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STATE OF WASHINGTON
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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; WASHINGTON STATE DEPARTMENT OF HEALTH; STATE OF WASHINGTON, JOHN F. KUNTZ, JOHN WIESMAN, Dr. PH, MPH; and CATHERINE HUNTER, D.O.,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

From statehood, Washington has recognized that the constitutional importance of the need to protect the public health and safety by regulating the practice of medicine and sale of drugs warrants deference over providers' financial interest in their license. *See* Laws of Washington (2008), c.134, sec. 1, at 691 (Finding-Intent); Ch. 18.130 RCW (Uniform Disciplinary Act). In keeping with this longstanding tradition, the legislature enacted the Uniform Disciplinary Act, authorizing Boards and Commissions of the healing arts professions to protect the public health by regulating licensees. Included in this authorization is the power to investigate and discipline licensees for unprofessional conduct. These have always been civil proceedings. Laws of Washington, (1890), Sections 1-10, at 114-20; *In re Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958).

In order to protect the public, the Board issued its July 2014 Order revoking Dr. Dale Alsager's license to practice Osteopathic medicine. By the time of that Order, the subject of this appeal, the Board had been working to protect the public and rehabilitate Dr. Alsager for eight years. And yet even with the 2008 Order in place, Dr. Alsager flagrantly defied the Board's restrictions. He then refused to cooperate with the Board's duly authorized investigation by failing to produce requested information

and patient records and refused to even take the witness stand at hearing; thus he attempted to hinder the Board's obligation to and adjudicate complaints and its ability to try him at hearing. His arguments to escape responsibility for these blatant unprofessional actions are without merit.

Dr. Alsager protests that, because licensing proceedings have been called "quasi-criminal," he is entitled to criminal constitutional protections. He requests that this Court invalidate a decades-old regulatory investigation procedure under the Fourth Amendment and article I, section 7 of the Washington Constitution and make an unprecedented application of the Fifth Amendment to civil enforcement proceedings.

Dr. Alsager's argument rests on the faulty assumption that "quasi-criminal" and criminal are synonymous. The word "quasi-criminal" carries no legal weight on its own. Actions are either civil or criminal in nature depending on whether they are enacted to achieve a remedial purpose or to punish a person for violating criminal laws, not by how they are labeled. The Uniform Disciplinary Act's regulatory scheme is civil and explicitly remedial in nature. RCW 18.130.160. Because Dr. Alsager cannot establish heightened privacy rights under article I, section 7, and the investigatory statutes he challenges meet administrative search requirements under the Fourth Amendment, his challenge to the regulatory

investigation scheme fails. Because Uniform Disciplinary Act disciplinary actions are not criminal in nature, the full panoply of criminal rights do not apply, including the Fifth Amendment privilege against self-incrimination. Dr. Alsager's arguments must therefore fail.

II. COUNTER STATEMENT OF ISSUES

A. RCW 70.05.020(2) and 70.225.040(3) authorize access to patient medical records, including prescription information, without a search warrant in the course of a properly authorized investigation. Do these statutes satisfy the privacy protections and search and seizure requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment of the U.S. Constitution?

B. The Fifth Amendment and article I, section 9 of the Washington Constitution apply only to criminal matters. Are "quasi-criminal" health care provider disciplinary actions outside the scope of those constitutional provisions because they are fundamentally civil enforcement proceedings which are remedial in nature and do not punish licensees for criminal conduct?

C. If, *assuming arguendo*, the Fifth Amendment privilege against self-incrimination applies to licensing actions under the Uniform Disciplinary Act, does the required records exception to the Fifth Amendment apply to medical records, including prescriptions?

D. Is Finding 1.10 of Board's Final Order supported by substantial evidence?

E. Do Dr. Alsager's other assignments of error lack merit?

III. STATEMENT OF THE CASE

Dr. Alsager has a long history of prescribing dangerously addictive drugs without determining whether the drugs are medically necessary. In 2006, he was charged with unprofessional conduct for prescribing addictive and potentially dangerous drugs without first conducting a physical exam or ordering the necessary tests. AR 1817-20.[1] He was summarily restricted for that action. *Id.*

At the full hearing on those charges in 2008, his controlled substance prescriptions were found to have put seven patients at risk of harm. AR 1845-47. After determining that this disregard for patient safety constituted unprofessional conduct, the Board restricted his license, including his authority to prescribe drugs listed in schedules II and III of the Uniform Controlled Substances Act until he completed a Board approved training course or residency regarding pain management.[2]

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[1] "AR" refers to the Administrative Record in this case. This brief cites to the AR because the index to the clerk's papers was prepared prior to submission of the administrative record. RAP 9.7(c).

[2] The Uniform Controlled Substances Act establishes a "schedule" or classification system for drugs. *See* RCW 69.50. Drugs are placed in Schedules II and III upon a finding that their abuse could lead to psychological or physical dependence. RCW 69.50.205(3), RCW 69.50.207(3).

AR 1821-49, AR 1846-47. While under the Order, the Board had authority to monitor his patient medical and prescription records to ensure compliance with the order and protection of his patients. RCW 18.130.050(13), RCW 18.130.160. On appeal, the 2008 order was affirmed in an unpublished opinion. *Alsager v. Wash. State Bd. of Osteopathic Med. & Surgery*, 155 Wn. App. 1016, rev. denied, 169 Wn.2d 1024 (2010) (Unpublished)

While he was under this restriction, new complaints were filed with the Board regarding Dr. Alsager's treatment of "Patient P." The Board notified Dr. Alsager of the complaints. AR 1857-60. On September 21, 2012, the Board found merit to the complaints and authorized investigation. AR 1861-62; AR 1442-1451. The Board investigator requested that Dr. Alsager provide copies of Patient P's medical records and a response to the complaint. AR 1142-44. The investigator informed Dr. Alsager that: (1) the complaint involved, among other things, treatment of Patient P, including treatment of "neck pain;" and (2) that "the treatment he provided to Patient P was questionable, according to two doctors familiar with her health history and prior care." AR 1142.

Rather than responding, Dr. Alsager petitioned for a declaratory order "to quash the demand to produce records" and declare certain

statutes unconstitutional or inapplicable. AR 1711; AR 1442-45; AR 1864-84. When the Board declined to do so, Dr. Alsager filed a complaint in the federal district court requesting declaratory judgment and injunctive relief. AR 1885-88. The district court dismissed his complaint, and the Ninth Circuit Court of Appeals affirmed. *Alsager v. Bd. of Osteopathic Medicine and Surgery*, 573 Fed.Appx. 619 (9th Cir. 2014) (Unpublished).

Meanwhile, the investigation of Patient P's complaint continued. The investigator obtained information from the State's prescription monitoring database, which tracks all prescriptions issued in Washington for controlled substances which have a potential for abuse. AR 1922-28; RCW 70.225.020. The confidential prescription information in the database is available to professional health licensing and regulatory agencies, such as the Board. RCW 70.225.040(3)(c); WAC 246-470. The database revealed that Dr. Alsager prescribed Schedule III drugs to himself and patients in violation of the 2008 order. AR 1921-28.

