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STATE OF WASHINGTON

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BY RONALD W. CARPENTER

RWC

COA # 38844-8

SUPREME COURT OF THE
STATE OF WASHINGTON

Case No. 82009-1

PETITION FROM THE SUPERIOR COURT OF
WASHINGTON IN THURSTON COUNTY

NO. 08-2-01337-2

FILED AS
ATTACHMENT TO EMAIL

JOYCE TASKER,

Appellant,

v.

WASHINGTON STATE DEPT. OF HEALTH

Respondent.

**APPELANT JOYCE
TASKER'S AMENDED
OPENING BRIEF ON
APPEAL**

Submitted by:

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TABLE OF CONTENTS

I.	Identity of Petitioner	4
II.	Citation to Decision Below	4
III.	Statement of the Case	4
IV.	Issues Presented	11
V.	Discussion	
	A. The DOH does not have authority to adjudicate controversies over unlicensed health care.	11
	1. DOH jurisdiction, generally.	12
	2. The APA does not allow the DOH to adjudicate unlicensed health care controversies.	15
	3. Unlicensed health care controversies are adjudicated by the OAH.	16
	4. Legislative history of DOH jurisdiction.	18
	5. The Legislature specifically rejected DOH authority over unlicensed health care controversies.	20
	6. The Statutes that grant the OAH authority over unlicensed health care are consistent with Constitutional Due Process	21
	7. Principles of Statutory Construction confirm OAH jurisdiction over unlicensed health care.	23
	B. Subject matter jurisdiction may be	

Raised at any time. 25

C. Declaratory Judgment is appropriate. 26

VI. Request Interpretation RCW 18.120.010

TABLE OF AUTHORITIES

Washington Cases

Ballard Sq. v. Dynasty Const.,
158 Wn. 2d 603 (2006) 25

Chavez v. L&I, 129 Wn. App. 236 (2005) 26

Hertzke v. DRS, 104 Wn. App. 970 (2001) 26

Marley v. L&I, 125 Wn. 2d 533 (1994) 11, 25

Nelson v. Appleway, 160 Wn. 2d 262 (2007) 28

Port Townsend Sch. Dist. V. Brouillet,
21 Wn. App. 646 (1978) 24

Smith v. Skagit Cty., 75 Wn. 2d 715, (1969) 23

State ex rel. Beam v. Fulwiler,
76 Wn. 2d 313 (1969) 23

Tingey v. Haisch, 158 Wn. 2d 652 (2007) 25

Waste Management v. WUTC,
123 Wn. 2d. 621 (1994) 24

Yow v. DOH, 61021-0-I, filed 10/13/08 12

Washington Statutes

RCW 7.24.00 5, 27

RCW 18.120 14, 28

RCW 18.130	12
RCW 18.130.040(2)(a)	13, 19
RCW 18.130.040(2)(b)	13, 18
RCW 18.130.050	15, 17, 18, 19, 25
RCW 18.130.095	16, 17, 19, 20, 21, 25
RCW 18.130.165	5, 27
RCW 18.130.190	14, 15
RCW 34.05.425	15
RCW 34.12	12, 18, 21

Washington RAP

RAP 2.5(a)	26
	<u>Washington WAC</u>
WAC 246-10	13

I. IDENTITY OF PETITIONER

Appellant Joyce Tasker is a single woman from Colville, Washington. She was plaintiff in the Thurston County Superior Court.

II. CITATION TO DECISION BELOW

The decision of Thurston County Superior Court from which this appeal is made is provided at CP 179-180.

III. STATEMENT OF THE CASE

A. INTRODUCTION

In 2005, the Washington State Department of Health (DOH) issued a “cease and desist” notice to Tasker for the unlicensed practice of medicine. Tasker stated willingness to abide by the law and accept the DOH’s initial offer of a \$400 fine for previous website wording. DOH proceeded with an adjudicatory hearing. A DOH employee conducted that hearing and fined Tasker (who was acting “pro se”) \$10,000, despite Ms. Tasker’s express willingness to abide by the law.

It is Ms. Tasker’s contention that the DOH lacked subject-matter jurisdiction to conduct her administrative hearing using a DOH employee as the presiding officer. An Administrative Law Judge should have conducted her hearing.

