not." *Nims v. Washington Board of Registration*, 113 Wn. App. 499, 505, 53 P.3d 52 (2002) (professional engineer disciplinary action).

the ultimate facts in issue have been shown to be "highly probable."[25] Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Thieu Lenh Nghiem v. State*, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994).[26] Although the Board panel is the trier of fact,[27] the application of law to the facts is a question of law that the Court reviews *de novo*.[28] The Court accords substantial weight to the Board's interpretation of such law as may specially fall within its area of expertise, but the agency is not the final arbiter of the law and the Court may substitute its judgment for that of the Board. *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).[29] Moreover, the

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[25] *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973); *Dewberry v George*, 115 Wn. App. 351, 362, 62 P.3d 525 (2002); *In re Estate of Mumby*, 97 Wn. App. 385, 391, 982 P.2d 1219 (1999).

[26] "In other words, the facts relied upon to establish [that Dr Alsager in fact committed acts of unprofessional conduct] must be clear, positive, and unequivocal in their implication." *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993)

[27] *Deatherage v. State Examining Board of Psychology*, 85 Wn. App. 434, 445, 932 P 2d 1267, *reversed on other grounds*, 134 Wn.2d 131, 948 P.2d 828 (1997), *Chicago, Milwaukee, St Paul and Pacific R.R. Co. v. Washington State Human Rights Commission*, 87 Wn.2d 802, 806-807, 557 P.2d 307 (1976).

[28] *Tapper v. Employment Security Department*, 122 Wn 2d 397, 402, 858 P.2d 494 (1993) (the Board's contested conclusions of law are reviewed de *novo* under the error of law standard, *Bond v. Department of Social & Health Services*, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002)).

[29] The grounds for judicial review and the vacation of the Board's Final Order include those bases set forth in RCW 34.05 570(3) that relate *inter alia* to (1) the unconstitutionality of statutes (namely, RCW 18.130.050(7), RCW 18.130.180(8), RCW 18.130.230(1), RCW 70.02.050(2)(a), and RCW 70.225.040(3) (the latter two in the absence of a search warrant)) applied as an error of law by the DOH and Board in this professional license disciplinary quasi-criminal action, and the refusal of the agencies to find and conclude that such unconstitutional statutes are unenforceable and inapplicable in quasi-criminal professional license (continued...)

Court does not defer to an agency's construction, interpretation or application of constitutional law.[30] (A copy of each relevant law is in APP, at 128-36.)

VI. DISCUSSION AND ARGUMENT

A. OVERVIEW OF CONSTITUTIONAL RIGHTS AND PRIVILEGES

Totally ignored, cast aside, and trampled upon by the administrative officials and agencies is the very well-settled law that affords the accused full and blanket protection of Fourth and Fifth Amendment constitutional rights and privileges, and those greater protections afforded by our Washington Constitution. Although presented in the context of Dr Alsager's present appeal, those agencies and administrative officials that are in positions of

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[29](. .continued)
disciplinary actions thus constituting an error of law and an arbitrary and capricious decision; (2) findings of fact that are not supported by substantial competent evidence lawfully obtained and authenticated; (3) conclusions of law that are clearly erroneous and/or erroneously interpret and apply the law; and (4) a Final Order of guilty of unprofessional conduct and imposing the administrative death penalty of permanent revocation of a professional license that does not comport with legal requirements under State and federal constitutions and statutes. RCW 34.05.570(3)(a), -(c), -(d), -(e), -(f), -(g), -(h), and -(i).

[30] "At least since *Marbury v. Madison*, 1 Cranch 137, this Court has recognized that it is emphatically the province and duty of the Judiciary to determine the constitutionality of a statute." *Zivotofsky v. Clinton*, 566 U.S. __, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012, Syllabus by the Court). *Carter v. University of Washington*, 85 Wn 2d 391, 399, 536 P.2d 618 (1975) ("[I]t is [the judicial] branch of our system of government that is the final arbiter of our constitution."). Courts will review constitutional challenges to a statute *de novo*. *U.S. v. Koons*, 300 F.3d 985, 990 (8th Cir. 2002); *U.S. v Haney*, 264 F.3d 1161, 1163 (10th Cir. 2001); *Kildea v Electro-Wire Products, Inc.*, 144 F.3d 400, 407 (6th Cir. 1998); *Lund v. State Department of Ecology*, 93 Wn. App 329, 334, 969 P.2d 1072 (1998). An administrative agency does not have the power to determine the constitutionality of statutes under which it operates. *See, e.g., United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693 (7th Cir. 1982); *Longview Fibre Company v Department of Ecology*, 89 Wn. App. 627, 633, 949 P.2d 851 (1998) ("As constitutional issues are outside the realm of agency expertise, [courts] do not defer to the agency's application of constitutional principles", citing *Crescent Convalescent Center v. Department of Social and Health Services*, 87 Wn App. 353, 357, 942 P 2d 981 (1997)).

authority with respect to investigating complaints alleging unprofessional conduct, and then proceeding with trial and imposition of sanctions, are in desperate need of a definitive and final authoritative decision by this Court in order that the full rights and privileges of the accused in such quasi-criminal actions are recognized, acknowledged and applied without penalty, sanction or adverse inference being drawn from the assertion of such rights and privileges.

It cannot be overemphasized enough and as often as possible that under very well and long-settled Washington law, a professional license disciplinary proceeding, including and not limited to all pre-adjudicative investigative actions undertaken by the State, is a quasi-criminal action, *Johnston*, 99 Wn.2d at 474;[31] as observed by our Supreme Court "[a disciplinary proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose." *Kindschi*, 52 Wn.2d at 10-11.[32] Moreover, "*Johnston* and *Kindschi* are unquestionably the law of this jurisdiction." *Nguyen*, 144 Wn.2d at 528. And of special note, "*Nguyen* is the law of this state, whether one agrees with it or not." *Nims*, 113 Wn. App. at 505.

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[31] *Citing, e.g., In re Ruffalo*, 390 U.S 544 (attorney disbarment); *In re Kindschi*, 52 Wn.2d 8 (physician discipline). *See also Nguyen*, 144 Wn.2d 516 (medical doctor); *In re Haley*, 156 Wn.2d 324, 347-49, 126 P.3d 1262 (2006, Sanders, J., concurring) (attorney); *Clausing*, 90 Wn. App. 863 (osteopathic physician).

[32] A disciplinary proceeding's ultimate sanction is the revocation of the professional license -- an administrative death sentence: "revocation of a [professional] license is much like the death penalty in criminal law -- it is not imposed to reform the particular person involved." *In re Flynn*, 52 Wn.2d at 596.

It is well-established that under our State Constitution the rights and privileges against self-incrimination under the Fifth Amendment and article I, section 9 are coextensive. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); *State v. Earls*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991). Thus, where the U.S. Supreme Court has clearly spoken and held that the Fifth Amendment right to remain silent and privilege against self-incrimination apply with full force and effect in quasi-criminal actions without penalty or adverse inference, such application shall apply with full force and effect in all State proceedings that are declared by our Supreme Court to be quasi-criminal actions, as precedent under the doctrine of *stare decisis*. Wash. Const. art. I, § 2. As a direct result, the U.S. Supreme Court's decisions with respect to the application of Fifth Amendment rights and privileges to protect the accused in quasi-criminal actions are binding on our courts and State agencies. Clearly, unequivocally, and undiminished in its applicability:

> [Q]uasi-criminal [actions] are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . . .

Boyd v. United States, 116 U.S. 616, 634-35, 6 S. Ct. 524, 29 L. Ed. 746 (1886).[33] The fundamental constitutional principles applicable to quasi-

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[33] *See In re Ruffalo*, 390 U.S. at 551 (attorney disciplinary proceedings are quasi-criminal actions). Courts must be ever vigilant that we are here dealing with issues of substantial and fundamental personal rights and privileges that are never lightly presumed waived or relinquished. "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or forfeit his property, (continued...)

criminal actions such as the professional license revocation proceeding here, as derived from *Boyd* and its progeny over the years, including *Spevack v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967),[34] are summarized by our like-minded Sister State highest courts as follows:

> In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings *penal* in nature [*i.e.*, quasi-criminal] in that they tend to degrade the individual's professional standing, professional reputation or livelihood.

State ex rel. Vining v. Florida Real Estate Commission, 281 So.2d 487, 491 (Fla. 1973).[35] The compulsion element of the privilege against self-

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[33](...continued)
is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd*, 116 U.S. at 631-32. Our Supreme Court has long held that a professional license is a very valuable property right accorded an individual by the State and is afforded fundamental constitutional protections. *See, e.g., Nguyen*, 144 Wn.2d at 522-23 (re: standard of proof).

[34] In *Spevack*, the United States Supreme Court reversed the disbarment of a New York attorney who had failed to produce records demanded in a subpoena duces tecum and who had refused to testify at the judicial inquiry holding that the Fifth Amendment protected the licensee from such compulsory production and testimony in a disciplinary proceeding. "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence. . . . In this context *penalty* is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege *costly*. *Id.*, at 614. We held in that case that the Fifth Amendment, operating through the Fourteenth, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. *Id.*, at 615. What we said in *Malloy* and *Griffin* is in the tradition of the broad protection given the privilege at least since *Boyd v. United States*, 116 U.S. 616, 634-635, where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself." *Spevack*, 385 U.S. at 514-15. Here, the forfeiture is the revocation of Dr Alsager's professional license.

[35] The privilege is entitled to be invoked in those proceedings sufficiently penal in effect upon the individual and/or his/her property rights, and the penalty is not restricted to fine or
(continued ..)

incrimination is present when the State attaches sufficiently adverse consequences to the choice to remain silent that a person is compelled to speak (*e.g.*, RCW 18.130.050(7), RCW 18.130.180(8), RCW 18.130.230(1)).

> In our judgment, logic and reason demand that the rationale of *Spevack* be applied not only to disbarment proceedings, but as well to other types of administrative proceedings which may result in deprivation of livelihood. Certainly, threatened loss of professional standing through revocation of his real estate license is as serious and compelling to the realtor as disbarment is to the attorney.

Vining, 281 So.2d at 491.[36] The full, unfettered privilege against self-incrimination and right to remain silent, free from adverse inference and sanctions, accorded an accused by operation of the Fifth Amendment applies to all aspects of this quasi-criminal proceeding, including preliminary investigations and any subsequent trial[37] (giving rise to Dr Alsager's claim that

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[35](. continued)
imprisonment. *Vining*, 281 So.2d at 490-91. *See also State ex rel. Oklahoma Bar Association v. Wilcox*, 227 P 3d 642, 654-55, 658 (Okla. 2009) (recent application of *Spevack* to quasi-criminal attorney disciplinary action).

[36] *See also State Bar of Michigan v. Woll*, 194 N.W.2d 835 (Mich. 1972) (Fifth Amendment application to quasi-criminal disciplinary actions). In *Woll*, 194 N.W.2d at 838, the Michigan Supreme Court held that the Fifth Amendment privilege against self-incrimination applied to the attorney in a disciplinary action seeking disbarment, as a quasi-criminal proceeding and, moreover, there can be no adverse inference derived or inferred from, or commentary made upon, the invocation of the right to remain silent in such a proceeding. "[C]omment on the refusal to testify is a remnant of the inquisitorial system of criminal justice . . . which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct 1229, 14 L. Ed. 2d 106 (1965). *See Spevack*, 385 U.S. at 514-15.

[37] The privilege against self-incrimination protects persons "against being forced to make incriminating disclosures at any stage of the proceeding if they could not be compelled to make such disclosures as a witness at trial." *National Acceptance Company of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983). It therefore applies not only at trial, but at the investigative stage of such proceedings as well. The privilege against self-incrimination not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the one who
(continued...)

RCW 18.130.050(7), RCW 18.130.180(8), RCW 18.130.230(1), RCW 70.02.050(2)(a), and RCW 70.225.040(3) are unconstitutional as applied to this quasi-criminal action against Dr Alsager's professional license). Furthermore, the right to remain silent and privilege against self-incrimination is a blanket right and privilege, and once raised cannot be impinged, impaired, or impugned by the State.[38] Moreover, because Wash. Const. art. I, §§ 7 and 9, afford our citizens greater protection than is otherwise available under U.S. Const., Amends. IV and V,[39] under Washington law there is **no** *required records* exception to *Boyd's* Fourth and Fifth Amendment coverage that might make Dr Alsager's private medical records, including prescriptions wherever located and by whomever kept, subject to production on govern-

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[37](...continued)
claims the right. *Blau v. United States*, 340 U.S. 159, 71 S. Ct. 223, 95 L. Ed. 170 (1950). In fact, in *Vining* the Florida Supreme Court made it a specific point to note that what was constitutionally repugnant to the Fifth Amendment was the coercive effect created by "the fact that the defendant is required to respond at all" under statutory compulsion to answer the statement of charges else face delicensure by default. *Vining*, 281 So.2d at 491-92 (akin in our case to the statutory compulsion to answer else be guilty of unprofessional conduct).

[38] "[In] quasi-criminal cases, the Fifth Amendment privilege is fully applicable; the [accused] may refuse to testify altogether and no adverse inference may be drawn from such refusal." *City of Philadelphia v. Kenny*, 369 A.2d 1343, 1348-49 (Pa.Commw.Ct. 1977), *cert. denied*, 434 U.S. 923 (1978) (citing as authority *U.S. v. United States Coin & Currency*, 401 U.S. 715 (1971); *Lees v U S.*, 150 U.S. 476 (1893); *Boyd*, 116 U.S. 616).

[39] "It is well settled that article I, section 7 . . . provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.2d 1062 (2002). *See also State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). "The relevant question [is] whether the State has unreasonably intruded into a person's private affairs. . . . The inquiry under the state constitution is broader than under the Fourth Amendment, and the inquiry focus on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant . . . There are no express limitations on the right to privacy recognized under article I, section 7." *State v. Cheatam*, 150 Wn.2d 626, 641-42, 81 P.3d 830 (2003).

ment demand without a valid search warrant. CAR, at 2043-44.[40] A physician's private medical records and papers comprising personal protected information do not become public and thus unprotected merely because the government by fiat says they are by enactment of statutes (*e.g.*, RCW 70.02.050(2)(a) and RCW 70.225.040(3) enforced without search warrants):

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege [of the Fourth and Fifth Amendments]. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress.

Marchetti v. United States, 390 U.S. 39, 57, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968). The government's interest in obtaining private information does not, and cannot be allowed to, outweigh and supersede the individual's fundamental constitutional protections.[41]

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[40] "Except in the rarest of circumstances, the *authority of law* required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes *authority of law* justifying an intrusion into the *private affairs* of its citizens. This defies the very nature of our constitutional scheme." *Ladson*, 138 Wn.2d at 353 n.3. *See also Cohan v. Ayabe*, 322 P.3d 948, 955 n.6 (Haw 2014) (State Constitution, including that of Washington State, provides increased privacy protection to individual health information and records above and beyond that required by HIPAA – Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 201 *et seq.*). *See* CAR 1622-26 (includes basic analysis as to greater protection given private records under Wash. Const. art. I, § 7). *Accord State v. Skinner*, 10 So.3d 1212, 1218 (La. 2009) (search warrant required because of reasonable expectation of privacy in prescription records).

[41] The individual's fundamental Fifth Amendment rights far outweigh the government's recognized significant interest in ferreting out fraud and violations of criminal laws. "We recognize the Department's significant interest in detecting any wrongdoing among its employees or those who do business with them. We cannot accept, however, the Department's argument that it has a compelling interest in investigating fraud that far out-

(continued...)

The full application and protections of the Fourth and Fifth Amendments, coupled with the greater protections afforded under the Washington Constitution, cannot be ignored or misapplied by administrative agencies acting under the guise and color of authority provided by statutes that are unconstitutional on their face or as applied to quasi-criminal actions, and are essential to protect the fundamental rights and privileges afforded by law in professional license quasi-criminal actions seeking forfeiture of such license and ultimately ending the licensee's professional life and livelihood, as the Board has done to Dr Alsager.

B. CONTINUED VALIDITY AND VITALITY OF *BOYD*

Respondents have from time to time espoused certain memes; *e.g.*, that the Supreme Court's use of the tem "quasi-criminal" is but a mere talisman not legally significant and inapplicable to professional license disciplinary actions; and that *Boyd* is dead, along with its application to quasi-criminal actions. Both of these cannot be further from the truth.[42]

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[41](...continued)
weighs the . . . interests of [defendants] in asserting the Fifth Amendment's privilege. . . . We repeat that the government has a substantial interest in pursuing white collar crime among its contractors, but the pursuit of such crime cannot be permitted to overwhelm constitutional protections." *United States v. Wujkowski*, 929 F.2d 981, 985-86 (4th Cir. 1991).

[42] Specially noteworthy is the fundamental truth that *Boyd* held and continues to hold a special place in Washington law commencing even before statehood with the drafting of our State Constitution, as *Boyd* was decided 3 years prior to Washington becoming a State, and proceeding unabated through present day in the form of our case. All one need do is consider *Boyd's* direct impact on the framers at our constitutional convention. As described in Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 522 (1986), "the 'give evidence' language in article 1, section 9 probably reflected the framers' (continued...)

In those jurisdictions that recognize professional license disciplinary

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[42](...continued)
intent to incorporate the *Boyd* convergence theory[; and just like] article 1, section 7, the text of the self-incrimination guarantee seems to have come directly from *Boyd* [in which] Justice Bradley carefully examined the fourth and fifth amendments and concluded that searches and seizures conducted in violation of the fourth amendment, were almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases [and equally in quasi-criminal actions pursuant to *Boyd*] is condemned under the Fifth Amendment. [Accordingly,] under the convergence theory adopted by the framers, article 1, section 9 mandates the exclusion of physical and real evidence obtained in violation of the defendant's constitutionally guaranteed right to privacy." Thus, no required records exception. *Boyd* has suffered the slings and arrows of critics, such as our own State government agencies, over the many years it has been the law of the land. Notable, however, is the fact that *Boyd's* holding that the Fifth Amendment right against self-incrimination applies to quasi-criminal actions equal to its application in criminal cases has not been diminished one iota – in what are held to be quasi-criminal actions courts apply the Fifth Amendment right to remain silent and privilege against self-incrimination firmly, broadly, and absolutely just as they do in criminal cases. As for any purported inroads against *Boyd's* absolute protection of private records where such can be used for incrimination purposes, the so-called required records exception, there is absolutely no diminishment to *Boyd's* protection for private records in the form of medical prescriptions under broader protection to private affairs pursuant to the Wash. Const. art I, §§ 7 and 9, as there is absolutely no public aspect to private prescription records wherever located and by whomever kept and, consistent with the extremely well reasoned decision in *Oregon Prescription Drug Monitoring Program v. U S Drug Enforcement Administration*, 998 F. Supp. 2d 957 (D. Oregon 2014), there remains a reasonable societal expectation of privacy in those records as evidenced also by Washington's history immediately prior to and after statehood in statutes regulating druggists and pharmacies and expressly exempting physician prescriptions from record keeping requirements and from disclosure upon mere demand by government agents. Scholarly papers and at least several Justices of the US Supreme Court have gone on record within the last 15 years asserting it is more than past time to reinvigorate *Boyd* and its root holdings regarding the Fourth and Fifth Amendments' application to the protection of private records from the prying eyes of government, as these Justices opine that the Court has improperly strayed from the true intent of the Fourth and Fifth Amendments and their interconnection in holding the government at arms length from private records that are incriminating in content, regardless of whether they may be required to be kept or not. And as for *Spevack's* continued vitality, as recently as 2009 the Oklahoma Supreme Court cited that decision as precedent in holding that it could not discipline an attorney for exercising his Fifth Amendment's privilege against self-incrimination. As the Oklahoma court quoted from *Spevack*, "the self-incrimination clause . . . guarantees a person the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty." *Wilcox*, 227 P 3d at 654-55. A penalty is a sanction which makes assertion of the right against self-incrimination costly, such as charging and then finding Dr Alsager guilty of unprofessional conduct for his failure to cooperate, stemming from his assertion of his Fourth and Fifth Amendment rights and privileges as set forth in, and continuing to be the supreme law of the land, *Boyd* and *Spevack* as applied to quasi-criminal professional license disciplinary actions – as held by and continues to be the law as stated in *Ruffalo*, and as adhered to by our Washington courts. Where courts stay true to the fundamental and clear holdings of *Boyd* and *Spevack*, and are not in some manner trying to make an end run around them to further some agenda, Dr Alsager's concrete pillars of law are precedent that cannot be toppled.

actions or other property forfeiture proceedings as quasi-criminal, there is absolutely no doubt that the uniform legal effect of such is to accord full Fourth and Fifth Amendment rights and privileges to the accused in such action. Moreover, except for the federally carved limited exception to the Fourth and Fifth Amendments known as the *required records doctrine*, which is not part of and will never be engrafted into Washington State constitutional jurisprudence, the application of *Boyd's* holdings to quasi-criminal actions, including our case at bar, remains intact, valid, viable and undiminished.[43] And as for the U.S. Supreme Court's contemporaneous look to *Boyd* as not only continuing to be good law, but also perhaps in need of reinvigorating its firm constitutional protection of private records that has come under the knife, *see United States v. Hubbell*, 530 U.S. 27, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000).

> In *Boyd*, this Court unanimously held that the Fifth Amendment protects a defendant against compelled production of books and papers. . . . And the Court linked its interpretation of the Fifth Amendment to the commonlaw understanding of the self-incrimination privilege. . . . But this Court in *Fisher v. United States*, 425 U.S. 391 (1976), rejected this understanding, permitting the Gov-

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[43] As a modern comprehensive analysis of *Boyd*, its holdings and full application to what are determined to be quasi-criminal actions in rebuttal to its detractors, *see One 1995 Corvette v Mayor and City Council of Baltimore*, 724 A.2d 680 (Md. 1999), *cert. denied*, 528 U.S. 927, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999). By an in depth analysis of *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965), with its reliance on *Boyd* and *Plymouth Sedan's* continued validity and viability as to the Supreme Court's holding that the Fourth Amendment's exclusionary rule applies to quasi-criminal actions, the *One 1995 Corvette* Court not only underscored the continued validity and vitality of *Boyd*, 724 A.2d at 682-93, the Court also confirmed the applicability of the Fourth Amendment's exclusionary rule to suppress private property seized without a proper warrant based on probable cause in a quasi-criminal action. *Id.*, at 691-92.

> ernment to force a person to furnish incriminating physical evidence and protecting only the "testimonial" aspects of that transfer. . . . In so doing, *Fisher* not only failed to examine the historical backdrop of the Fifth Amendment, it also required . . . a difficult parsing of the act of responding to a subpoena duces tecum. . . . [I]n light of the historical evidence that the Self-Incrimination Clause may have a broader reach than *Fisher* holds, I remain open to a reconsideration of that decision and its progeny in a proper case.

Hubbell, 530 U.S. at 55-56 (Justice Thomas, with whom Justice Scalia joins, concurring). *See also* Clemens, *The Pending Reinvigoration of Boyd: Personal Papers Are Protected by the Privilege Against Self-Incrimination*, 25 N. Ill. U. L. Rev. 75 (2004) (*Boyd* still applies to protect personal papers from seizure without a warrant); *De La Cruz v. Quackenbush*, 96 Cal. Rptr. 2d 92, 98-104 (Cal.App. 2000) (the mere fact that the government may require a business to maintain certain records is not sufficient justification for the government to seize those records without a **search warrant** or **subpoena** – as for which here we admittedly have neither).[44]

The State succeeded in pulling the wool over the Presiding Officer's eyes;[45] but in light of the foregoing, the government will not be allowed to

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[44] *See* CAR, at 1274, 1290 (statutes, including RCW 70.02.050(2)(a) and RCW 70.225.040(3), that Dr Alsager challenges as unconstitutional were relied on by the State to access private patient prescription records from PMP and pharmacies without a search warrant) The Presiding Officer concurred with the DOH and Dr Alsager's objections (CAR, at 959-92, 997-1003) were summarily denied. CAR, at 1641-44, 2116 (Dr Alsager's motion for directed judgment denied at close of prosecution's case-in-chief). *But see* fn.40, *supra*.

[45] The State has grounded its contentions that professional license disciplinary actions are only civil actions with any Fourth and Fifth Amendment rights and privileges to be accorded the licensee are to be construed in accordance with their application to mere parties or witnesses in civil actions; citing *Ikeda v Curtis*, 43 Wn.2d 449, 261 P.2d 684 (1953); and *King v. Olympic Pipeline Company*, 104 Wn. App. 338, 16 P.3d 45 (2000). These cases are clearly distinguishable, inapposite and irrelevant to our case at bar and are to be ignored.

succeed in diverting the Court's focus from the very significant and compelling constitutional issues and applicable law regarding fundamental rights and privileges presented by Dr Alsager.

C. PHYSICIAN PRESCRIPTIONS ARE SUBJECT TO NOT JUST A REASONABLE, BUT A HEIGHTENED, EXPECTATION OF PRIVACY, RECOGNIZED BY WASHINGTON LAW PRIOR TO STATEHOOD AND CONTINUING THEREAFTER

Private and personal records which are reasonably intended and expected to be subject to privacy rights and remain private are protected from government search and seizure by our third concrete pillar constructed from the Fourth and Fifth Amendments as buttressed by our Washington Constitution art I, §§ 7 and 9. There is no basis under the US Constitution and the greater protection to private affairs under our State Constitution for application of any so-called ***required records exception*** to the Fifth Amendment (and, pursuant to *Boyd*, arguably the Fourth Amendment as well) to make physician prescription records available to the government upon mere demand and be used in a quasi-criminal action against the prescriber as allegedly incriminating evidence.[46] In fact, physician prescriptions have been protected as private, confidential information from before the time Washington became a State.

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[46] There is absolutely no public aspect to very personal and private physician prescriptions that would in any manner render prescription records subject to disclosure on mere demand wherever located and by whomever kept, without much, much more – such as a properly issued search warrant supported by probable cause. There is no exception under Washington law that holds prescription records have public aspects and are subject to a diminished expectation of privacy – even as to any that may have allegedly been written by Dr Alsager.

Under Section 936 of the 1881 Code of (the Territory of) Washington it was provided that "every druggist shall keep a book in which he shall register the name of any person purchasing or receiving from him any such poisonous drug or compound, ***unless the same shall be furnished upon the prescription of a competent physician***,[47] together with the name of such drug or compound, and the time when it was furnished." (Emphasis added.) This Territorial Law was followed two years after Washington became a State with an updated State statute requiring pharmacists to keep extremely detailed and personal records and to disclose that information to certain officials upon demand – ***with one very large, and relevant, exception***:

> The proprietor of every drug store shall keep in his place of business a registry book in which shall be entered an accurate record of the sales of all mineral acids, carbolic acid, oxalic acid, hydrocyanic acid, cyanide of potassa, arsenic and its preparations, corrosive sublimate, red precipitate, preparations of opium (except paregoric), phosphorus, nux vomica and strychnine, aconite, belladonna, hellebore and their preparations, croton oil, oil savin, oil tansy, creosote, wines and spirituous or malt liquors. Said record shall state amount purchased, the date, for what purpose used, buyer's name and address, and said record shall at all times, during business hours, be subject to the inspection of the prosecuting attorney, or to any authorized agent of the board of pharmacy; *Provided*, That no such wines, spirituous or malt liquors shall be sold for other than medicinal, scientific, mechanical or sacramental purposes. Furthermore, that all poisons shall be plainly labeled as such, and that such labels shall also bear the name and address of the druggist selling the same. ***The provisions of this section shall not apply to dispensing by physicians' prescriptions.***

1891 Laws of Washington, Chapter CLIII (153), Section 12 (emphasis

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[47] The requirements for a person to practice medicine or surgery were set forth in Sections 2284-94 of the 1881 Code of (the Territory of) Washington.

added).[48] In a *Gunwall* analysis, such expectation of privacy underscores the necessity of a search warrant issued on probable cause in order to search and seize physician prescription records wherever located and by whomever kept.