The investigator then requested Board authorization for a second investigation into Dr. Alsager's prescribing activity in violation of the 2008 Order. AR 2069. A Board panel again found merit and authorized the investigation. AR 1890. The investigator sent Dr. Alsager a second notification letter and requested medical records for patients for whom

Dr. Alsager had prescribed Schedule II or III controlled substances. AR 1889-93. The investigator also gathered prescription information from pharmacies. AR 1929-55.

Dr. Alsager responded by claiming that the Fourth and Fifth Amendments allowed him to refuse to answer questions or provide patients' records because they were his personal, private records. AR 1894-98. He also asked the investigator to provide names of specific patients. *Id.* The investigator provided some patient names. AR 1899-1901.

Dr. Alsager did not provide the requested records or information. Instead he sought a second declaratory order with the Board. AR 1892; 1903-16. Dr. Alsager asked the Board to clarify whether its 2008 Order's prohibition on prescribing schedule II and schedule III controlled substances "applies only to scheduled opioids used in pain management." AR 1909. This was the first time since the 2006 restriction on his prescribing authority that Dr. Alsager sought any clarification about the restriction on his authority. The Board again declined to issue a declaratory order stating "the Board finds that Petitioner has not demonstrated an uncertainty necessitating resolution exists with regard to the language of the Final Order dated August 14, 2008. Therefore the Petitioner has not met the requirements of RCW 34.05.240(1)." AR 1919.

On September 20, 2013, the Board charged Dr. Alsager with unprofessional conduct for: (1) prescribing Schedule III drugs in violation of the Board's 2008 Order; and (2) failing to provide the requested patient records, and summarily suspended his license. AR 04-10. Under RCW 18.130.180(9), unprofessional conduct includes failure to comply "with an order issued by the disciplining authority"; RCW 18.130.180(8) defines unprofessional conduct as failure to furnish papers, documents, records, or other items requested by the Board and failure to provide a written response to the complaint.

Dr. Alsager requested a hearing to challenge the summary suspension. AR 96-113; *see* RCW 18.130.135 and WAC 246-11-340. The Board upheld the summary suspension. AR 298-306. Dr. Alsager then sought superior court intervention against the Board's licensing action. CP 4-53. On January 24, 2014, the superior court dismissed the action. CP 238-39. The appeal of that dismissal is now before this Court and consolidated for hearing with this matter. *See* Washington Court of Appeals Cause No. 47367-4-II.

Dr. Alsager received a hearing before the Board to consider the merits of his case. During the hearing, the Board considered the prescribing records from the State prescription monitoring database, pharmacy records, and copies of prescriptions. AR 1921-28; 1929-55. It

also considered the testimony and cross-examination of the Board investigator. AR 2007-2125. Dr. Alsager refused to testify, claiming that the Fifth Amendment protected him from being compelled to testify against himself in a Board disciplinary matter. AR 2056; *see also* AR 2037-46. He also declined to present evidence on his own behalf. The Department asked Dr. Alsager specific questions. He refused to take the stand or to invoke the Fifth Amendment privilege on a question by question basis. AR 2056-64.

After the hearing, the Board issued its order concluding that Dr. Alsager violated RCW 18.130.180(9) by prescribing controlled substances in violation of the Board's 2008 Order, and violated RCW 18.130.180(8) by refusing to cooperate with two Board investigations. In response to Dr. Alsager's refusal to comply with the 2006 and 2008 orders restricting and suspending his prescribing authority, the Board permanently revoked his osteopathic medical license. AR 1701-17.

The superior court upheld the Board's action. CP 3-54; CP 67-68. Dr. Alsager timely appealed. CP 69-103.

IV. STANDARD OF REVIEW UNDER THE APA

Dr. Alsager bears the burden of demonstrating the invalidity of the Board's order. RCW 34.05.570(1)(a). He is entitled to relief only if he

demonstrates one or more grounds set forth in RCW 34.05.570(3)(a)-(i). Appellate review is confined to the administrative record. *Clausing v. State*, 90 Wn. App. 863, 870, 955 P.2d 394 (1998).

Dr. Alsager challenges argue the constitutionality of the Board's proceedings, RCW 34.05.570(3)(a), the application of law to the facts RCW 34.05.570(3)(d), and the substantiality of the evidence RCW 34.05.570(3)(e). App. Br. at 18-21. Statutes are presumed constitutional and the challenger "must prove beyond a reasonable doubt that the statute is unconstitutional." *In re A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). Findings of fact are reviewed under the substantial evidence test, i.e., evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises. RCW 34.05.570(3)(e); *Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015). The court reviews the Board's legal conclusions *de novo* under an error of law standard. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

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V. ARGUMENT

A. Consistent Article I, Section 7 and The Fourth Amendment, RCW 70.05.020(2) and RCW 70.225.040(3) Authorize The Board To Obtain Patient Records Without A Search Warrant

During investigation of unprofessional conduct, health care providers are statutorily required to disclose to the Board health care information, including patient medical records and prescription information. RCW 70.02.050(2)(a) provides in relevant part:

> (2) A health care provider shall disclose health care information ... 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.

In addition, RCW 70.225.040(3) authorizes disclosure of data in the State prescription monitoring program to the Board as the regulatory and licensing agency.

Dr. Alsager challenges the constitutionality of these statutes under article I, section 7 of the Washington Constitution, and the Fourth Amendment. App. Br. 32-37. Without providing any analysis,

Dr. Alsager contends that RCW 70.02.050 and RCW 70.225.040 are facially unconstitutional because the statutes do not require a judicially-issued warrant prior to demanding health care information maintained by a practitioner during an investigation of unprofessional conduct. App. Br. 37-40.

1. Dr. Alsager Has No Privacy Interest In His Patients' Medical Records

Article I, section 7 requires that no person "shall be disturbed in his private affairs ... without authority of law." Interpretation of the provision involves a two-part inquiry. First, the court determines "whether the action complained of constitutes a disturbance of one's private affairs. If there is no private affair being disturbed, no article I, section 7 violation exists." *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007). This part of the inquiry focuses on privacy interests which Washington citizens hold and should be entitled to hold safe from governmental trespass absent a warrant. *Id.* at 244. Courts examine the protection that historically has been afforded to the interest asserted and consider the nature and extent of the information which may be obtained. *Id.*

Dr. Alsager's private affairs are not disturbed by the challenged statutes. A patient's records are not the *doctor's* private affair. In

Washington, a physician does not have a personal privacy interest in his patients' medical records and lacks standing to assert his patients' privacy rights against disclosure. *See Jeckle v. Crotty*, 120 Wn. App. 374, 380-82, 85 P.3d 931 (2004), *rev. denied*, 152 Wn.2d 1029 (2004) (release of patient records under Public Disclosure Act not violative of doctor's right of privacy and doctor lacked standing to assert patients' privacy rights).

