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SUPREME COURT OF
STATE OF WASHINGTON

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GEOFFREY S. AMES, M.D.,

Petitioner,

vs.

WASHINGTON STATE HEALTH
DEPARTMENT MEDICAL QUALITY
HEALTH ASSURANCE COMMN.,

Respondent.

FILED
JAN 18 2008
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STATE OF WASHINGTON

**PETITIONER'S MEMORANDUM IN RESPONSE TO
AMICUS BRIEF OF WaCHOICE**

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CERTIFICATE OF SERVICE

The undersigned served this
Petitioner's Memorandum on Respondent and Amicus
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January 18, 2008

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FILED AS ATTACHMENT
TO E-MAIL

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**PETITIONER'S MEMORANDUM IN RESPONSE TO
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Amicus, as does Petitioner, urges the grant of review in this case, and makes what Petitioner believes to be important and powerful points about the devastating effect on alternative health care that would follow a refusal to rein in the Medical Commission. Petitioner thus would like to respond solely by acknowledging its concurrence and foregoing any further comment. However, because of the peculiar nature of this case, Petitioner is concerned that the amicus brief in making its points, sometimes elliptically, may subtly, but adversely affect the weight of the arguments in the Petition for Review.

For example, Amicus does not cite authority in support of important points. Although this is no doubt due to the stringent page limitations, this may mistakenly imply that no such authority exists. Petitioner will provide some of that authority. *See e.g., Franz v. Board of Med. Qty Assur.*, 31 Cal.3d 124 (1982); *McKay v. State Board of Medical Examiners*, 103 Colo. 305, 314-315, 86 P.2d 232, 237 (1938).

In deciding whether to grant review of the Medical Commission decision in this case, and, particularly, of the use by the panel below of the Washington decisions that rely on *Jaffe v. State Dept. of Health*, 135 Conn. 339, 64 A.2d 330 (1949), there are certain considerations that Amicus does not mention. This creates concern that these considerations will be minimized

or even overlooked by this Court. They include:

1. The Jaffe position reflects a minority view in this country and the panel and Court of Appeals decisions in this case place Washington, to Washington's discredit, squarely in that minority. See e.g., Martin v. Sizemore, 78 S.W. 249, 271 (Tenn. Ct.App. 2001).

2. Every leading court or jurisdiction in this country that has considered the doctrine has rejected Jaffe's language and reasoning. See e.g., Franz, below.

3. Jaffe has not only been rejected by a majority of courts that includes all of the leading jurisdictions that have considered it, it has been rejected in the strongest language – the courts who have rejected it consider it violative of basic due process and administrative law principles as well as inconsistent with realities of modern-day regulation that did not exist when Jaffe or, for that matter, Davidson v. Dept. of Licensing, 33 Wn.App. 783, 657 P.2d 810 (1983) and Johnston v. Medical Board, 99 Wn.2d 466, 663 P.2d 457 (1983) were decided.

The Amicus brief does not reflect awareness that the Washington courts that invoke Jaffe (Davidson and Brown v. Dental Board, 94 Wn.App. 7, 972 P.2d 101 (Div. 3, 1998) or use language that appears to be borrowed at least in part from it (Johnston) were never told that Jaffe was a minority decision. The Amicus brief does not appear to be aware that the

courts in Davidson, Brown and Johnston were never furnished with a critique of Jaffe's reasoning by any of the counsel in those cases.

In addition, as strong as may be the underlying critique of Jaffe presented in the Amicus memorandum, in Petitioner's view it does not convey just how wrong that case is. And where this Court must make a discretionary decision as to whether to consider Jaffe's validity and whether it should be allowed to be the law of this State, Petitioner considers it imperative that the Court realize that Jaffe is not just a controversial decision which may be in error. As a judicial decision it is a disaster. Despite the surface plausibility of its language, Jaffe is a textbook example of the kind of legal reasoning and decisionmaking that every law student who has completed his first year of law school, and has had a chance to "think like a lawyer" about it, should recognize as the product of radical intellectual confusion and illogic, and extraordinary naivete about the facts of medicine and medical practice. Jaffe is seen as an embarrassing aberration once a lawyer or judge takes a critical look at it.