State v. Parris, 163 Wn. App. 110, 259 P.3d 331 (2011), and other cases of that ilk are easily and readily distinguishable and provide absolutely no recognized ground to deviate from the law of Washington that "authority of law" means very clearly, a search warrant issued and supported on probable cause. As courts have observed, why even bother with constitutional rights

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[48] In 1915 the people of the State of Washington by Initiative voted in the local era of Prohibition by passing Laws of Washington, Chapter 2. In Section 7 of that Act of the people, it is stated that "nothing in this act shall be construed to prohibit a registered druggist or pharmacists from selling intoxicating liquor for medicinal purposes, upon the prescription of a licensed physician, as herein provided . . . ". Section 7 went on to require "every druggist or pharmacist selling intoxicating liquor or alcohol for the purposes above described shall keep a true and exact record in a book provided by him for that purpose, in which shall be entered at the time of every sale of intoxicating liquor or alcohol made by him or in or about his place of business the date of the sale, the name of the purchaser, his place of residence, stating the street and house number (if there be such), the kind, quantity and price of such liquor or alcohol and the purpose for which it is sold . . .". Now, as for sales made under physician's prescription for medicinal purposes, Section 7 provided that "whenever any druggist or pharmacist fills a prescription for intoxicating liquor, he shall cancel the same by writing across the face thereof, in ink, the words: "cancelled," with the date on which it was presented and filled, and shall keep the same on file, ***separate from other prescriptions***, and no such prescription shall be filled again. Such book and all prescriptions for intoxicating liquor filled shall be open to inspection by any prosecuting attorney or city attorney, judge or justice of the peace, sheriff, constable, marshal or other police officer, or member of the city or town council." So, even as the Prohibition era began, the people of the State of Washington recognized that special protection must be given to prescriptions written by physicians for other than intoxicating liquor – and such other prescriptions were not made available for inspection upon mere demand by anyone. And a mere two years later the Legislature totally overhauled Section 7 of the Laws of 1915 by implementing a special permit system by which intoxicating liquor or alcohol could be sold for specific purposes, totally removing from the law and record keeping requirements any and all references to physician prescriptions. 1917 Laws of Washington, Chapter 19. And finally by Initiative of the people in 1933, all of the Prohibition era laws were repealed, including all of chapter 2 of the Laws of 1915, and chapter 19 of the Laws of 1917. *See* 1933 Laws of Washington, Chapter 2. Clearly, even *through the years of* Prohibition, all physician prescriptions (except for intoxicating liquor during 1915-17) were accorded special rights of privacy and protection from inspection upon mere demand by government agents.

if the legislature can merely enact a statute to negate such protection? *Marchetti*, 390 U.S. at 57.[49] And in *Skinner*, *supra* (a 2009 Louisiana Supreme Court decision), it was held that a right to privacy in medical and prescription records is an expectation of privacy that society recognizes as reasonable, and prescription records obtained without a search warrant are inadmissible and must be suppressed as evidence. It is very obvious that government cannot conduct an investigatory search and subsequent seizure of such personal and private medical records with anything less than a validly issued search warrant. Even the opinions in *Client A v. Yoshinaka*, 128 Wn. App. 833, 116 P.3d 1081 (2005), and *Seymour v. Washington State Department of Health, Dental Quality Assurance Commission*, 152 Wn. App. 156, 216 P.3d 1039 (2009), hold no sway to negate the necessity for a search warrant in our case. The only concern in both of those cases was whether threshold statutory requirements were met in order to even commence an investigation that could subsequently possibly lead to making a demand for medical records. Constitutional issues were sidestepped as the appellate court in *Seymour* expressly

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[49] Even where considered solely under the Fourth Amendment the federal courts, such as in the *Oregon PDMP* case, have held that prescription records held by a third party in a database, very similar to our Prescription Monitoring Program database, retain a very reasonable and protected expectation of privacy, and cannot be disclosed to government agencies even under an administrative subpoena. The State takes exception to the *Oregon PDMP* federal decision (now on appeal to the Ninth Circuit Court of Appeals).and cites a State decision to the contrary in *Lewis v Superior Court and Medical Board of California*, 172 Cal. Rptr. 3d 491 (Cal. App. 2014). That appellate court decision is, however, now on review by the California Supreme Court as a Petition for Review was *GRANTED* in *Lewis v. Superior Court and Medical Board of California*, 334 P.3d 684 (Cal. 2014). In any event, Washington has a long history of treating physician prescriptions as protected private affairs and information that compels greater protection under our State Constitution.

stated that "we emphasize that we do not reach the question of whether the scheme under the UDA is an adequate substitute for the warrant requirement. Our analysis is limited to the threshold question of whether the warrantless inspection herein was authorized by any statute." 152 Wn. App. at 168 n.6. However, *Seymour* did hold that all documents obtained stemming from an unauthorized, warrantless inspection must be excluded from any disciplinary action pursuant to the provisions of RCW 34.05.452(1), which states that "the presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds." *See* 52 Wn. App. at 171. Obviously, neither *Yoshinaka* nor *Seymour* provide any analysis of the relevant issues in our case regarding increased protection of private patient records and prescriptions under both the Fourth Amendment (per the *Oregon PDMP* decision) and Wash. Const. art I, §§ 7 and 9; accordingly, both of these cases are distinguishable and hold no persuasive value; ***except*** perhaps for the fact that the Board did ***not*** authorize the prescription investigation until ***after*** the DOH conducted the PMP database search and the DOH thereafter filed a complaint.[50] Very clearly, the common law recognized and protected the right of

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[50] There is, however, one case not at this time referenced by the State that may provide some valuable insight into the privacy protection given to physician prescription records in the common law and statutory law at the time of Washington's statehood – which goes to elements of the *Gunwall* analysis. The Court of Appeals in *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003), harkened back to the historical treatment of drug records as support for its position that such records have since statehood been subject to disclosure to law enforcement and administrative agencies without a search warrant pursuant to mere statutory authority. At page 313, the *Murphy* Court referenced as its sole support Section 12 of the 1891 Act To Regulate The Practice Of Pharmacy. This Statute was enacted only 2 years after state-
(continued...)

privacy in physician prescriptions – a protection recognized upon statehood, notwithstanding recent statutes purported to be to the contrary, that is subject to Wash. Const. art. I, §§ 7 and 9 requiring a valid, supported search warrant.

D. THE WARRANTLESS SEARCH BY DOH OF PMP DATABASE WITHOUT PROBABLE CAUSE AND WITHOUT BOARD AUTHORIZATION YIELDED FRUIT OF THE POISONOUS TREE THAT IS SUBJECT TO THE EXCLUSIONARY RULE

Timing is everything, both in life and in the law. Here, the timing of DOH Investigator Hoyle's warrantless search of the PMP database is most telling. Based on documents in the CAR, notice of two complaints, neither of which referenced any allegations regarding prescriptions,[51] were sent to Dr Alsager by the DOH dated October 1, 2012. CAR, at 1858, 1860. Following issuance of a DOH demand letter on November 26, 2012, Dr Alsager responded with the assertion of his constitutional rights and privileges and submitted a Petition for Declaratory Order to the DOH and Board on December 14, 2012. CAR, at 1864-84. The Board issued a letter dated January 8,

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[50](...continued)
hood and was in furtherance of the common law during the time Washington was a Territory. On the one hand, the statute clearly provides that a pharmacy must keep detailed records as to the over the counter sale of certain types of narcotics and poisons (which are all noticeably absent from the allegations underlying our case), and that such records must be made available for inspection by certain government agents upon mere demand. This inspection privilege was opined by the Court of Appeals as an indicator that prescription records were available for disclosure upon mere demand since the time Washington became a State. ***However***, and on the other hand, ***what the Court of Appeals failed to also include*** in its discussion was the very last sentence of Section 12 of this 1891 Act, which reads "The provisions of this section shall not apply to dispensing by physicians' prescriptions." *See* p. 33, *supra*.

[51] These complaints were apparently consolidated and referenced in the Board's Statement of Charges against Dr Alsager in ¶ 1.11 (CAR, at 7), subsequently Stipulated by the parties to be redacted in part as irrelevant and unduly prejudicial. CAR, at 1447 ¶ 4.

2013, declining to issue a Declaratory Order. CAR, at 1886-88.[52] It was not until after all of the foregoing had transpired and efforts at mediation had failed (Order dated April 26, 2013) that, based solely on a request by the AAG prosecutor and without probable cause, a search warrant, or even a subpoena, Hoyle submitted a search query to be run against the PMP database on May 3, 2013. CAR, at 1922-28; APP, at 118. It was then solely upon the outcome of this fishing expedition that the DOH filed its own complaint against Dr Alsager with allegations relating to prescriptions that the Board subsequently authorized an investigation of Dr Alsager on June 5, 2013 (CAR, at 1890; APP, at 119), which eventually resulted in the formal Statement of Charges against Dr Alsager – but noteworthy absent therefrom are any allegations regarding prescriptions related in any way to the subject patient of the original two complaints notice of which was given on October 1, 2012.[53]

The DOH and Board have cited *Parris*, 163 Wn. App. 110, for their contention that a statute authorizing warrantless searches and seizures consti-

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[52] Judicial notice may be taken of the fact that Dr Alsager commenced an action for Declaratory Judgment and Injunctive Relief in the U.S. District Court, Western District of Washington, at Tacoma, on January 15, 2013 (No. CV-13-5030 RJB). On the State's Motion to Dismiss grounded on the *Younger* abstention doctrine, the District Court dismissed Dr Alsager's case by Order dated March 8, 2013. Dr Alsager then filed an appeal with the Ninth Circuit Court of Appeals on March 18, 2013 (No. 13-35210).

[53] It is readily apparent that no probable cause for any search of the PMP database arose from the original complaints, as the search did not occur for another 8 months following their filing with the DOH. The warrantless search only occurred after Dr Alsager had asserted his constitutional rights and privileges, filed a Petition for Declaratory Order, litigated an action in federal district court, and filed an appeal in the Ninth Circuit Court of Appeals. Clearly, motive for such a search comes into question; the only possible explanation being a retaliatory fishing expedition to see whatever could possibly be found and used against Dr Alsager, as the 2012 complaints were clearly going nowhere.

tutes valid authority of law under Wash. Const. art. I, § 7, thereby validating Hoyle's search of the PMP database and seizure of prescription records without patient consent or supported and issued search warrants. The *Parris* case is, obviously, readily distinguishable and in no way provides any authority whatsoever for the State to avoid obtaining a search warrant in order to comply with the constitutional protection accorded private affairs, including patient medical/prescription records in which there is a continuing reasonable expectation of privacy. *See Oregon PDMP*, *supra*. The *Parris* court merely recognized a previously established and very limited exception to the constitutional prohibition of warrantless searches that exists under Washington common law, and codified by statute in RCW 9.94A.631(1), applicable to parolees and probationers "sentenced to confinement but who are simply serving their time outside the prison walls." *Parris*, 163 Wn. App. at 117.[54] On their face, *Parris* and such other cases related to this very limited exception to the prohibition of warrantless searches and seizures under Wash. Const. art. I, § 7, are not in any way applicable to our case and the reasonable expectation of privacy in, and the constitutional protection given to private and personal medical records, including prescriptions, wherever located and by

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[54] Because Washington law is that such offenders have a diminished expectation of privacy during such community confinement, a warrantless search of their home and personal effects satisfies constitutional muster when there is a well-founded or reasonable suspicion (*i.e.*, **probable cause**) of a probation violation and there is probable cause to believe that the offender resides at the residence to be searched; and even then, a warrantless search is constitutionally permissible only to the extent necessitated by the legitimate demands of the operation of the parole process. *State v. Winterstein*, 167 Wn.2d 620, 628, 630, 220 P.3d 1226 (2009); *State v Simms*, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973).

whomever kept. Neither RCW 70.225.040 nor RCW 70.02.050(2)(a) pass constitutional muster sufficient to provide an exception to the clear prohibition of warrantless searches and seizures of private and personal patient medical records, including prescriptions, under the broad, protective umbrella of Wash. Const. art. I, §§ 7 ***and*** 9. *Ladson* and *Oregon PDMP*, *supra*.

Evidence obtained unlawfully in a quasi-criminal action is subject to exclusion and is inadmissible in such a case as RCW 34.05.452(1) clearly mandates, under the fruit of the poisonous tree exclusionary rule.[55] As the PMP and prescription information in our case was all unlawfully obtained, none of this information and none of any subsequently discovered evidence was admissible and must have been excluded from the record of this quasi-criminal action. *See Ladson*, 138 Wn.2d at 359-60; *Board of License Commissioners, Town of Tiverton v. Pastore*, 463 A.2d 161, 163-64 (R.I. 1983).

E. WASH. CONST. ART I, §§ 7 AND 9, *GUNWALL* ANALYSIS

Foregoing parts of this Main Brief present the foundational support for Dr Alsager's assertion that, although the protection of his Fourth and Fifth

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[55] Our Supreme Court's decision in *Deeter v. Smith*, 106 Wn.2d 376, 378-79, 721 P.2d 519 (1986), confirms that the exclusionary rule fully applies to quasi-criminal actions. The DOH cannot go on a fishing expedition into the PMP database without a search warrant. It is admitted and not subject to any debate that the DOH investigator did not have a search warrant (or even a subpoena) when the query was submitted and the search of the prescription record database was made in May 2013. It is subject to no debate that a query made on a database in which private medical information in the form of physician prescriptions is stored and in which there exists a very reasonable expectation of privacy recognized in Washington prior to statehood constitutes a search subject to constitutional protections, as found and held in the *Oregon PDMP* case and as so clearly held to be true at Washington's inception as a State as evidenced by the Territorial Laws of 1881, the last sentence in Section 12 of the 1891 Pharmacy statute, and the Prohibition era laws.

Amendment rights and privileges in this quasi-criminal action provide the baseline prescribed by the U.S. Supreme Court below which State action cannot fall, Wash. Const. art. I, §§ 7 ***and*** 9 provide greater levels of protection to the forced production of prescription records wherever located and by whomever kept without a search warrant issued on probable cause. *See* Parts VI(A) - (D), and fn.42, *supra*.[56] As to these sections of the Washington Constitution, the heavy lifting has been done and only factors 4 and 6 need to addressed.[57] As for factor 4 (and 3 as well), even prior to and immediately following statehood it is clear Washington laws relating to physician prescriptions gave heightened levels of confidentiality and privacy to both physicians and patients wherever such records are located and by whomever kept. *See* Part VI(C), *supra*. As for factor 6, this same history clearly demonstrates that control of both medical practitioners and physician prescriptions are long held to be matters of State concern.[58] Under a *Gunwall*

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[56] Wash. Const. art. I, § 7 protects against government intrusion into private affairs, which are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014) (cell phone text messages). *See also Gunwall*, 106 Wn.2d at 65-66; (telephone toll billing records); *State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) (garbage cans placed on curb); *In re Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997) (electric consumption records), *State v. Jackson*, 150 Wn.2d 251, 262, 76 P.3d 217 (2003) (installation of GPS to track vehicle); *State v. Jorden*, 160 Wn.2d 121, 129, 156 P.3d 893 (2007) (motel registry).

[57] *Centimark Corporation v. Department of Labor and Industries*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005) (only *Gunwall* factors four and six must now be addressed for specific context in which Washington constitutional protections are in issue).

[58] *See* 1881 Code of (Territorial) Washington, §§ 936 (prescriptions) and 2284-94 (medical practitioners); *Fox v Territory of Washington*, 2 Wash. Terr. 297, 5 Pac. 603 (1884) (State (continued...)

analysis and in the context of quasi-criminal professional license disciplinary actions in which the government demands from physicians and/or pharmacies, under risk of substantial penalties, the forced giving/production of, *inter alia*, private prescription records, it is very clear that Wash. Const. art. I, §§ 7 ***and*** 9 are intended to and as a matter of law do accord greater protection than do the Fourth and Fifth Amendments. *Boyd*, 116 U.S. at 633-34, prescribes the absolute minimum level of protection that this Court should adopt pursuant to a *Gunwall* analysis with respect to Wash. Const. art. I, §§ 7 ***and*** 9.[59] Accordingly, in this quasi-criminal action Dr Alsager has the absolute right to remain silent and privilege against self-incrimination, unfettered and without adverse inference or punishment, and there is absolutely no required records exception under our State Constitution and neither Dr Alsager nor pharmacies can be forced upon mere demand to give the State prescription records without a search warrant issued on probable cause.

F. APPLICATION OF LEGAL PRINCIPLES TO CHALLENGED FINDINGS, CONCLUSIONS AND ORDERS

At and prior to trial in this quasi-criminal action, Dr Alsager asserted and properly preserved all of his fundamental and well-established constitutional rights and privileges including, *inter alia*, his absolute right to remain silent

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[58](...continued)
requirements for medical practitioners upheld); 1891 Laws of Washington, Ch. CLIII, § 12 (physician prescriptions excluded from record keeping and disclosure requirements).

[59] Especially in light of the special place the *Boyd* decision held in the framers' making of Wash. Const. art. I, §§ 7 ***and*** 9. *See* fn.42, *supra*.

and his privilege against self-incrimination, all without, according to well-established constitutional law, being subject to adverse inference or comment by the prosecution. CAR, at 2039-44, 2048-49. Dr Alsager further presented timely objections to the State's documentary evidence obtained without a search warrant, and with absolutely no chain-of-custody and authentication compliance. CAR, at 1002-03. All of Dr Alsager's objections were properly made and preserved in the record for judicial review. CAR, at 2043, 2048-49.[60] Nevertheless, the Presiding Officer's mind was set against the acknowledgment and full protection of Dr Alsager's federal and State constitutional rights and privileges as mandated by well-established law,[61] and the Board

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[60] Should there be an issue that not all Prehearing Orders have been duly challenged, including the *Ex Parte* Order of Summary Action (APP, at 125), regarding Prehearing Order Nos. 1, 4 and 9, Dr Alsager's primary challenges are patent errors of law in issuance thereof and the refusal to disqualify Dr Markegard from sitting both on the Show Cause Panel and as a member of the Board Panel at trial. *See* fn.9, *supra*. Regarding Prehearing Order Nos. 4 and 5 with respect to the Orders on Show Cause, and Prehearing Order Nos. 2, 6 and 7 regarding exhibits and continuances, Dr Alsager sets forth the specific grounds to challenge these preliminary Orders in his Motions for Reconsideration identified in fn.9 and fn.19, *supra*.

[61] Substantially and unduly prejudicing and trampling on Dr Alsager's absolute constitutional rights and privileges, including the right to a fair and unbiased trial, the Presiding Officer over Dr Alsager's objections allowed the prosecutor to call Dr Alsager as a witness in the DOH's case-in-chief; allowed the Board Panel to draw an adverse inference from Dr Alsager's invocation of his absolute and blanket Fifth Amendment rights and privileges and refusal to be called as a witness and forced to testify; and allowed the prosecutor to pose direct questions to an ***empty chair*** as part of its case-in-chief in the quasi-criminal trial of Dr Alsager. CAR, at 2056-65. The mindset of the Presiding Officer was firm and unbending throughout this matter, and is embodied in the following statement made by him at trial: "The law requires that I rule, and my ruling is and shall be that if your client [*i.e.*, Dr Alsager] refuses [to be called and testify], with respect to both you and your client, I will instruct the Panel that they are allowed to draw a negative inference if that question is put to me by the Panel during deliberations. I believe Washington case law is clear on that. And if this gets spawned in the appellate courts, I suppose that's where it's going to get fought. I note that the appellate courts, in fact, anticipate that we're going to finish this administrative proceeding before the next step gets done based on rulings that I've received both from the federal and the state courts. So we need not belabor this anymore." CAR, at 2029-30 (Presiding Of-
(continued...)

Panel[62] proceeded under this clear error of law to find Dr Alsager guilty of unprofessional conduct and imposed sanctions on him that permanently revoked his professional license without any opportunity ever for reinstatement.[63] The Final Order imposing the administrative death penalty on Dr Alsager was very clearly supported **neither by** Conclusions of Law that were constitutional **nor** evidence that was substantial, competent, and lawfully obtained and preserved. Lacking a lawful foundation, the Final Order is legally and fatally defective and must fall as a matter of law. In particular:

1. Addressing Issues #1 and #3, *supra*, in light of Parts IV, V, and VI(A) - (E), *supra*, as identified in accompanying footnotes certain Prehearing Orders,[64] Final Order Findings of Fact,[65] Final Order Conclusions of Law,[66] and

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[61](...continued)
ficer speaking at trial), 2116 (denied motion for directed judgment).

[62] Over the continuing objections of Dr Alsager, Dr Shannon Markegard (who is in direct competition with Dr Alsager's private practice in the immediate Maple Valley area) was not disqualified from sitting on the Board Panel. It was an error of law, and extremely and unduly prejudicial for Dr Markegard to sit on the Board Panel and have a determining voice in imposing the death penalty on Dr Alsager, and thereby ridding the Maple Valley area of a competing D.O. to the benefit of Dr Markegard's practice. *See* CAR, at 945-54; RCW 34.05.425(3); *Trust and Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994); *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 578-79, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

[63] CAR, at 1715. *See* fn.18, *supra* (the unprofessional conduct the Board Panel found and concluded Dr Alsager had, in their fault-ridden opinion, committed was the violation of RCW 18.130.180(8) and the violation of RCW 18.130.180(9)); CAR, at 1713 (both conclusions are grounded on patent errors of law).

[64] Prehearing Order (PHO) No. 10; PHO No. 11; and PHO No. 12

[65] Final Order Findings of Fact, Paragraphs 1.8 and 1.9.

[66] Final Order Conclusions of Law, Paragraphs 2.2, 2.3, 2.4, and 2.5.

parts of the Board's Final Order[67] are grounded on clear and unduly prejudicial beyond harmless violations of Dr Alsager's Fifth Amendment right to remain silent and privilege against self-incrimination.[68] In light of Dr Alsager's Fifth Amendment rights and privileges, as applied to the underlying quasi-criminal action, RCW 18.130.050(7), RCW 18.130.180(8), and RCW 18.130.230(1) are beyond any reasonable doubt unconstitutional.[69] Dr Alsager zealously protected his private medical records as to which neither his patients (CAR, at 959-95), HIPAA requirements (CAR, at 965), nor Wash. Const. art. I, §§ 7 and 9, countenance or allow their disclosure without a properly supported and issued search warrant – as for which here we admittedly have none.[70] Accordingly, unprofessional conduct grounded on a violation of RCW 18.130.180(8) alleging failure to cooperate must be vacated by the Court. CAR, at 1713. RCW 34.05.570(3).

2. Addressing Issues #2 and #3, *supra*, in light of Parts IV, V, and VI(A)

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[67] Final Order, Paragraphs 3.1 and 3.2; Order Denying Reconsideration of Final Order.

[68] All of which he was absolutely entitled to, and did, assert at each stage of the DOH/Board quasi-criminal action (both pre-Statement of Charges and post-Statement of Charges) against him and his professional license unfettered and without sanctions or adverse inference.

[69] The Board's charging Dr Alsager initially with failure to cooperate is a clear violation of his constitutional rights and privileges. *See, e.g., Vining*, 281 So.2d at 491-92. The prosecution's calling Dr Alsager to testify, questioning an empty chair, and commenting that from such the Board Panel may draw an adverse inference are all egregious violations of his constitutional rights that are not harmless in any way, shape, manner or result.

[70] Moreover, the use of PMP records for a fishing expedition contrary to the privacy interests of patients is unlawful and all records obtained from such illicit search and seizure as well as all subsequent records/documents found "but for" the initial PMP records filing and search must be suppressed and excluded from the record as *fruit of the poisonous tree* – but they were not. CAR, at 959-92, 997-1003, 1452-66, 1633-45.

- (E), *supra*, as identified in accompanying footnotes certain Prehearing Orders (PHO),[71] Final Order Findings of Fact,[72] Final Order Conclusions of Law and parts of the Board's Final Order are grounded on unlawfully obtained DOH evidence that was fruit of the poisonous tree and must have been suppressed and excluded from the record.[73] U.S. Const., Amends. IV and V; Wash. Const. art. I, §§ 7 and 9.[74] In light of these well-established constitutional rights and privileges, as applied to the underlying quasi-criminal action, in the absence of a search warrant RCW 70.02.050(2)(a) and RCW 70. 225.040(3) are beyond any reasonable doubt unconstitutional. Because all

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[71] PHO No 10; PHO No. 11 (including *inter alia* admission of DOH Exhibits D-15 and D-16, and denying Dr Alsager's Exhibits R-1 through R-5, inclusive; *but see* CAR, at 1447 ¶ 3 re: R-2 and R-3); PHO No. 12.

[72] Final Order Findings of Fact, Paragraphs 1.5 and 1.5(A) through (T), inclusive; 1.6; and 1.7. Also included *inter alia* is the admission of DOH Exhibits D-15 and D-16.

[73] Final Order Conclusions of Law, Paragraphs 2.2, 2.3, 2.4, and 2.6; and Final Order, Paragraphs 3.1 and 3.2; respectively; Order Denying Reconsideration of Final Order.

[74] The DOH evidence relating to alleged prescriptions relied upon by the Board Panel in making its Final Order, admitted over Dr Alsager's objections (CAR, at 959-92, 997-1003, 1452-66, 1627-32, 1633-45, 2073, 2077-85, 2104) was unlawfully acquired without a search warrant in violation of Wash. Const. art. I, §§ 7 and 9, and constitutes fruit of the poisonous tree that must be excluded from the record and given no consideration by the Board. The *exclusionary rule* applies to suppress unlawfully obtained evidence from use in administrative license revocation actions deemed quasi-criminal. *Pastore*, 463 A.2d at 163-64 (State administrative agencies must conduct their investigative and enforcement functions in compliance with constitutional requirements); *cf. State v. Johnson*, 814 So.2d 390 (Fla. 2002) (suppress medical records improperly subpoenaed). Moreover, documentary evidence offered by the State relating to alleged prescriptions (CAR, at 1922-28, 1930-55) was not subject to chain of custody and authentication as raised by Dr Alsager in both his Prehearing Motion in Limine and Addendum to Motion in Limine as well as during cross-examination of Hoyle. CAR, at 2077-85. Because such evidence was not competent and must have been excluded from the record, as well as any evidence or testimony stemming from or related to such material, it was clearly erroneous and substantially prejudicial for the Presiding Officer to admit this evidence and allow the Board Panel to consider such tainted and incompetent material in the Board's quasi-criminal action against Dr Alsager and his professional license. *See also* Comment, *Washington's Exclusionary Rule*, 61 Wash. L. Rev. at 480-85, 516-25, 530-31.

of the DOH prescription-related evidence/documents must be suppressed and excluded from the record as *fruit of the poisonous tree*, there is no substantial competent evidence to meet DOH's requisite burden of proof in this quasi-criminal action and support the Board's Findings and Conclusions. Accordingly, unprofessional conduct grounded on a violation of RCW 18.130.180 (9) must be vacated by the Court. CAR, at 1713. RCW 34.05.570(3).