Generally, patients hold their own medical records confidential as their private affairs. *See* Ch. 70.02 RCW; Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191 (1996); But constitutional privacy protections are not absolute and must be balanced against the need for comprehensive and effective government oversight of significant public health concerns. *Murphy*, 115 Wn. App. at 308. To ensure public safety, prescription records are collected and held for government regulatory purposes. *Murphy*, 115 Wn. App. at 307-08. Regulatory agencies are permitted to access patient records without a warrant when they are investigating unprofessional conduct. RCW 70.02.050; RCW 70.225.040. Since first enactment, patient privacy protection laws have provided for warrantless access to protected information by law enforcement and regulatory agencies for narrowly limited uses, including investigation of provider unprofessional conduct. RCW 70.02.050(2)(a); 45 C.F.R. 164.512.

These principles demonstrate that privacy protections for health care information are intended to protect primarily against public exposure of information, rather than against its careful use in narrowly defined regulatory and law enforcement actions. *Murphy*, 115 Wn. App. at 316; *see, e.g., Whalen v. Roe*, 429 U.S. 589 (1977) (statutory protection against public disclosure made warrantless gathering of narcotic prescriptions by state to monitor drug flow constitutional).

Mistakenly relying on the assumption that patient medical records are his private affairs, Dr. Alsager attempts a limited analysis of how prescription records have historically been protected as "private affairs" within the meaning of article I, section 7. App. Br. at 40-42. He relies entirely on pharmacy statutes enacted in 1891 which required drug stores and pharmacies to keep records of sales of drugs and poisons and to make them available for law enforcement inspection. Laws of Washington (1891), c. 153, §12. He then summarily concludes he is entitled to the privacy protections of article I, section 7 in refusing to provide medical records, including prescription records, in cooperation with the Board's investigation and in violation of RCW 70.02.050(2)(a). But Dr. Alsager's argument is directly contradicted by this Court's holding in *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003) (no long-held privacy

protection in prescription records because 1891 statutes required records be made available to law enforcement inspection upon demand).

The fact that Dr. Alsager was under the 2008 Board ordered restriction during his ongoing violation of the Board's order weakens his contention that he enjoyed heightened privacy under article I, section 7. In applying this constitutional provision, the courts consider the status of the person claiming the protection. *See State v. Surge*, 160 Wn.2d 65, 73-74, 156 P.3d 208 (2007) (lower privacy expectation for inmates under careful scrutiny); *State v. Parris*, 163 Wn. App. 110, 117-18, 259 P.3d 331 (2011) (lower privacy expectation for registered sex offender on probation). The Board's 2008 Order placed Dr. Alsager on "restrictions with conditions," prohibited his prescription of schedule II and III controlled substances, and the Board retained authority for compliance checks. AR 1846-47; RCW 18.130.050(13); RCW 18.130.160. Also, while under investigation for his treatment of Patient P, not only were his treatments via prescription medications under the ambit of the originally authorized investigation,[3] but pursuant to RCW 18.130.050(7) the Board is also authorized to conduct a practice audit when investigating a complaint that has been

[3] Dr. Alsager attempts to misdirect this Court regarding the scope of the original investigation of Patient P. App. Br. at 37. But the original complaint concerned the treatment and prior treatment of Patient P going back to 2009 when he originally began treating her. AR 2077. Treatment by prescription of medication fits squarely within the four corners of the complaint upon which investigation was authorized.

authorized for investigation by the Board. Therefore, Dr. Alsager possessed no legitimate privacy expectation in his prescribing practices or medical care and the Court should reject his argument that he has a heightened privacy interest in his patients' medical records beyond what the Fourth Amendment affords.

2. The Board's Access To The Prescription Records Was Authorized By "Authority Of Law"

The Board's access to the patient records also satisfies the second part of the analysis under article I, section 7, which considers whether "authority of law" justifies the intrusion into private affairs. RCW 70.02.050(2) and RCW 70.225.040(3) provide the required legal authority.

Both RCW 70.02.050(2) and RCW 70.225.040(3) provide investigative information that is essential to the Board's ability to regulate the medical profession. The courts have repeatedly found that there is a legitimate public interest in limited disclosure to regulatory agencies. For example, the Washington Supreme Court upheld statutes allowing disclosure of patient information to DSHS, to allow the agency to track certain types of mentally ill persons involved in the Medicaid program. *Peninsula Counseling Ctr. v. Rahm,* 105 Wn.2d 929, 932-33, 719 P.2d 926 (1986). DSHS was given authority to demand the names and diagnoses of

these patients from the health care facilities where they were treated. *Id.* The Court held that "disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest...." *Id.* at 935. The Court determined that the statutes at issue met the test because the interest in ensuring that funds were used to treat mentally ill patients and maintain quality treatment facilities were important government interests; the name and diagnosis of patients was necessary to meet those goals. *Id.* at 936. The Court also relied on the statutes' protections preventing further disclosure of the information beyond a handful of key DSHS employees. *Id.* Therefore, the statutes complied with article I, section 7. *Id.* at 936-37; *see also Holbrook v. Weyerhauser Co.*, 118 Wn.2d 306, 314, 822 P.2d 271 (1992) (upholding constitutionality of statute requiring treating physicians to disclose medical information to Department of Labor and Industries for Industrial Insurance Act claims).

In *Miles,* the Court used the same basic reasoning as *Peninsula Counseling* to conclude that an administrative subpoena used to obtain personal bank records of a purported investment specialist violated article I, section 7. *Miles*, 160 Wn.2d at 247. The Court first determined that personal bank records have long been protected from governmental intrusion as private affairs. The purpose of the warrant requirement is to

limit government intrusion into private affairs by ensuring that "some determination has been made which supports the scope of the invasion," that the scope of the invasion is limited to that authorized by authority of law, and that the process of obtaining a warrant reduces mistaken intrusions. *Id.* In examining the state Securities Act under which the bank records were obtained, the Court determined that the Department of Financial Institution's investigatory discretion to obtain "any" materials "the director deems relevant or material to the inquiry," lacked the protections of the warrant or subpoena process and "would allow the state to intrude into private affairs for little or no reason." *Id.* at 248, citing RCW 21.20.380(1). The Court concluded that an agency's regulatory authority "extends to the person and matter being regulated and not to third parties who hold information protected as private affairs." *Id.* at 249.

Peninsula Counseling and *Miles* use the same reasoning and yield the same basic rule for agency investigations of the persons and matters they regulate. In order to proceed constitutionally under article I, section 7, statutes authorizing a warrantless administrative investigation must provide the same type of safeguards against mistaken intrusion into private affairs as a warrant.

Applied here, the safeguards and requirements of the Uniform Disciplinary Act and RCW 70.02.050(2) are stringent:

> When properly followed, the procedural safeguards provided by the UDA and the requirement in RCW 70.02.050(2)(a) that providers disclose health records without patient consent only under enumerated circumstances, strike an appropriate balance between adequately allowing the State to obtain pertinent records when needed while preventing it from having unfettered access to health records.

Client A v. Yoshinaka, 128 Wn. App. 833, 844, 116 P.3d 1081 (2005), *as amended on reconsideration* (2005). As with the requirement for a neutral magistrate to issue a search warrant, an investigation is commenced only after a panel of three Board members applies medical expertise to determine the complaint merits investigation. RCW 18.130.080. The Board then authorizes investigation only within the scope of the complaint, consistent with RCW 70.02.050(2)(a); *see Seymour v. Wash. State Dep't of Health*, 152 Wn. App. 156, 216 P.3d 1039 (2009). Third, the Board guarantees privacy of any health records obtained by preventing further disclosure. RCW 70.02.050(3); WAC 246-08-390. These narrowly tailored protections satisfy both *Miles* and *Peninsula Counseling*.

