

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
SUPREME COURT OF
STATE OF WASHINGTON
FEB 27 3:19

BY RONALD R. CARPENTER

GEOFFREY S. AMES, M.D.,

CLERK

Petitioner,

vs.

WASHINGTON STATE HEALTH
DEPARTMENT MEDICAL QUALITY
HEALTH ASSURANCE COMMN.,

Respondent.

PETITIONER'S ANSWER TO AMICUS CURIAE BRIEF OF:
(1) AMERICAN ASSOCIATION FOR HEALTH FREEDOM;
(2) CITIZENS FOR HEALTH;

(3) WaCHOICE

William R. Bishin P.S.
1404 East Lynn
Seattle, WA 98112
(206) 323-7175
By: William R. Bishin No. 8386

CERTIFICATE OF SERVICE

The undersigned served this
Petitioner's Answer to Amicus Curiae Brief, etc. on
Respondent and *Amici* on this date by placing
it properly stamped in the U.S. MAIL addressed as follows:

Kim O'Neal, Esq.
P.O. Box 40100
Olympia, WA 98504

Michael McCormack, Esq.
26828 Maple Valley Hwy #242
Maple Valley, WA 98038

February 27, 2009

WILLIAM R. BISHIN

TABLE OF CONTENTS

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

Some Background Legislative Facts for Understanding and Evaluating the Issues Raised by the <i>Amici</i> Brief	1
A. Legislative Facts: Unnecessary and Ineffective Mainstream Health Care in the United States	1
B. The Lack of Scientific Evidence for Mainstream Treatment and Testing	3
<i>Brown, Jaffe</i> and the Nature of the Burden of Proof That the <i>Jaffe</i> Doctrine Places on a Respondent	4
A. <i>Brown</i> and <i>Jaffe</i> Do Not Support the Decision in this Case	7
B. <i>Jaffe</i> Is Objectionable Because it Denies Respondents the Opportunity to Learn The Agency's Legal Theories	10
C. <i>Amici's</i> Concern with the Burden of Proof May Reflect Another Unarticulated Concern about the <i>Jaffe</i> Doctrine	15
Conclusion	18

TABLE OF AUTHORITIES

Cases

Brown v. Dental Disciplinary Board, 94 Wn.App. 7, 972 P2d 101 (Div. 3, 1998)	4, 5, 8, 9, 10
---	----------------

Davidson v. Department of Licensing, 5
33 Wn.App. 783, 657 P.2d 810 (Div. 1, 1983)

Hart Twin Volvo Corp. v. 7
Commissioner of Motor Vehicles,
165 Conn. 42, 327 A.2d 588 (1973)

In re Disciplinary Proceeding Against Romero,
6 152 Wn.2d 124, 137, 94 P.3d 939, 945 (2004)

Jaffe v. Dept. of Health, 4,
5, 6, 9, 10, 11 135 Conn. 339, 64 A.2d 330 (1949)
13, 14, 15, 16

Levinson v.
Connecticut Bd. of
14, 15 Chiropractic Examiners,
211 Conn. 508, 560 A.2d 403
(1989)

N.L.R.B. v. Tennsco Corporation, 7
339 F.2d 396 (6th Cir. 1964).

Rodale Press, Inc. v. F.T.C.,
7 407 F.2d 1252 (D.C. Cir. 1968)

Statutes and Regulations

RCW 34.05.461(5) 5, 9
RCW 34.05.452(5) 9
WAC 246-11-260 6, 13

Other Authority

Brownlee, Overtreated 1, 2, 3, 4, 16
(Bloomsbury USA: New York: 2008)

Porter, The Greatest Benefit of Mankind: 3, 4, 16
A Medical History of Humanity (Norton ed. 1999)

Table of Authorities

Preliminary Statement	1	
Some Background Legislative Facts for Understanding and Evaluating the Issues Raised by the <i>Amici</i> Brief		1
A. Legislative Facts: Unnecessary and Ineffective Mainstream Health Care in the United States	1	
B. The Lack of Scientific Evidence for Mainstream Treatment and Testing	3	
<i>Brown</i> , <i>Jaffe</i> and the Nature of the Burden of Proof That the <i>Jaffe</i> Doctrine Places on a Respondent	4	
A. <i>Brown</i> and <i>Jaffe</i> Do Not Support the Decision in this Case	7	
B. <i>Jaffe</i> Is Objectionable Because it Denies Respondents the Opportunity to Learn The Agency's Legal Theories	10	
C. <i>Amici's</i> Concern with the Burden of Proof May Reflect Another Unarticulated Concern about the <i>Jaffe</i> Doctrine	15	
Conclusion	18	