3. Addressing Issue #3, *supra*, in light of Parts IV, V, and VI(A) - (E), *supra*, grounded firmly on Dr Alsager's fundamental constitutional rights and privileges pursuant to U.S. Const., Amends. IV, V, and XIV, and Wash. Const. art. I, §§ 2, 3, 7, 9, and 29, beyond any reasonable doubt the following State statutes are unconstitutional and unenforceable in professional license disciplinary quasi-criminal actions; RCW 18.130.050(7), RCW 18.130.180 (8), RCW 18.130.230(1), RCW 70.02.050(2)(a), and RCW 70.225.040(3) (latter two without a search warrant). *See Boyd, Spevack, Ruffalo, Johnston, Kindschi, Nguyen, Vining, Woll, Ladson, Oregon PDMP, Skinner - supra.*

4. Addressing Issue #4, *supra*, the Board Panel was required to but failed to apply the adopted regulations set forth in Chapter 246-16 WAC in determining and applying legally appropriate sanctions under circumstances where it finds and concludes that unprofessional conduct has occurred. RCW 34.05.570(3).[75] The statutory and regulatory criteria for the Board to impose

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[75] Challenging/objecting to Final Order Findings of Fact, Paragraph 1.10; Conclusions of Law, Paragraphs 2.7, 2.8, and 2.9. WAC 246-16-800(1)(a) and RCW 18.130.040(2)(b)(vii) (continued..)

the death penalty on Dr Alsager must be strictly construed and followed; the Board did not do so.[76] Applying the Rule of Lenity in this situation, in order to impose the ultimate sanction of professional license revocation with absolutely no opportunity ever for reinstatement, it is mandatory that the Board make and enter specific findings of fact as to reasons and rationale that Dr Alsager can never be rehabilitated or never regain the ability to practice safely, in light of his Sanctioning Brief and a fair consideration of mitigating circumstances.[77] The omission of these express statutorily required findings is

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[75](...continued)
(the Board is a listed disciplinary authority as to which the Sanctioning Rules apply).

[76] The Board claims that the statutory language and criteria need not be strictly followed and that specific findings need not be made. CAR, at 1769-71. However, the Rule of Lenity is applicable and, under its provisions in this quasi-criminal action imposing the administrative death sentence, RCW 18.130.160 and WAC 246-16-800(2)(b)(ii) must be strictly construed with any ambiguities resolved in favor of Dr Alsager. *In re Discipline of Haley*, 156 Wn.2d 324, 347, 126 P.3d 1262 (2006, Sanders, J., concurring) (citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)).

[77] Dr Alsager's original Sanctioning Brief dated May 23, 2014 (submitted to the DOH Adjudicative Clerk Office but **excluded** from the CAR for reasons unstated), was ordered by the Presiding Officer at trial, to immediately be modified to drastically reduce the number of patient letters voicing their support for and trust in Dr Alsager's care and treatment of each of them (CAR, at 178-99, 277-78) notwithstanding there was no such limitation imposed on Dr Alsager set forth in Prehearing Order No. 11. CAR, at 2012-21. The removal of and/or limitations imposed on these Exhibits had an adverse effect on the Board Panel's fair consideration of appropriate sanctions that could be imposed on Dr Alsager's professional practice in lieu of permanent revocation. There is no indication anywhere in the Final Order that the Board duly and fairly considered Dr Alsager's Sanctioning Brief and the direct, substantial adverse effect the permanent revocation of his professional license would have on his patients, especially in light of Dr Alsager's expertise in treating his patients with non-drug osteopathic therapies. CAR, at 147-76. This aspect of Dr Alsager's training, skills, education, and expertise, as well as the direct substantial adverse impact on his patients, were obviously overlooked by the Board Panel in the sanctioning phase of this quasi-criminal proceeding. This was legally erroneous, arbitrary and capricious, and substantially and unduly prejudicial to Dr Alsager. It was clear error of law for the Board Panel to summarily disregard the mitigating factors set forth in Dr Alsager's Sanctioning Brief, both in its erroneously ordered redacted version as well as in its original form and content.

a fatal defect and mandates that the Final Order of permanent revocation with no chance for reinstatement be vacated. RCW 34.05.570(3).

5. Addressing Issue #5, *supra*, and in no way, shape, form or manner intending or presenting the following as an admission but only for the sole purpose of addressing more appropriate lesser sanctions in light of the ultimate sanction imposed of permanent revocation without any chance ever for reinstatement, the proof is clear, cogent and convincing that Dr Alsager in good faith complied with the Board's 2008 Final Order.[78]

VII. CONCLUSIONS

The DOH investigation of the complaints against Dr Alsager was fatally flawed. The Board's Statement of Charges against Dr Alsager was fatally flawed. The Presiding Officer's Prehearing Orders were fatally flawed. The Board's quasi-criminal trial of Dr Alsager was fatally flawed. The Board applied and blindly enforced against Dr Alsager RCW 18.130.050(7), RCW 18.

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[78] Challenging/objecting to Final Order Findings of Fact, Paragraphs 1.1, 1.2, 1.3, 1.4, and 1.10; Conclusions of Law, Paragraph 2.6. Without admitting to any improper acts or conduct of any kind, the cross-examination testimony of Hoyle was that none of the alleged prescriptions in issue were for Schedule II opioid substances (CAR, at 2087-89) and that the alleged prescriptions in issue were all filled by pharmacies and pharmacists without objection (CAR, at 2085-86). This gives rise to substantial evidence and grounds for finding that all prescriptions which may have in fact been written by Dr Alsager were legitimate, that he was at no time put on notice of any alleged potential issues regarding any of his actual prescriptions, and that at no time was he simply and overtly "unwilling to comply with the Board's Orders". There is no proof of intent (an essential element to a willful act) by Dr Alsager to allegedly violate the 2008 Final Order and the Board's clear intent thereunder to only prohibit opioid prescriptions. However, the Board was clearly unwilling to address his concerns regarding uncertainty as to this matter and clearly demonstrated its intent to do so by its summary refusal to issue a Declaratory Order as requested by him. Based on this undisputed and competent evidence, the Board could not reasonably find as fact that Dr Alsager was "unwilling to comply" with its 2008 Order when the Board itself was a willing accomplice in fostering uncertainty and any possible violations – and may itself be guilty of conspiracy and/or entrapment in violation of Dr Alsager's civil rights. *See* fn. 6, 13, and 14, *supra*.

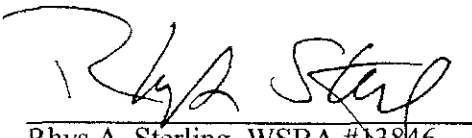
130.180(8), RCW 18.130.230(1), RCW 70.02.050(2)(a), and RCW 70.225.040(3); each of which is beyond a reasonable doubt unconstitutional as applied to quasi-criminal actions. With such a flawed foundation, it is no wonder that the Board's Final Order imposing on Dr Alsager the administrative death penalty was likewise fatally flawed.[79] Dr Alsager's federal and State bedrock constitutional rights and privileges were absolutely trampled upon and summarily cast aside in the State's quasi-criminal action against him.[80]

The Court is respectfully asked to correct this manifest injustice by vacating the Board's Final Order and directing the Board to immediately reinstate Dr Alsager's professional license (*see* Petition, Part VIII, *Petitioner's Request for Relief*). Moreover, all DOH-posted information on the Internet and other database sites must be removed to allow Dr Alsager to pursue his profession and livelihood without these unreasonable impediments.

Dated this 21st day of July, 2015.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling, WSBA #13846
Attorney for Appellant Dale E. Alsager

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[79] *See also* p. 12, ¶ E, *supra* (denial of Petition for Reconsideration).

[80] RCW 34.05.570(3) These violations are not harmless, they are outrageous and continue to have a devastating adverse effect on not only himself personally, but on his professional license and livelihood, his family, and his many patients.

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APPENDIX

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APPENDIX INDEX

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of: DALE E ALSAGER, D.O., Credential No. DO OP 00001485, Respondent	NO. M2013-514 PREHEARING STIPULATIONS

COMES NOW the State of Washington, Department of Health, Board of Osteopathic Medicine and Surgery (Department), by and through its attorneys, ROBERT W FERGUSON, Attorney General, and KRISTIN G BREWER, Assistant Attorney General, and DALE E. ALSAGER, D.O. by and through counsel RHYS A. STERING, Attorney at Law, and offer the *following prehearing stipulations* pursuant to the prehearing conference in this matter on May 1, 2014

1 The Department agrees to dismiss allegation 1 5 from the Statement of Charges dated September 18, 2013.

2. The parties stipulate that the issue of whether Dr Alsager has completed the pain management course is disputed The parties agree that they will not provide exhibits or testimony regarding the pain management course during the hearing. Accordingly, the Department will not need witnesses: Bruce Bronoske, Dr. Taubin or Megan Brown.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

3 Dr. Alsager agrees to withdraw his exhibits 2 and 3. The Department does not stipulate to the admission of exhibit 5, but the parties agree that Exhibit 5 ends at DEA EX 5-41

4. The Department agrees to withdraw Exhibits 7 and 8. The Parties agree that the hearing panel be informed that the parties stipulate that a complaint was received regarding Patient P on September 12, 2012. That Respondent was notified of the complaint on November 26, 2012 and that Respondent asserted his constitutional rights and refused to provide the requested documents or answer questions asked in the November 26, 2012 letter of cooperation. The Department agrees to strike from the SOC paragraph 1.11 the following sentence. "The Board was concerned about standard of care and boundary violations."

DATED this 7th day of May, 2014.

RHYS A. STERLING, WSBA #13846
Attorney at Law
for Dale E. Alsager, D.O

ROBERT W. FERGUSON
Attorney General

KRISTIN G. BREWER, WSBA #38494
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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of **DALE E. ALSAGER** Credential No DO.OP 00001485 Respondent	**No. M2013-514** **STATEMENT OF CHARGES**

The Executive Director of the Board of Osteopathic Medicine and surgery (Board), on designation by the Board, makes the allegations below, which are supported by the evidence contained in case nos 2012-8330, 2012-8589, and 2013-4839

1. ALLEGED FACTS

1 1 On August 22, 1995, the state of Washington issued Respondent a credential to practice as an osteopathic physician and surgeon Respondent's credential is currently active, subject to restrictions set forth in the Corrected Findings of Fact, Conclusions of Law and Final Order of August 15, 2008 (Final Order), as modified by Order of Modification entered on January 3, 2013

1 2 By the Order of Modification of January 3, 2013, the Board allowed Respondent additional time in which to pay the fine that the Board imposed in the Final Order In all other respects the Final Order remains the same.

1.3 In the Final Order the Board made "General Standard of Care Findings " which included

A A general review of the treatment provided to the above-identified patients reveals that the Respondent's treatment practices fall below the standard of care for the practice of osteopathic medicine in the state of Washington in several areas (Paragraph 1.5 of the Final Order)

1 4 By the Final Order, "Respondent is prohibited from prescribing Schedule II and Schedule III controlled substances The restriction shall remain in effect until Respondent completes a board approved training course or residency regarding pain management Any such training program must include at least a 6-month rotation in general medicine and a 6-month rotation in pain management " (Paragraph 3 1 of Final Order)

ORIGINAL

1 5 Respondent has not completed the Board approved training course or residency regarding pain management

1 6 While prohibited by the Final Order from doing so, Respondent prescribed Schedule III controlled substances as follows

A Respondent prescribed Axiron, a Schedule III controlled substance for himself and twelve (12) patients

B On or about March 5, 2012, Respondent prescribed Axiron 30 mg/actuation solution for himself The prescription was filled on or about July 2, 2012

C On or about March 5, 2012, Respondent prescribed Axiron 30 mg/actuation solution for Patient A The prescription was filled on or about March 12, 2012

D On or about February 15, 2013, Respondent prescribed Axiron 30 mg/actuation solution for Patient B. The prescription was filled on or about February 17, 2013.

E On or about August 1, 2012, prescribed Axiron 30 mg/actuation solution for Patient B. The prescription was filled on or about August 2, 2012 and on September 29, 2012

F On or about March 21, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient C. The prescription was filled on or about March 21, 2012.

G On or about April 19, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient C The prescription was filled on or about April 20 2012, May 18, 2012, and June 15, 2012

H. On or about July 18, 2012 Respondent prescribed Axiron 30 mg actuation solution for Patient C The prescription was filled on or about July 19, 2012.

I On or about September 13, 2012, Respondent prescribed Axiron 30 mg/actuation solution for Patient C The prescription was filled on or about September 17, 2012, October 18, 2012, and November 26, 2012.

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J. On or about August 9, 2012, Respondent prescribed Axiron 30 mg/actuation solution for Patient D. The prescription was filled on or about August 10, 2012, September 15, 2012 and November 10, 2012.

K. On or about July 5, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient E. The prescription was filled on or about July 17, 2012.

L. On or about October 30, 2012, Respondent prescribed Axiron 30 mg/actuation solution for Patient E. The prescription was filled on or about October 30, 2012.

M. On or about August 9, 2012, Respondent prescribed Axiron 30 mg/actuation solution for Patient F. The prescription was filled on or about August 10, 2012, September 5, 2012, and October 26, 2012.

N. On or about March 20, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient G. The prescription was filled on or about March 20, 2012 and April 28, 2012.

O. On or about October 26, 2012, Respondent prescribed Axiron 30 mg/actuation solution for Patient G. The prescription was filled on or about October 26, 2012.

P. On or about August 10, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient H. The prescription was filled on or about August 10, 2012.

Q. On or about August 1, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient I. The prescription was filled on or about August 1, 2012 and August 31, 2012.

R. On or about August 2, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient J. The prescription was filled on or about August 3, 2012.

S. On or about April 5, 2012, Respondent prescribed Axiron 30 mg actuation solution for Patient K. The prescription was filled on or about April 5, 2012.

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T On or about December 22, 2011, Respondent prescribed Axiron 30 mg actuation solution for Patient L. The prescription was filled on or about December 23, 2011

1.7 On or about April 12, 2007, Respondent prescribed EEMT, a Schedule III controlled substance, for Patient M

1 8 On or about the following dates, Respondent prescribed Bontril, a Schedule III controlled substance for Patient N. April 4, 2007; September 5, 2007, November 12, 2007, December 1, 2007 December 10, 2007, February 6, 2008, April 24, 2008, July 14, 2008, September 17, 2008; December 12, 2008; February14, 2009' April 27, 2009; September 14, 2009; January 7, 2010, and February 26 2010

1 9 On or about March 24, 2010 and December 6, 2010, Respondent prescribed Bontril, a Schedule III controlled substance, for Patient O

1 10 On or about July 5, 2013 the Department of Health investigator mailed to Respondent's last known address a letter requesting the medical records of patients for whom Respondent had prescribed Schedule II and/or Schedule III controlled substances On or about July 24, 2013, Respondent's attorney sent to the investigator a letter requesting names of patients about whom the Board was concerned On or about July 30, 2013, the investigator sent to Respondent and his attorney names of specific patients The investigator reiterated the request for information about these patients Respondent has not provided the requested information

1 11 On or about September 21, 2012, the Board authorized investigation of a complaint received on or about September 6, 2012, regarding Respondent s treatment of Patient P The Board was concerned about standard of care and boundary violations On or about November 26, 2012, the Department of Health investigator mailed to Respondent's last known address, telefaxed to Respondent's last known telefax number, and mailed to Respondent's attorney of record a letter requesting specific information including medical records of Patient P. Respondent has not provided "he requested information.

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2. ALLEGED VIOLATIONS

2.1 Based on the Alleged Facts, Respondent has committed unprofessional conduct in violation of RCW 18 130 180(8)(a) and (b), and (9), which provide.

> **RCW 18.130.180 Unprofessional conduct.** The following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter
>
> (8) Failure to cooperate with the disciplining authority by
>
> (a) Not furnishing any papers, documents, records, or other items,
>
> (b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority,
>
> (9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority,

2.2 The above violations provide grounds for imposing sanctions under RCW 18 130 160

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3. NOTICE TO RESPONDENT

The charges in this document affect the public health, safety and welfare. The Executive Director of the Board directs that a notice be issued and served on Respondent as provided by law, giving Respondent the opportunity to defend against these charges. If Respondent fails to defend against these charges, Respondent shall be subject to discipline pursuant to RCW 18.130.180 and the imposition of sanctions under RCW 18.130.160.

DATED: September 18, 2013

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE
AND SURGERY

BLAKE MARESH
EXECUTIVE DIRECTOR

ROBERT W. FERGUSON
ATTORNEY GENERAL

KRISTIN G. BREWER, WSBA #38494
ASSISTANT ATTORNEY GENERAL

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of: DALE E. ALSAGER, Credential No. DO OP.00001485, Respondent.	Master Case No. M2013-514 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

APPEARANCES:

Respondent, Dale E Alsager, by
Rhys A. Sterling, Attorney at Law

Department of Health Osteopathic Program (Department), by
Office of the Attorney General, per
Kristin Brewer, Assistant Attorney General

BOARD PANEL: Catherine A. Hunter, DO, Chair
Shannon L. Markegard, DO
John Finch, Jr., DO

PRESIDING OFFICER. John F. Kuntz, Review Judge

A hearing was held in this matter on June 4, 2014, regarding allegations of unprofessional conduct. Permanent Revocation of Credential

ISSUES

Did the Respondent commit unprofessional conduct as defined by RCW 18 130.180(8)(a) and (b) and (9)?

If the Department proves unprofessional conduct, what sanctions are appropriate under RCW 18.130.160?

SUMMARY OF PROCEEDINGS

At the hearing, the Department presented the testimony of Trish Hoyle, Health Care Investigator for the Department of Health. The Department called the Respondent as an adverse witness. The Respondent refused generally to testify or answer any of the questions asked by the Department, citing to his Fourth and Fifth Amendment rights. The Respondent also did not testify on his own behalf and did not present any witnesses. The Respondent submitted a sanctions brief, which included his curriculum vitae and patient statements in support of the Respondent's practice.

The Presiding Officer admitted the following Department exhibits.

D-1. Ex Parte Order of Summary Suspension, dated August 8, 2006;

D-2. Corrected Final Order, dated August 15, 2008;

D-3: Order of Modification, dated January 3, 2013;

D-4: Letter, dated October 1, 2012 from Department of Health (DOH) to the Respondent;

D-5. Letter, dated October 1, 2012 from DOH to the Respondent;

D-6: Authorization of Investigation, dated September 21, 2012, re Patient P,

D-7: The Respondent's Response (Petition for Declaratory Order),

D-8: Letter, dated January 8, 2013 from DOH to Rhys Sterling,

D-9: Authorization of Investigation, dated June 5, 2013 (prescribing in violation to prior order),

D-10: Letter of Cooperation, dated July 5, 2013;

D-11. The Respondent's Response, dated July 24, 2013 (Second Request for Declaratory Order);

D-12 Letter, dated July 30, 2013 from DOH to Rhys Sterling,

D-13 The Respondent's Response, dated August 14, 2013,

D-14 Letter, dated September 6, 2013, from DOH to Rhys Sterling;

D-15. Prescription Monitoring Program (PMP) Reports;[1] and

D-16 Pharmacy Records and Scripts.

The parties offered prehearing stipulations pursuant to the prehearing conference on May 1, 2014. Those stipulations are incorporated by reference. The stipulation included the Department agreement to dismiss allegation 1.5 from the Statement of Charges, dated September 18, 2013. At the hearing, the Department further agreed to dismiss allegation 1.7 of the Statement of Charges, dated September 18, 2013, and requested an order striking the second sentence in allegation 1.11. These requests were GRANTED.

I. FINDINGS OF FACT

1.1 The Respondent was granted a license to practice as an osteopathic physician in the state of Washington on August 22, 1995. The Respondent's credential

[1] The PMP is a database maintained by the DOH pursuant to Chapter 70.225 RCW and Chapter 246-470 WAC. The PMP program's purpose is to improve health care quality and detect and prevent prescription drug misuse. RCW 70.225.020(1). Access to the database is limited to specific health professionals and government agencies, including the Board. RCW 70.225.040.

was summarily suspended on September 20, 2013 Prior to the summary suspension, the Respondent's credential was active but was subject to restrictions set forth in the Corrected Findings of Fact, Conclusions of Law and Final Order, dated August 15, 2008 (Final Order).

1 2 The Board's Final Order found the Respondent's treatment fell below the standard of care for osteopathic physicians in several areas, including but not limited to prescribing controlled substances without sufficient objective medical findings (Final Order Paragraph 1.6); prescribing controlled substances or opiate medications in large amounts and at high dosages or potency (Final Order Paragraph 1.7); prescribing benzodiazepine medications for use in addition to opiate medication without considering the synergistic effect when prescribing the opiate medication (Final Order Paragraphs 1 8 and 1.9); repeatedly injecting steroid medication into joint and tissue without apparent medical justification (Final Order Paragraph 1.12); and failing to obtain consulting opinions on a consistent basis with pain management specialists regarding the Respondent's treatment plan (Final Order Paragraph 1.13)

1 3 By the Final Order, "The Respondent is prohibited from prescribing Schedule II and Schedule III controlled substances The restriction shall remain in effect until the Respondent completes a Board approved training course or residency regarding pain management. Any such training program must include at least a 6-month rotation in general medicine and a 6-month rotation in pain management."

(Paragraph 3.1 of the Final Order)

1 4 By the Order of Modification of January 3, 2013, the Board allowed the Respondent additional time in which to pay the $5,000 fine that the Board imposed in the Final Order. In all other respects, the Final Order remains the same.

1 5 While prohibited by the Final Order from doing so, the Respondent prescribed Schedule III controlled substances as follows

A The Respondent prescribed Axiron (Testosterone), a Schedule III controlled substance for himself and 12 patients

B On March 5, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for himself. The prescription was filled on or about July 2 2012.

C On March 5, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient A. The prescription was filled on or about March 12, 2012.

D. On February 15, 2013, the Respondent prescribed Axiron 30 mg/actuation solution for Patient B The prescription was filled on February 17, 2013.

E On August 1, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient B. The prescription was filled on August 2, 2012, and on September 29, 2012

F. On March 21, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient C. The prescription was filled on March 21, 2012

G. On April 19, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient C The prescription was filled on April 20, 2012, May 18, 2012, and June 15, 2012.

H On July 18, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient C. The prescription was filled on or about July 19, 2012.

I. On September 13, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient C The prescription was filled on September 17, 2012, October 18, 2012, and November 26, 2012

J On August 9, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient D. The prescription was filled on August 10, 2012, September 15, 2012, and November 10, 2012.

K. On July 5, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient E. The prescription was filled on July 17, 2012

L. On October 30, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient E. The prescription was filled on October 30, 2012.

M On August 9, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient F. The prescription was filled on August 10, 2012, September 5, 2012, and October 26, 2012

N On March 20, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient G. The prescription was filled on March 20, 2012 and April 28, 2012.

O On October 26, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient G The prescription was filled on October 26, 2012.

P On August 10, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient H. The prescription was filled on August 10, 2012

Q On August 1, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient I. The prescription was filled on August 1, 2012 and August 31, 2012.

R On August 2, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient J The prescription was filled on August 3, 2012

S On April 5, 2012, the Respondent prescribed Axiron 30 mg/actuation solution for Patient K. The prescription was filled out on April 5, 2012.

T. On December 22, 2011, the Respondent prescribed Axiron 30 mg/solution for Patient L. The prescription was filled on December 23, 2011.

1.6 On the following dates, the Respondent, prescribed Bontril, a Schedule III controlled substance for Patient N April 4, 2007, September 5, 2007, November 12, 2007; December 1, 2007; December 10, 2007, February 6, 2008; April 24, 2008; July 14, 2008, September 17, 2008; December 12, 2008, February 14, 2009; April 27, 2009; September 14, 2009, January 7, 2010; and February 26, 2010

1.7 On March 2010 and December 6, 2010, the Respondent prescribed Bontril, a Schedule III controlled substance. for Patient O.

1.8 On July 5, 2013, the DOH investigator mailed to the Respondent's last known address, a letter requesting the medical records of all patients for whom the Respondent had prescribed Schedule II and/or Schedule III controlled substances. On July 24, 2013, the Respondent's attorney sent to the investigator a letter requesting

names of patients about whom the Board was concerned [2] On July 30, 2013, the investigator reiterated the request for information about these patients. The Respondent has not provided the requested information

1 9 On September 21, 2012, the Board authorized an investigation of a complaint received on or about September 6, 2012, regarding the Respondent's treatment of Patient P. On November 26, 2012, the Department of Health investigator mailed to the Respondent's last known address, telefaxed to the Respondent's last known telefax number, and mailed to the Respondent's attorney of record a letter requesting specific information, including medical records of Patient P. The Respondent has not provided the requested information.

Sanction Findings

1.10 The Board previously determined in the 2008 Final Order that the restrictions on prescribing and retraining placed on the Respondent by the Order were necessary to protect the public and to rehabilitate the Respondent. The Board provided the Respondent with a rehabilitation plan that would allow him to remove the restriction The evidence shows the Respondent began to violate the Final Order by issuing prescriptions for Schedule III controlled substances as early as September 17, 2008 and through at least February 15, 2013 The Panel finds the Respondent's conduct (the

[2] See Exhibit D-11 In addition to the request for a more particular statement, counsel for the Respondent filed two Petitions for Declaratory Orders with the Board See Exhibits D-13 and D-87 The Board denied these Petitions See Exhibits D-8 and D-14

issuance of numerous Schedule III controlled substance prescriptions) shows a disregard of the 2008 Final Order As a result, the Board finds there is no rehabilitation plan that will ensure the Respondent's compliance

II. CONCLUSIONS OF LAW

2.1 The Board has jurisdiction over the Respondent and subject of this proceeding RCW 18.130 040

2 2 Except as otherwise required by law, the Department bears the burden of proving the allegations set forth in the Statement of Charges by a preponderance of the evidence WAC 246-11-520. The Washington Supreme Court has held the standard of proof in disciplinary proceedings against physicians is proof by clear and convincing evidence *Nguyen v. Department of Health*, 144 Wn.2d 516, 534 (2001), cert. denied, 535 U.S 904 (2002). In 2006, the Washington Supreme Court extended the *Nguyen* holding to all professional disciplinary proceedings. *Ongom v. Dept. of Health*, 159 Wn 2d 132 (2006), cert denied 550 U.S 905 (2007). However, in 2011, the Washington Supreme Court overruled *Ongom*, but declined to overrule *Nguyen*. *Hardee v Dept of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011).