The problem in Washington was that in the cases that appeared to use Jaffe's reasoning counsel for the affected licensees never asked the courts to *take* a critical look at Jaffe's reasoning. In addition, Jaffe's holding about the need for expert testimony regarding standard of care and competence were unnecessary to sustain the administrative decisions under review in Davidson,

Brown and *Johnston*. Thus, it is not surprising that the courts in those cases never subjected *Jaffe* to actual critical scrutiny and that there is no discussion in any of them of contrary decisions and reasoning from other states.¹

The most obvious intellectual confusion affecting the *Jaffe* court stemmed from analogizing the administrative law problem before it to situations in which expert testimony is offered in civil cases and is permitted only when it might aid a lay factfinder in deciding the factual issues those cases raise. *Jaffe, supra.*, 135 Conn. at 348, 64 A.2d at 335. The *Jaffe* court's reasoning assumes that the only purpose for expert testimony in a medical board disciplinary proceeding would be to aid the finder of fact in making a factual determination about a matter beyond the ken of a layperson. It concluded, on the basis of this assumption, that such expert testimony was

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The *Johnston* court did not cite *Jaffe* even though it had been cited by the Medical Board in its briefing, instead relying on an administrative decision that had nothing to do with expert testimony on health care matters. It is thus possible that this Court in deciding *Johnston* deliberately chose not to adopt *Jaffe*, even though some of its language sounds like a paraphrase of some of *Jaffe*'s language. In *Johnston* there was substantial expert testimony in support of all findings, but there had not been a specific statement by one of those experts of the standard of care governing the misconduct he testified about.

not required, because the factfinders were a medical board consisting entirely of physicians who were not laypersons.

Amicus is apparently challenging the underlying assumption in this reasoning when it discusses the substantial evidence rule on page 9 of its brief. It is saying that although the administrative body may have experts on it, the reviewing court does not. The reviewing court is made up of laypersons. Even if conceded for argument's sake that the agency never needs expert testimony to do its job, the reviewing court does. For example, it needs such evidence to apply the substantial evidence rule. Amicus says:

The substantial evidence rule states . . . :

Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. . . .

How can a reviewing court know whether 'a fair minded, rational person' would be persuaded of a medical, scientific or otherwise technical fact about which the court has no knowledge, unless the agency puts enough expert evidence into the record on these matters to make the finding appear reasonable or at least plausible?

Emphasis added. Amicus cites no authority for this reasoning. But there is ample authority. For example, in *Franz v. Board of Med. Qty Assur.*, 31 Cal.3d 124, 138-139 (1982), Justice Frank Newman, a former professor of law and dean of the University of California, Berkeley, law school and one of the nation's leading authorities on administrative law, wrote for the California Supreme that:

Whatever the expertise of certain members of the panel and the Division, we cannot impute similar knowledge to a reviewing judge untrained in medical matters. . . . Therefore *the agency record must provide as complete a basis for judicial review as due diligence makes feasible.* [footnote omitted] It must include any technical matter necessary to enable a *lay judge* to determine whether the agency's decision has adequate support.

[This] . . . imposes no unreasonable burden on the administrative process." [M]edical standards" testimony . . . appears routine in discipline matters. [citing cases]

Emphasis added. Why this is not obvious to experienced judges must be attributed to the failure of counsel to adequately present the case to them. Of course, the substantial evidence rule is very deferential. Within a wide range of choices, a hearing panel can decide as it wishes on factual matters, but the reviewing court needs to know what the range is. The expert witnesses describe that range for them. They provide evidence that would give the court a general understanding of the area. They provide reasons why the public should view the conduct charged as unprofessional. And unlike the expert members of the hearing body, they are subjected to both direct and cross examination under oath. In explaining their opinions, they will usually make admissions and concessions about their field and their opinions that will not further their client's case, but which they must make to maintain personal or professional integrity or for fear of professional censure or even discipline. These constraints do not apply to the same extent to an expert member of the panel who does not have to state his opinion in public and face not only

cross-examination, but public and professional scrutiny.

This hopefully elucidates part of Amicus's argument that:

to insure that the agency is not, out of possibly well-intentioned, but misguided zeal, creating ad hoc standards and facts that do not exist in the real world . . . it is essential that there be an independent standard; that some expert, other than those on the hearing panel, testify under oath (and subject to cross-examination) that the facts and the standard are as the agency ultimately finds them to be.