PRELIMINARY STATEMENT

Petitioner Geoffrey S. Ames, M.D. hereby submits his Answer to the Amicus Curiae Brief of American Association for Health Freedom, Citizens for Health, and WaChoice (hereafter “amici”). Petitioner agrees with the underlying thrust of much of what amici argue. He does, however, disagree with some of their important assertions about the law and the legal consequences of the actions of DOH and the Commission. He is also concerned about assertions and analysis by amici that may or may not be literally correct, but even if defensible on analysis may spread further confusion or obscure more important issues if no attempt is made to clarify the apparent concerns underlying them. Because of space limitations, Petitioner does not discuss all of his disagreements with and all of the questions raised by amici’s brief. The limited discussion that follows should not be viewed as implicit agreement with matters not addressed.

SOME BACKGROUND LEGISLATIVE FACTS FOR UNDERSTANDING AND EVALUATING THE ISSUES RAISED BY THE AMICI BRIEF

A. Legislative Facts: Unnecessary and Ineffective Mainstream Health Care in the United States

Extensive studies by medical researchers headquartered primarily at Dartmouth medical school, the results of which have been known but not widely publicized for years, are reported and explained in Brownlee, *Overtreated: Why Too Much Medicine is Making Us Sicker and Poorer*

(Bloomsbury USA: New York: 2008). Some of the findings reported are set out below.

In 2006, we spent an estimated \$2.1 trillion on health care. That's almost as much as the worldwide market for petroleum, and more than the United States spends on food [A]nnual health care costs are predicted to] hit \$4.1 trillion by 2016, eating up nearly 20 percent of our gross domestic product. We currently spend nearly \$6,000 a piece on health care, two and a half times the median for the rest of the industrialized world.

What do we get for our money? Politicians are constantly telling us we have the best health care in the world, but that's simply not the case. By every conceivable measure, the health of Americans lags behind the health of citizens in other developed countries, starting with life expectancy. . . .

[W]hile . . . wasteful bureaucratic overhead, malpractice, moral hazard, and high prices . . . contribute to the high cost of American medicine, throughout the political debate over our health care mess, *the most important piece of the puzzle has been consistently overlooked. . . . [:] unnecessary care.*

. . . .
As of 2006, when the total healthcare budget reached two trillion dollars a year, Americans were spending as much as *seven hundred billion dollars on health care that not only did them no good*, but caused unnecessary harm.

Id at 2, 4-5, 37 (emphasis added); see also *id* at 153-154, 158:

In 2005, the Journal of the American Medical Association published a survey of 824 Pennsylvania doctors in high risk specialties, including obstetrics, neurology, and emergency medicine; 59 percent of those surveyed said they routinely ordered unnecessary tests, including imaging tests. *Doctors know perfectly well that they are ordering useless imaging tests*, but when you ask them why they do

it, they offer conflicting reasons [such as fear of malpractice lawsuits and patient demand]. . . . [But] [n]o study ever conducted has shown that malpractice worries or patient demand can account for any more than a tiny fraction of unnecessary care.

Emphasis added. And see:

Wave after wave of protest has arisen against the medical system and the medical establishment in recent decades. . . . It was shown that many procedures benefit doctors and other medical professionals and technocrats more than patients, while others are positively harmful. . . .

. . . . Everyone is aware that scientific medicine has not proved successful against lethal diseases such as cancer, many chronic conditions . . . and other severe syndromes

Porter, *The Greatest Benefit of Mankind: A Medical History of Humanity* 686, 689 (Norton ed. 1999) (emphasis added). Unfortunately, what may be known by “everyone” in Professor Porter’s circle is not and has not been known by the general public. See Brownless, *supra*, at 6 (“Americans believe devoutly in the power of medicine not only to heal but to cure.”)

**B. The Lack of Scientific Evidence For
Mainstream Treatment and Testing**

Mainstream medical regulators challenge alternative health care modalities when supported by empirical, but not “scientific” evidence.