These statutory requirements were followed to the letter in this case. At least three Board members authorized investigation regarding the treatment of Patient P. AR 1861-62; AR 1711; AR 1442-51. At least

three Board members authorized investigation regarding whether Dr. Alsager prescribed in violation of the 2008 Order. AR 1890. Both of the investigator's letters requested very specific, well-defined information from Dr. Alsager, narrowly tailored to obtain only those patients' records implicated by the complaints. AR 1142; AR 1892-93. Copies of prescriptions written by Dr. Alsager were then requested from pharmacies consistent with the *Murphy* case.

Dr. Alsager fails to show that RCW 70.02.050(2)(a) or 70.225.040(3) are unconstitutional, or that article I, section 7 applies to his claims of privacy in his patients' medical records. He further fails to demonstrate that the Board did not comply with these statutory protections here.

3. The Board's Investigative Authority Is Constitutional Under The Fourth Amendment

Under the Fourth Amendment, administrative inspections are constitutional:

> "(1) if 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 v. Wash. State Dep't of Health, Dental Quality Assurance Comm'n, 152 Wn. App. 156, 167, 216 P.3d 1039 (2009) (quoting *Beck v. Texas State Bd. of Dental Exam'rs*, 204 F.3d 629, 638 (5th Cir. 2000)).[4]

The statutes governing Board investigations meet the requirements of the Fourth Amendment for administrative searches. First, regulating medical practitioners is done to further the government's overwhelming interest in protecting public health and safety. It is impossible to accomplish this goal without access to patient records, which reflect the level of care provided by the practitioner.

Second, warrantless investigation is necessary because allowing the regulatory body to apply their medical expertise to determine whether to investigate ensures regularity in investigations. The regulatory scheme is premised at its heart on the legislative charge of each profession to regulate itself using its expertise. Requiring a superior court to review every contested demand for patient records would not only become overly burdensome, but more importantly it would interrupt the regulatory scheme by interjecting a decision-maker without medical expertise

[4] The Fourth Amendment's application to Board investigations of licensees is arguably more attenuated under the pervasively regulated industry exception to the Fourth Amendment. *See New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

between those charged by the legislature with regulating their profession and the regulated person.

And finally, the requirements of the Fourth Amendment are satisfied because the investigation process provides a constitutionally adequate substitute for the warrant requirement. It requires a decision by at least three neutral Board members prior to proceeding in addition to the other stringent safeguards enumerated in *Yoshinaka*. These requirements were followed here.

The Court should find that the investigation in this matter and the statutory scheme under which it was conducted conformed to the requirements of the Fourth Amendment.

B. The Fifth Amendment And Article I, Section 9 Of The State Constitution Do Not Apply To Actions Under The Washington Uniform Disciplinary Act, Despite The "Quasi-Criminal" Label

1. The Term "Quasi-Criminal" Has Been Used In Washington Only To Denote That Certain Civil Enforcement Proceedings Require Additional Procedural Due Process Protections

Like the Fifth Amendment to the federal constitution, the Washington Constitution provides that no person "shall be compelled in any *criminal case* to give evidence against himself." U.S. Const. art. I, § 9 (emphasis added); U.S. Const. amend. V. By its plain language, in order

for the privilege against self-incrimination to apply, there must be a "criminal case."

State licensing disciplinary actions have been labeled "quasi-criminal" by the state Supreme Court for decades. *See, e.g., In re Kindschi*, 52 Wn.2d 8, 11, 319 P.2d 824 (1958). But only procedural due process protections have been applied, not criminal protections. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 528, 29 P.3d 689 (2001); *Kindschi*, 52 Wn.2d at 11.

Labeling a subject area "quasi-criminal" is insufficient to invoke the constitutional protections. "Quasi-criminal" cases must be examined for their criminal and civil elements and be determined to be criminal in nature before they can be considered a "criminal case" for Fifth Amendment purposes. *E.g., United States v. Ward*, 448 U.S. 242, 251-255, 100 S. Ct. 2636 (1980) (Congressional intent to create civil penalty in absence of strong countervailing evidence of punitive purpose did not warrant protection of Fifth Amendment privilege); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700-02 (1965) (a forfeiture proceeding is "quasi-criminal" if it is intended to impose a penalty on an individual for a violation of the criminal law); *In re Daley,* 549 F.2d 469, 474 (7th Cir. 1977); *Deeter v. Smith*, 106 Wn.2d 376, 378, 721 P.2d 519 (1986). Even in a "quasi-criminal" proceeding, criminal protections are

afforded only when the proceedings are "so far criminal in their nature" that the defendant cannot be compelled to testify "to matters involving, or that may involve, his being guilty of a criminal offense." *Ward*, 448 U.S. 242 at 253 (internal citations omitted). For example, in *Boyd v. U.S.*, 116 U.S. 616 (1886), the Supreme Court held that criminal constitutional protections must be afforded to an individual indicted for customs fraud under a statute imposing fines and forfeiture of property, as well as up to two years of imprisonment. *Id.* at 617.

In *Boyd*, the defendants claimed the Fourth and Fifth Amendment protections when a federal prosecutor sought to compel books and records in a forfeiture action. The defendants were accused of criminal violations of the revenue laws, but the criminal prosecutor waived the criminal charges in order to seek forfeiture under the ancillary civil forfeiture remedy. The Court determined that the action required criminal protections because it sought to penalize the defendants for violation of criminal laws:

> As, therefore, suits for *penalties and forfeitures*, <u>incurred by the commission of offences against the law</u>, are of this quasi-criminal nature, we think that they 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, 116 U.S. at 634 (*italics* in original) (underline added). Suits must be for more than penalties and forfeitures to trigger those protections. The suit must be done to penalize criminal violations. This defining feature was reaffirmed in *One 1958 Plymouth*, 380 U.S. at 700-02.

In stark contrast to *Boyd*, Dr. Alsager was not prosecuted for violation of any criminal law and was not at risk of imprisonment. Rather, as in *Nguyen*, the medical disciplinary proceeding was fundamentally civil in nature even though it resulted in the loss of his professional license. The Court there required due process protections including a burden of proof higher than the preponderance standard used for mere money judgment actions, but less than the criminal protection of "beyond a reasonable doubt" standard. *Nguyen*, 144 Wn.2d at 528.

Dr. Alsager fails to examine or correctly apply the term "quasi-criminal." He conflates the various uses of the term without acknowledging the varied legal protections associated with actions labeled "quasi-criminal." Surveying the breadth of cases using the term shows that "quasi-criminal" describes a hybrid action that has some aspects akin to a criminal prosecution and some aspects akin to a civil suit or enforcement action. *Daley*, 549 F.2d at 474. The critical inquiry for discerning whether criminal due process protections apply is whether the defendant violated criminal laws and whether the purpose of the action is

to punish him for it. *One 1958 Plymouth*, 380 U.S. at 700-02; *Boyd*, 116 U.S. at 634; *Daley*, 549 F.2d at 475; *Deeter*, 106 Wn.2d at 378.