Ms. Tasker's case has run the course of appeal on the merits. However, the issue of enforcement of the order and \$10,000 fine is still pending. See RCW 18.130.165. Under RCW 18.130.165, the Superior Court has exclusive jurisdiction over enforcement of any fine levied by the DOH. Enforcement of the fine is not an issue under the Administrative Procedures Act (APA).

The Superior Court also has the exclusive authority under the Declaratory Judgment Act to determine the status of the parties with respect to the fine under the various statutes involved. See RCW 7.24.020.

The issue before this Court now, therefore, is whether the DOH has the statutory authority to enforce the order and fine due to lack of subject-matter jurisdiction in the first place. Subject-matter jurisdiction may be raised at any time.

B. BACKGROUND FACTS

1. Joyce Tasker

Joyce Tasker is a 70-year old woman, living alone in Colville, Washington. See Tasker Declaration. CP 143-163.

She operates a local non-profit organization called Dog Patch, through which she foster cares for stray and lost dogs and cats. Id. To support her non-profit work, she helps people with biofeedback using a galvanic skin device approved for biofeedback by the FDA. A license is not required to help people with biofeedback.¹

Ms. Tasker purchased her biofeedback equipment for \$16,000.00, and adopted the marketing language provided by the manufacturer of that equipment for her website and in the delivery of her services. Admittedly, that marketing language was couched in language that inappropriately conveys that the equipment is capable of diagnosing and treating certain diseases and illnesses. Tasker Declaration, at ¶ 4.

2. Administrative Proceedings.

In March 2005, Ms. Tasker received a Notice of Intent to Issue a Cease and Desist from the DOH, in which the DOH accused her of practicing medicine without a license. The DOH's Notice initially sought a \$1,000 fine with \$600

¹ See, e.g. WAC 296-21-280.

deferred if Ms. Tasker would remain in compliance with the Order. Tasker Declaration at 6. In the weeks that followed, Ms. Tasker communicated repeatedly with the DOH in an effort to gain a better understanding of how to comply with the law and avoid further penalty. Tasker Declaration at 7 & 8.

Examples of Ms. Tasker's communications to the DOH include the following, as shown within Exhibit A to the Tasker Declaration:

March 24, 2005 email to DOH attorney Teresa Landreau: "The system [I use] is approved by the FDA for bio-feedback use. Please explain why bio-feedback requires a medical degree. . . I want to follow the law and am very appreciate that you are my resource for sorting out these issues."

March 30, 2005 email to DOH Quality Assurance Director Bonnie King: "Does my current website violate any law?"

March 31, 2005 email to Ms. King: "At least 18 months ago, my web site and release changed. I supplied copies of the changes to the DOH. Tell me please if you continue to have a problem with my web site wording . . ."

April 1, 2005 email to Ms. Landreau: "I am hopeful that once my questions are answered by you that I will have enough information on how to proceed."

April 5, 2005 to Ms. Landreau: “I am asking these questions not to be a problem . . . but so I am fully informed and not only have all the information in a timely way on which to base my decision but [also to have] all the information that will help me comply.”

April 7, 2005 to Ms. Landreau: “My questions go to the heart of what I can do . . . you are not giving me the information that I can only get from the DOH.”

April 8, 2005 to Ms. King: “I am trying to find out how I can proceed and COMPLY at the same time.”
[emphasis in original].

May 6, 2005 to Ms. Landreau: “The text may have been confusing. . . [I am] amenable to working with the AGO’s office and/or DOH to ensure the current Intersites (sic) comply with the law.”

As indicated by her communications to the DOH, Ms. Tasker was persistent in wanting to understand the law, and equally consistent in her willingness to comply with the law. Because the DOH was either unable or unwilling to assist her, Ms. Tasker proceeded with an administrative hearing. Department of Health employee Arthur DeBusschere conducted that hearing. Mr. DeBusschere found Ms. Tasker guilty of practicing medicine without a license and fined her \$10,000, with \$6,000 deferred if she remained in compliance with the Order.