As to the scientific support for mainstream health care, see the following:

[S]tunningly little of what physicians do has ever been examined scientifically, and when many treatments and procedures

have been put to the test, they have turned out to cause more harm than good. In the latter part of the twentieth century, dozens of common treatments . . . have ultimately been shown to be *unnecessary, ineffective*, more dangerous than imagined, or sometimes more deadly than the disease they were intended to treat. By the 1990s, progressive doctors were talking about a new movement called “evidence-based medicine,” but well into the twenty-first century, much of what doctors do remains evidence-free.

....

David Eddy, a heart surgeon turned mathematician turned health care economist and a leader in the evidence-based medicine movement, estimates that *as little as 15 percent of what doctors do is backed up by valid evidence*.

....

Deans of medical schools often tell graduating doctors that half of what they have learned in the past four years is wrong – but nobody knows which half.

Brownlee, *Overtreated*, *supra*, at 27, 237, 28 (emphasis added). See also Porter, *supra*, at 686 (“Though new drugs have to surmount the hurdle of randomized double-blind trials . . . , strict trials have *rarely* been conducted for myriad other medical procedures, including surgical interventions and *diagnostic tests*”) (emphasis added).

BROWN, JAFFE AND THE NATURE OF THE BURDEN OF PROOF THAT THE JAFFE DOCTRINE PLACES ON A RESPONDENT

Although it is not completely clear, the structure of amici’s critique suggests that they are criticizing *Brown v. Dental Disciplinary Board*, 94 Wn.App. 7, 972 P2d 101 (Div. 3, 1998) for authorizing the result in this case, and arguing that both *Brown* and the *Jaffe* doctrine permit health care

regulatory agencies to effectively shift “the burden of proof” on all issues requiring expert testimony from the agency to the accused. See Jaffe v. Dept. of Health, 135 Conn. 339, 64 A.2d 330 (1949). Amici argue that Brown does this by construing RCW 34.05.461(5) to allow a hearing panel to base decisions on private, undisclosed views, not in evidence or on the record.

For the reasons stated in his other briefing before this Court, Petitioner agrees that Brown’s adoption of the language from Jaffe and Davidson v. Dept. of Licensing, 33 Wn.App. 783, 657 P.2d 810 (1983) was a serious mistake. However, Petitioner parts company with amici as to other criticisms of Brown and as to the specific charge leveled against both Brown and Jaffe. The errors in the amici brief may create unnecessary confusion and almost certainly obscure the most important objections to Jaffe that amici may be concerned about.

Amici’s criticism that Brown and the Jaffe doctrine assertedly shift the burden of proof prompts Petitioner’s main concern. It is certainly true that the Court of Appeals, and perhaps the Commission in its finding that Patient One did not have an egg allergy, effectively ruled against Petitioner for supposedly failing to introduce evidence of the efficacy of his device. It is also true that DOH, which had the burden of producing persuasive evidence of inefficacy, risk of harm and of other matters

requiring expert testimony, did not offer such evidence. Yet it does not appear, except perhaps in a metaphorical sense, that the Jaffe doctrine is responsible for or justifies this or that it amounts to a shift to Petitioner of the burden either of production or of nonpersuasion.

The Jaffe doctrine does place a burden on an accused in Petitioner's position, but it is a far more serious burden than the burden of proof and a far more difficult burden for a party to discharge. It is an evidentiary burden, but it is a far heavier evidentiary burden than the burden of production or of nonpersuasion. There is some evidence in amici's brief that it is actually to this burden that amici are referring when they speak of shifting the burden of proof. But, if so, the point will be lost unless the difference between the legal burden of proof and this far more onerous burden is clarified.

The burden that Jaffe places on an accused physician in the position of parties like Dr. Ames is the burden of defending himself against one or more legal theories of which he has not been informed and which in a case like this one he would not discover from the statement of charges, from discovery, or from the case that the agency puts on against him. This objection is not the one based on WAC 246-11-260 and its requirement that the statement of charges state the "factual basis" of the Department's case. Nor is it the due process objection that charges be

“clear and specific,” affording the respondent “an opportunity to anticipate, prepare, and present a defense.” In re Disciplinary Proceeding Against Romero, 152 Wn.2d 124, 137, 94 P.3d 939, 945 (2004). Instead, this is a notice problem created by Jaffe, but rarely discussed at any length, because the courts rejecting Jaffe tend to emphasize its destruction of meaningful judicial review and the requirement that findings be based exclusively on the record.