2 3 Given the legal uncertainty regarding the standard of proof for disciplinary proceedings, the evidence in this matter will be evaluated under both the clear and convincing standard, as well as the preponderance of the evidence standard

2.4 The Board used its experience, competency, and specialized knowledge to evaluate the evidence RCW 34.05 461(5)

2 5 The Department proved by a preponderance of the evidence and clear and convincing evidence that the Respondent committed unprofessional conduct as defined in RCW 18 130 180(8), which states:

> Failure to cooperate with the disciplining authority by
>
> (a) Not furnishing any papers, documents, records, or other items, and
>
> (b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority

2 6 The Department proved by a preponderance of the evidence and clear and convincing evidence that the Respondent committed unprofessional conduct as defined in RCW 18 130.180(9), which states

> Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority

2.7 The Department requested the permanent revocation of the Respondent's osteopathic medicine and surgery credential. The Respondent requested the Board dismiss the allegations. In the alternative, the Respondent requests the Board look to remedies other than revocation in fashioning the appropriate sanctions in this case. In determining appropriate sanctions, public safety must be considered before the rehabilitation of the Respondent. RCW 18.130 160. The conduct in this case is not

described in a sanctioning schedule in chapter 246-16 WAC.[3] Thus the Panel uses its judgment to determine sanctions WAC 246-16-800(2)(d) The Panel considered the violation of the 2008 Final Order (a violation of RCW 18 130.180(9)), to be the primary violation requiring protection of the public. In making its sanctioning decision, the Panel considered the pattern of the Respondent's egregious violation of the 2008 Final Order in particular. The Panel concludes the Respondent cannot be rehabilitated *See* RCW 18 130.160 and WAC 246-16-800(2)(b)(ii) The Board Panel did not reach this decision lightly and considered whether there was any lesser sanction that would protect the public in this case.

2 8 The Panel relies on the 2006 Summary Restriction Order and the 2008 Final Order's Findings and Order of Restriction[4] The Board previously determined that the restrictions on prescribing and retraining placed the Respondent by those Orders were necessary to protect the public and to rehabilitate the Respondent, yet the Respondent began to violate the 2008 Final Order even during the original period of summary restriction The Panel concludes that retraining, restriction, and oversight have failed to rehabilitate the Respondent's conduct and that there is

[3] Chapter 246-16 WAC is the chapter addressing sanctions when a health care provider is found to commit unprofessional conduct. The Legislature amended the Uniform Disciplinary Act in 2008 to add a requirement to develop a schedule that defines appropriate range of sanctions applicable when there is a determination that unprofessional conduct occurred. *See* RCW 18 130 390

[4] See Exhibits D-1 and D-2

no lesser sanction than permanent revocation that can adequately protect the public, given the Respondent's repeated unwillingness to comply with the Boards' Orders.

2.9 The aggravating factors supporting the permanent revocation include the violation of the 2008 Final Order, the length of time the Respondent was violating the 2008 Final Order, the number of violations of the 2008 Final Order, and the seriousness of the underlying standard of care violations for which these sanctions were imposed. There were no mitigating factors considered.

III. ORDER

3.1 The Respondent's license to practice as an osteopathic physician in the state of Washington is PERMANENTLY REVOKED. The Respondent may not petition for reinstatement of his credential.

3.2 If he has not already done so, the Respondent shall present both portions of his credential to the Department of Health, Secretary of Health, P.O. Box 47873, Olympia, WA 98504-7873 within ten days of receipt of this Order.

Dated this 9 day of July, 2014.

Board of Osteopathic Medicine and Surgery

CATHERINE HUNTER, DO
Panel Chair

CLERK'S SUMMARY

Charge	Action
RCW 18.130.180(8)(a)	Violated
RCW 18.130.180(8)(b)	Violated
RCW 18.130 180(9)	Violated

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130 110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank

Either party may file a **petition for reconsideration.** RCW 34.05.461(3), 34 05 470. The petition must be filed within ten days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to

Department of Health Osteopathic
Medicine and Surgery Program
P.O. Box 47874
Olympia, WA 98504-7874

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Board does not respond in writing within 20 days of the filing of the petition

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05 542. The procedures are identified in chapter 34 05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for

reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34 05 470(3)

The order is in effect while a petition for reconsideration or review is filed "Filing" means actual receipt of the document by the Adjudicative Service Unit RCW 34 05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05 010(19)

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of DALE E ALSAGER, Credential No. DO OP.00001485, Respondent	Master Case No M2013-514 ORDER DENYING REQUEST FOR RECONSIDERATION

APPEARANCES.

Respondent, Dale E Alsager, by
Rhys A. Sterling, Attorney at law

Department of Health Osteopathic Program (Department), by
Office of the Attorney General, per
Kristin Brewer, Assistant Attorney General

PRESIDING OFFICER. John F. Kuntz, Review Judge

The Respondent moved for reconsideration of the Findings of Fact, Conclusions of Law, and Final Order (Final Order) entered by the Board of Osteopathic Medicine and Surgery (the Board), on July 9, 2014

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On July 10, 2014, the Adjudicative Service Unit served the parties with the Final Order, dated July 9, 2014.

1.2 On July 17, 2014, the Respondent filed a Petition for Reconsideration of Findings of Fact, Conclusions of Law, and Final Order of Permanent Revocation dated July 9, 2014 (Petition for Reconsideration) with the Adjudicative Service Unit In his Petition for Reconsideration, the Respondent requested the Board reconsider its Final

Order, vacate it *in toto*, and enter a new Final Order dismissing the Statement of Charges In his Petition for Reconsideration, the Respondent:

A. Renewed the constitutional issues previously raised in his prehearing motions,

B. Questioned the evidentiary issues raised in the prehearing conference, questioned the Board's drawing an adverse inference against him when the Respondent was relying on his constitutional rights;

C Challenged all of the Findings of Fact 1.2 through 1.10 in whole or in part, 1 3; 1 5(a) through 1 5(t), inclusive; 1.6, 1 7; and 1 10 and

D Challenged all of the Conclusions of Law in whole or in part

The Respondent identified one error of fact in Paragraph 1.4 of the Final Order, which states the administrative fine is $5,000 A review of the amount of the administrative fine in the Corrected Findings of Fact, Conclusions of Law, and Final Order, dated August 15, 2008 shows the amount of the administrative fine is $20,000, to be paid in $5,000 installments

1 3 On August 4, 2014, the Department filed its Memorandum Opposing Respondent's Petition for Reconsideration (Department's Response) with the Adjudicative Service Unit. The Department argued the Board's Final Order:

A Is not premised on an error of law, as the Board's order meets all of the requirements for a final order under the Administrative Procedure Act (chapter 34 05 RCW) and for permanent revocation under the Uniform Disciplinary Act (chapter 18.130 RCW) The Board's order is not premised on an error of law for this reason; and

B Is not premised on an error of fact, as the findings in the Board's Final Order are based squarely on the evidence presented at the hearing and are supported by the record.

The Department stipulated that the number "$5,000" in Finding of Fact 1.4 should be corrected to "$20,000"

1 4 On August 12, 2014, the Respondent filed his Reply on His Petition for Reconsideration of Board's Final Order The Respondent renews all of his constitutional arguments The Respondent argues that the Department bears the burden of proving the case with clear, cogent, convincing, and competent evidence The Respondent argues he does not bear the burden of affirmatively proving that he did not commit unprofessional conduct

II. CONCLUSIONS OF LAW

2 1 A petition for reconsideration must be filed within ten days of service of the order. RCW 34.05.461(3). RCW 34 05.470, and WAC 246-11-580. In this case, the Final Order was served on July 10, 2014 The Respondent filed the request for reconsideration on July 17, 2014. The request was timely filed.

2 2 Petitions for reconsideration must identify a specific error of fact or law. WAC 246-11-580(2). In this instance. the Respondent contested the Board's Final Order. The Respondent has provided no valid basis for reconsideration; he relists his disagreements with the Board's findings and conclusions and relists his disagreement with the Presiding Officer's prehearing orders. No specific error of fact or law was identified other than the error regarding the amount of the administrative fine in Paragraph 1 4 of the Final Order. This error does not support the issuance of an order granting of the Respondent's Petition

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, the Respondent's Petition for Reconsideration is DENIED.

Dated this 20th day of August, 2014.

JOHN F KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of:	)	Master Case No. M2013-514
	)	
DALE E. ALSAGER, Credential No. DO.OP 00001485,	)	PREHEARING ORDER NO 1: ORDER ON MOTIONS
	)	
Respondent.	)	
	)	

APPEARANCES

Respondent, Dale E Alsager, by
Rhys A Sterling, P E., J D , Attorney at Law

Department of Health Osteopathic Medicine and Surgery Program
(Department), by
Office of the Attorney General, per
Kristin G. Brewer, Assistant Attorney General

The Respondent filed a Request for Show Cause Hearing on Ex Parte Order of Summary Action (Motion for Show Cause) and a Request for Recusal/Disqualification of Certain Board Members and Presiding Officer (Motion for Recusal/Disqualification). Motion for Show Cause GRANTED. Motion for Recusal/Disqualification DENIED

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On September 20, 2013, the Board of Osteopathic Medicine and Surgery (Board) issued a Statement of Charges alleging the Respondent committed unprofessional conduct in violation of the Uniform Disciplinary Act (chapter 18.130 RCW); an Ex Parte Order of Summary Action, which suspended the Respondent's credential to practice as an osteopathic physician and surgeon; an Ex Parte Motion for Order of Summary Action (with supporting attachments); a Notice of Your Legal Rights form, and an Answer to Statement of Charges

1.2 On October 3, 2013, the Respondent filed an Answer to the Statement of Charges and Motions requesting: (1) a show cause hearing; (2) an order requiring the Department to prove its case by clear, cogent, and convincing evidence at the show cause hearing, and (3) an order recusing or disqualifying Board members Shannon Markegard, D O , John G Finch, D.O., Shannon Gunderson, Public Member, and Jeremy Graham, D O , who presided over the September 20, 2013 Summary Action, as well as Presiding Officer John Kuntz who assisted the Board panel In addition, the Respondent requested an order to recuse or disqualify Board members who were involved in the Respondent's previous Board matters (Daniel Dugaw, D.O , Bill Grant, Public Member; Catherine Hunter, D.O , Thomas N. Shelton, D.O , Thomas Bell, D O ; and Peter V Kilburn, D O.) and Laura Farris, Senior Health Law Judge The Respondent's request was based in part on appearance of fairness grounds

1.3 On October 4, 2013, the Presiding Officer initiated a telephonic conference call with the parties The Presiding Officer informed the parties that the Respondent's request for a show cause hearing would be granted, and set the cutoff dates for the submission of documents pursuant to WAC 246-11-340. The show cause hearing is scheduled for October 17, 2013. Each side will get 10 minutes to argue to the Board.

1 4 In his Motion to Recuse/Disqualify, the Respondent requested that the show cause panel consist of Board members and Presiding Officer(s) who have not taken part in the current summary action or previous actions against the Respondent. The current and previous actions included: (1) the Ex Parte Order of Summary Action

under Master Case Number M2013-514, (2) the Ex Parte Order of Summary Restriction under Docket Number 06-07-A-1204OP; (3) the Corrected Findings of Fact, Conclusions of Law and Final Order under Docket Number 06-07-A-1024OP/Master Case Number M2006-11164; (4) the Stipulated Findings of Fact, Conclusions of Law and Agreed Order on Modification under Master Case Number M2006-11164; (5) the letter declining to issue a Declaratory Order dated January 8, 2013, and (6) the letter declining to issue a Declaratory Order dated September 6, 2013

1.5 The identified Board members and Judges participated in current summary action or previous disciplinary proceedings against the Respondent. The Respondent *did not submit* any evidence in support of his Motion to show that any of the identified Board members, Judge Farris, or the Presiding Officer have (1) prejudged the outcome of the show cause action or any hearing/ruling; (2) evidenced any personal bias or personal prejudice that signified an attitude for or against the Respondent as distinguished from issues of law or policy, or (3) an interest whereby the identified Board members stand to gain or lose by any Board decision.

II. CONCLUSIONS OF LAW

2.1 The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement. RCW 34.05.437(1); *see also* WAC 246-11-380(1).

Show Cause

2.2 The license holder must request the show cause hearing within 20 days of the issuance of the order. RCW 18.130.135(1); *see also* WAC 246-11-340(1).

2.3 The Board issued its Ex Parte Order on Summary Action on September 20, 2013, and the Respondent filed his Motion for Recusal/Disqualification on October 3, 2013 The Respondent's request for show cause was therefore timely and the show cause hearing was scheduled. *See* Amended Scheduling Order dated October 10 2013

Show Cause Standard of Review

2 4 At the show cause hearing, the Department has the burden of demonstrating that more probable than not, the license holder poses an immediate threat to the public health and safety RCW 18 130.135(1); *see also* WAC 246-11-340(6).

2.5 The Respondent argues that the burden of demonstrating the license holder poses an immediate threat is or should be "clear, cogent, and convincing" evidence The burden of proof for a hearing for an osteopathic physician is not settled Except as otherwise required by law, the Department bears the burden of proving the allegation set forth in the Statement of Charges by a preponderance of the evidence WAC 246-11-520 The Washington Supreme Court held the standard of proof in medical disciplinary proceedings is proof by clear and convincing evidence. *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 534 (2001) *cert denied* 535 U S. 904 (2002) (*Nguyen*) In 2006, the Washington Supreme Court extended the Nguyen holding to all professional disciplinary proceedings *Ongom v. Department of Health*, 159 Wn.2d 132 (2006) *cert. denied* 550 U.S. 905 (2007) (*Ongom*). However, the Washington Supreme Court overruled *Ongom*

but declined to overrule *Nguyen*. *See Hardee v. Department of Social and Health Services*, 172 Wn.2d 1 (2011).

2.6 Given the legal uncertainty regarding the standard of proof for disciplinary proceedings, the evidence in this matter (when it gets to a full administrative hearing) will be evaluated under both the clear and convincing standard as well as the preponderance of the evidence standard.

2.7 However, the show cause hearing is not a final decision regarding the Respondent's credential. The Legislature may reasonably exercise the police power in the interest of public safety to authorize summary agency action, provided the aggrieved party has the opportunity to present a case on the merits before the action becomes final. *Gnecchi v. Swe*, 58 Wn 2d 467 (1991). The Legislature has done so here: RCW 18.130.135 makes it clear that for a show cause hearing, the Department's burden of proof is preponderance of the evidence. If the Respondent is seeking a ruling from the Presiding Officer to overturn this statute, the Presiding Officer declines. The Presiding Officer does not have the authority to declare a statute unconstitutional. WAC 246-11-480(3)(c).

Recusal/Disqualification of Judges or Board Member

2.8 Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified. RCW 34.05.425(3); *see also* WAC 246-11-230(4). A party may move to disqualify the presiding officer or

any member of the board pursuant to RCW 34 05 425(3) WAC 246-11-480(6).[1] A presiding officer or board member is subject to disqualification for bias, prejudice, interest, or any other provision for which a judge is disqualified *See* RCW 34 05.458

2 9 Principles related to disqualification are:

> [1] prejudgment concerning issues of fact about a party in a particular case; [2] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and, ...[3] an interest whereby one stands to gain or lose by a decision either way

Washington State Medical Disciplinary Board v. Johnston 99 Wn.2d 466, 474 (1983) (internal citations omitted), *see also Ritter v. Board of Commissioners of Adams County Public Hospital District No. 1*, 96 Wn 2d 503 (1981). The burden of proof to demonstrate bias – an "affirmative showing of prejudice which would alter the outcome of the pending litigation" – is on the person alleging it *Reinhart v. Seattle Times Co.*, 51 Wn. App. 561, *rev. denied* 111 Wn.2d 1025 (1988). Prior knowledge about the facts of an adjudicative proceeding does not require disqualification *See Clausing v State*, 90 Wn App. 863, *rev. denied* 136 Wn.2d 1020 (1998). Where there is merely a general predilection toward a given result which does not prevent the agency member from deciding the particular case fairly, however, there is no deprivation of due process. *Washington State Medical Disciplinary Board v Johnston*, 99 Wn.2d at 475. The members of the Board are presumed to be unbiased and the party alleging bias bears the burden of making an affirmative showing. *See Ritter v. Board of Commissioners of Adams County Public Hospital District No 1*, 96 Wn 2d at 513.

[1] The Presiding Officer has no vote in the outcome of any proceeding before the Board *See* RCW 18 130 050(10)

2 10 The Board consists of seven individuals. RCW 18.57 003 The Respondent moved to recuse/disqualify most of the Board members, the Presiding Officer, and Senior Health Judge Farris The Respondent's basis for disqualification is that some of the Board members and the Judges have either participated in the summary action under review or have participated in prior disciplinary matters against him The Respondent shows that some or all of the Board members (and the undersigned Presiding Officer) have prior knowledge of the matter(s). But prior knowledge is not enough The Respondent has not provided affirmative evidence of bias. The Respondent has not provided proof of a general predilection toward a given result regarding the outcome of the show cause hearing The Board members are presumed to be unbiased. *See Ritter v Board of Commissioners of Adams County*. The Respondent has not proved otherwise. To permit disqualification without any affirmative proof of bias would allow the Respondent to invalidate or halt the administrative process merely by filing a motion against the Board and would allow him to dictate preferences for the composition of the Board panel members in his proceeding. The Respondent's argument, without more, fails. The Motion for Recusal/Disqualification of the listed Board members and judges is denied

Appearance of Fairness

2.11 An administrative adjudication violates the appearance of fairness doctrine if a reasonably prudent disinterested observer would conclude that the party did not obtain a fair, impartial, and neutral hearing *See Deatheridge v. Board of Psychology*, 85 Wn App 434, *rev. on other grounds*, 134 Wn 2d 131 (1997) The doctrine requires that the hearing meet two requirements: (1) the hearing itself must be procedurally fair;

and (2) it must be conducted by impartial decision makers *See Raynes v City of Leavenworth*, 118 Wn.2d 237 (1992).

2.12 In considering the procedural fairness requirement, it is clear that the Board has the authority to conduct emergency proceedings. See RCW 34 05 479 and WAC 246-11-300 through 246-11-350 The Board also has authority to conduct show cause hearings. RCW 18.130 135 and WAC 246-11-340 The Respondent has not provided any evidence that proves the Board acted outside the authority to conduct an emergency proceeding or is not following its written show cause procedure WAC 246-11-340 In fact, the Respondent was informed that he could submit evidence and briefing for consideration by the Board. The Respondent's Motion fails to show that the show cause hearing is not procedurally fair.

2.13 In considering the impartial decision maker requirement, an impartial decision maker is one who does not prejudge the matter Although the Presiding Officer or Judge Farris is not a final decision-maker in this matter, Washington law provides that administrative officers may reconsider, rehear and re-decide cases without automatically implicating prejudgment. *City of Lake Forest Park v State of Washington Shorelines Hearings Board*, 76 Wn.2d 212, 219 (1994) The fact that the Presiding Officer participated in the summary action proceeding and the judges participated in the Respondent's prior case neither disqualifies them nor does it show any appearance of fairness concerns

2.14 As to the members of the Board, prejudgment is not shown where the same Board members who imposed summary suspension of a license also issued the final order revoking the license See *Clausing v State*, 90 Wn. App. 863, 876 (1998)

Neither is it shown by ideological or policy leanings of the decision makers. *See Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn 2d 869, 890 (1996), *see also Washington State Medical Disciplinary Board v. Johnston*, 99 Wn 2d 466 (1983).[2] As discussed in Paragraph 2.9 above, a general predilection toward a certain result is inadequate to show a violation of the prejudgment requirement. The only evidence raised by the Respondent is prior participation by the identified Board members. This is insufficient to prove pre-judgment The Respondent's Motion to Recuse/Disqualify the Board members fails and must be denied.

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED.

3.1 The Respondent's Motion for Show Cause is GRANTED

3.2 The Respondent's Motion for Recusal/Disqualification, as it relates to the recusal or disqualification of the Presiding Officer or Judge Farris, is DENIED.

3.3 The Respondent's Motion for Recusal/Disqualification, as it relates to the recusal or disqualification of the Board members, is DENIED.

Dated this 17th day of October, 2013.

JOHN F KUNTZ, Review Judge
Presiding Officer

[2] The Johnston case is directly on point as to the Board members who participated in the initial summary suspension decision in this case

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record:
RHYS A. STERLING, ATTORNEY AT LAW AND KRISTIN BREWER, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 15 DAY OF OCTOBER, 2013

Michelle Singer
Adjudicative Service Unit

cc: JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of	)	Master Case No M2013-514
	)	
DALE E. ALSAGER,	)	PREHEARING ORDER NO 2
Credential No DO.OP.00001485,	)	ORDER ON MOTIONS
	)	
Respondent	)	
	)	

APPEARANCES:

Respondent, Dale E. Alsager, by
Rhys A. Sterling, P E., J.D., Attorney at Law

Department of Health Osteopathic Medicine and Surgery
Program (Department), by
Office of the Attorney General, per
Kristin G. Brewer, Assistant Attorney General

PRESIDING OFFICER. John F Kuntz, Review Judge

The Department filed a Motion to Strike Respondent's Exhibit Nos. 2 and 4 (Motion to Strike), seeking an order striking the identified exhibits from the Respondent's Show Cause Hearing Brief and Exhibits. The Respondent opposed the Motion Motion to Strike DENIED.

The Respondent filed a Motion for Leave to File Reply Brief and to Supplement Exhibit 2 (Respondent's Motion), seeking an opportunity to file his opposition to the Department s Motion to Strike. The Department opposed the Respondent's Motion. Respondent's Motion DENIED

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On September 20, 2013, the Board of Osteopathic Medicine and Surgery (Board) issued a Statement of Charges alleging the Respondent committed unprofessional conduct in violation of the Uniform Disciplinary Act (chapter 18 130 RCW) Included with the Statement of Charges was an Ex Parte Order of Summary Action, which suspended the Respondent's credential to practice as an osteopathic physician and surgeon The Respondent was provided with notice that he could request a show cause hearing to contest the Ex Parte Order of Summary Action

1.2 On October 3, 2013, the Respondent filed his Answer to Statement of Charges and requested a hearing to contest the allegations. The Respondent also requested a show cause hearing to contest the summary suspension

1 3 On October 4, 2013, the Adjudicative Clerk Office served the parties with a Scheduling Order/Notice of Show Cause Hearing, informing the parties of the filing dates for pleadings and exhibits for the Show Cause hearing.

1.4 On October 14, 2013, the Department filed a Motion to Strike, seeking an order striking the Respondent's Exhibit Nos. 2 and 4 attached to his Show Cause Hearing Brief and Exhibits Exhibit No. 2 consisted of letters and statements provided by individuals who received care and treatment from the Respondent. Exhibit No. 4 consisted of a letter from the Respondent's attorney and statement of Patient P. The Department argued that Exhibit No. 2 was not relevant to a show cause proceeding pursuant to Evidence Rule (ER) 401 and 402. Even if Exhibit No. 2 was relevant, the content of the exhibit was both prejudicial and confused the issues addressed in a show

cause hearing *See* ER 403 The Department further requested striking Exhibit No 4 on relevance grounds. *See* ER 402 and 403

1 5 On October 15, 2013, the Respondent filed a Motion requesting an opportunity to file a reply brief to contest the Department's Motion to Strike As part of his Motion, the Respondent requested to supplement Exhibit No 2 by including several additional patient letters

1 6 On October 16, 2013, the Presiding Officer convened a telephonic prehearing conference with the parties to address the Motion to Strike and the Respondent's Motion. Following the arguments of the parties, the Presiding Officer denied both the Department's Motion to Strike and the Respondent's Motion to file a reply brief As a part of the ruling, the Presiding Officer denied the Respondent's request to supplement Exhibit No 2, given that the Respondent's cutoff date for the submission of exhibits had passed.

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions WAC 246-11-380(1) The presiding officer shall apply as the first source of law governing an issue those statutes and rules applicable to the issue. *See* WAC 246-11-480(3)(a). If there is no statute or rule governing the issue, the presiding officer may resolve the issue on the best legal authority available. *See* WAC 246-11-480(3)(b)

2.2 Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.453(1). If not

inconsistent with [RCW 34 05 4252(1)], the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings RCW 34.05 452(2).

2 3 "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules and regulations applicable in the courts of this state. ER 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403

2.4 In support of his Motion to contest the Board's Ex Parte Order of Summary Action, the Respondent submitted patient letters (Exhibit No. 2) that state the Respondent is a good osteopathic physician. The issue at a show cause hearing is whether the Respondent's conduct poses an immediate threat to the public health or safety. *See* RCW 18.130 135(1) Given that this is the issue, the Board can weigh whether patient letters have any tendency to make the existence of this fact (immediate danger) more probable or less probable pursuant to the relevant evidence definition under ER 401 Such letters are also the type of evidence on which reasonably prudent persons are accustomed to rely upon as pursuant to RCW 34 05 452(1) For those reasons, the letters that comprise the Respondent's Exhibit No 2 are admissible. The Department's Motion to Strike is denied on this issue

2.5 The Respondent's Exhibit No 4 is an explanation from the Respondent's attorney that dispute allegations regarding the Respondent's treatment of Patient P, and Patient P's letter disputing the allegations against the Respondent In support of its Ex Parte Motion for Order of Summary Action, the Department included a letter from Health Care Investigator that speaks to allegations regarding Patient P *See* Declaration of Trish Hoyle in Support of Motion for Summary Action, Exhibit No G. These possible allegations, while not contained in the Statement of Charges, raise concerns about behavior (possible sexual misconduct by the Respondent) that can be viewed as prejudicial to the Respondent. At a minimum, the Respondent should be given an opportunity to address the possible prejudicial behavior The Department's Motion to Strike is denied on this issue

2 6 Given the above ruling on the Department's Motion to Strike. it is unnecessary to grant the Respondent's Motion This includes the request to supplement Exhibit No. 2, as the Respondent's cutoff date for the submission of evidence has expired

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED·

3 1 The Department's Motion to Strike is DENIED

3 2 The Respondent's Motion for Leave to File a Reply and Supplement Exhibit No 2 is DENIED

Dated this 17th day of October, 2013

JOHN F KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record:
RHYS A. STERLING, ATTORNEY AT LAW AND KRISTIN BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 17th DAY OF OCTOBER, 2013

Adjudicative Service Unit

cc. JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of	)	Master Case No. M2013-514
	)	
DALE E. ALSAGER, Credential No DO.OP 00001485,	)	PREHEARING ORDER NO 4 ORDER ON SHOW CAUSE
	)	
Respondent.	)	
	)	

APPEARANCES:

Respondent, Dale E. Alsager, by
Rhys A. Sterling, P.E., J D., Attorney at Law

Department of Health Osteopathic Medicine and Surgery
Program (Department), by
Office of the Attorney General, per
Kristin G Brewer, Assistant Attorney General

COMMISSION PANEL: John G Finch, D.O., Panel Chair
Sharon Gundersen, Public Member
Shannon Markegard, D O

PRESIDING OFFICER: John F. Kuntz, Review Judge

On October 17, 2013, the Board of Osteopathic Medicine and Surgery (Board) convened a show cause hearing pursuant to RCW 18 130.135 The hearing was to determine two issues (1) whether the Respondent's conduct poses an immediate threat to the public health, safety, or welfare, and (2) whether the action taken was necessary to prevent or avoid the immediate danger to the public health, safety, or welfare.