3. Arthur Debusschere’s authority as a DOH employee.

Mr. Debusschere is not an administrative law judge (ALJ). He is a Department of Health employee, to whom certain authorities have been delegated by the Secretary of the DOH. See Appendix A to this Brief. Mr. Debusschere’s official job description is attached to this Brief as Appendix B. Within that job description is a list of “Administrative Demands” at page 2. Under that heading is the following statement that defines one condition of his employment:

“Accept departmental limitations on independence of judgment.”

IV. ISSUES PRESENTED

A. Does the DOH have authority to adjudicate this type of controversy, i.e., did the DOH lack subject matter jurisdiction to conduct the Tasker hearing?

B. Does the lack of subject matter jurisdiction survive *res judicata*?

C. Is enforcement of the Tasker order and fine a justiciable controversy appropriate for resolution by declaratory judgment?

V. DISCUSSION

A. The DOH Does Not Have Authority to Adjudicate Unlicensed Healthcare Controversies.

Subject matter jurisdiction is lacking when an administrative agency does not have authority to adjudicate the type of controversy at issue. Marley v. L&I, 125 Wn. 2d 533 (1994). In this case, only the Office of Administrative Hearings (the OAH, as authorized by RCW 34.12) has the authority to adjudicate cases involving unlicensed health care practices.²

1. DOH Jurisdiction over Healthcare Cases, Generally.

The statutory scheme within RCW 18.130 is known as the Uniform Disciplinary Act (UDA). The UDA states the basis for the DOH's jurisdiction over health professions. Generally, the UDA sets forth three different categories of health professions for disciplinary purposes: (a) those

² Division One has just recently ruled in a similar case that the issue of the DOH's authority is not one of subject matter jurisdiction. See Yow v. DOH, # 610210-0-1, filed 10/13/08. However, Ms. Tasker contends that the Yow opinion is conclusory and leaves questions unanswered that must be reviewed by this Panel.

licensed professions that do not have Boards, and as a result, are governed by the DOH Secretary; (b) those licensed health care professions governed by Boards or Commissions; and, (c) those health care providers who are practicing illegally without a license.

a) Secretary Programs and Professions

At **RCW 18.130.040(2)(a)**, the legislature has listed those health care professions for which the Secretary of Health has authority, i.e. those health care professions that are not governed by a Board or Commission. By way of example, Acupuncture and Naturopathy are among the many professions listed under (2)(a). These professions are known as "program" professions. See e.g. WAC 246.10 et. al. For these professions, the Secretary is the “disciplinary authority.”

b) Board Professions

Under **RCW 18.130.040(2)(b)**, the legislature has listed the health care professions that are governed by

Boards or Commission. They are known as "full authority" professions with "full authority" boards. Medical doctors, dentists and psychologists are among those listed in this subpart of the statute.

For these professions, the Board or Commission is the "disciplinary authority."

c) Unlicensed Practice Cases under the UDA.

Not all health care practitioner activities must be licensed. See RCW 18.120, et. seq.³ The DOH has the authority to pursue only those unlicensed health care practitioners who are practicing a licensed profession. The authority to do so is outlined in RCW 18.130.190. Like the non-board professions identified in RCW 18.130.040(2)(a), disciplinary cases involving the unlicensed practice of a licensed health care profession are investigated under the authority of the Secretary. See RCW 18.130.190(1).

Under RCW 18.130.190, the DOH Secretary has the

³ "The legislature believes that all individuals should be permitted to enter into a health profession unless there is an overwhelming need for the state to protect the interests of the public by restricting entry into the profession." RCW 18.120.010(1)

authority to investigate, bring charges and issue orders involving unlicensed practice, with “the same authority as provided the Secretary under RCW 18.130.050.” See RCW 18.130.190(1).

When someone charged with illegal unlicensed practice requests a hearing, RCW 18.130.190 states that the hearings are conducted under the Administrative Procedure Act (the APA at RCW 34.05).

2. The APA does not allow the DOH to Adjudicate Unlicensed Controversies.

The APA says this at RCW 34.05.425:

(1) Except as provided in subsection (2) of this section, in the discretion of the agency head, the presiding officer in an administrative hearing shall be:

(a) The agency head or one or more members of the agency head;

(b) *If the agency has statutory authority to do so*, a person other than the agency head or an administrative law judge designated by the agency head to make the final decision and enter the final order; or

(c) One or more administrative law judges assigned by the office of administrative hearings in accordance with chapter 34.12 RCW.