It has been held that due process requires that a defendant be given notice of the legal theories on which her liability is allegedly predicated. Hart Twin Volvo Corp. v. Commissioner of Motor Vehicles, 165 Conn. 42, 47-48, 327 A.2d 588, 591 (1973) (“due process requires that the notice given must advise the party of the facts or conduct alleged to be in violation of the law and must fairly indicate *the legal theory under which such facts are claimed to constitute a violation* of the law”) (emphasis added); see Rodale Press, Inc. v. F.T.C., 407 F.2d 1252 (D.C. Cir. 1968); N.L.R.B. v. Tennesco Corporation, 339 F.2d 396 (6th Cir. 1964). Jaffe, may not shift the burden of proof from the agency to the respondent, but it does create a new, often wholly impossible “burden of proof,” that it places solely on the respondent, a burden of proving she is not guilty without being apprised of the theory on which her purported guilt is based.

Because this objection requires more than a few sentences to make

it clear, further discussion will be deferred until other objections to amici's argument are addressed.

A. Brown and Jaffe Do Not Support the Decision in this Case

Amici focus their argument on the Commission's failure to offer expert testimony to support the claim that Petitioner created a risk of harm and that his device was inefficacious or unnecessary. Amici criticize Brown for providing authority to do this. But Brown does not and could not lawfully provide such authority. As the Brown court stated, "Brown does not dispute any of the agency's findings. He simply disagrees with their assessment of the standard of care." 94 Wn.App at 13.

In Brown the only issue was the "propriety of medical conduct," *i.e.*, whether Dr. Brown violated the standard of care. The evidence of *three* dentists – one in writing, the other two at the hearing – was introduced against Dr. Brown and the evidence was that the respondent had performed specified, fully described standard dental procedures improperly, had fallen below the standard of care in doing so and had thereby caused his patients specified harm. *Id* at 14-16.

Thus, to the extent that Brown permits an agency to forego producing expert testimony to prove a critical fact in its case, it does so only as to the issue of the standard of care and its claimed violation. It does not do so, for example, as to such issues as whether a patient had an

allergy, whether a device is efficacious, whether the device or the practitioner created a risk of harm and what that risk was. It thus cannot support the Commission's decision in this case, because Brown does not in any way authorize making findings on the factual issues just mentioned without expert testimony. Indeed, it is not even good authority for permitting a finding that the standard of care was violated without expert testimony, because there was ample expert testimony on that issue.

Interestingly, contrary to amici's argument, Brown does not rely on RCW 34.05.461(3), which it does not cite. Instead, Brown relies on RCW 34.05.452(5), which permits official notice of technical facts, but also requires that the parties be given the opportunity to contest them on the record before they may be noticed. 94 Wn.App. at 13-14. Thus, that statute does not permit an agency to keep the expert knowledge it uses in its decision to itself and outside the record. Nor does Jaffe rely, as amici's argument suggests they may believe, upon the authority of a medical board to use its expertise to evaluate and draw inferences from evidence.

Instead, Jaffe relies on a mistaken analogy with civil court cases decided by lay fact finders. Jaffe assumes, without demonstrating, that the only reason why expert testimony is ever required is that the fact-finder is not competent to understand the technical issues in a case. As Petitioner argues elsewhere, one of Jaffe's many logical and factual

errors was its failure to recognize that the major reasons why courts require expert testimony in disciplinary cases have nothing to do with the fact-finder's expertise.

The Court in Brown was not made aware of this by Dr. Brown's counsel, who cited only civil tort cases in support of his position, not administrative disciplinary cases, never mentioning any of the objections that the majority of courts had to Jaffe and the cases that followed it. See Brown, *supra*, Brief of Appellant, No. 16725-9-111, pp. 9-13. This is another reason why amici should not have viewed Brown as authority for what the Commission and the Court of Appeals did here on the issues of harm and efficacy, even though they purported to rely on the case.

**B. Jaffe Is Objectionable Because it Denies Respondents
The Opportunity to Learn the Agency's Legal Theories**

In criticizing Jaffe, most courts may mention but do not elaborate on its effect on the ability of the accused provider to defend herself at the evidentiary hearing. *Amici* in emphasizing the burden of proof may, at least in part, be referring to this problem, but if so they may be obscuring its importance by framing it the way they have.

Petitioner complains that he was not given notice in the statement of charges of, for example, the later claims that the patient did not have an egg allergy, that Petitioner had incorrectly said that he did, that the patient

was treated for the allergy with the device, and that the patient was told that he had been cured of an allergy he did not have. Petitioner's complaint is of a failure to apprise him that certain claims about the facts were in issue until during or after the hearing.