SUMMARY OF PROCEEDING

The Presiding Officer admitted the following Department exhibits

D-1 Ex Parte Motion of Summary Action.

D-2: Declaration of Health Care Compliance Officer Bruce Bronoske, Jr , which included:

Exhibit A: Ex Parte Order of Summary Restriction entered on or about August 8, 2006

Exhibit B: Corrected Findings of Fact, Conclusions of Law, and Final Order entered on or about August 15, 2008

D-3: Declaration of Health Care Investigator Trish Hoyle, which included

Exhibit C Report of Prescription Monitoring Program, dated May 3, 2013

Exhibit D Letter of Cooperation, dated July 5, 2013.

Exhibit E Authorization of Investigation, dated September 21, 2012

Exhibit F: Investigative Report, dated August 18, 2013, and Memorandum to File, dated July 22, 2013

Exhibit G: Letter of Cooperation, dated November 26, 2012

D-4 Department's Response to Respondent's Show Cause Hearing Brief and Exhibits,[1] which included

Exhibit A: September 6, 2013 Board letter in Response to the Respondent's Petition for Declaratory Order.

The Presiding Officer admitted the following Respondent exhibits:

R-1: Dr Dale Alsager's Show Cause Brief, with appendices and exhibits, including:

Appendix A: Constitutional Rights and Privileges Analysis.

Appendix B: Standard of Proof Analysis

Exhibit 1: Dr Dale E. Alsager's October 2013 Curriculum Vitae

Exhibit 2. Letters of Support for Dr. Alsager from patients

[1] The Department's Response included a Motion to Strike, which was addressed by a separate order See Prehearing Order No. 2.

Exhibit 3:	November 14, 2012 Opinion Letter from Rhys A. Sterling; October 19, 2012 letter from Rhys A. Sterling to Assistant Attorney General John R Nicholson, December 3, 2012 letter from Rhys A. Sterling to Assistant Attorney General John R. Nicholson; December 3, 2012 Provider Credential Search from Department of Health database; and February 23, 2012 letter approving Dr Alsager's training program at the University of Washington Division of Pain Medicine
Exhibit 4.	May 9, 2013 letter from Rhys A. Sterling to Assistant Attorney General Heather Carter, with attached patient letters.
Exhibit 5	"DHEA and adrenal imbalance" by Marcelle Pick, OB/GYN NP; "The Truth About DHEA" by the editors of PureHealthMD, and "Dehydroepiandrosterone (DHEA) is an Anabolic Steroid Like Dihydrotestosterone (DHT), the Most Potent Natural Androgen, and Tetrahydrogestrinone (THG), J. Steroid Biochem Mol Biol, 2006 Jul 100 (1-3); 52-8. Epub 2006 Jun 21

In addition to the above exhibits, the Board was provided with copies of the Statement of Charges and Answer to Statement of Charges. Oral argument was requested by the parties

I. FINDINGS OF FACT

1 1 On September 18, 2013, the Board issued a Statement of Charges, an Ex Parte Order of Summary Action, and other required pleading under WAC 246-11-520 Under the Ex Parte Order of Summary Action, the Board alleged the Respondent's conduct posed an immediate threat to the public health, safety. or welfare, and summarily suspended the Respondent's credential to practice as an osteopathic physician and surgeon

1 2 On October 3, 2013, the Respondent filed his Answer to Statement of Charges The Respondent denied the allegations contained in the Statement of Charges As a part of the Answer to Statement of Charges, the Respondent requested a show cause hearing pursuant to RCW 18.130.135.

1 3 The Board convened a show cause hearing on October 17, 2013, and considered the evidence submitted by the parties

1.4 On August 15, 2008, the Board issued a Corrected Findings of Fact, Conclusions of Law and Final Order (2008 Final Order) in which the Board determined that the Respondent's treatment of patients fell below the standard of care in the state of Washington. The Board found that the Respondent prescribed large amounts of Schedule II controlled substances in providing care to patients when there were no objective findings to support such treatment. As a result of the Respondent's conduct, the Board prohibited the Respondent from prescribing Schedule II and Schedule III controlled substances pending the Respondent's completion of a Board approved training course or residency regarding pain management One element of the completion of the approved training course required that the Respondent submit written proof upon his completion. The Board took this action pursuant RCW 18.130.160 to (1) first to ensure the public was protected; and (2) only then to provide the Respondent with an opportunity for rehabilitation

1 5 Based on the totality of the evidence submitted by the Department in support of its Ex Parte Motion for Summary Action, the Board finds the Respondent has continued to prescribe controlled substances to a number of patients. *See* Exhibit C to Trish Hoyle Declaration. The Respondent has prescribed at least three controlled

substances, including Axiron 30 mg (a Schedule III controlled substance) for himself and 12 other patients, EEMT (a Schedule III controlled substance) for one patient, and Bontnl (a Schedule III controlled Substance) for two patients The Respondent did not provide any evidence to refute the above allegations. In fact, he admits that he did prescnbe the above identified medication, but states he will no longer do so

1 6 In the 2008 Final Order, the Board made it clear that before the Respondent could prescnbe Schedule II or III controlled substances, he needed to complete an approved training course or residency regarding pain management. The Respondent did receive the Board's permission to attend a course at the University of Washington. While he produced some evidence that he participated in the University of Washington training course, the Respondent did not produce evidence of his completion of that course. Completion of the course was a specific precondition for the Respondent to be permitted to prescnbe controlled substances. Without any objective evidence of his completion, the Board could not determine whether the Respondent could safely prescnbe Schedule II and III controlled substances

1.7 Based on the totality of the evidence, the Board finds that the Respondent has ignored the Board s requirements as set forth in the 2008 Final Order. The Board's 2008 Final Order provided the Respondent with an opportunity to a lesser restriction than total suspension if the Respondent could complete the terms and conditions of the 2008 Final Order. The Respondent failed to do so. The Respondent's failure to comply with the 2008 Final Order shows that the Respondent's conduct poses an immediate threat to the public's health, safety, or welfare The only action that will protect the

public is to leave the summary suspension in place pending a full administrative hearing on the matter.

II. CONCLUSIONS OF LAW

2.1 The Board has jurisdiction over the Respondent and the subject matter of the proceeding. RCW 18.130.040; RCW 18.130.135; and chapter 18.57 RCW.

2.2 The Department bears the burden of proof in a show cause proceeding on a more likely than not basis that the Respondent poses an immediate threat to the public health, safety, or welfare. RCW 18.130.135 (1).

2.3 Based on the Findings of Fact, the Department proved on a more likely than not basis that the Respondent's conduct poses an immediate threat to the public health, safety, or welfare.

2.4 The sanction above is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare.

III. ORDER

The Ex Parte Order, dated September 20, 2013, shall remain in effect pending a full adjudication of the allegations.

Dated this 4 day of November, 2013.

JOHN G. FINCH, D.O.
Panel Chair

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18 130 110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank

The Respondent has requested a full hearing on the merits in this matter Should the Respondent seek an expedited hearing, they must request it by sending such request in writing to the Adjudicative Service Unit within 45 days of the date of this Order. An expedited hearing must be provided within 45 days of the request of the hearing, unless stipulated otherwise. RCW 18 130.135(5).

This Order is "served" the day it is deposited in the United States mail RCW 34.05 010(19).

For more information, visit our website at.
http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of:	)	
	)	Master Case No M2013-514
DALE E. ALSAGER	)	
Credential No. DO OP.00001485	)	DECLARATION OF SERVICE
Respondent.	)	BY MAIL
	)	
	)	

I declare under penalty of perjury, under the laws of the state of Washington, that the following is true and correct.

On November 6, 2013, I served a true and correct copy of the Prehearing Order No. 4· Order on Show Cause, signed by the Panel Chair on November 4, 2013, by placing same in the U S. mail by 5 00 p m , postage prepaid, on the following parties to this case

Rhys Sterling
Attorney at Law
PO Box 218
Hobart, WA 98025

Dale E. Alsager
20241 269th Ave SE
Maple Valley, WA 98038

Dale E. Alsager
PO Box 1010
Maple Valley, WA 98038

Dale E. Alsager
22520 SE 218th St
Maple Valley, WA 98038

Kristin Brewer, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

DATED: This 6th day of November, 2013.

Michelle Singer, Adjudicative Clerk Office
Adjudicative Clerk

cc: Janelle Cognasso, Case Manager
Bruce Bronoske, Jr , Compliance Officer
Judy Young, Staff Attorney

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

November 6, 2013

Rhys Sterling
Attorney at Law
PO Box 218
Hobart, WA 98025

RE: Dale E. Alsager
Master Case No. M2013-514

Dear Mr. Sterling:

Enclosed please find Declaration of Service by Mail and Prehearing Order No 4: Order on Show Cause dated November 4, 2013

Any questions regarding the terms and conditions of the Order should be directed to Bruce Bronoske, Jr., Compliance Officer at (360) 236-4855.

Sincerely,

Michelle Singer, Adjudicative Clerk
Adjudicative Clerk Office
PO Box 47879
Olympia, WA 98504-7879

cc: Dale E. Alsager, Respondent
Kristin Brewer, AAG
Janelle Cognasso, Case Manager
Bruce Bronoske, Jr., Compliance Officer
Judy Young, Staff Attorney

Enclosure

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of:	)	Master Case No. M2013-514
	)	
DALE E. ALSAGER,	)	PREHEARING ORDER NO. 5
Credential No. DO.OP 00001485,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
Respondent.	)	OF SHOW CAUSE
	)	

The Respondent filed a Motion for Reconsideration[1] of Prehearing Order No. 4 and contests the Board of Osteopathic Medicine and Surgery (Board) Order on Show Cause.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On September 18, 2013, the Board issued a Statement of Charges, an Ex Parte Order of Summary Action, and other required pleadings under WAC 246-11-250. Under the Ex Parte Order of Summary Action, the Board concluded the Respondent's conduct posed an immediate threat to the public health, safety, or welfare, and summarily suspended the Respondent's credential to practice as an osteopathic physician and surgeon. The Ex Parte Order provided that the Board had the authority to take emergency adjudicative action to address an immediate danger to the public health, safety, or welfare under RCW 34.05.422(4), RCW 34.05.479,

[1] A motion for reconsideration is a remedy for the review of a final order. See WAC 246-11-580. The Presiding Officer considers the term "reconsideration" to be a term of art that should only be used pursuant to WAC 246-11-580. Having so stated, there is authority to rule on any motion under WAC 246-11-480(1)(e). The Presiding Officer will rule on any request to "review" or "revise" an earlier prehearing order pursuant to the WAC 246-11-480(1)(e) authority.

RCW 18 130 050(8), and WAC 246-11-300 *See* Ex Parte Order of Summary Action Conclusion of Law 2.2 The Board concluded the Department's evidence had met that standard *See* Ex Parte Order of Summary Action, Conclusion of Law 2.3.

1.2 On October 3, 2013, the Respondent filed his Answer to Statement of Charges, denied the Board's allegations, and requested a show cause hearing pursuant to RCW 18 130.135 As a part of the show cause hearing, the Respondent requested oral argument before the Board panel.

1.3 On October 17, 2013, the Board convened a show cause hearing with the parties pursuant to RCW 18.130.135. The Board considered the oral argument of the parties and the exhibits submitted by the Department of Health Osteopathic Program (Department) in support of the Ex Parte Motion for Summary Suspension, the Respondent's exhibits submitted in support of the Respondent's Show Cause Brief, and the exhibits submitted in support of the Department's Response to the Respondent's Show Cause Brief.

1 4 On November 4, 2013, the Board issued an Order on Show Cause. The Board ruled that the September 20, 2013 Ex Parte Order of Summary Action, which summarily suspended the Respondent's credential to practice as an osteopathic physician and surgeon, should remain in effect pending a full administrative hearing. Prehearing Order No. 4. The Board issued its Order following argument by the parties and a review of the materials submitted by the parties. That Order was served on the parties on November 6, 2013. In Prehearing Order No 4, the Board concluded the

Respondent's conduct "poses an immediate threat to the public health, safety, or welfare". *See* Prehearing Order No. 4, Conclusions of Law 2.3.

1.5 On November 15, 2013, the Respondent filed a Motion for Reconsideration of Prehearing Order No. 4 Order on Show Cause (Respondent's Motion) with the Adjudicative Service Unit. In support of the Respondent's Motion, the Respondent argued the Board:

A Applied the incorrect statutory standard in determining to continue the summary suspension of his credential by applying a "poses an immediate threat to the public health, safety, or welfare" standard rather than the RCW 18.130 135(4) required "poses an immediate threat to the public health and safety" standard. In addition to using the wrong statutory standard, the Respondent argued the Board did not make any findings of fact that the public health and safety were immediately threatened.

B Applied the wrong standard of proof at the show cause hearing by applying a "more likely than not" standard rather than the higher standard of proof of "clear, cogent, and convincing" standard required by the Washington Supreme Court's holding in *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516 (2001)

C. Improperly and in violation of the Respondent's constitutional rights and privileges declared as a fact that he admitted he prescribed medication, when the Respondent made no such admission. In fact, the Respondent denied all of the allegations contained in the Statement of Charges and that any

argument made by his counsel during the show cause cannot be used as evidence absent the Respondent's express stipulation to that effect.

D. Ignored substantial competent evidence in support of the Respondent's continuation of a more limited scope of practice in making a finding that the only action that will protect the public is to leave the summary suspension in place. The Respondent argued that the Board ignored evidence that the Respondent's practice is not open to the general public, is limited to selected individuals by appointment only; and that the Respondent's practice encompasses significant and needed treatment modalities other than medication

1.6 The Department of Health Osteopathic Program (Department) did not file any responsive pleading as of the date of this Order.

II. CONCLUSIONS OF LAW

2.1 The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to motions. *See* RCW 34.05.437(1).

2.2 The show cause procedure is set forth in RCW 18.130.135:

> (1) Upon an order of a disciplining authority to summarily suspend a license, or restrict or limit a license holder's practice pursuant to RCW 18.130.050 or 18.130.062, the license holder is entitled to a show cause hearing before a panel or the secretary as identified in subsection (2) of this section within fourteen days of requesting a show cause hearing. The license holder must request the show cause hearing within twenty days of the issuance of the order. *At the show cause hearing, the disciplining authority has the burden of demonstrating that more probable than not, the license holder poses an immediate threat to the public health and safety.* The license holder must request a hearing regarding the statement of charges in accordance with RCW 18.130.090.

(2)(a) In the case of a license holder who is regulated by a board or commission identified in RCW 18 130 040(2)(b), the show cause hearing must be held by a panel of the appropriate board or commission

(b) In the case of a license holder who is regulated by the secretary under RCW 18.130 040(2)(a), the show cause hearing must be held by the secretary.

(3) At the show cause hearing, the show cause hearing panel or the secretary may consider the statement of charges, the motion, and documents supporting the request for summary action, the respondent's answer to the statement of charges, and shall provide the license holder with an opportunity to provide documentary evidence and written testimony, and be represented by counsel. Prior to the show cause hearing, the disciplining authority shall provide the license holder with all documentation in support of the charges against the license holder.

(4)(a) If the show cause hearing panel or secretary determines that the license holder does not pose an immediate threat to the public health and safety, the panel or secretary may overturn the summary suspension or restriction order.

(b) If the show cause hearing panel or secretary determines that the license holder poses an immediate threat to the public health and safety, the summary suspension or restriction order shall remain in effect. The show cause hearing panel or secretary may amend the order as long as the amended order ensures that the license holder will no longer pose an immediate threat to the public health and safety

(5) Within forty-five days of the show cause hearing panel's or secretary's determination to sustain the summary suspension or place restrictions on the license, the license holder may request a full hearing on the merits of the disciplining authority's decision to suspend or restrict the license. A full hearing must be provided within forty-five days of receipt of the request for a hearing, unless stipulated otherwise.

RCW 18.130.135 (emphasis added).

Standard of Proof

2.3 The Respondent argues that the Board used the wrong standard of proof in Prehearing Order No 4, because the Board used the preponderance of the evidence (more likely than not) standard rather than the clear and convincing (highly probable) standard.[2] The Respondent relies on the Washington Supreme Court's decision in *Nguyen v. Medical Quality Assurance Commission*, 144 Wn 2d 516 (2001) (*Nguyen*). However, the Respondent's reliance on the Supreme Court's holding in *Nguyen* is misplaced here, as the show cause proceeding is not the Respondent's final hearing regarding the Respondent's alleged unprofessional conduct (which must be conducted using a clear and convincing evidentiary standard). Rather it is an emergency adjudicative proceeding that is authorized under the Administrative Procedure Act (chapter 34 05 RCW) and the Uniform Disciplinary Act (chapter 18.130 RCW). *See* RCW 18 130 050(8), RCW 18.130.135, RCW 34.05 479, and RCW 34 05.422(4)

2 4 In addition, the Legislature provided in RCW 18.130 135(1) (which was passed in 2008) that the standard of proof in show cause proceedings is the preponderance of the evidence standard. The legislature may reasonably exercise the police power in the interest of public safety *provided the aggrieved party has the opportunity to present a case on the merits before the action becomes final* *See Gnecchi v. Swe*, 58 Wn 2d 467 (1991) (emphasis added) The Respondent (the aggrieved party) will have an opportunity to present a case on the merits before the

[2] The Board cannot find the standard of proof portion of RCW 18 130 135(1) to be unconstitutional *See Yakima County Clean Air Authority v Glascam Builders*, 85 Wn 2d 255 (1975) To the extent the Respondent is making such an argument, he has made his record for appeal

Board before any final decision is made on the Respondent's credential. In fact, the Respondent has the opportunity to request an expedited hearing schedule to present his case on the merits. *See* RCW 18 130 135(5). The Board made no error by relying on the preponderance of the evidence standard. The Respondent's Motion must be denied for this reason

Statutory Standard for Show Cause

2.5 The Respondent further argues that the Board used the wrong statutory standard because the Board did not use the "poses an immediate threat to the public health and safety" standard in Prehearing Order No 4, as required under RCW 18 130 135(4)(b). That subsection states

> If the show cause hearing panel or secretary determines that the license holder *poses an immediate threat to the public health and safety*, the summary suspension or restriction shall remain in effect The show cause hearing panel or secretary may amend the order as long as the amended order ensures that the license holder will no longer pose an immediate threat to the public health and safety (Emphasis added).

Compare this language to that found in RCW 34.05.479(1), which states:

> Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving *an immediate danger to the public health, safety or welfare requiring immediate agency action*. (Emphasis added)

In this case the Board has the responsibility to determine whether there is a threat to the public health and safety by the Respondent's conduct. The Board derives its ability to do so from the authority found in RCW 34.05.422(4), RCW 34.05.479, RCW 18.130 050(8) and RCW 18.130 135. The issue is less about whether the

language is about an immediate threat to the "public health and safety" or "the public health, safety, or welfare" and more about whether there is an immediate threat requiring *immediate action*. The Board found in Prehearing Order No. 4, that the Respondent's conduct posed an immediate threat based on the evidence presented. The Board then assessed the evidence and written testimony presented as a part of the show cause process, which included the Respondent's exhibits and written testimony, to determine if the summary suspension should remain in effect. The Board determined that the Respondent's conduct *created an immediate threat* based on the totality of the evidence. That the Respondent disagrees with the Board's conclusion does not constitute a basis for reconsideration. The Respondent's Motion must be denied for that reason.

Admission at Show Cause Proceeding

2.6 The Respondent argues that the Board *improperly stated in Prehearing* Order No. 4, that the Respondent "admits that he did prescribe the above identified medication." *See* Prehearing Order No. 4, Finding of Fact 1.5. The Respondent stated he made no such admissions because (1) he denied the allegation in his Answer to Statement of Charges, and (2) any argument made by his counsel at the show cause hearing cannot be considered as evidence.

2.7 The Board's responsibility at the show cause hearing was limited in scope. The Board's responsibility was to determine whether the summary suspension against the Respondent's credential as an osteopathic physician and surgeon should remain in effect pending the administrative hearing. One of the allegations relating to that issue

was whether the Respondent prescribed Schedule II or Schedule III controlled substances in violation of the Board's August 15, 2008 Corrected Findings of Fact Conclusions of Law and Final Order. The Board's decision at the show cause hearing was based on the totality of the evidence, which included objective evidence of the Respondent's prescription of such medication For that reason, there was sufficient evidence to support the Board's decision to continue the summary suspension pending a full administrative hearing on this matter. The Board's finding does not address or resolve the issue for purposes of the full administrative hearing. Based on the totality of the evidence, the Respondent's motion is denied for this reason.

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, the Respondent's Motion is DENIED.

Dated this 9th day of December, 2013.

JOHN F. KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record:
RHYS STERLING, ATTORNEY AT LAW AND KRISTIN BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 12th DAY OF DECEMBER, 2013

Adjudicative Service Unit

cc JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of: DALE E ALSAGER, Credential No. DO OP 00001485, Respondent	Master Case No. M2013-514 PREHEARING ORDER NO 6: ORDER DENYING MOTION FOR CONTINUANCE

APPEARANCES:

Respondent, Dale E. Alsager, DO, by
Rhys A. Sterling, PE, JD, Attorney at Law

Department of Health Osteopathic Medicine Program (Department), by
Office of the Attorney General, per
Kristin G Brewer, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

The Respondent filed a Motion for Continuance and Stay of Scheduled Adjudicative Proceeding/Hearing Pending Completion of Appellate Judicial Review (Motion for Continuance), seeking to stay the administrative hearing pending the outcome of the Respondent's appellate judicial review. The Department opposes the continuance. Continuance DENIED.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On January 16, 2014, the Adjudicative Service Unit issued a Scheduling Order/Notice of Hearing, which set: the witness and exhibit cutoff date for March 17, 2014; the dispositive motion cutoff date for April 14, 2014; scheduled the prehearing conference for May 1, 2014; and scheduled the hearing date for June 2-4, 2014.

1.2 On February 27, 2014, the Respondent filed a Motion for Continuance, seeking to continue the administrative hearing to allow the completion of the appellate judicial review in the Washington Supreme Court. The Respondent's appeal raised issues regarding the applicability of constitutional issues, namely his rights and privileges under U.S Constitutional Amendments IV, V, and XIV, and Washington Constitutional Article I, sections 2, 3, 9, and 29 relating to quasi-criminal disciplinary proceedings. The Respondent argued the Department would suffer no harm by such a continuance/stay, as the Respondent was summarily suspended from the practice of osteopathic medicine and surgery under the Ex Parte Order issued on September 20, 2013. The Respondent's Motion for Continuance did not specify the length of the stay being requested.

1.3 On March 7, 2014, the Respondent filed a Motion to Shorten Time Pursuant to WAC 246-11-380(10) and Motion for Extension of Time to Disclose Possible Witness and Exhibits The Respondent's Motion for Extension was a request to extend the March 17, 2014 cutoff date for the identification of witnesses and filing of exhibits

1.4 On March 11, 2014, the Department filed a Memorandum in Opposition to Motion for Stay of Adjudicative Proceeding Pending Appellate Judicial Review and Response to Motion for Extension of Time to Disclose Witnesses and Exhibits (Memorandum) The Department did not oppose a short continuance of the March 17, 2014, witness/exhibit cutoff date. The Department did oppose any request to stay or continue the hearing date in this matter. In support of its Memorandum, the Department

included the Thurston County Superior Court Order granting the Department's Motion to Dismiss Declaratory Judgment Action and Denying the Respondent's Motion for Summary Judgment [1] The Thurston County Superior Court ruled the Uniform Declaratory Judgment Act (chapter 7.24 RCW) did not apply to the Administrative Procedure Act (chapter 34.05 RCW) [2]

1.5 On March 13, 2014, the Respondent filed his Reply to the DOH/Board Opposition to Dr Alsager's Motion for Continuance/Stay of Adjudicative Proceeding Pending Completion of Appellate Judicial Review The Respondent noted that the Thurston County Superior Court's decision was not based on a consideration of the merits of the Respondent's suit for declaratory judgment This was why the Respondent appealed to the Washington Supreme Court to obtain a judicial declaration whether the Respondent's rights and privileges under the Fourth and Fifth Amendments of the U.S. Constitution fully apply to the Respondent's quasi-criminal disciplinary action before the Board

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions and continuances may be granted for good cause. WAC 246-11-380(1).

Stay of Proceeding

2.2 The Administrative Procedure Act (APA) provides for a stay of the effectiveness of a final order RCW 34.05.467. There is no clear statutory language providing authority to grant stays prior to the issuance of a final order However, the

[1] Thurston No 13-2-02089-8, dated January 24, 2014
[2] See Department's Memorandum, Exhibits 14 and 15.

APA provides the presiding officer with the authority to conduct and control the proceeding. *This authority encompasses the implied* authority to grant a stay *See Boise Cascade v. Washington Toxics Coalition*, 68 Wn. App. 447 (1993).

2.3 The APA is silent on what criteria must be used before issuing a stay of proceedings It is prudent to consider the factors contained in RCW 34 05 550(3), which addresses the criteria the reviewing court may consider in granting a stay Before it may stay the enforcement of a final order under RCW 34 05 550(3), the court must find

- The petitioner is likely to prevail in the appeal
- The petitioner will suffer irreparable injury
- A stay will not substantially harm other parties
- The threat to the public health and welfare is not sufficiently serious to justify the agency action in the circumstance

The alternative is to use the criteria used by the courts

- The issue is debatable; and
- A stay is necessary to preserve the fruits of the appeal, considering the equities of the situation

Purser v. Rahm, 104 Wn.2d 159, 177 (1985) Whichever criteria are used, a stay should be limited in duration.

2.4 Applying the RCW 34 05 550(3) elements to the present matter, the Respondent's Motion for Continuance only addresses two of the four requirements. The Respondent's Motion partially addresses the issue of the substantial harm that he might suffer if he is required to submit the medical records in derogation of his

Fourth Amendment constitutional rights The Respondent does not indicate that he is currently subject to any criminal action in Washington, such that his testimony at the hearing will suffer irreparable injury to his Fifth Amendment rights The Respondent believes a stay will not substantially harm the Department, given that the Board has suspended the Respondent's credential to practice as an osteopathic physician in the state of Washington The Department contests that belief, as it argues the Respondent has not complied with prior Board orders up to this point.

2 5 The Respondent does not provide any evidence that he is likely to prevail on appeal While not totally controlling on the merits of the issue, the Presiding Officer notes the Respondent did not prevail in Thurston County Superior Court. The Court indicated the Respondent had a "plain, complete, speedy, and adequate remedy at law" taking the Uniform Disciplinary Act (chapter 18 130 RCW) and the Administrative Procedure Act (chapter 34 05 RCW) together [3] The Court's decision suggests that the Respondent is not likely to prevail in his Washington Supreme Court appeal.

2 6 The final RCW 34 05 550(3) element is whether the threat is not sufficiently serious to justify the agency's action under the circumstance. The Board has determined that the threat is sufficiently serious, as the Board acted under its summary action authority in RCW 34 05 422(4), RCW 34 05 479, RCW 18 130.050(8), and WAC 246-11-300 The Respondent has not provided any proof to the contrary.