(2) An agency expressly exempted under RCW 34.12.020(4) or other statute from the provisions of chapter 34.12 RCW or an institution of higher education shall designate a presiding officer as provided by rules adopted by the agency.

(Emphasis added.)

The DOH is not exempt from RCW 34.12, pursuant to subsection (2) above. Furthermore, as explained in the following sections, the State Legislature has specifically barred the DOH Secretary and her designee from adjudicating unlicensed health care controversies.

3. Unlicensed Controversies are Adjudicated by the OAH.

With respect to all health care controversies, RCW 18.130.050 allows the DOH to adjudicate only those controversies “as authorized in RCW 18.130.095(3)” Otherwise, health care controversies are adjudicated using “the OAH as authorized in chapter 34.12 RCW to conduct hearings.”

- a) **RCW 18.130.095(3) prohibits the DOH from adjudicating controversies except those involving Board professions.**

18.130.095(3) reads as follows:

“Only upon the authorization of a disciplinary authority identified in RCW 18.130.040(2), the secretary or his or her designee, may serve as the presiding officer for any disciplinary proceedings of the disciplinary authority authorized under this chapter. The presiding officer shall not vote on any final decision. . .” (emphasis added).

The plain language of this statute says that the DOH has the authority to adjudicate **only** those controversies involving Board Professions, i.e. those identified in RCW 18.130.040(2). The Secretary or her designee are not even allowed to vote on the final decision!

All other controversies – including those involving unlicensed health care – are adjudicated by the OAH under the authority of RCW 34.12.

The legislative history of the UDA bears out this result.

4. Legislative History of DOH Jurisdiction.

a) All hearings were conducted by ALJs prior to 1993.

Prior to 1993, all hearings under the Uniform Disciplinary Act (UDA) used only “the Office of Administrative Hearings as authorized in Chapter RCW

34.12 [OAH] to conduct hearings.” See 1992 version of RCW 18.130.050(8) at Appendix C. This was the case for all hearings, regardless of profession, licensed or unlicensed.

b) The DOH received Authority in 1993 to Adjudicate Only Board-Profession Controversies.

The legislature added RCW 18.130.095(3), in 1993. To reiterate, it says:

“Only upon the authorization of a disciplinary authority identified in RCW 18.130.040(2), the secretary or his or her designee, may serve as the presiding officer for any disciplinary proceedings of the disciplinary authority authorized under this chapter. The presiding officer shall not vote on any final decision. . .” (emphasis added).

The legislature made a corresponding change to RCW 18.130.050.(8). To review, the old version said this:

“The disciplinary authority has the following authority . . . to use the office of administrative hearings in Chapter 34.12 RCW to conduct hearings.” See Appendix C.

The new and current version of RCW 18.130.050 now says this:

“The disciplinary authority has the following authority . . . to use a presiding officer as authorized in RCW 18.130.095(3), or the office of administrative hearings in Chapter 34.12 RCW to conduct hearings. . . .” (emphasis added).

5. The Legislature Specifically Rejected Authorizing the DOH to Adjudicate All Health Care Controversies.

The legislative history of RCW 18.130.095(3) unequivocally confirms that DOH does not have authority to adjudicate all health care controversies. The original proposed language of RCW 18.130.095(3) said this:

“In order to assure the uniform application of the procedural rules developed by the secretary, the secretary or his or her designee shall serve as presiding officer for all proceedings under this chapter, including those conducted by disciplinary authorities identified in RCW 18.130.040(2)(b) . . . In those areas where the disciplining authority is a board, the secretary or his or her designee shall not vote in the final decision.” (Emphasis added.)

See Appendix D, Journal of the Senate for March 15,

1993 on Sub. Senate Bill 5948 at p. 624-625.