But he might have had little or no grounds for complaint if the Department had identified an expert witness to testify in support of the claims that, for example, the device was inefficacious and that using such a device was negligent. Counsel often need the depositions of expert witnesses to discover the facts on which their opponents' legal theories are based, but they also need those depositions to understand and create a defense against the rationales or legal theories themselves. The *Jaffe* doctrine denies an accused health care provider this often essential means of discovery.

The attorney work product doctrine is a major obstacle to obtaining this information, because it is usually invoked to justify a refusal to disclose legal theories. Information that might have been obtained in a civil case from the deposition of a plaintiff cannot be obtained in a disciplinary proceeding, because the plaintiff is a state agency. In this case, Petitioner attempted to depose the reviewing commission member – the commission member who oversaw the investigation of Petitioner and then recommended that charges be brought against him – and the Department staff member who had been

investigating devices like Petitioner's for ten years and who specifically interviewed Petitioner and questioned him about his use of his device. CR 173-204. When the Department objected, the health law judge quashed *both* of Petitioner's subpoenas, without allowing Petitioner to ask even one question of either witness. CR 280.

Standard interrogatories should help in obtaining this information. These ask, for example, for the facts on which a contention is based. But opposing counsel frequently evade or deflect such questions, and pursuing adequate answers is often futile and expensive. These problems are especially acute in a medical commission proceeding, because interrogatories cannot even be propounded without permission of a health law judge and attempting to compel discovery by such a judge can be far more cumbersome and frustrating than doing so in a court, which has greater power and inclination to sanction discovery abuse.

Accused providers, especially alternative providers, do not have the funds in most cases for extensive discovery motion practice. That is one reason why justice requires that the statement of charges specifically disclose the alleged facts on which a claim of unprofessional conduct is based.

It is also why it may be essential that if charges are based on allegations of technical facts, they be supported by an expert who can be deposed as to

the facts and the reasoning on which she is basing her opinion. In this case, for example, the finding that the device in question was inefficacious was purportedly based on a finding that the patient did not have an egg allergy and the finding that the device supposedly said that he did.¹

The finding that there was no egg allergy was critical to the decision in the case. Had there been an expert identified, that expert could have been deposed and would have given Petitioner notice of this theory. Petitioner would then have known that the existence of the allergy was in question and would also have been told what evidence the expert was relying on. He then could not have complained about lack of notice of either of these critical facts or the legal theory of the case, even though they had not been stated in the initial or amended statement of charges. This applies as well to all of the other asserted facts forming the basis of the conclusion that Petitioner had been negligent and had promoted for personal gain an inefficacious device. They would all have come out in the expert's explanation of his opinions and their evidentiary grounding, had there been an expert.

The *Jaffe* court does not seem fully aware of the argument

¹ To avoid further confusion, Petitioner hastens to remind the Court that the findings show that it was a muscle test, facilitated by using the device to generate the homeopathic signals of eggs, and a blood test, that suggested the allergy, not the device itself.

that its doctrine deprives the accused of notice. It seems to say that the accused does not need the expert's testimony to inform himself of facts and theories if the statement of charges is sufficiently specific. *Jaffe, supra*, at 352, 354-55. But *Jaffe's* justification for depriving an accused physician of an expert to depose and examine at trial evades the issue and displays a lack of concern for procedural due process, which may reflect the primitive state of due process law when *Jaffe* was decided in 1949.

The charges should be specific, especially where they can be amended at will until the day before the hearing. WAC 246-11-260. But it is not practical to require the statement of every supporting evidentiary fact, even if it is an important one. Yet the accused, in order to defend herself, is still entitled to know what those alleged facts are. A deposition of the expert is a standard way to provide that information.

More importantly, the regulation requires a statement of the facts and the law allegedly violated, but does not require that the legal theories that tie the facts and the law together actually be stated. Those theories often cannot be inferred simply from a statement of the facts and the allegedly relevant legal authority. Nor would requiring excessively detailed charges serve public policy, because they would create traps that would allow unprofessional conduct to go unsanctioned when the omission was merely technical. Thus, merely requiring that charges be

even more specific than the law now requires would not solve the notice problem created by Jaffe.