2 7 Although not a criterion of RCW 34 05.550(3), a stay should be limited in duration The Respondent has not provided any timeline for the stay being requested,

[3] *See* Department Exhibit 15 (page 3, line 25 through page 4, line 2).

other than the appeal is to the Washington Supreme Court. The Presiding Officer does not know whether that means six months or two years Without any timeline at all, the Respondent's request is denied

Order to Shorten Time and Extend Cutoff Date

2 8 Motions to shorten time or emergency motions shall be exceptions to the rule, and a party may only make such motions in exigent or exceptional circumstances WAC 246-11-380(10). The Respondent filed a Motion to Shorten Time and a Motion for Extension of Time to Disclose Possible Witnesses and Exhibits on March 7, 2014, which was ten days before the March 17, 2014 cutoff date. The Department did not oppose the Respondent's Motion. The Respondent's Motion to Shorten Time is GRANTED. The Respondent's witness and exhibits lists will be due two weeks after the date of service of this Order

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED·

3.1 The Respondent's Motion for a Stay is DENIED

3.2 The Respondent's Motion to Shorten Time and Extend Cutoff Date for the production of witness and exhibits lists is GRANTED The Respondent should produce the lists within two weeks of the date of service of this Order.

Dated this 25th day of March, 2014.

JOHN F KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record:
RYHS A. STERLING, ATTORNEY AT LAW AND KRISTIN BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 20th DAY OF MARCH, 2014

Adjudicative Service Unit

cc: JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of:	)	Master Case No. M2013-514
	)	
DALE E ALSAGER,	)	PREHEARING ORDER NO 7
Credential No DO OP.00001485,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION OF
Respondent	)	PREHEARING ORDER NO 6
	)	

APPEARANCES:

Respondent, Dale E. Alsager, DO, by
Rhys A. Sterling, PE, JD, Attorney at Law

Department of Health Osteopathic Medicine Program (Department), by
Office of the Attorney General, per
Kristin G Brewer, Assistant Attorney General

PRESIDING OFFICER: John F Kuntz, Review Judge

The Respondent filed a Motion for Reconsideration of Prehearing Order No 6: Order Denying Motion for Continuance (Motion for Reconsideration), seeking an order to reconsider the ruling in Prehearing Order No. 6, and granting the Respondent's motion for a stay of the proceedings. The Department opposed the Respondent's motion.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1 1 On March 25, 2014, the Presiding Officer issued an Order Denying Motion for Continuance denying the Respondent's Motion for Continuance and Stay of Scheduled Adjudicative Proceeding/Hearing Pending Completion of Appellate Judicial Review. *See* Prehearing Order No 6.

1.2 On April 1, 2014, the Respondent filed a Motion for Reconsideration with the Adjudicative Service Unit. The Respondent argued that he was entitled to relief on several grounds (1) the Presiding Officer misunderstood his Fourth and Fifth Amendments rights that arose from the instant quasi-criminal matter; (2) the Respondent has a previously scheduled oral argument before the Ninth Circuit Court of Appeals on his separate federal Declaratory Judgment action on June 2, 2014 (the first scheduled hearing day before the Board); and (3) the Presiding Officer's reliance on the RCW 34.05.550(3) stay requirements is misplaced and inappropriate under the circumstances, given that a scheduling order is not a final order

1.3 On April 9, 2014 the Department filed its Memorandum in Opposition to Motion for Reconsideration of Prehearing Order No. 6 (Memorandum). In its Memorandum, the Department argued that: (1) reconsideration is not proper under WAC 246-11-580, given that an order denying stay or continuance is not final; (2) a reconsideration is limited to a showing of a specific error of fact or law in the order sought to be reconsidered: and (3) the Respondent's conflict in federal court as to the first day of the hearing, need not require a stay or continuance, as the Department will accommodate the Respondent by starting its case on June 3, 2014.

II. CONCLUSIONS OF LAW

Reconsideration of Prehearing Order No. 6

2.1 As a starting point in the analysis, both parties raise issues whether reconsideration is an available remedy. The Respondent questions whether it is appropriate to rely on the reasoning of RCW 34.05.550(3) given that Prehearing

Order No. 6 is not "final". The Department questions whether the reconsideration remedy is available to the Respondent when Prehearing Order No. 6 is not "final". While the use of the term reconsideration may create confusion, the term does not control whether the Presiding Officer can rule on the Respondent's Motion for Reconsideration

2.2 In his Motion, the Respondent argues that the Presiding Officer's use of RCW 34.05.550(3) stay criteria is misplaced and inappropriate under the circumstances, as a scheduling order is not a "final" order. In the absence of a specific statute or rule, a presiding officer may rely on the best legal authority available *See* WAC 246-11-480(3)(b). The Respondent requested a stay of the proceedings, the best legal authority available can be found in RCW 34.05.550(3). The Presiding Officer can rely on the criteria found in RCW 34.05.550(3) for that reason, and the analysis of the Respondent's request under RCW 34.05.550(3) criteria was appropriate in this circumstance *See also Purser v. Rahm*, 104 Wn.2d 159 (1985).

2.3 The record before him at the time of his Prehearing Order No. 6 ruling indicated that the Respondent did not provide any evidence that he is likely to prevail on appeal. The Respondent did not prevail at the Thurston County Superior Court The Board determined that the threat created by the Respondent's conduct was sufficiently serious to act under the circumstances. The Respondent's stay request was not limited in duration. These reasons supported the decision in Prehearing Order No. 6.

2.4 In his Motion for Reconsideration, the Respondent did not address all of the RCW 34.05.550(3) criteria He did modify his stay request to make it of a limited

duration: a four month continuance to allow the completion of his separate federal Declaratory Judgment action. The Respondent notes that oral argument is scheduled for June 2, 2014. The Department argues that while the date of the argument is certain, the date of the decision is not. The Presiding Officer concludes that the Respondent's four-month estimate is just that, an estimate. There is no evidence that the federal decision will be issued within the four-month estimate given by the Respondent.

2.5 Additionally, the mere pendency of related proceedings need not prevent the hearing from going forward. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 352 (the mere pendency of related civil and criminal proceedings does not prevent the civil proceedings from going forward. The Constitution does not ordinarily require a stay of a civil proceeding pending the outcome of criminal proceedings). *Id.* (citations omitted). If a related criminal proceeding does not prevent going forward, a declaratory judgment action (without more) does not support the Respondent's stay request. The Respondent's request for reconsideration on the issue of the use of RCW 34.05.550(3) criteria is denied.

2.6 The Department similarly argues that the Respondent's Motion for Reconsideration is not appropriate, given that a motion for reconsideration is a remedy to request a review of a final order and Prehearing Order No. 6 is not a "final" order. *See* WAC 246-11-580. However, the presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of proof. RCW 34.05.437(1). The Presiding Officer

concludes there is authority to rule on any motion under RCW 34.05 437(1), and will rule on the Respondent's Motion to "reconsider" Prehearing Order No. 6

Fifth Amendment Privilege

2 7 The Respondent argues that the Presiding Officer misunderstands the law by suggesting that his Fourth and Fifth Amendment rights and privileges are dependent on any criminal action that may or may not exist. The Respondent argues that the present action before the Board is quasi-criminal in nature and his rights arise from the quasi-criminal action *See Medical Disciplinary Board v Johnson*, 99 Wn.2d 466, 474 (1983) (*Johnston*). With respect to the Respondent, the Presiding Officer understands the Respondent's procedural due process rights and protections are established in quasi-criminal proceedings based on the Washington Supreme Court's decision in *Johnston*. For the purposes of determining whether a stay is appropriate, the Presiding Officer can consider whether there are parallel civil and criminal actions. Prehearing Order No 6 states that there is no parallel criminal action at this time for determining whether a stay is appropriate and nothing more.[1]

2.8 In its responsive pleadings, the Department argues that the Respondent has no Fifth Amendment privilege to the Respondent's treatment records under the "required records doctrine" (or exception). *See In re Grand Jury Proceedings v. Doe*,

[1] One of the cases cited by the Respondent, *In Re Kindschi*, 52 Wn.2d 8 (1958) (*Kindschi*) discusses the comparison of disciplinary proceedings to civil and criminal proceedings. "It is somewhat difficult to classify a medical disciplinary proceeding It is characterized as civil, not criminal, in nature, yet it is quasi-criminal in that it is for the protection of the public The United States supreme court has not required that due process and equal protection standards relative to criminal trials are "necessarily entirely" applicable to disciplinary proceedings relative to state granted licenses to practice professionally " *Kindschi*, 52 Wn 2d at 10 and 12.

801 F 2d 1164 (9th Circuit 1986) (citing to the three part test set forth in *Grosso v. United States*. 390 US 62, 67-68 (1968)). The Respondent disagrees. However, the Presiding Officer need not address the issue. The issue before him is whether to reconsider his ruling in Prehearing Order No. 6 to stay the proceeding The Presiding Officer does not see anything in the Respondent's Motion for Reconsideration that requires him to grant the stay

Continuance of the Hearing

2 9 Finally, the Respondent seeks a continuance of the hearing date because of the previously scheduled oral argument on June 2, 2014, before the Ninth Circuit Court of Appeals, regarding his separate federal Declaratory Judgment action. This is the first day of the scheduled three-day hearing (June 2 through June 4, 2014) before the Board. The Department offers to accommodate the Respondent by starting its case on June 3, 2014, which leaves June 4, 2014, for the Respondent's case.

2.10 Continuances may be granted for good cause WAC 246-11-380(3). The Presiding Officer concludes there is good cause to continue the matter for one day to accommodate the Respondent's argument before the Ninth Circuit Court of Appeals.

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED

3.1 The Respondent's Motion for Reconsideration of Prehearing Order No 6 is DENIED.

3 2 The Respondent's Motion for Continuance is GRANTED The hearing will convene on **June 3, 2014** The Adjudicative Service Unit will issue a Notice of Hearing informing the parties of the time and location of the hearing

Dated this 23rd day of April, 2014.

JOHN F KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record:
RHYS A. STERLING, ATTORNEY AT LAW AND KRISTIN G. BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 24th DAY OF APRIL, 2014

Adjudicative Service Unit

cc: JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of:	)	Master Case No. M2013-514
	)	
DALE E ALSAGER, Credential No. DO OP 00001485,	)	PREHEARING ORDER NO. 9: ORDER DENYING MOTION TO DISQUALIFY BOARD MEMBERS
	)	
Respondent.	)	
	)	

APPEARANCES.

Respondent, Dale E. Alsager, by
Rhys A. Sterling, P E., J.D , Attorney at Law

Department of Health Osteopathic Medicine and Surgery
Program (Department), by
Office of the Attorney General, per
Kristin G. Brewer, Assistant Attorney General

PRESIDING OFFICER John F. Kuntz, Review Judge

The Respondent filed a Motion to Disqualify Board Members from Sitting on Panel at Quasi-Criminal Trial of Dr. Alsager – WAC 246-11-230(4) (Motion to Disqualify) In his Motion to Disqualify, the Respondent requested an order disqualifying certain members of the Board of Osteopathic Medicine and Surgery (Board) from sitting on the hearing panel. The Department opposes the Respondent's Motion to Disqualify. Motion DENIED

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On September 20, 2013, the Board issued a Statement of Charges that alleged the Respondent committed unprofessional conduct in violation of the Uniform Disciplinary Act (chapter 18.130 RCW) The Board also issued an

Ex Parte Order of Summary Action, which suspended the Respondent's credential to practice as an osteopathic physician and surgeon in the state of Washington.

1.2 On October 3, 2013, the Respondent filed an Answer to Statement of Charges (Answer) and requested a hearing to contest the allegations.[1]

1.3 On April 14, 2014, the Respondent filed a Motion to Disqualify, seeking to disqualify all of the current Board members from serving on the hearing panel. The basis for the Respondent's Motion was that each of the present Board members is believed to be in private osteopathic practice in the immediate Puget Sound area, making the Board in direct and substantial competition with the Respondent. In support of his Motion, the Respondent submitted a copy of a February 6, 2014 Covington-Maple Valley newspaper article relating to the Valley Medical Center building a new medical center. One of the Board members (Shannon Markegard, D.O.) is the medical director at the Valley Medical Center

1.4 On April 23, 2014, the Department filed its Memorandum in Opposition to Motion to Disqualify Board Members. The Department argued that the Respondent's argument about who can serve on the panel is both speculative and unpersuasive.

1.5 On April 28, 2014, the Respondent filed his Reply to Department of Health's Opposition to Motions to Dismiss, Suppress, and Disqualify (Reply).[2] The Respondent argued that the Board members are competitors in the surrounding and proximate vicinity of the Respondent and are thereby as a matter of law deemed to be

[1] As a part of his Answer, the Respondent moved to disqualify or recuse all of the Board members, the Presiding Officer and the Senior Health Law Judge. This Motion was DENIED. *See* Prehearing Order No. 1.

[2] The Respondent's Motions to Dismiss and Suppress will be addressed in a separate order

sufficiently biased as standing to benefit monetarily and professionally from the Respondent's de-licensure *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

II. CONCLUSIONS OF LAW

2.1 The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to motions. *See* RCW 34.05.437(1), *see also* WAC 246-11-380(1) Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause for which a judge is disqualified *See* RCW 34.05.425(3); *see also* WAC 246-11-230(4).

2.2 The Board consists of seven individuals appointed by the governor. *See* RCW 18 57 003. One member shall be a consumer who has neither a financial nor fiduciary relationship to a health care delivery system *Id.* The Respondent argues that all of the current Board members live and practice in the Puget Sound region, that they stand to benefit monetarily and professionally from the Respondent's de-licensure, and that all of the Board members should be disqualified for that reason.[3]

2.3 Principles related to disqualification are:

> [1] prejudice concerning issues of fact about a party in a particular case; [2] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy, and ...[3] an interest whereby one stands to gain or lose by a decision either way.

Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 474 1983 (internal citations omitted); *see also Ritter v. Board of County Commissioners of*

[3] The Respondent's Motion to Disqualify included public member Sharon Gundersen The Respondent presented no evidence how Ms Gundersen does or could benefit financially in the present matter.

Adams County Public Hospital Distnct No. 1, 96 Wn 2d 503 (1981). The burden of proof to demonstrate bias – an affirmative showing of prejudice which would alter the outcome of the pending litigation – is on the person alleging it. *Reinhart v. Seattle Times Co.*, 51 Wn. App. 561, *rev. denied* 111 Wn 2d 1025 (1988) The members of the Board are presumed to be unbiased and the party alleging the bias bears the burden of making an affirmative showing. *See Ritter v. Board of County Commissioners of Adams County Public Hospital Distnct No 1*, 96 Wn 2d at 513. Where there is a general predilection toward a given result which does not prevent the agency member from deciding the particular case fairly, however, there is no deprivation of due process *Washington State Medical Disciplinary Board v. Johnston*, 99 Wn.2d at 475.

2.4 The Respondent does not provide sufficient direct evidence to overcome the presumption that the Board members are unbiased The Respondent's argument is because the Board members are located in the Puget Sound region, they are "competitors" and that they are sufficiently biased as a matter of law under the United States Supreme Court holding of *Gibson v. Berryhill*, 411 U S 564 (1973). The Respondent's reliance on *Gibson v. Berryhill* is misplaced, given the facts in that case.

2 5 Prior to 1965, Alabama law related to the practice of optometry allowed a business firm or corporation to maintain a department which allowed for eye exams and fitting eyeglasses, provided a licensed optometrist was in charge of the department. The law was repealed in 1965. The Alabama Optometric Association (a professional organization whose membership was limited to independent practitioners) began filing complaints with the Alabama Board against named optometrists who were employed by

Lee Optical (a corporation) The Alabama Board of Optometry brought charges of unprofessional conduct against the named optometrists employed by Lee Optical. Two days later the Board filed a suit of its own in state court, seeking to enjoin Lee Optical from the "unlawful practice of optometry". The Board held the administrative licensing proceedings in abeyance pending the state court suit.

2 6 On March 17, 1971, the state trial court rendered judgment in favor of the Alabama Board. The Alabama Board then reactivated the unprofessional conduct proceedings against the Lee Optical optometrists which were held in abeyance since 1965 The Lee Optical optometrists named in the unprofessional conduct matters before the Alabama Board then filed suit in federal district court and requested an injunction against the Alabama Board proceedings. The thrust of the complaint was that the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with the due process of law. The federal district court ruled in favor of the named optometrists on a number of factors, including:

1 The Board, acting as both prosecutor and judge in the de-licensing proceedings, had previously brought suit against the named optometrists on virtually identical proceedings in state court The district court took this to indicate that the Board members might have 'preconceived opinions' regarding the cases pending before them.

2. Lee Optical Co. did a large business in Alabama, and that if forced to suspend operations that the individual members of the Board, along with other private practitioners, would fall heir to this business

3. The Board was a suspect administrative body, as only members of the Alabama Optometric Association could be member of the Board. As a result 92 of the 192 practicing optometrists practicing in Alabama were denied participation in the governance of their own profession.

Gibson v. Berryhill, 411 U S. at 571.

2 7 The U S Supreme Court agreed with the federal district court that the Alabama Board was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings The Supreme Court's holding only reached the grounds of possible personal interest in reaching its decision. The Supreme Court held that it was sufficiently clear that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Gibson v. Berryhill*, 411 U.S. at 579 (internal citations omitted)

2 8 Here the Respondent makes no showing that the Board members have a *substantial* pecuniary interest in the Respondent's disciplinary proceedings. He merely argues that given the geographic proximity (the Puget Sound region) of the Board member's respective osteopathic medicine and surgery practices, the fact that the almost all of the Board members practice osteopathic medicine and surgery, and one newspaper article identifying one Board member by name, is sufficient proof of a substantial pecuniary interest in the outcome of the Respondent's disciplinary proceeding. The Presiding Officer concludes the Respondent has not met his burden of proving a substantial pecuniary interest. Without more, the Respondent's Motion to Disqualify is DENIED

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, the Respondent's Motion to Disqualify the Board Members from Sitting on Panel at Trial is DENIED

Dated this 6th day of May, 2014.

JOHN F. KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record
RHYS A. STERLING, ATTORNEY AT LAW AND KRISTIN G. BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 7th DAY OF MAY, 2014

Adjudicative Service Unit

cc: JANELLE TEACHMAN
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OSTEOPATHIC BOARD OF MEDICINE AND SURGERY

In the Matter of:	)	Master Case No. M2013-514
	)	
DALE E. ALSAGER,	)	PREHEARING ORDER NO 10:
Credential No. DO.OP 00001485,	)	ORDER DENYING MOTION
	)	IN LIMINE TO SUPPRESS,
Respondent	)	ORDER DENYING MOTION
	)	TO DISMISS STATEMENT OF
	)	CHARGES PARAGRAPH 2.1

APPEARANCES.

Respondent, Dale E. Alsager, DO, by
Rhys A Sterling, PE, JD, Attorney at Law

Department of Health Osteopathic Medicine Program (Department), by
Office of the Attorney General, per
Kristin G. Brewer, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

The Respondent filed a Motion in Limine to Suppress and Exclude All Department of Health Prescription Related Documents and Evidence (Motion in Limine) The Department opposed the Respondent's Motion in Limine The Respondent's Motion in Limine is DISMISSED. The Respondent filed a Motion to Dismiss Statement of Charges, Paragraph 2.1 (RCW 18.130.180(8)(a) and (b)

and RCW 18.130 180(9)) (Motion to Dismiss). The Department opposed the Respondent's Motion to Dismiss The Respondent's Motion to Dismiss is *DENIED.*[1]

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On September 18, 2013, the Board of Osteopathic Medicine and Surgery issued a Statement of Charges alleging the Respondent committed unprofessional conduct Under Paragraph 2.1 of the Statement of Charges, the Board alleged the Respondent violated RCW 18.130.180(8)(a) and (b) (failure to cooperate with the Board by producing requested treatment records) and RCW 18 130.180(9) (failure to comply with the Board's Findings of Fact, Conclusions of Law and *Final Order* (2008 Final Order)). The Board also issued an Ex Parte Order of Summary Action, which suspended the Respondent's credential to practice osteopathic medicine and surgery in the state of Washington

1 2 On October 3, 2013, the Respondent filed an Answer to Statement of Charges and Request for Recusal/Disqualification of Certain Board Members and Presiding Office (Answer)[2] In his Answer, the Respondent denied each and every one

[1] The Respondent also filed a Motion to Disqualify Board Members from Sitting on Panel at Quasi-Criminal Trial pursuant to WAC 246-11-230(4). That order was denied by a separate order *See* Prehearing Order No 9

[2] The Respondent also requested an opportunity to contest the summary suspension The Board conducted a show cause hearing in response to the Respondent's request and denied the Respondent's request. *See* Prehearing Order No 4 Order on Show Cause, dated November 4, 2013

of the alleged facts in the Statement of Charges and requested a hearing to contest the allegations contained in the Statement of Charges.[3] See Answer, page 3, lines 4-8

1.3 On April 14, 2014, the Respondent filed a Motion in Limine and a Motion to Dismiss with the Adjudicative Service Unit. In his Motion in Limine, the Respondent requested an order to suppress and exclude all Department Prescription Monitoring Program (PMP) prescription-related documents and evidence from the records as fruit of the poisonous tree. In his Motion to Dismiss, the Respondent requested an order to dismiss with prejudice the alleged violations constituting unprofessional conduct under the Statement of Charges, Paragraph 2.1 (the allegation the Respondent violated RCW 18.130.180(9) relating to the violation of a previous Board order). In support of his two Motions, the Respondent submitted documents from some of his patients in which the patients do not give their consent to any pharmacist to disclose any personal health information and protesting and refusing to allow any personal health information (including PMP information) to be used against the Respondent.

1.4 On April 23, 2014, the Department filed its Memorandum in Opposition to the Respondent's Motion to Dismiss Statement of Charges Paragraph 2.1 and Motion to Suppress and Exclude All Department of Health Prescription-Related Documents. The Department argued:

[3] The Respondent further requested an order disqualifying identified Board members, the Presiding Officer, and the Senior Health Law Judge on bias/prejudice and appearance of fairness grounds. This request was denied. See Prehearing Order No. 1.

A Without citing relevant or governing authority, the Respondent argues that the statutes governing the case are unconstitutional, as such the case should be dismissed

B. The Respondent has no basis to assert his personal privilege against self-incrimination with respect to the patient records the Board seeks. (1) The Fifth Amendment privilege only applies when the accused is compelled to make a testimonial communication that is incriminating (2) The Fifth Amendment privilege does not apply to license regulations under the UDA, a civil enforcement proceeding. (3) Patient records are not the Respondent's personal or private records. (4) Production of the patient records is not compelled testimony. (5) The patient records fall within the required records exception to the Fifth Amendment.

C. The Board has the authority to investigate the Respondent's prescribing in order to monitor the Respondent's compliance with the Board's 2008 Order

1.5 On April 28, 2014, the Respondent filed his Reply to the Department's Opposition to Motions to Dismiss, Suppress, and Disqualify (Reply). The Respondent argued that raising constitutional issues does not automatically result in the dismissal of the underlying action Instead the Respondent argues that Washington case law clearly holds that disciplinary actions are quasi-criminal actions The Respondent argues this

means he has absolute personal fundamental constitutional rights to remain silent under the Fourth Amendment and the privilege against self-incrimination, all without punishment, sanction, or adverse inference. The Respondent argues his constitutional rights require the dismissal of Paragraph 2 1 of the Statement of Charges as it applies to RCW 18 130.180(8)(a) and (b) regarding the failure to cooperate.

1 6 The Respondent further argued that he was not required to produce the medical records, as osteopathic physicians are *not* required to keep records by any general rule or statute. The Respondent argues the records are the Respondent's private property which he is not acting in any custodial capacity, and is not compelled to produce his private papers under the Fourth Amendment

II. CONCLUSIONS OF LAW

2.1 The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement RCW 34 05.437(1), *see also* WAC 246-11-380(1). If there is no statute or rule governing the issue, the presiding officer shall resolve issues using the best legal authority available WAC 246-11-480(3)(b)

Summary Judgment/Motion to Dismiss

2.2 If on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, if matters outside the pleadings are presented to and not

excluded by the court, the motion shall be treated as a summary judgment.[4] *See* Civil Rule (CR) 12(b) Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 12(b)(6). In a summary judgment motion, the moving party bears the initial burden of demonstrating there is no genuine issue of material fact *Young v Key Pharmaceuticals*, 112 Wn.2d 216, 225 (1989) A material fact is one upon which the outcome of the litigation depends. *Tran v State Farm Fire & Casualty Co.*, 139 Wn 2d 214, 223 (1998). All facts submitted and all reasonable inferences from them must be viewed in the light most favorable to the nonmoving party. *Young v. Key Pharmaceuticals*, 112 Wn.2d at 226

2.3 The Department alleges that the Respondent committed unprofessional conduct in its Statement of Charges The Respondent denies each and every factual allegation contained in the Statement of Charges Given that the parties dispute the allegations, there exist genuine issues of material fact. Summary judgment is not appropriate for that reason The Respondent's Motion to Dismiss is denied on those grounds.

[4] The Respondent seeks an order on summary judgment from the Presiding Officer The Department argues that the Presiding Officer cannot issue a summary judgment in cases related to standards of practice or where clinical expertise are required *See* RCW 18.130.050(10) and RCW 18 130 095 Nothing would prohibit the Board from granting summary judgment if the Respondent has provided sufficient grounds for such relief Given that the Respondent fails to do so, the Board is not required to decide on the Respondent's motion to dismiss or summary judgment motion.

2 4 However, the Respondent argues the Statement of Charges must be dismissed because the suppression and exclusion of the PMP material leaves the Board with no basis to support unprofessional conduct regarding his alleged failure to comply with the terms of the 2008 Final Order, which is the alleged unprofessional conduct under RCW 18 130 180(9) [5] The Respondent further argues that the Statement of Charges must be dismissed because he is not required to produce personal records under his Fifth Amendment right to remain silent in quasi-criminal proceedings, such that he cannot be found to have committed unprofessional conduct under RCW 18 130.180(8)(a) and (b). The Respondent contends the medical records the Department requested are his personal records and he is not compelled to produce them.

Quasi-Criminal Proceedings

2.5 The Respondent argues that he has absolute Fourth Amendment[6] and Fifth Amendment[7] rights in quasi-criminal disciplinary matters such as the present case The Department contends the Respondent does not provide any authority that once a constitutional challenge is raised that a case should be dismissed and the Presiding

[5] *But see* Paragraphs 2 12 through 2 15 below

[6] The Fourth Amendment states in relevant part that "[t]he right of the people against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause "

[7] The relevant portion of the Fifth Amendment states "nor shall any person be compelled in any criminal case to be a witness against himself."