The U.S. Supreme Court provides a more refined analysis a century after *Boyd* in *Ward*, 448 U.S. at 251-55. The Court decided that a civil penalty for a violation of the Federal Water Pollution Control Act was civil in nature, not criminal, by examining the provision in detail. The Court first noted that, read broadly, "*Boyd* might control the present case", but declined to give "full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that several of *Boyd*'s express or implicit declarations have not stood the test of time." *Ward*, 448 U.S. at 253 (citation omitted). The Court emphasized the importance of the Congressional intent that the penalty be civil in nature:

> More importantly, however, we believe that in the light of what we have found to be overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect it would be quite anomalous to hold that § 311(b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. We do not read *Boyd* as requiring a contrary conclusion.
>
> . . .
>
> We conclude that the penalty imposed by Congress was civil, and that the proceeding in which it was imposed was not "quasi-criminal" as that term is used in *Boyd v. United States, supra*.

Ward, 448 U.S. at 254-55. Like the act at issue in *Ward*, our state legislature has been clear that the Uniform Disciplinary Act is civil and regulatory, enacted for remedial purposes to ensure the quality provision of medicine. RCW 18.130.010.

Also long after *Boyd*, the Seventh Circuit Court confronted "whether a state bar disciplinary proceeding is a 'criminal case' within the purview of the Fifth Amendment." *Daley*, 549 F.2d 469 at 474. Daley argued that he was entitled to Fifth Amendment protection because a disbarment action is a "quasi-criminal" proceeding. The court stated:

> Thus, a clear distinction exists between proceedings 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 licensed by the jurisdiction to practice law.

Daley, 549 F.2d at 474. The court concluded that the penal scenario is criminal for purposes of the Fifth Amendment; "the latter is not." *Id.* at 475. The court decided that the disbarment proceeding was not criminal and did not warrant Fifth Amendment protection because it was brought for the remedial purposes outlined. *Id.*; *cf. In re Ruffalo*, 390 U.S. 544 (1968) (quasi-criminal, adversarial nature of disbarment

proceeding requires due process protection including advance notice of disciplinary charges).

Physician discipline in Washington is very similar to the fundamentally civil "quasi-criminal" disbarment action in *Daley*. Since statehood, physician discipline has been conducted as "ordinary civil actions." *An Act to Regulate the Practice of Medicine*, 1890, at 114 § 6. The Uniform Disciplinary Act "is a civil statute for the 'enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts.'" RCW 18.130.010. Its purpose is remedial, requiring Boards and Commissions to safeguard the public's health and safety as "the paramount responsibility of every disciplining authority." RCW 18.130.160. Courts give weight to the Legislature's stated intent that a statute serves civil enforcement goals. *In re Young*, 122 Wn. 2d 1, 17, 857 P.2d 989 (1993), *superseded by statute on other grounds*, *In re Det. of Thorell*, 149 Wn. 2d 724, 746, 72 P.3d 708 (2003) (the commitment of sexually violent predators under RCW 71.09 is civil rather than criminal based on the expressed legislative purpose); *see State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996) (privilege does not apply in probation setting); *In re Young*, 122 Wn.2d 1, 51, 857 P.2d 989 (1993)

(privilege does not apply in sexually violent predator commitment proceedings).

As in *Daley*, discipline is not undertaken to punish license holders. The action is not brought by a criminal prosecutor, but rather a civil enforcement attorney.

Additionally, the primary purpose of professional discipline is to protect the public:

> 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 alleged misconduct of the doctor involved. 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 whether disciplinary action is to be taken against him in order to maintain sound professional standards of conduct for the purpose 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 8, 10-11; *e.g., Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 742, 818 P.2d 1062 (1991). The *Kindschi* Court noted that the U.S. Supreme Court has not required that criminal due process standards are necessarily entirely applicable to state granted licenses to practice professionally. *Kindschi*, 52 Wn.2d at 12. Due process protections applied such that the charged conduct underlying the action,

moral turpitude based on a criminal conviction for tax fraud, had to be reasonably related to the practice of the profession. *Id.* at 12-13.

The fact that the *Kindschi* Court did not rely on *Boyd* in its use of the term "quasi-criminal" is indicative that the court did not give the term the same meaning as in *Boyd*. Although *Boyd* was well-known and widely cited when *Kindschi* was decided, the *Kindschi* opinion neither mentions *Boyd* nor any case which relies on *Boyd*. Instead, the *Kindschi* decision relies on two attorney discipline cases deciding that due process guarantees must be afforded in disciplinary actions under the Fourteenth Amendment given the unique nature of such proceedings. *Schware v. Bd. of Bar Exam'r of N.M.*, 353 U.S. 232 (1957); *In re Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952).

Dr. Alsager also challenges the constitutionality of RCW 18.130.050(7), RCW 18.130.180(8), and RCW 18.130.230(1), claiming they violate the Fifth Amendment by compelling him to produce information and documents that incriminate him, not as to real criminal conduct, but as to unprofessional conduct under the Uniform Disciplinary Act. App. Br. at 44-47. However, the Fifth Amendment applies only to actual criminal conduct, not to violations of a civil regulatory statute meant to preserve the public health and safety by remedial discipline. No Washington case has found medical disciplinary actions to be criminal in

nature for purposes of any constitutional protection. *E.g.*, *Nguyen*, 144 Wn.2d at 516 (applying a lower burden of proof to a licensing action than is applicable to criminal proceedings); *Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983) ("quasi-criminal" nature of action required due process protection, but vesting investigatory, prosecutorial, and adjudicative powers in one body not violative). In Washington Uniform Disciplinary Act proceedings, "quasi-criminal" means only that procedural due process protections apply.

This Court should reject Dr. Alsager's attempt to dismantle the licensing framework so carefully crafted over the decades to protect both the licensees and the public. Holding that licensing proceedings are criminal in nature would be a dramatic departure from the existing case law and could create problematic unintended consequences.

2. The Privilege Against Self-Incrimination May Only Be Selectively Invoked In Non-Criminal Proceedings Where The Testimony May Incriminate The Deponent In Future Criminal Proceedings

In addition to its application in criminal prosecutions, the Fifth Amendment self-incrimination privilege is selectively applied where a witness's statements might incriminate him in future criminal proceedings. *Ikeda v. Curtis*, 43 Wn.2d 449, 457-58, 261 P.2d 684 (1953).

Article I, section 9 is coextensive with the protections of the Fifth Amendment. *State v. Unga,* 165 Wn.2d 95, 100, 196 P.3d 645 (2008). The Fifth Amendment privilege is available outside of a criminal case only when "the nature of the statement or admission" is criminal, or the statement invites "exposure" to criminal sanctions. *State v. Post*, 118 Wn.2d 596, 604-05, 826 P.2d 172 (1992), *amended by* 118 Wn.2d 596 (1992) (citing *In re Gault*, 387 U.S. 1, 49 (1967)). Outside of the context of a criminal prosecution, the privilege must be explicitly invoked for each question, and the tribunal determines whether the asserted risk of self-incrimination is real or illusory. *Ikeda v. Curtis*, 43 Wn.2d at 457-58; *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981).