Five weeks later, the House and Senate both passed the entirety of the UDA with one – and only one – substantive change. The above-quoted language was stricken, and the language as it now appears was inserted in its place. See Appendix E (House Journal for April 22, 1993 on ESSB 5948); See also, Appendix F (Senate Journal for April 22, 1993 on ESSB 5948). It bears repeating with emphasis: *Both Houses of the State Legislature considered – and both rejected – authorizing the DOH to adjudicate all health care controversies. The law passed by the Legislature authorizes the DOH Secretary to adjudicate only Board-profession health cases. All other health cases are adjudicated under RCW 34.12.*⁴

6. The Statutes are Consistent with Constitutional Principles of Due Process.

Why would the legislature create such a striking

⁴ Division One's unpublished opinion in Yow says –without any explanation or analysis - that RCW 18.130.095(3) does not apply to unlicensed health care controversies. In so stating, Division One ignored RCW 18.130.095(4), which states “*The uniform procedural rules shall be . . . used for all adjudicative proceedings conducted under this chapter, as defined by chapter 34.05 RCW.*”

limitation on the DOH's subject matter jurisdiction?

Clearly, the legislature recognized that when an administrative proceeding vests authority in one person rather than a board, the Constitution and the Appearance of Fairness require an unbiased, independent judge. The legislature also knew that such an important standard could not be met by a DOH employee whose job description includes the requirement that s/he "*Accept departmental limitations on independence of judgment.*"

Washington courts have upheld this standard of an independent judiciary in administrative proceedings in dramatic, unequivocal fashion:

Implicit in such provisions [providing for administrative hearings] is that such a hearing shall be fair and impartial, and before an unbiased tribunal. Such protections are inherent in the word "hearing" and without them hearing procedures could be seriously infected. See Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 57 L. Ed. 431, 33 S. Ct. 185 (1913). These protections, and the concepts of fundamental fairness they project, are inherent in the notions of "administrative due process"

...

'The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the

history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest.'

State ex rel. Beam v. Fulwiler, 76 Wn. 2d 313, 316

(1969), citing in part Smith v. Skagit Cty., 75 Wn. 2d 715, (1969).

7. **Principles of Statutory Construction confirm OAH jurisdiction over unlicensed health care controversies.**

There is no reasonable way to interpret the UDA or the APA in a way that authorizes the DOH to adjudicate unlicensed health care controversies. Clearly, this authority lies with the OAH under RCW 34.12.

Courts have the inherent power to determine the limits of statutory grants of authority to agencies. Port Townsend School Dist. V. Brouillet, 21 Wn. App. 646, 587 P.2d 555 (1978). To determine those limits, courts engage in statutory construction. Id.

Interpretation of a statute is an issue of law that an appellate court reviews “de novo.” Waste Management v. WUTC, 123 Wn. 2d. 621 (1994). An agency’s interpretation of a statute is not entitled to deference by a court if the agency’s interpretation is contrary to the plain language of the statute. Id. No part of a statute should be deemed inoperative or superfluous absent a finding of obvious error on the part of the Legislature. Id.

Based on these principles of statutory interpretation, the OAH has exclusive authority to adjudicate unlicensed health care controversies. To conclude otherwise is to read RCW 18.130.095(3) contrary to the statutory scheme.

If there remains any doubt beyond the plain language of RCW 18.130.050(8) and 18.130.095(3), the legislative history dispels it. Courts may resort to the legislative history of a statute to ascertain the legislature’s intent if the intent is not clear from the plain meaning of the statutory language. see Tingey v. Haisch, 159 Wn2d 652 (2007), and Ballard Sq. v. Dynasty Const. 158 Wn. 2d 603 (2006). The plain language of the statute and the legislative history are

consistent and leave no doubt: only the OAH under RCW 34.12 has subject matter jurisdiction to adjudicate unlicensed health care controversies.

B. Subject-matter jurisdiction may be raised at any time.

Subject-matter jurisdiction may be raised at any time. See RAP 2.5(a); See also, Marley v. L&I, 125 Wn. 2d 533 (1994), and Hertzke v. DRS, 104 Wn. App. 920 (2001).

If an agency lacks subject-matter jurisdiction, its actions are void “ab initio.” Chavez v. L&I, 129 Wn. App. 236 (2005). Without the subject-matter jurisdiction to have levied the fine against Ms. Tasker in the first place, the DOH cannot enforce that fine against her now. As a result, res judicata should not bar Ms. Tasker’s Petition for Declaratory Relief.