Officer is not required to search out such authority if the Respondent has not found any. *See State v Logan*, 102 Wn. App. 907, 911 (footnote 1) (1993)

2.6 The Respondent argues that the Department's view in Paragraph 2.5 above misstates his argument *See* Reply, page 1 line 26 through page 4, line 4. The Respondent does not argue that the raising of his constitutional challenges requires the dismissal of the matter. Rather he argues that he has an absolute personal fundamental constitutional right to remain silent and the privilege against self-incrimination, all without punishment, sanction, or adverse inference. *See* Reply, page 3, lines 1-6. Stated another way, the Respondent argues that he has the same protection in quasi-criminal cases (such as the present disciplinary matter) as he would have in criminal matters. *See Spevak v. Klein*, 385 U.S. 511 (1967) and *Boyd v. United States* 116 U.S. 616 (1886)

2.7 The Respondent conflates quasi-criminal proceedings (such as the Board's disciplinary proceedings) with criminal proceedings. Disciplinary proceedings are civil in nature and the principles of due process and equal protection apply. *In re Kindschi*, 52 Wn 2d 8, 10 and 11 (1958). Quasi-criminal proceedings are those proceedings that ensure a party receives all necessary procedural due process rights. *See Washington Medical Disciplinary Board v. Johnston*, 99 Wn 2d 466 (1983); *see also In re Kindschi*, 52 Wn 2d 8 (1958). Denomination of a particular proceeding as either "civil" or "criminal" is not a talismanic exercise but rather attaches "labels of

convenience." *In re Daley* 549 F 2d 469, 474 (7th Circuit, 1977) (citing *In re Gault*, 387 U.S. 1 (1967) The Court of Appeals stated

> Thus, a clear distinction exists between proceedings that whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys license by a jurisdiction to practice law.

In re Daley, 549 F 2d at 475. The Presiding Officer concludes the Uniform Disciplinary Action is a remedial action designed to protect the public and the interests of the practice of osteopathic medicine. The Respondent's argument that the proceeding is "quasi-criminal" and converts the proceeding into a criminal proceeding fails This is important for several reasons

Fifth Amendment Privilege

2.8 The Respondent can assert the Fifth Amendment protections against self-incrimination in any proceeding, be it civil, criminal, administrative, judicial, investigative or adjudicatory *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263. (2000) (citing *Kastigar v United States*, 406 U S 441, 444, 92 S.Ct. 1653, 32 L Ed 210 (1972)) While in a criminal trial a judge or prosecutor may not suggest that the jury draw an adverse inference from a defendant's failure to testify, an adverse inference can be drawn from a party's invocation of this Fifth Amendment right in a civil proceeding. *See Doe ex.rel. Rudy-Glanzer v. Glanzer*, 232 F.3d at page 1264 (citing *SEC v Colello*, 139 F.3d 674, 677 (9th Cir 1998); *see also Ikeda v. Curtis*, 43 Wn 2d

449, 457-458 (1953) In the civil context, the invocation of the privilege is limited to those circumstances in which the person invoking the privilege reasonably believes that his disclosure could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner. *Doe ex.rel. Rudy-Glanzer v. Glanzer,* at 1264;

see also Eastham v Arndt, 28 Wn. App 524, 528 (1981) In *Fisher v. U S.*, 425 U S. 391, 399 (1976), the United States Supreme Court held:

> Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort

2 9 So unlike the absolute Fifth Amendment right he has in a criminal proceeding, the Respondent's invocation of his Fifth Amendment rights in this civil disciplinary proceeding depends upon the Respondent providing evidence that the Respondent can reasonably believe that his disclosure can be used in a criminal proceeding. The Respondent provides no evidence that allows the Presiding Officer to know whether the Respondent's belief is a reasonable belief that his disclosure could be used in a criminal prosecution. There are no criminal proceedings against the Respondent at this time; neither is there any evidence that criminal proceedings are forthcoming The Presiding Officer concludes that the Respondent has not made a sufficient showing, to this point, that he is being compelled to provide testimonial self-incriminating statements or evidence With the record before him, the Presiding

Officer concludes that the Respondent may be called to testify at the disciplinary hearing If the Respondent invokes his Fifth Amendment privilege, the Board may make an adverse inference at the hearing based on his invocation of the privilege [8] The Respondent's Motion to Dismiss is denied on these grounds.[9]

2 10 The Respondent further relies on his Fifth Amendment right to refuse to produce the medical records requested for his patients, claiming the records to be his personal records. The Respondent relies on *Boyd v United States*, 116 U S 616 (1886), where the U.S. Supreme Court held a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, was a "criminal case" within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself." However, the Respondent is not being asked to produce "personal books or records' here, the Respondent is being asked to produce patient records.[10] These are records that the Respondent is required to maintain as a part of the practice as an osteopathic physician. As such, they fall within the required records exception to the Fifth

[8] Nothing precludes the Respondent from making an in-camera offer of proof to show that his belief is, in fact, reasonable This could include, but is not limited to, portions of the relevant medical records

[9] The Respondent's reliance on *Spevak v Klein*, 384 U S 511 (1967) is misplaced here In that case the U S Supreme Court held that an attorney could not be disbarred for merely invoking his Fifth Amendment privilege

[10] The Respondent proposes for admission an exhibit that appears to undercut his argument. *See* Exhibit 5, pages 2-5 (Amanda Hawley's October 15, 2013 statement) Ms. Hawley speaks to keeping the Respondent's EMR (electronic medical records), in which she states "so that when [the Respondent] is examining the patient I am recording the details of the findings and treatment plan, as they are dictated by [the Respondent] in real-time "

Amendment privilege *See In re Grand Jury Proceedings v. Doe*, 801 F.2d 1164 (9th Circuit, 1986). In *Grosso v. U.S.*, 390 U S 62 (1968), the U.S Supreme Court held

> The premises of the doctrine, as it is described in Shapiro [*Shapiro v United States*, 335 U.S. 1 (1948)], are evidently three: first the purposes of the inquiry must be essentially regulatory, second information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept, and third, the records themselves must have assumed 'public aspects' which render them at least analogous documents.

Grosso, 390 U S at 67-68

2.11 Despite his characterization, the Respondent's records are not his personal records. Rather they are "required records" pursuant to the standards set forth in the *Grosso* decision. *See* Board Policy/ Procedure OP04-29. The fact that there is no specific osteopathic statute or regulation is not controlling; recordkeeping falls within the standard of practice of osteopathic medicine. It can also be inferred from the Medical Records Act (chapter 70.02 RCW) The legislature findings in the Medical Records Act state that records contain "health care information" and assume a public aspect regarding the use of such information. *See* RCW 70.02 005(4) The Respondent's argument fails and his Motion to Dismiss is denied.

Fourth Amendment Privilege

2 12 The Respondent argues that the Presiding Officer should grant his Motion in Limine, as the evidence was unlawfully obtained and is not admissible (the "fruit of the poisonous tree") *See Mapp v. Ohio*, 367 U.S. 643(1961). The Respondent argues the Statement of Charges must be dismissed because the suppression and exclusion of

the PMP material leaves the Board with no basis to support unprofessional conduct regarding his alleged failure to comply with the terms of the 2008 Final Order, which is the alleged unprofessional conduct under RCW 18 130.180(9) If the Motion in Limine is granted regarding the PMP documentation, the Respondent argues it will result in a dismissal of the current RCW 18.130 180(9) action.

2.13 The Prescription Monitoring Program (PMP) Act (chapter 70 225 RCW) provides for the establishment of a program to monitor the prescribing and dispensing of all Schedule II, III, IV and V controlled substances and any additional drugs demonstrating a potential for substance abuse by all professionals licensed to prescribe or dispense such substances. RCW 70.225.020(1). This includes osteopathic physicians and surgeons PMP data may be provided to health profession licensing, certification, or regulatory agencies. RCW 70.225 040(3)(a). The Board is the regulatory agency for osteopathic physicians and surgeons in the state of Washington. *See* chapter 18 57 RCW.

2 14 In the present case, the Board received a complaint from Patient P The Board conducted an assessment to determine whether to investigate the matter *See* the Department's Response, Exhibits 4 and 10. The Board is the regulatory agency regarding the Respondent. In the present case, the PMP program provided such information to the Board to allow the Board to enforce its 2008 Final Order This is

clearly authorized under chapter 70 225 The Respondent's arguments to the contrary do not control.

2 15 In support of his Motion, the Respondent provided several documents signed by individuals in which the individuals express that under their HIPPA[11] rights they do not give consent to a pharmacy to disclose any personal health care information to the Department of Health. *See* Motion in Limine/Motion to Dismiss, Exhibit 1 However, the HIPPA law does not control. The Medical Records Act provides that the Board (or the Department's health care investigators conducting investigations on behalf of the Board) can access health care information from pharmacies and other providers without consent. RCW 70.02 050(2)(a) The Respondent's Motion in Limine is denied. The Respondent's Motion to Dismiss based on the theory that the PMP materials are the "fruits of the poisonous tree" is denied.

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED

3 1 The Respondent's Motion to Dismiss Statement of Charges Paragraph 2 1 (RCW 18.130.180(9)) is DENIED.

3.2 The Respondent's Motion to Dismiss Statement of Charges Paragraph 2.1 (RCW 18.130.180(8)(a) and (b)) is DENIED.

[11] Health Insurance Portability and Accountability Act of 1996, 42 U S C sections 201 *et.seq*

3 3 The Respondent's Motion in Limine to Suppress and Exclude all the Department's Prescription-Related Documents is DENIED

Dated this 8th day of May, 2014

JOHN F. KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties or record
RHYS A. STERLING AND KRISTIN BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 9th DAY OF MAY, 2014

Adjudicative Service Unit

cc: JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL QUALITY ASSURANCE COMMISSION

In the Matter of: DALE E. ALSAGER, Credential No. DO OP.00001485, Respondent.	Master Case No. M2013-514 PREHEARING ORDER NO. 11: ORDER DEFINING CONDUCT OF HEARING

PRESIDING OFFICER: John F. Kuntz, Review Judge

The Presiding Officer convened a prehearing conference on May 1, 2014 and May 12, 2014, pursuant to RCW 18.130.095(3) and WAC 246-11-390. Present at the prehearing conference were John F. Kuntz, the Presiding Officer; Kristin Brewer, Assistant Attorney General; and Rhys A. Sterling, Attorney at Law.

This prehearing order contains the stipulations and agreements of the parties related to the conduct of the hearing in this matter, and the prehearing orders and decisions of the Presiding Officer on discovery, evidentiary issues, and motions brought by either party.

1. Amendments of the Pleadings. The parties submitted prehearing stipulations in which they agree to dismiss allegation 1.5 of the Statement of Charges (SOC), dated September 18, 2013. The parties further stipulate to strike from allegation 1.11 of the SOC the following sentence: "The Board was concerned about *standard of care and boundary issues*."

2. Discovery Issues. None.

3 Statement of Issues

A. Did the Respondent engage in unprofessional conduct as alleged under RCW 18 130.180(8)(a) and (b), and (9)?

B If unprofessional conduct is proven by the Department, what is the appropriate sanction under RCW 18.130.160?

4. Witnesses. Any witness not identified during the prehearing conference shall not be allowed to testify at the adjudicative proceeding absent good cause WAC 246-11-390(8).

A The Department may call the following witnesses:

1 The Respondent (as an adverse witness); and

2. Trish Hoyle, Health Care Investigator,

B The Respondent did not identify any witnesses during the prehearing conference. The Respondent continues to assert and present as his principle defense in this quasi-criminal trial any and all constitutional rights under and pursuant to U.S. Constitution, Amendments IV, V, and XIV, and the Washington Constitution art. I, sections 2, 3, 7, 9, and 29

5. Exhibits. Documentary evidence not offered in the prehearing conference shall not be received into evidence at the adjudicative proceeding absent good cause WAC 246-11-390(7).

A. The Department offered the following exhibits as numbered.

Exhibit D-1: Ex Parte Order of Summary Suspension, dated August 8, 2006,

Exhibit D-2: Corrected Final Order, dated August 15, 2008;

Exhibit D-3: Order of Modification, dated January 3, 2013;

Exhibit D-4: Letter, dated October 1, 2012 from DOH to Respondent,

Exhibit D-5: Letter, dated October 1, 2012 from DOH to Respondent;

Exhibit D-6: Authorization of Investigation, dated September 21, 2012 re: Patient P,

Exhibit D-7. Respondent's Response (Petition for Declaratory Order);

Exhibit D-8: Letter, dated January 8, 2013 from DOH to Rhys Sterling,

Exhibit D-9: Authorization of Investigation, dated June 5, 2013 (prescribing in violation to prior order);

Exhibit D-10: Letter of Cooperation, dated July 5, 2013;

Exhibit D-11: Respondent's Response, dated July 24, 2013 (second request for declaratory order);

Exhibit D-12: Letter, dated July 30, 2013 from DOH to Rhys Sterling;

Exhibit D-13: Respondent's Response, dated August 14, 2013,

Exhibit D-14: Letter, dated September 6, 2013 from DOH to Rhys Sterling,

Exhibit D-15: PMP Reports; and

Exhibit D-16: Pharmacy Records and Scripts

B. The Respondent opposed the admission of all of the Department's exhibits, which he initially discussed in his Addendum to Motion in Limine to Suppress and Exclude all DOH Prescription-Related Documents and Evidence; and Motion to Dismiss Statement of Charges Paragraph 2 1 (RCW 18.130.180(9)) (Addendum) In addition, the Respondent filed a Motion

for Reconsideration of Prehearing Order No. 10 on May 12, 2014, in which he incorporates and requests a ruling on the previously-filed Addendum. The Department argued at the prehearing conference that the Respondent did not raise or identify any additional authority in support of the Motion for Reconsideration. The Presiding Officer will review the Motion for Reconsideration and Addendum and will notify the Department if it must file any responsive pleading. In the event he determines that no additional Department pleading is necessary, the Presiding Officer will issue an order on the Respondent's Motion for Reconsideration and will issue a ruling on the admissibility of the Department's exhibits.

C. The Respondent offered the following exhibits as numbered:

Exhibit R-1. Curriculum Vitae, dated October 2013;

Exhibit R-2: Compliance with Board Ordered Training and Board's Final (Amended) Order, Documents and Letters,

Exhibit R-3: Patient P Documents and Letters;

Exhibit R-4: Patient HIPAA Statements Regarding Unauthorized Use of Their Personal Health Information; and

Exhibit R-5: Patient Support Letters/Statements.

D. The following exhibits were withdrawn or rejected:

Exhibit R-1: Curriculum Vitae, dated October 2013,

Exhibit R-2: Compliance with Board Ordered Training and Board's Final (Amended) Order, Documents and Letters;

Exhibit R-3: Patient P Documents and Letters;

Exhibit R-4: Patient HIPAA Statements Regarding Unauthorized Use of Their Personal Health Information; and

Exhibit R-5 Patient Support Letters/Statements.

E Sanctioning Brief The parties may submit a sanctioning brief for consideration by the Board in the event the Board finds the Respondent committed unprofessional conduct as alleged. The briefs are due no later than **May 28, 2014**. The Respondent may submit Exhibits R-1 and R-5 as a part of his sanctioning brief

F. Proposed Order. Both parties may file a proposed Findings of Fact, Conclusions of Law and Final Order by **May 28, 2014**.

Each party is responsible for bringing binders with all their exhibits to the hearing. There must be enough exhibit binders for the Presiding Officer, the parties, and each panel member.

6. Prehearing Motions. The Presiding Officer issued orders relating to the outstanding motions. See Prehearing Order Nos 9 and 10. As discussed in Section 5.B above, the Respondent renews his Addendum Motion and Motion for Reconsideration. The Presiding Officer will address these Motions by a separate order.

7. Relief Statement. The Department requests affirmance of the violations alleged in the Statement of Charges and the impositions of appropriate sanctions. The Respondent moves for a total dismissal of the SOC.

8 Hearing. Based in part on the stipulations, the parties predict the hearing will be one day in length. The hearing date is therefore scheduled for **June 4, 2014**. A Notice of Hearing will be sent describing the location and start time

Dated this 13th day of May, 2014

JOHN F KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record:
RHYS A. STERLING, ATTORNEY AT LAW AND KRISTIN G. BREWER, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 15th DAY OF MAY, 2014

Adjudicative Service Unit

cc JANELLE COGNASSO
JUDY YOUNG

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of DALE E. ALSAGER, Credential No. DO OP.00001485, Respondent.	Master Case No. M2013-514 PREHEARING ORDER NO. 12: ORDER DENYING MOTION FOR RECONSIDERATION

APPEARANCE:

Respondent, Dale E. Alsager, DO, by
Rhys A. Sterling, PE, JD, Attorney at Law

Department of Health Osteopathic Medicine Program (Department), by
Office of the Attorney General, per
Kristin G. Brewer, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

The Respondent filed a Motion for Reconsideration of Prehearing Order No. 10 (Motion for Reconsideration) to request an order to completely set aside Prehearing Order No. 10. The Department opposes the Respondent's Motion for Reconsideration.

The Respondent renews his Addendum to Motion in Limine to Suppress; and Motion to Dismiss Certain Charges (Addendum Motion) to renew his request for an order to suppress and exclude all Department of Health (DOH) prescription-related documents and evidence, and seeks an order to dismiss with prejudice that portion of the Statement of Charges, Paragraph 2.1, relating to the Respondent's alleged violation of RCW 18.130.180(9). The effect of this order, if granted, would exclude the Department's proposed exhibits for admission at hearing. The Department opposes the Respondent's Addendum Motion.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 On April 14, 2014, the Respondent filed a Motion in Limine, seeking an order excluding and suppressing all of the DOH prescription-related documents and evidence. The Department opposed the Respondent's Motion in Limine.

1.2 On April 16, 2014, the Respondent filed an Addendum Motion, in which he raised many of the same issues raised in the Motion in Limine. As a part of the Addendum Motion, the Respondent incorporated by reference information contained in the investigative files he received (Case # 2012-8589OP and Case # 2012-8330OP). The Respondent did not include the information incorporated by reference in support of his Addendum Motion.[1]

1.3 On May 8, 2014, the Presiding Officer issued an Order Denying Motion in Limine to Suppress; and Order Denying Motion to Dismiss Statement of Charges, Paragraph 2.1. *See* Prehearing Order No. 10. The Presiding Officer denied the Respondent's request to dismiss the Statement of Charges, Paragraph 2.1, relating to RCW 18.130.180(8) and (9), and denied the Respondent's request to suppress and exclude all of the Department's prescription-related documents. Prehearing Order No. 10 did not specifically identify the Department's exhibits being offered for admission at the hearing. While it addressed many of the same issues raised by the Respondent in his Addendum Motion, Prehearing Order No. 10 did not specifically identify the Addendum Motion.

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[1] *See* Addendum Motion, page 3, lines 1-14. It appears the Respondent assumes the Presiding Officer possesses the material that he incorporates by reference, i.e., the investigative files. In fact, the Presiding Officer does not receive the entire investigative file. The Presiding Officer only receives the exhibits offered by the parties for admission at the hearing or offered in support of the various motions.

1.4 On May 12, 2014, the Presiding Officer reconvened the prehearing conference with the parties.[2] During the prehearing conference, the Respondent advised the Department and the Presiding Officer that he filed a Motion for Reconsideration to seek an order setting aside Prehearing Order No. 10. As he did not read in Prehearing Order No 10 any language to address the Addendum Motion, the Respondent further requested an order in limine regarding the Department's proposed exhibits, and asked for a ruling on the Addendum Motion

1.5 After the completion of the prehearing conference, the Respondent's Motion for Reconsideration was filed on May 12, 2014. In his Motion for Reconsideration, the Respondent argued Prehearing Order No. 10:

A. Incorrectly held the Uniform Disciplinary Action was civil and not quasi-criminal, which denied the Respondent's Fourth and Fifth Amendment rights *See In Re Flynn*, 52 Wn.2d 589 (1958).

B. Did not exclude all of the prescription-based information, thereby failing to properly consider and apply the Washington Constitution Article I, Section 7 protection to the Respondent. *See also* the Healthcare Insurance Portability and Accountability Act of 1996, 42 U.S.C sections 201 *et seq.* The failure to exclude all of the Respondent's private information, obtained without probable cause and supported by a warrant, was unauthorized and contrary to law. *See State v. Gunwall*, 106 Wn. App 54 (1986) The Respondent argued

[2] The prehearing conference was originally convened on May 1, 2014, but was continued to allow the issuance of Prehearing Order No. 10

that none of the recognized exceptions to the warrant requirement applied in his case.

II. CONCLUSIONS OF LAW

Reconsideration of Prehearing Order No. 10

2.1 Reconsideration is a remedy available to parties for final orders. *See* WAC 246-11-580. While the use of the term "reconsideration" may create confusion, the term does not control whether the Presiding Officer has the authority to rule on, review, or revise an order issued at an earlier point of the proceeding in response to a motion by a party. The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to respond to motions. *See* RCW 34.05.437(1).

Quasi-Criminal Proceedings

2.2 The Respondent argues that he has absolute Fourth Amendment[3] and Fifth Amendment[4] rights in quasi-disciplinary matters such as the present case. Quasi-criminal proceedings are those proceedings that ensure that a party receives all necessary procedural due process rights. *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466 (1983) (*Johnston*). The state may not deprive a person of protected rights without appropriate procedural safeguards – they must be "preceded by notice and opportunity for hearing appropriate to the case." *Cleveland Bd. of Educ. v.*

[3] The Fourth Amendment of the US Constitution states in relevant part that "[t]he rights of the people against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause."

[4] The relevant portion of the Fifth Amendment states "nor shall any person be compelled in any criminal case to be a witness against himself."

Loudermill, 470 U S 532 (1985) (*see* Washington Administrative Law Practice Manual, Section 9.01[B] (citing to *Cleveland Bd of Educ v. Loudermill*)

2 3 Due process is flexible and calls for such procedural protection as the particular situations demands *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal citations omitted) The Supreme Court stated:

> [T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous determination of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Matthews v. Eldridge, 424 U S. at 335

2 4 The Respondent is conflating the quasi-criminal proceeding before the Board with a criminal proceeding. While the principles of due process and equal protection apply, a disciplinary proceeding is civil in nature. *In re Kindschi*, 52 Wn 2d 8 (1958). As the Washington Supreme Court explained:

> It is somewhat difficult to classify a medical disciplinary proceeding. It is characterized as civil, not criminal, in nature; yet it is quasi-criminal in that it is for the protection of the public, and is brought because of the alleged misconduct of the doctor involved. Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose. It is not strictly adversary in nature It is essentially a 'special', somewhat unique, statutory proceeding, in which the medical profession (under state authorization through *the medical disciplinary board*) inquires into the conduct of a member of the profession and determines what disciplinary action is to be taken against him in order to maintain sound professional standards of conduct for the purposes of protecting (a) the public, and (b) the standing of the medical profession in the eyes of the public

In re Kindschi, 52 Wn.2d at 10-11 (citations omitted).

2.5 The Respondent has an absolute right to exercise his Fourth Amendment and Fifth Amendment privileges in disciplinary proceedings before the Board. However, the Washington Supreme Court's decision *In re Kindschi* means the Respondent's exercise of his Fourth and Fifth Amendment privileges does not provide the absolute protection in a disciplinary proceeding as it would in a criminal proceeding. While he cited cases in support of the proposition[5] that quasi-criminal matters were treated as criminal matter in some circumstances, the Respondent did not provide any legal authority in which all quasi-criminal matter *must be* treated in the same manner as a criminal matter for Fourth Amendment and Fifth Amendment purposes. Absent the Respondent providing such legal authority, the Presiding Officer is not required to search for it. *See State v. Logan*, 102 Wn. App. 907, 911 (footnote 1) (1993). The Respondent's Motion for Reconsideration and Addendum Motion must fail for the reasons set forth below.

Fifth Amendment Privilege

2.6 The Respondent can assert the Fifth Amendment privilege protections in administrative proceedings. *See Doe ex.rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (2000) (citing *Kastigar v. United States*, 406 U.S. 441, 444 (1972)). While a judge or prosecutor in a criminal trial may not suggest that the jury draw an adverse inference from a defendant's failure to testify, an adverse inference may be drawn from a party's

[5] *See Spevak v. Klein*, 385 U.S. 511 (1967) (where the U.S. Supreme Court reversed the disbarment of a lawyer simply because he asserted his Fifth Amendment privilege), *United States v. Boyd*, 116 U.S. 616 (1886) (a forfeiture proceeding was equal to a criminal case for Fifth Amendment purposes)

invocation of this Fifth Amendment privilege in a civil proceeding. *See Doe ex.rel Rudy-Glanzer v. Glanzer*, 232 F 3d at 1264 (citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir 1998); *see also Ideda v. Curtis*, 43 Wn 2d 449 (1953). In the civil context, the invocation of the privilege is limited to those circumstances in which a person invoking the privilege reasonable believes that his disclosure could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner *Doe ex.rel. Rudy-Glanzer v Glanzer*, at 1264

2.7 The Respondent has not provided any evidence in his Motion for Reconsideration or Addendum Motion to show that his belief that any disclosure made by him will reasonably result in a criminal proceeding, or that he will be compelled to provide testimonial self-incriminating statements or evidence. Any argument in the Respondent's Motion for Reconsideration or his Addendum Motion must be denied on this point.[6]

Fourth Amendment Privilege

2.8 The Respondent renews his argument set forth in the Motion for Reconsideration and his Addendum Motion that his requested remedy (exclusion of any prescription-related evidence) should be granted on Fourth Amendment grounds The Respondent argues that any prescription-related material was unlawfully obtained and the Fourth Amendment requires its exclusion (the exclusion of the "fruits of the poisonous tree"). *See Mapp v. Ohio*, 367 U S. 643 (1961) In brief, the Respondent argues that: (a) the patient records in his possession are his personal records; (b) they

[6] Nothing precludes the Respondent from making an in-camera offer of proof to show that his belief is, in fact, reasonable This can include, but is not limited to, portions of the relevant medical records

are protected by HIPPA law, and (c) that the Prescription Monitoring Program (PMP) Act (chapter 70 225 RCW) does not authorize the release of the PMP documents in the present case Each of these arguments is addressed below.

A Treatment Records

2.9 The Respondent argues he creates personal records regarding the care *he provides his patients. The Respondent* does not provide any legal authority in support of that argument. Treatment records are not personal records *See United States v White*, 322 U.S. 694, 700 (1944), *see also Grosso v. U.S* , 390 U.S 62 (1968) Osteopathic physicians are required to maintain treatment records as a part of practicing osteopathic medicine and surgery in the state of Washington Chapter 18 57 RCW It can be inferred from a reading of the Medical Records Act (chapter 70.02 RCW) that osteopathic physicians such as the Respondent must keep such treatment record [7] The legislative findings in the Medical Records Act state that records contain "health care information" and assume a public aspect regarding the use of such information.[8] *See* RCW 70 02.005(4).

2.10 In addition, such health care information can be obtained without the consent of the patient when it is needed to determine compliance with state or federal licensure, laws or when needed to protect the public. *See* RCW 70.02.050(2)(a);

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[7] The Respondent offered for admission at hearing an exhibit that argues *against his position See* Exhibit R-5, pages 2-5 (Amanda Hawley's October 15, 2013 statement) Ms Hawley states that she prepared the Respondent's electronic medical records in real time while the Respondent was treating the patients While not admissible at the hearing, these records can be examined for purposes of the motions *See* CR 12(b)(6)

[8] As an aside. If the records were the Respondent's personal property (which the Presiding Officer concludes they are not) then his patients would have neither any HIPPA or chapter 70 02 RCW protection in the records

see also 45 CFR Section 164.512(d)(1). Neither the Medical Records Act nor HIPPA prohibit the production of the records in the present circumstance.[9] The Respondent's argument fails and his Motions are denied.