Dr. Alsager incorrectly argues that the Board erred at several stages by not affording him the protection of the Fifth Amendment privilege. To the contrary, the Board properly allowed him to invoke the Fifth Amendment for any criminal concern. AR 1638-39. Dr. Alsager's actual complaint is that the Presiding Officer ruled that the administrative hearing was not a "criminal case" for Fifth Amendment purposes. AR 2037-46. But Dr. Alsager was not charged with or required to defend criminal matters before the Board. Nor has he been charged with any crime related to facts at issue in the Board action.

Moreover, the Board does not have the authority to criminally charge Dr. Alsager. RCW 18.130.050. The Board brought only two charges against Dr. Alsager: failure to comply with a prior order of the Board, RCW 18.130.180(9), and failure to cooperate with a Board investigation by refusing to produce requested records, RCW 18.130.180(8)(a). AR 4-9. Neither of these charges involves criminal behavior and the disciplinary purpose was remedial, not punitive. The hearing was therefore not criminal in nature for Fifth Amendment purposes under *Boyd*, *Daley*, *Ward*, or *Kindschi*.

Also, the failure to cooperate charge does not implicate the Fifth Amendment because the act of producing patient records, even if they contain incriminating information, is not typically testimonial in character. The fundamental nature of the privilege is that it applies only when the accused is compelled to make a testimonial communication that is incriminating. *Fisher v. United States*, 425 U.S. 391, 407-08, 409 (1976).

The preceding discussion demonstrates the inadequacy of Dr. Alsager's designations of error concerning the Fifth Amendment. He argues that the Presiding Officer erred by allowing specific questions to be put to Dr. Alsager when he refused to testify. But Dr. Alsager was only entitled to invoke the Fifth Amendment privilege question by question and only where real criminal liability existed, at the judge's discretion, not his

own. *E.g., State v. Parker*, 79 Wn.2d 326, 332; 485 P.2d 60 (1971). Without the power of contempt of court to require Dr. Alsager to testify, the tribunal had no choice but to allow the questions to be posed to an empty witness seat. In addition, the Board was entitled to a specific negative inference from each question Dr. Alsager refused to answer by invoking the Fifth Amendment privilege. *E.g., Ikeda*, 43 Wn.2d at 457-58. He cannot now complain of an error, if any, that he invited.[5]

Next, Dr. Alsager's complaint that the Presiding Officer instructed the Board regarding adverse inference from Dr. Alsager's silence similarly fails. Once Dr. Alsager declined to provide information to the Board's investigator and refused to testify, he received the full benefit of the Fifth Amendment privilege. "When a witness in a civil suit refuses to answer a question on the ground that his answer might tend to incriminate him, the result sought to be achieved by invoking the constitutional privilege is accomplished." *Ikeda*, 43 Wn.2d at 457-58. A party who asserts the Fifth Amendment privilege is not shielded from "the consequences of that choice." *Ikeda*, 43 Wn.2d at 458-59.

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[5] The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *In Re Personal Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999). If the party asserting error materially contributed thereto, the error is viewed as waived. This doctrine applies equally to constitutional issues. *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990).

In support, Dr. Alsager relies on several out-of-state cases premised on the inapplicable regulatory schemes and case law. App. Br. at 24-27. The Florida Supreme Court struck down a statute requiring a real estate broker accused of engaging in various dishonest business practices which violated multiple Florida statutes governing the real estate profession to answer disciplinary information against him, but did not strike the requirement that he subject himself to depositions by the state during the adjudicatory process. *Florida ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487 (1973). The court considered the action "penal" in nature and that the Fifth Amendment was intended to protect the accused in penal proceedings. *Id.* at 490-91. That court's ruling is consistent that penal proceedings are more akin to criminal cases than are remedial civil enforcement actions, but discordant with Washington law since *Kindschi* that medical disciplinary actions are remedial, not penal.

Dr. Alsager's other primary case also conflicts here. In *In re Woll*, 194 N.W.2d 835, 840 (1972), the court held that neither an adverse inference nor a comment could be made from invocation of the Fifth Amendment during a disbarment proceeding, relying on *Spevak v. Klein*, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). The *Woll* court's holding cuts against the long line of Washington cases since *Kindschi*

which have held that professional disciplinary cases deserve civil due process protections. No Washington case has ever held that criminal protections apply to professional disciplinary cases.

The *Spevak* Court held that the protections of the Fifth Amendment apply to the states through the Fourteenth Amendment and apply to lawyers alike with all citizens. *Spevak*, 385 U.S. at 514. When tax and financial records held by Mr. Spevak, an attorney, were subpoenaed, he invoked his Fifth Amendment privilege against self-incrimination and refused to produce them or testify. He was disbarred for invoking the privilege. The Court reversed on grounds that disbarment constituted compulsion within the meaning of the Fifth Amendment. In addition, the disbarment also deprived him of a hearing as to why the records should not be produced. *Spevak*, 385 U.S. at 518-19. *Spevak* held that the Fifth Amendment privilege may be invoked, by anyone, in civil proceedings as well as criminal proceedings where there is a real danger of criminal liability at issue. *Ikeda*, 43 Wn.2d at 457-58.

Spevak, however, does not require the far-reaching conclusions reached by the *Woll* court. And Michigan cases after *Woll* held that an attorney may not use the Fifth Amendment to avoid participating in a disciplinary proceeding. *In re Moes*, 205 N.W.2d 428, 430 (1973) (*Woll* did not support respondent's argument there that "because bar grievance

proceedings are quasicriminal in nature," requiring him to appear or respond violates his right against self-incrimination). Rather, the privilege is meant to protect against compulsory incrimination, not to shield one from "quasi-criminal" professional discipline. *Matter of Baun*, 232 N.W.2d 621, 624 (1975) (disbarment defendant had "no blanket right to refuse cross-examination on everything involved in proceedings").

Dr. Alsager's reliance on *Vining*, *Woll*, and *Spevak* also fails because the parties in those matters invoked the Fifth Amendment concerning actual criminal liability. In stark contrast to those cases, Dr. Alsager attempted to invoke the Fifth Amendment only for protection from "quasi-criminal" civil enforcement liability, no actual identified risk of criminal liability. To so allow would result in an expansive and unwarranted extension of the Fifth Amendment. This Court should soundly reject his arguments.

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C. Even Assuming The Fifth Amendment Applies, The Required Records Doctrine Allows The Board To Require Production Of Medical Records In A Board Investigation

1. The Required Records Doctrine Is An Exception To The Fifth Amendment

The required records doctrine[6] is a recognized exception to the privilege against self-incrimination. Even *assuming arguendo* this Court agrees that Dr. Alsager could lawfully invoke the Fifth Amendment to avoid "quasi-self-incrimination," the doctrine applies. The privilege does not allow physicians to hide or fail to provide records regarding the prescription of controlled substances from their regulatory boards.