C. Declaratory Judgment Is Appropriate Relief.

Apellant seeks Declaratory Judgment that the DOH had no lawful authority to conduct the adjudicatory hearing against Joyce Tasker except by assignment to the Office of

Administrative Hearings pursuant to RCW 34.12;
specifically

1. A Declaratory Judgment that the DOH decision against Ms. Tasker is void “ab initio” due to lack of subject matter jurisdiction; and,

2. A Declaratory Judgment that the DOH has no authority to enforce the \$10,000 fine against Ms. Tasker.

There is still a pending controversy between Ms. Tasker and the DOH over enforcement of the \$10,000 fine.

RCW 18.130.165 says:

Where an order for payment of a fine is made as a result of a hearing under RCW 18.130.100 or 18.130.190 and timely payment is not made as directed in the final order, the disciplining authority may enforce the order for payment in the superior court in the county in which the hearing was held.

As stated in the statute, the DOH may enforce the order for payment only in superior court. The issue of enforcement is appropriate for resolution under the Uniform Declaratory Judgment Act, (UDJA) which says:

A person . . . whose rights, status or other legal relations are affected by a statute [or] municipal ordinance may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder. See RCW 7.24.020

Furthermore, the UDJA's purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." See RCW 7.24.120. See also, Nelson v. Appleway, 160 Wn. 2d 262 (2007).

3. An award of attorney fees and costs pursuant to the Equal Access to Justice Act.

4. For such further relief as this Court deems just and proper.

VI. I Request This Court Interpret

RCW 18.120.010

In Arlene Sherman, App./cross- resp. V. Jennifer J.

Kissinger, Et Al., Respondents/cross-appellants the state appellate court of Washington Div. I NO. 60137-7-1/11 held that the "purpose of Chapter 18.120 RCW is to establish guidelines and

ensure that regulations ‘imposed upon any health profession [are] for the exclusive purpose of protecting the public interest.’ At Pg. 11 RCW.120.010(2). “It stands to reason, therefore, that DOH does not have disciplinary jurisdiction over unlicensed healthcare practitioners without a consumer complaint of harm.” The fact that many unlicensed health care practitioners have practiced in the state of Washington with no complaints of harm, along with the language of Chapter 18.120 RCW as interpreted by this case, a presumption of “no harm” is created for these unlicensed practices in general. (For example Ms. Tasker’s galvanic skin device practice. If operators of galvanic skin devices were causing harm to consumers, the DOH would be required to use the procedures of RCW 18.120 to convince the legislature that the practice should be regulated in some manner to protect the public.) The DOH Secretary cannot “regulate” unlicensed health professions through the UDA where no harm to Washington State citizens has been shown.

In the course of deciding disputes a court may be called upon to interpret the meaning of a statute.

When a statute is drafted or adopted, its’ meaning

may not be totally clear.

A court's interpretation is very important.

Practitioners have repeatedly raised the issue of 18.120, but no court interpreted 18.120 as having significance in unlicensed or unregulated practice cases in the State of Washington.

A few case examples of such cases are:

In re Kline, Div I Washington State Court of Appeals NO. 56886-8-I

In re Tasker Div. II Washington State Court of Appeals NO. 35144-7

In re Yow Div. I Washington State Court of Appeals NO.61021-0

In re Brewitt King County Superior Court NO. 07-2-16579-7-SEA

In re Arlene Sherman Div I Washington State Court of Appeals App./cross-resp. V. Jennifer J. Kissinger, Et Al. NO. 60137-7-1/11

However, there is no case law interpreting RCW 18.120.010.

The correct interpretation of this statute can determine the DOH Secretary's subject-matter

jurisdiction in this case. It could also provide precedent that will save the State of Washington, many litigants and lower courts needless controversies and expense.

This court in interpreting RCW 18.120.010 can guide all unlicensed and unregulated practitioners in structuring their practices to create reasonable certainty and assure statutory compliance.

Therefore, Appellant requests this court to render its interpretation of RCW.18.120.010.

DATED this November 3, 2008.

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