B. The Prescription Management Act

2.11 The PMP Act (Chapter 70 225 RCW) establishes a program to monitor the prescribing and dispensing of controlled substances and legend drugs that demonstrate a potential for substance abuse by all professionals licensed to prescribe or dispense such substances. RCW 70 225 020(1) This includes the Respondent, whose osteopathic credential authorizes him to use *any treatment modality*. *See* RCW 18.57.001(4) (emphasis added). PMP data may be provided to health profession licensing, certification, or regulatory agencies RCW 70 225 040(3)(a) The Board is the regulatory agency for osteopathic physicians and surgeons in the state of Washington. *See* chapter 18.57 RCW. That the Board can obtain PMP data is unquestionable The Respondent's Motion for Reconsideration and Addendum Motion are denied on these grounds.

C. Fruits of the Poisonous Tree

2.12 The Respondent argues that the Board cannot obtain the information as it has not established its right to do so under the Fourth Amendment: "[t]he rights of the people against *unreasonable* searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause." (Emphasis added). He further argues that the Washington Constitution, Article I, sections 2, 3 and 7 preclude the Board from

[9] *See also Murphy v. State*, 115 Wn App 297 (2003) (Pharmacy Commission can conduct a warrantless survey of an individual's patient prescription information).

obtaining this material (the treatment records or seeing any of the Department's proposed exhibits). The relevant sections state, in order

> "The Constitution of the United States is the supreme law of the land"
>
> "No person shall be deprived of life, liberty, or property, without due process of law."
>
> "No person shall be disturbed in his private affairs, or his home invaded, *without authority of law.*"

The Respondent's protection under Article I, Section 3 is no greater than the Federal provisions *See Sherman v State*, 128 Wn 2d 164 (1995). The protection of Article 1, Section 7, of the Washington Constitution extends to administrative searches coextensively with those of the Fourth Amendment. *See Seymour v Dental Quality Assurance Commission*, 152 Wn. App. 156, 165 (Division 1, 2009) (*Seymour*).

2.13 In the *Seymour* decision, the Division I Court of Appeals held that to be valid under the Fourth Amendment, a warrantless regulatory search or administrative inspection must satisfy three criteria:

> (1) [I]f there is a substantial governmental interest that informs the regulatory scheme pursuant to which the inspection is made, (2) if warrantless inspections are necessary to further the regulatory scheme, and (3) if the inspection program provides a constitutionally adequate substitute for a warrant, in terms of certainty and regularity of its application

Seymour, 152 Wn App. at 167. In consideration of the *Seymour* criteria, the Presiding Officer concludes

A. In the Uniform Disciplinary Act (chapter 18.130 RCW), one of the legislature's stated intentions is for "the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and

conduct in the health arts." RCW 18.130.010 The legislature's intent is evidence that there is a substantial governmental interest in assuring the adequacy of the conduct of the health arts In addition, the practice of medicine is an extensively regulated industry. *See New York v. Burger*, 482 U.S. 691, 707 (1987).

B By passing the Uniform Disciplinary Act, the legislature created a regulatory scheme that permits warrantless searches First, the Board has the authority and duty to investigate complaints of unprofessional conduct. RCW 18.130.050(2). In the process of investigating a complaint of unprofessional conduct, the Board is authorized to conduct practice reviews (defined in RCW 18.130.020(9) as an investigative audit of records related to the complaint). RCW 18.130.050(7)

C Complaints may not be investigated until the Board reviews the complaint RCW 18 130 080(2); *see Seymour*, 156 Wn. App at 168; *see also Client A v. Yoshinaka*, 128 Wn. App. 833, 844 (Division I, 2005). The Board authorized the investigations. *See* Department Exhibits D-6 and D-11. While the Division One Court of Appeals in *Seymour* did not specifically reach the question of whether the Uniform Disciplinary Act scheme was an adequate substitute,[10] the Presiding Officer concludes the Board's actions can be used to determine if the searches were "unreasonable" for Fourth Amendment and Article 1, Section 7 purposes. The Presiding Officer concludes that under the

[10] *See Seymour v Dental Quality Assurance Commission*, 152 Wn App at 168 (Footnote 6)

circumstances the Board's action in obtaining the PMP documents and requesting treatment records based on the complaints was not an unreasonable method of conducting the investigation

2.14 Given the analysis in Paragraphs 2 12 and 2.13 above, the Presiding Officer concludes the investigation authorized by the Board was appropriate under the circumstances and did not violate the Fourth Amendment or Article 1, Section 7 For that reason, the Respondent's Motion for Reconsideration and Addendum Motion are denied. As the Motions are denied, the Presiding Officer further concludes that the "fruit of the poisonous tree" issue that requires the suppression of the Department's proposed exhibits fails. The Presiding Officer admits the Department's Exhibits D-1 through D-16, as identified in the May 12, 2014 Amended Prehearing Statement

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED.

3.1 The Respondent's Motion for Reconsideration of Prehearing Order No 1 dated May 12, 2014, is DENIED

3.2 The Respondent's Addendum Motion dated April 16, 2014, is DENIED

3.3 The Department's Exhibits D-1 through D-16, as identified in the

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//

//

Department's Amended Prehearing *Statement* dated May 12, 2014, are each ADMITTED

Dated this 22nd day of May, 2014

JOHN F. KUNTZ, Review Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record
RHYS A. STERLING, ATTORNEY AT LAW AND KRISTIN G. BREWER, AAG by mailing a copy properly addressed with postage prepaid

DATED AT OLYMPIA, WASHINGTON THIS 23rd DAY OF MAY, 2014

Adjudicative Service Unit

cc **JANELLE COGNASSO**
JUDY YOUNG

For more information, visit our website at
http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx

DEPARTMENT OF HEALTH
HEALTH SYSTEMS QUALITY ASSURANCE
OFFICE INVESTIGATION AND INSPECTION
MEMORANDUM TO FILE

Date. May 7, 2013

Case # 2012-8330OP & 2012-8589OP

Re: Dale E. Alsager, DO

From: Trish Hoyle, Investigator

On May 2, 2013 a task was requested for a Prescription Monitoring Program (PMP) Report for the Respondent. The request covered prescriptions written by the Respondent for patients and prescriptions he wrote to himself

On May 3, 2013 prescriptions written by the Respondent from July 12, 2011 to April 25, 2013 were obtained from the PMP Report. The reporting pharmacies included Bartell, Costco, Fred Meyer, Safeway Summit, Thrifty Payless Wal-Mart, Walgreen and Target covering most of Washington State Two other pharmacies listed are Humana Pharmacy located in Phoenix, AZ and Medco located in Las Vegas, NV.

Reviewed by:_____ Date:_____

EXHIBIT C PAGE 1

0030

Assessment Worksheet

Case Number: 13-483900

Respondent:

Board/Commission/Profession: Osteo Facility Type:

Date: 06/05/13 Staff present: Cognasse, Cain, Young

Presented by: Hunter

☒ Conference Call ☐ Board/Commission/CMT meeting Panel members: Hunter, Fleck, Kitten, Markegard

A. *FILE CLOSED:*

☐ BT- No jurisdiction	☐ BT- No violation at the time the event occurred	☐ BT- Advertising that is a technical violation	☐ BT- Communication and personality issues
☐ BT- Aged or outdated complaints	☐ BT- Risk minimal, and likely to reoccur	☐ BT- Lack of complaint credibility	☐ BT- Complainant withdrew
☐ BT- No complainant's or client/patient's name and no allegations of significant harm or potential harm	☐ BT- Billing and fee disputes except as designated by disciplining authority	☐ BT- Practice on an expired credential for a period of time accepted by the disciplining authority	☐ BT- Insufficient information
☐ BT- Profession-specific threshold. Explain _____ a) Violating confidentiality b) Inappropriate delegation c) Failure to supervise d) Isolated incidents	☐ BT- Issues which have been otherwise resolved. Explain resolution: _____ (detail corrective action, practitioner is already revoked; ongoing monitoring, etc.)	☐ BT- If allegations are true, no violation of law occurred	☐ BT- Referral to another program or agency ☐ BT- Incident reported by facility

B. *Investigation of the complaint is authorized.*

Additional instructions to investigator: _____

Initiate investigation and obtain relevant records, including patient records

Authorized by Panel Chair/CMgr: _____

Print Name of Panel Chair/CMgr: _____ Reviewing Commission Member (if applicable)

Per Program Staff (initials) _____ (if applicable)

Date investigation authorized: 6/5/13

Recommended priority:

Professions
- ☒ A (risk of immediate danger)
- ☐ B (serious risk)
- ☐ C (moderate risk)
- ☐ D (minor risk)
- ☐ E (technical violations)

Facilities
- (____ # of days)
- (____ # of days)
- (____ # of days)
- (____ # of days)
- (____ # of days)

C. SEXUAL MISCONDUCT CASES

For Board and Commission cases: panel should refer sexual misconduct cases to the Secretary when the case does not involve clinical expertise or standard of care issues. (Note: any pre-investigation referral should still include a panel authorization for investigation.)

- ☐ Panel finds there are clinical issues, do not refer
- ☐ No clinical issues, refer case to Secretary

ALSAGER, OST
Inv 001019

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

July 5 2013

Dr. Dale Alsager DO
P.O. Box 1010
Maple Valley, WA 98038

Case No. 2013-4839OP

Dear Dr Alsager

The Board of Osteopathic Medicine and Surgery is investigating a complaint against you. The complaint alleges "Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority.", RCW 18.130.180(9).

Specifically, it was alleged you continued to write prescriptions for Scheduled II and Scheduled III drugs for patients after the Conclusions of Law and Final Order was issued on August 7, 2006 by the Department of Health. The Order restricted you from prescribing Schedule II and Schedule III controlled substances

The Board of Osteopathic Medicine and Surgery is authorized to investigate all allegations and complaints. (RCW 18.130 050)

State law requires you to cooperate with an investigation You must respond to requests for records and documentation If you do not provide documents, records and other items when they are due, we can charge you a fine of up to $100 per day. The fine applies to existing documents, records, or items under your control. The maximum fine is $5,000. We will report the fine to federal databases and it will appear on our Web site. We may also charge you with unprofessional conduct for failure to cooperate. (RCW 18 130.180(8))

You must provide a full and complete explanation of the matter if requested (RCW 18 130 180(8)(b) We may use your response if we take disciplinary action, or in a hearing You may have an attorney assist you prior to making your response. This will be at your expense. If an attorney represents you, please have the attorney send me a Letter of Representation. The letter allows us to speak with him or her about the complaint against you. It will ensure we provide a copy of any correspondence to you to your attorney

The Health Care information Act requires you to disclose health care information about a patient without patient authorization (RCW 70.02 050 (2)(a)

Please provide the following information

- *Please submit a list of patients for whom you have prescribed scheduled II and/or scheduled III drugs after August 7, 2006 This information should include, but is not limited to*

EXHIBIT D PAGE 1 0040

APP-120

- *Patient's name*
- *Date of prescription*
- *Name of drug prescribed.*
- *Dosage per drug*
- *Quantity of prescription*
- *Specific instructions*
- *Number of Refills (if any)*
- *Please provided a complete copy of the patient's file, including but not limited to patient history, intake sheet, chart notes addressing the prescription written*

The information is due July 29, 2013 If available, provide records and images in CD format. Mail your response to the address below Please contact me if you have any questions or cannot provide the information by the due date

IMPORTANT NOTICE
RCW 18.130.230 replaced rules about how quickly you must respond to requests for documents, records and other items.

Thank you for your cooperation

Sincerely,

Trish Hoyle
Health Care Investigator
20425 72nd Ave S, Suite 310
Kent, WA 98032
Trish Hoyle@DOH WA GOV
253-395-6708 (P)
253-395-6365 (F)

I declare under penalty of perjury under the laws of the State of Washington that I placed this letter addressed to the person named above at the address listed on the date identified in the United States mail in a properly addressed and stamped envelope

Dated July 5, 2013 at Kent, Washington

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

September 6, 2013

Mr. Rhys A. Sterling
Attorney at Law
P O Box 218
Hobart, WA 98025-0218

Re Dale E. Alsager, D.O
Petition for Declaratory Order

Dear Mr. Sterling

The Board of Osteopathic Medicine and Surgery (Board) received your client's Petition for Declaratory Order (Petition) regarding the constitutionality of certain provisions of the Uniform Disciplinary Act (UDA) and RCW 70.02.050 and the Final Order dated August 15, 2008. The Department of Health received the Petition on August 14, 2013.

The Petitioner filed a similar Petition for *Declaratory* Order on December 14, 2012. By letter dated January 7, 2013, the Board informed the Petitioner it declined to enter a Declaratory Order in response to the December 2012 petition.

The Washington Administrative Procedure Act (APA) determines the procedure for requesting a declaratory order from an agency. "Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency." RCW 34.05.240(1). The Petitioner must set forth facts and reasons to show *all* of the requirements below:

> (a) That uncertainty necessitating resolution exists;
>
> (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
>
> (c) That the uncertainty adversely affects the petitioner;
>
> (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested, and
>
> (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

RCW 34.05.240(1)

An agency must respond, in writing, within thirty days of receipt of the petition. The agency has four statutory options on how it may respond. It may, enter an order declaring the applicability of the statute or rule in question to the specified circumstances, set the matter for specified

proceedings; set a time within ninety days to enter a declaratory order; or decline to enter a declaratory order, stating the reasons for its action. RCW 34.05.240(5)(a)-(d)

In this matter, the Board declines to enter a declaratory order, pursuant to RCW 34.05.240(5)(d), for the following reasons:

1) The Petitioner seeks a remedy that is not within the Board's authority to provide. The Petitioner requests, as he did in his December 2012 Petition for Declaratory Order, that the Board find portions of the Uniform Disciplinary Act and Health Care Information Act are either unconstitutional on their face or as applied. See Petition at 6, 7, 11 and 13. The statutes argued to be unconstitutional by the Petitioner are RCW 18.130.050(7), 18.130.180(8), 18.130.230(1) and RCW 70.02.050(2)(a). These statutes relate to the production of documents and/or health care records to the Board. However, it is well established that a statute is presumed constitutional. *Pierce County v. State*, 150 Wn.2d 422 at 430, 78 P.3d 640 (2003); *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998) "The burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt." *Island County*, 135 Wn.2d at 146. The determination as to whether a statute is unconstitutional is exclusively a judicial function. *State ex rel Heavey v. Murphy*, 138 Wn.2d, 800, 810, 982 P.2d 611 (1999) The Board has no authority to define the meaning or scope of a constitutional provision.

2) Second, the Petitioner seeks a remedy that is not properly addressed by means of a declaratory order. The relief requested in the Petition is to quash the Board's "demand letters" dated July 5, 2013 and July 30, 2013. See Petition at 13. The purpose of a declaratory order is not to require the agency to take action. Instead, its purpose is to obtain clarification from an agency as to the applicability of unclear law. 1981 Model APA §2-103(c). The APA describes the declaratory order "with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency." RCW 34.05.240(1). In this case, Petitioner is urging the agency to take action on events that have already occurred. Petitioner is unable to make the showing required in RCW 34.05.240(1)(a)-(c) regarding the request to quash.

3) Finally, the Board finds that the Petitioner has not demonstrated an uncertainty necessitating resolution exists with regards to the language of the Final Order dated August 15, 2008. Therefore, Petitioner has not met the requirements of RCW 34.05.240(1).

For the foregoing reasons, the Board of Osteopathic Medicine and Surgery, in accordance with the Washington Administrative Procedure Act, RCW 34.05.240, respectfully declines to issue a declaratory order in this matter.

Sincerely,

SMarkegard DO

Shannon Markegard, DO, Panel Chair
Board of Osteopathic Medicine and Surgery

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

PROOF OF SERVICE

I certify that I served the foregoing letter regarding Dr. Dale E. Alsager's Petition for Declaratory Order via US Mail postage prepaid to:

Mr. Rhys A. Sterling
Attorney at Law
P O. Box 218
Hobart, WA 98025-0218

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of September, 2013, at Olympia WA.

Brett Cain

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE AND SURGERY

In the Matter of DALE E. ALSAGER Credential No DO OP 00001485, Respondent	Master Case No M2013-514 EX PARTE ORDER OF SUMMARY ACTION

BOARD PANEL Shannon Markegard, DO, Panel Chair
John G Finch, DO
Sharon Gundersen, Public Member
Jeremy Graham, DO

PRESIDING OFFICER: John F Kuntz, Review Judge

This matter came before the Board of Osteopathic Medicine and Surgery (Board) on September 20, 2013, on a Motion for Order of Summary Action (Ex Parte Motion) brought by the Osteopathic Program of the Department of Health (Department) through the Office of the Attorney General The Department issued a Statement of Charges alleging Respondent violated RCW 18.130 180(8)(a) and (b), and (9) The Board, after reviewing the Statement of Charges Ex Parte Motion, and supporting evidence, GRANTS the motion CREDENTIAL SUSPENDED pending further action

I FINDINGS OF FACT

1 1 Respondent is a doctor of osteopathic medicine and surgery credentialed by the state of Washington at all times applicable to this matter

1 2 The Department issued a Statement of Charges alleging Respondent violated RCW 18 130 180(8)(a) and (b) and (9) The Statement of Charges was accompanied by all other documents required by WAC 246-11-250

1 3 As set forth in the allegations in the Statement of Charges, as well as the Ex Parte Motion, the Board finds that Respondent violated the Ex Parte Order of Summary Action of August 8, 2006, and the Findings of Fact, Conclusions of Law and Final Order of August 15, 2008, by prescribing Schedule III controlled substances while the prohibition against such prescriptions was in effect The Board finds that summary action is necessary to address danger and potential danger to patients, because the Board has tried a less restrictive means of restricting Respondent's prescribing and placing him on probation, and this did not stop Respondent from prescribing in violation of the Board's orders Further Respondent has not cooperated with investigations and thus has thwarted the Board in its efforts to conduct further investigation into Respondent's prescribing practices

1 4 The above allegations, supported by the declarations of health care Investigator Trish Hoyle and Compliance Officer Bruce Bronoske Jr , together with the attached exhibits, justify the determination of immediate danger in this case and a decision to immediately suspend the credential until a hearing on the matter is held.

II CONCLUSIONS OF LAW

2 1 The Board has jurisdiction over Respondent's credential to practice as an osteopathic physician and surgeon RCW 18 130 040

2.2 The Board has authority to take emergency adjudicative action to address an immediate danger to the public health safety or welfare RCW 34 05.422(4) RCW 34 05.479 RCW 18 130 050(8), and WAC 246-11-300

2 3 The Findings of Fact establish the existence of an immediate danger to the public health, safety or welfare if Respondent has an unrestricted credential The

Findings of Fact establish that the requested summary action is necessary and adequately addresses the danger to the public health, safety, or welfare

III. ORDER

3.1 Based on the Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's credential to practice as an osteopathic physician and surgeon is SUMMARILY SUSPENDED pending further disciplinary proceedings by the Board.

3.2 It is HEREBY ORDERED that a protective order in this case is GRANTED. All healthcare information and non-conviction data contained in the Ex Parte Motion, Declaration, and attached exhibits shall not be released except as provided in Chapter 70.02 RCW and Chapter 10.97 RCW RCW 34.05.446(1) and WAC 246-11-400(2), and (5)

Dated this 20 day of September, 2013

SMarkegard DO
Shannon Markegard, DO
Panel Chair

For more information, visit our website at
http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx

U.S. Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the

United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Washington State Constitution

ARTICLE I DECLARATION OF RIGHTS

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 29 CONSTITUTION MANDATORY. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

WASHINGTON STATE STATUTES (RCW)

RCW 18.130.050 Authority of disciplining authority.

Except as provided in RCW 18.130.062, the disciplining authority has the following authority:

(7) In the course of investigating a complaint or report of unprofessional conduct, to conduct practice reviews and to issue citations and assess fines for failure to produce documents, records, or other items in accordance with RCW 18.130.230;

RCW 18.130.095 Uniform procedural rules.

(2) The uniform procedures for conducting investigations shall provide that prior to taking a written statement:

> (a) For violation of this chapter, the investigator shall inform such person, in writing of: (i) The nature of the complaint; (ii) that the person may consult with legal counsel at his or her expense prior to making a statement; and (iii) that any statement that the person makes may be used in an adjudicative proceeding conducted under this chapter.

RCW 18.130.100 Hearings – Adjudicative proceedings under chapter 34.05 RCW.

The procedures governing adjudicative proceedings before agencies under chapter 34.05 RCW, the Administrative Procedure Act, govern all hearings before the disciplining authority. The disciplining authority has, in addition to the powers and duties set forth in this chapter, all of the powers and duties under chapter 34.05 RCW, which include, without limitation, all powers relating to the administration of oaths, the receipt of evidence, the issuance and enforcing of subpoenas, and the taking of depositions.

RCW 18.130.160 Finding of unprofessional conduct — Orders — Sanctions — Stay — Costs — Stipulations.

Upon a finding, after hearing, that a license holder has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority shall issue an order including sanctions adopted in accordance with the schedule adopted under RCW 18.130.390 giving proper consideration to any prior findings of fact under RCW 18.130.110, any stipulations to informal disposition under RCW 18.130.172, and any action taken by other in-state or out-of-state disciplining authorities. The order must provide for one or any combination of the following, as directed by the schedule:

(1) Revocation of the license;

(2) Suspension of the license for a fixed or indefinite term;

(3) Restriction or limitation of the practice;

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment.

(5) The monitoring of the practice by a supervisor approved by the disciplining authority;

(6) Censure or reprimand;

(7) Compliance with conditions of probation for a designated period of time;

(8) Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per violation. Funds received shall be placed in the health professions account;

(9) Denial of the license request;

(10) Corrective action;

(11) Refund of fees billed to and collected from the consumer;

(12) A surrender of the practitioner's license in lieu of other sanctions, which must be reported to the federal data bank.

Any of the actions under this section may be totally or partly stayed by the disciplining authority. Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority. In determining what action is appropriate, the disciplining authority must consider the schedule adopted under RCW 18.130.390. Where the schedule allows flexibility in determining the appropriate sanction, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder. All costs associated with compliance with orders issued under this section are the obligation of the license holder. The disciplining authority may order permanent revocation of a license if it finds that the license holder can never be rehabilitated or can never regain the ability to practice with reasonable skill and safety.

Surrender or permanent revocation of a license under this section is not subject to a petition for reinstatement under RCW 18.130.150.

The disciplining authority may determine that a case presents unique circumstances that the schedule adopted under RCW 18.130.390 does not adequately address. The disciplining authority may deviate from the schedule adopted under RCW 18.130.390 when selecting appropriate sanctions, but the disciplining authority must issue a written explanation of the basis for not following the schedule.

RCW 18.130.180 Unprofessional conduct.

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter:

(8) Failure to cooperate with the disciplining authority by:

(a) Not furnishing any papers, documents, records, or other items;

(b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority;

(c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding; or

(d) Not providing reasonable and timely access for authorized representatives of the disciplining authority seeking to perform practice reviews at facilities utilized by the license holder;

(9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority;

RCW 18.130.230 Production of documents — Administrative fines.

(1) (a) A licensee must produce documents, records, or other items that are within his or her possession or control within twenty-one calendar days of service of a request by a disciplining authority. If the twenty-one calendar day limit results in a hardship upon the licensee, he or she may request, for good cause, an extension not to exceed thirty additional calendar days.

(b) In the event the licensee fails to produce the documents, records, or other items as requested by the disciplining authority or fails to obtain an extension of the time for response, the disciplining authority may issue a written citation and assess a fine of up to one hundred dollars per day for each day after the issuance of the citation until the documents, records, or other items are produced.

(c) In no event may the administrative fine assessed by the disciplining authority exceed five thousand dollars for each investigation made with respect to the violation.

RCW 34.05.020 Savings — Authority of agencies to comply with chapter — Effect of subsequent legislation.

Nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or

otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter or its applicability to any agency except to the extent that such legislation shall do so expressly.

RCW 34.05.452 Rules of evidence – Cross-examination.

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious

(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

RCW 34.05.570 Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

RCW 70.02.050 Disclosure without patient's authorization – Need-to-know basis.

(2) A health care provider shall disclose health care information, except for information and records related to sexually transmitted diseases, unless otherwise authorized in RCW 70.02.220, about a patient without the patient's authorization if the disclosure is:

(a) To federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information; when needed to determine compliance with state or federal licensure, certification or registration rules or laws, or to investigate unprofessional conduct or ability to practice with reasonable skill and safety under chapter 18.130 RCW. Any health care information obtained under this subsection is exempt from public inspection and copying pursuant to chapter 42.56 RCW.

RCW 70.225.040 Confidentiality of prescription information – Procedures – Immunity when acting in good faith.

(1) Prescription information submitted to the department shall be confidential, in compliance with chapter 70.02 RCW and federal health care information privacy requirements and not subject to disclosure, except as provided in subsections (3) and (4) of this section.

(2) The department shall maintain procedures to ensure that the privacy and confidentiality of patients and patient information collected, recorded, transmitted, and maintained is not disclosed to persons except as in subsections (3) and (4) of this section.

(3) The department may provide data in the prescription monitoring program to the following persons:

(a) Persons authorized to prescribe or dispense controlled substances, for the purpose of providing medical or pharmaceutical care for their patients;

(b) An individual who requests the individual's own prescription monitoring information;

(c) Health professional licensing, certification, or regulatory agency or entity;

(d) Appropriate local, state, and federal law enforcement or prosecutorial officials who are engaged in a bona fide specific investigation involving a designated person;

(e) Authorized practitioners of the department of social and health services and the health care authority regarding medicaid program recipients;

(f) The director or director's designee within the department of labor and industries regarding workers' compensation claimants;

(g) The director or the director's designee within the department of corrections regarding offenders committed to the department of corrections;

(h) Other entities under grand jury subpoena or court order; and

(i) Personnel of the department for purposes of administration and enforcement of this chapter or chapter 69.50 RCW.

(4) The department may provide data to public or private entities for statistical, research, or educational purposes after removing information that could be used to identify individual patients, dispensers, prescribers, and persons who received prescriptions from dispensers.

(5) A dispenser or practitioner acting in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for requesting, receiving, or using information from the program.

WASHINGTON ADMINISTRATIVE CODE (WAC)

WAC 10-08-220 Other law.

Nothing in chapter 10-08 WAC is intended to diminish the constitutional rights of any person or to limit or modify additional requirements imposed by statute, including the Administrative Procedure Act.

WAC 246-16-800 Sanctions – General provisions.

(1) Applying these rules.

(a) The disciplining authorities listed in RCW 18.130.040(2) will apply these rules to determine sanctions imposed for unprofessional conduct by a license holder in any active, inactive, or expired status. The rules do not apply to applicants.

(b) The disciplining authorities will apply the rules in:

(i) Orders under RCW 18.130.110 or 18.130.160; and

(ii) Stipulations to informal disposition under RCW 18.130.172.

(c) Sanctions will begin on the effective date of the order.

(2) Selecting sanctions

(a) The disciplining authority will select sanctions to protect the public and, if possible, rehabilitate the license holder.

(b) The disciplining authority may impose the full range of sanctions listed in RCW 18.130.160 for orders and RCW 18.130.172 for stipulations to informal dispositions.

(i) Suspension or revocation will be imposed when the license holder cannot practice with reasonable skill or safety.

(ii) Permanent revocation may be imposed when the disciplining authority finds the license holder can never be rehabilitated or can never regain the ability to practice safely.