Under the required records doctrine, the Fifth Amendment protection exists to shield private papers, but not to cover records which are required by law to be maintained and open for governmental inspection. *Shapiro v. U.S.,* 335 U.S. 1, 33 (1948). A three-part test is used to determine whether records are within the scope of the required records exception: (1) the purpose of the government's inquiry must be essentially regulatory; (2) the records should be of a type customarily kept; and (3) the records themselves must have assumed "public aspects." *Grosso v. United States,* 390 U.S. 62, 67-68 (1968);

[6] For a more full discussion of the required records doctrine, the Respondents adopt the required records discussion of its briefing in the consolidated appeal, Respondent's Brief at 32, § V(D)(1)-(5). RAP 10.1(g).

In re Grand Jury Proceedings v. Doe, 801 F.2d 1164 (9th Cir. 1986) (required records exception applied where California law required that physicians maintain and open for inspection records relating to their controlled substances prescriptions); *cf. In re Doe*, 711 F.2d 1187 (2nd Cir. 1983); *In re Kenny* 715 F.2d 51 (2nd Cir. 1983).

2. The State Constitution Does Not Prohibit The Required Records Doctrine

Dr. Alsager asserts that the required records doctrine will never be allowed in Washington because article I, section 7 of the state constitution provides broader protection than the Fourth Amendment. App. Br. at 30. He is wrong. The required records doctrine is not a Fourth Amendment doctrine. It is an exception to the Fifth Amendment. It states that certain documents are not privileged under the right against self-incrimination. Article I, section 7 provides no greater protection outside the search and seizure arena. *Ramm v. Seattle*, 66 Wn. App. 15, at 24-25, 830 P.2d 395 (1992).

3. The Privilege Against Self-Incrimination Does Not Shield Dr. Alsager From Disclosing Prescription And Other Medical Records

The patient records requested from Dr. Alsager during the Board's investigation fall within the scope of the "required records" exception. First, the investigator's request to Dr. Alsager for patient records was

regulatory. *Grosso,* 390 U.S. at 64-65. *See* RCW 18.130.180(9); RCW 18.130.050(7) (authority to conduct practice reviews); RCW 18.130.020(9) (defining "practice review"). Second, as an osteopathic physician, Dr. Alsager is legally required to keep prescription records and other patient records, the 2008 Order states that he does so, and he practices a profession where Board policy statements suggest patient records are customarily kept.[7] WAC 246-853-663(3)(e)(iv); *see also* former WAC 246-853-510-540 (repealed May 2, 2011), WSR 07-11-058; AR 1818-49. The third "public aspects" element of *Grosso* is satisfied by several statutes and regulations. RCW 70.225; RCW 70.225.020(1); RCW 70.225.020(2); RCW 70.225.040(3); RCW 69.50.302(a); RCW 69.50.304(a)(3); RCW 69.50.306; RCW 69.50.302(f); RCW 69.50.402(d) and (e); RCW 70.02.050(2)(a).[8]

Under Washington law, the *Grosso* test is satisfied. Even if Dr. Alsager's theory that the Fifth Amendment privilege applies fully to the Board's case is correct, the privilege would not shield him from providing prescription and patient records to the Board.

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[7] In fact, Dr. Alsager submitted an exhibit for the 2014 hearing demonstrating that he routinely keeps electronic medical records and dictates exams to an assistant who records them in real time. AR 843-46.

[8] Dr. Alsager's argument that requests for patient records violate the Health Insurance Portability and Accountability Act (HIPPA) is incorrect. App. Br. at 36. HIPPA regulations permit physicians to disclose medical records to licensing authorities. 45 C.F.R. §§ 164.512(a) and 45 C.F.R. §§ 164.512(d)(1). Thus HIPAA does not apply to the Board in disciplinary actions.

D. Finding 1.10 of the Board's Order Is Supported By Substantial Evidence

The only finding that Dr. Alsager challenges for lack of substantial evidence is Finding 1.10:[9]

> 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 writing 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 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.

AR 1711-12.

Dr. Alsager argues this finding lacks substantial evidence, by asserting that he completed the pain management course. This argument is a red herring. App. Br. at 9. Finding 1.10 does not mention whether Dr. Alsager completed a program in pain management.

[9] Dr. Alsager nominally challenges other findings for substantial evidence, but his other challenges are all contingent on the outcome of his constitutional arguments.

Prior to hearing, the parties stipulated to remove the issue concerning Dr. Alsager's attendance at a pain management course from the hearing proceeding:

> 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.

AR 1446. And yet, Dr. Alsager challenges Finding 1.10 of the 2008 Order "on the grounds that such Finding omits critical reference to the parties' Prehearing Stipulation set forth in Paragraph 2." App. Br. at 9. Dr. Alsager then refers to information not introduced at hearing because of the parties' agreement. App. Br. at 9, n. 11. The Court should reject his challenge because it is based solely on information outside the hearing record. RCW 34.05.558; *Clausing,* 90 Wn. App. at 870.

The Court should also reject his challenge to Finding 1.10 because whether he completed a pain management course in 2012 is immaterial to the validity of the finding. The finding is supported by the evidence of Dr. Alsager's prescribing behavior.

Additionally, Dr. Alsager argues that he completed the program by September 21, 2012; even if that were true and relevant, the final order relies on two prescriptions he wrote *after* September 21, 2012. None of

his arguments negate the fact that his prescribing schedule III controlled substances prior to September 21, 2012, were indisputably a violation of the Board's 2008 Order restricting such conduct. AR 1707-10.[10]

Therefore, the Board's finding that Respondent had not been rehabilitated is supported by substantial evidence.

E. The Remainder of Dr. Alsager's Assignments Of Error Lack Merit

1. The Sanction

Dr. Alsager asserts that the Board improperly failed to follow its own sanctioning rules. App. Br. at 47. An agency's determination of sanctions is accorded considerable judicial deference as it is peculiarly a matter of administrative competence. *Brown v. Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 16, 972 P.2d 101 (1998).

First, Dr. Alsager argues that the Board failed to consider any mitigating factors in derogation of the rules in chapter 246-16 WAC. But he misreads the rules. The list of mitigating and aggravating factors need only be used when determining sanctions by schedule. WAC 246-16-800(3)(d)(i)-(iii). Here, Dr. Alsager's violations did not fall under any sanction schedule. WAC 246-16-810 - 860. Dr. Alsager's

[10] *See* Dr. Alsager's attorney letter claiming that the last requirement under the 2008 Board Order was completed on September 21, 2012. AR 0206. However, he did not notify the Board that he believed he had completed the program or issue his "opinion letter" to the Board until November 14, 2012. AR 0201. All the prohibited prescriptions were written before November of 2012.

argument fails because he can demonstrate no Board duty to consider mitigating circumstances.

Second, Dr. Alsager contends that the Board failed to find that Dr. Alsager could "never be rehabilitated or can never regain the ability to practice with reasonable skill and safety." App. Br. at 48-49. His contention overlooks the plain language in the Board's order. Paragraphs 2.7 and 2.8 of the Board's order explain that no lesser measure could protect the public and that all attempts at rehabilitation had failed:

> 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.

AR 1713-15. The Order states that he cannot be rehabilitated and cites the correct statutory and WAC provisions containing the specific the language Dr. Alsager complains is missing. A finding that one "cannot" be rehabilitated and that one "can never" be rehabilitated is a distinction without a difference. The Court should reject Dr. Alsager's meritless challenge to the Board's sanction.