In 1989, after Connecticut enacted a law to require public members on its disciplinary boards, the Connecticut Supreme Court revisited Jaffe and reaffirmed it. Levinson v. Connecticut Bd. of Chiropractic Examiners, 211 Conn. 508, 525, 560 A.2d 403, 411-412 (1989). A careful reading of Levinson would provide further evidence of how indefensible Jaffe was, because the Levinson court is unable to present even one colorable argument that fairly meets any of the objections made by the majority of courts to Jaffe.

Petitioner is concerned here, however, with the Levinson court's response to the objection that Jaffe denies accused practitioners notice of the case against them. See *Id* at 531, at 414. Levinson frames this issue as whether "expert testimony was required to allow the doctors to cross-examine witnesses and present rebuttal evidence." *Ibid*. As to the right to cross-examine, the Levinson court relies on Jaffe's contention that the hearing panel could disregard the testimony of any expert witness. From this it concludes that the right to cross-examine such witnesses is not as valuable as it is in other cases. Whether cross-examination is or is not *less* valuable, however, the question is

whether cross-examination has significant value in a disciplinary proceeding and the Levinson court says nothing to suggest that it does not.

No experienced litigator could deny that in many cases cross-examination of such witnesses is essential to due process. Moreover, it promotes public policy by disabusing hearing panels of faulty preconceptions.

But the important point for present purposes is that the Levinson court ignores the need of the accused for notice of the entire case against her, both before and at the hearing. This is most obvious in the court's response, or absence of response, to the contention that expert testimony is needed to allow the accused to present rebuttal evidence. *Id* at 531, 414-415. In short, the court simply gives no actual reason for denying the ability to put on evidence to rebut the case that the expert's testimony would disclose. *Ibid*.

**C. Amici's Concern With the Burden of Proof May Reflect
Another Unarticulated Concern About the *Jaffe* Doctrine**

At the same time that the Jaffe doctrine denies a respondent notice of the agency's legal and factual theories, it also denies her one of the most important means of meeting the onerous burden this denial places on her. This may also be implicit in amici's concern about the shifting of the burden of proof, but the point could be obscured if not made explicit.

Jaffe limits the ability of an alternative physician to show that a

prosecution against her is based on a double standard, one that would not be applied to a conventional provider. Courts and lawyers are understandably skeptical about “conspiracy theories” and claims of discrimination. Yet Petitioner insists that there will be few cases against an alternative provider for engaging in some form of alternative practice that will be based on anything other than a double standard.

That this case involves double standards is suggested in part by the quotations above from Brownlee and Porter showing how much of mainstream medicine is inefficacious and unnecessary and how little of mainstream medicine is supported by the kind of evidence the Commission argues on appeal (but in its Order does not so find) should support Petitioner’s use of his device.

If an alternative provider is to persuade a court that there is a double standard in play, she often needs to establish it through cross-examination of a conventional provider called by the regulatory body. The agency’s expert, no matter how prejudiced against alternative care, can rarely deny under oath basic facts about his field that a judge would not know. Thus, the alternative provider can often establish in this way that the standard of conduct or of evidentiary support she is accused of violating is not one that actually governs or that is actually enforced against providers like the expert witness. It is that expert’s admissions

about health care in the respondent's field that will often have the most credibility and will give a reviewing court the confidence to thwart an attempt by a panel of orthodox providers to impose standards on an accused alternative provider that it would never impose on itself.

For example, at the root of the decision against the Petitioner here is the finding and conclusion that he used an inefficacious device and that by so doing he engaged in unprofessional conduct. There was no finding, however, that he knew the device was inefficacious or that he had reason to know it. Had the Department called an expert witness to testify that the use of an inefficacious device in itself was negligence and created an unreasonable risk of harm, Petitioner could have brought to the panel's, and ultimately to the courts', attention on cross-examination facts about the use of inefficacious devices, treatments and tests by conventional physicians. These would have cast substantial doubt on the good faith of any claim that merely using a device which may later be asserted to be inefficacious or unnecessary is and could be, without preferring charges against most mainstream physicians, considered unprofessional.

CONCLUSION

There are other objections to formulations advanced by amici in their brief which space does not permit Petitioner to describe. But none of Petitioner's objections should obscure the fact that amici's position is

at bottom spot on. It recognizes and deplors the departures from due process and the rule of law with which this case is pervasively affected. Its emphasis on the impropriety of government regulation in the absence of harm should be taken to be fundamental.

Respectfully submitted this 27th day of February 2009.

LAW OFFICES OF
WILLIAM R. BISHIN, P.S.

By _____
William R. Bishin WSBA No. 8386