2. Appearance of Fairness

In a footnote,[11] Dr. Alsager contends that the Board's Presiding Officer erred by not disqualifying Dr. Shannon Markegard from the hearing panel.[12] App. Br. at 44, n.62. But he fails to articulate a legally cognizable argument under the Appearance of Fairness doctrine. In fact, there was no argument or evidence established in the administrative hearing that Dr. Markegard had: (1) prejudged the issues in the case; (2) demonstrated partiality evidencing a personal bias or prejudice against a party; or (3) had an interest where she stood to gain or lose by a decision either way.

Administrative decision-makers are presumed to perform their quasi-judicial functions properly and a person claiming an appearance of fairness violation is required to present specific evidence of a violation,

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[11] Prehearing and at hearing, Dr. Alsager requested for recusal/disqualification of certain Board members and the presiding officer. AR 96-101, AR 104-110, AR 944-58. The motions were denied. AR 278-88, AR 1435-41.

[12] The legislature intended the Board of Osteopathic Physicians to govern the practice of osteopathic medicine in the state of Washington through its seven members appointed by the Governor. These are to be comprised of one consumer member and six other members who "must have been in active practice as a licensed osteopathic physician in this state for at least five years immediately preceding appointment." RCW 18.57.003. If one takes the legislative requirements and overlies every disqualifier described by Dr. Alsager, there could be no hearing panel. The Board would have to utilize a panel comprised of only new Board members (unlikely that there are three of a total of seven); or find *pro tem* members who are Osteopathic physicians but who are retired (so as not to be competitors) but who have been retired very recently (must have been in practice for the immediate five years preceding appointment).

not speculation. *City of Lake Forest Park v. State of Wash. Shorelines Hearings Bd.*, 76 Wn. App. 212, 217, 884 P.2d 614 (1994). Board members are treated the same as judges in terms of the appearance of fairness doctrine and the same legal standards apply. RCW 34.05.425(3); *Faghih v. Washington State Dept. of Health, Dental Quality Assur. Comm'n*, 148 Wn. App. 836, 845, 202 P.3d 962, *rev. denied*, 166 Wn.2d 1025 (2009); *Johnston*, 99 Wn.2d 466 at 475. The "presumption is that public officers will legally perform their duties until the contrary is shown." *Faghih,* 148 Wn. App. at 843 (other citations omitted).

Without argument or evidence, Dr. Alsager simply asks the Court to join in his assumption that: (1) any prior exposure by a panel member to Dr. Alsager's practice should disqualify them from considering his case; and (2) that Dr. Markegard, and all osteopaths in the South Sound area, in particular Maple Valley, were his direct financial competitors. App. Br. at 44, n. 62. Dr. Alsager presents no evidence to rebut the presumption that Board members perform their duties properly. He "is required to present specific evidence of a violation, not speculation." *City of Lake Forest Park,* 76 Wn. App. at 217. Without doing so, his argument fails.

3. Admissibility of State Prescription Monitoring Program and Pharmacy Records

Next, Dr. Alsager asserts that the admission of a printout from the state prescription monitoring program, showing prescriptions he had written, and admission of pharmacy records was error because it was done "without foundation or proof of a chain of custody." App. Br. at 43 (citing his motion at AR 1002).

Finding that the investigations had been Board authorized, the Presiding Officer admitted the State prescription monitoring program data and pharmacy records during the prehearing conference as Exhibits D-15 and 16. *See* AR 1643-44; WAC 246-11-390(5). When Dr. Alsager challenged the chain of custody and authenticity of the records at hearing, the Presiding Officer cited his prehearing order No 12, stating, "I have previously ruled that these exhibits will be admitted." AR 2081 lines 5-7. He further explained that, "the documents are admitted. So if you're challenging the authenticity at this point, I believe our procedural rules preclude that from happening." AR 2081, 13-15.

The trial court is "necessarily vested with a wide latitude of discretion in determining admissibility which will not be disturbed absent clear abuse." *State v. Campbell,* 103 Wn.2d 1, 21, 691 P.2d 292 (1984). Here, the model rules for Boards require parties to offer and object to

evidence at a prehearing conference so that exhibits can be pre-admitted. WAC 246-11-390. The Presiding Officer did not abuse his discretion by following established hearing procedures.

Further, the authenticity and chain of custody of the prescription records were established by the investigator's testimony and Dr. Alsager's silence. Dr. Alsager's counsel questioned the investigator, and argued to the panel about the weight of the admitted evidence. The investigator testified that Exhibit 15 was a copy of the prescription monitoring program report that she obtained regarding Dr. Alsager. AR 2068. She further testified that Exhibit 16 was a copy of the prescription profile and actual prescriptions written by Dr. Alsager which she obtained from Costco Pharmacy. AR 2068.

On cross-examination, the investigator testified that the scripts are connected to Dr. Alsager's DEA registration. AR 2078. On re-direct, she testified that the signature on the prescriptions at D-16 matched the other signatures of Dr. Alsager that she had seen. AR 2090. Finally, she stated that she had seen his signature on previous orders issued to him through the Board. The investigator handled the previous investigations of Dr. Alsager, including her investigation of Patients A – H in the 2008 matter. There, she also reviewed prescriptions signed by him. AR 2091-92.

Finally, Dr. Alsager had the opportunity to avow or disavow that he had written the prescriptions, that the prescriptions were written for schedule III controlled substances, or that he had some other understanding of the Order. AR 2057-64. Dr. Alsager was asked whether he received the request from the Board investigator and refused to produce patient records. AR 2063-64. He was also given the opportunity to testify about what he had learned since the 2008 Order or how he had changed his practice in light of those findings. AR 2060-63. Dr. Alsager did not answer these questions. Therefore, his argument fails.

4. Assignments Of Error Not Argued Are Waived

Dr. Alsager assigns error to all but two prehearing orders issued in this case. However, he fails to discuss or argue them in his brief. These assignments of error are therefore waived. *Brown*, 94 Wn. App. at 13.

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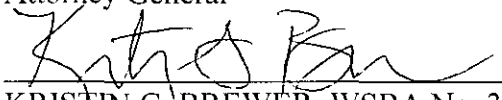
VI. CONCLUSION

Dr. Alsager has not demonstrated any error by the Board or constitutional infirmity in its procedures or the statutes that govern them. The Department therefore respectfully requests that this Court deny Dr. Alsager's petition for judicial review.

RESPECTFULLY SUBMITTED this 23rd day of September, 2015.

ROBERT W. FERGUSON
Attorney General



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STATE OF WASHINGTON

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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; WASHINGTON STATE DEPARTMENT OF HEALTH; STATE OF WASHINGTON, JOHN F. KUNTZ, JOHN WIESMAN, Dr. PH, MPH; and CATHERINE HUNTER, D.O., Respondents.	DECLARATION OF SERVICE

I, Diane Graf, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.

2. On September 23, 2015, I deposited via U.S. mail, postage prepaid, a copy of the Brief of Respondents to:

RHYS STERLING
PO BOX 218
HOBART, WA 98025-0218

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of September, 2015 at Olympia, Washington.

DIANE GRAF, Legal Assistant