The first major case in this field is one authority that Amicus could have cited in support of this proposition:

Without testimony by an expert the court cannot determine the limits of proper treatment in good faith of one possessing ordinary skill, nor *can it assume that the board members out of their own individual knowledge and skill correctly* fixed the limits within which one might prescribe *Such matters being only within the knowledge of experts must be shown by testimony of experts appearing in the record.*

It is charged that various of the prescriptions in question were not given in good faith but until there was competent evidence to support it *the board was not authorized to form such an opinion and exceeded its authority in so doing. McKay v. State Board of Medical Examiners*, 103 Colo. 305, 314-315, 86

P.2d 232, 237 (1938) (Emphasis added.)

This language from *McKay* is directly applicable to a portion of *Jaffe* that Amicus quotes, but about which Amicus does not comment. Its failure to do so is troubling, because in Petitioner's view this language is both the most seductive and the most deductively illogical statement in the *Jaffe* opinion. It is this language which apparently seduced the *Davidson* court and which the

Brown court found so attractive. And it is the failure to at least suggest the deficiencies in this reasoning that raises part of the concern that Amicus's brief may make it harder for this Court to recognize how embarrassing it would be for Washington jurisprudence to continue to suggest that Jaffe is a viable precedent in this state. The Jaffe language to which we refer is as follows:

Expert opinions of other physicians offered before [the medical board] could have been disregarded by it, and from a practical standpoint would in all probability have had little, if any, effect in bringing it to a decision at variance with its own conclusions upon the question whether or not the conduct of the practitioner had been compatible with professional standards or whether or not he was competent.

135 Conn. at 349, 64 A2d at 336. What is seductive about this statement is the apparent obviousness of the first part of it (*i. e.*, the board could disregard expert opinions that are offered in evidence). On its face, it would appear that the board can disregard any expert testimony with which it disagrees.

But, before directly addressing the logical fallacy or fallacies in the above language, it should be noted that the expert testimony under discussion is testimony offered by the prosecutorial arm of the board itself. The question is whether the board must prove medical, scientific and technical facts on which its case depends by expert evidence.

Suppose that the board's prosecutor were to call expert witnesses whose testimony unexpectedly favored the licensee and rationally required

that he be exonerated. Could the board disregard the board's own testimony and find the facts so that the licensee could be held to have acted unprofessionally? Even though there was no other expert testimony (*e.g.*, from the licensee's experts) on the record to support the board's findings? If it did so, it would be on the basis of its own personal views about the facts, or on the basis of impermissible considerations, such as ideological prejudice or personal economic or social interests.²

Assuming *arguendo* the truth of *Jaffe*'s dubious assertion that the board could disregard any expert testimony, the logical fallacy is in the conclusion that the *Jaffe* court draws from this proposition. The idea that "expert opinions of other physicians" are not necessary to support a board's

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The majority view, of course, is that a board could not do this. See *State Bd. of Medical Examiners v. McCroskey*, 880 P.2d 1188, 1194-1195 n.7 (Colo. 1984) ("The Board does not have the authority to set the standard of care from its own knowledge when that standard has not been *presented and tested* in the hearing process.") (emphasis added). In other words, as the court said in *McKay*, see quotation above, when *Jaffe* says that an expert opinion "at variance with [the board's] own conclusions upon the question" could be disregarded and implies that a board could then adopt its own opinion without expert evidence on the record, the majority's response is "the board was not authorized *to form such an opinion* and exceeded its authority in so doing." Emphasis added.

decision on matters about which only experts can testify, because the board could have disregarded them in its deliberations, is a *non sequitur* for two reasons. One reason has already been stated. The evidence would be necessary at the very least for the reviewing court to do its job and for the accused to challenge the factual case against him or her at the hearing.

The second reason Jaffe's conclusion involves a *non sequitur* is closely related to the discussion a few paragraphs back. It is that if the hearing body does disregard the agency's expert testimony, it does not *follow* that it can find against the licensee on the basis of its own personal views. The expert testimony in question is the testimony necessary to establish the body's case against the accused. If the hearing panel rejects it, the licensee's argument will be that there is insufficient evidence on the relevant scientific, medical or technical facts necessary to support the body's case. It does not follow merely from the fact that the body can disregard the expert testimony, that it can replace that evidence with its own views. But no other support is offered for that conclusion.

In other words, the impermissible, apparently undetected assumption of Jaffe, which Davidson and Brown were not alerted to, is that if the panel did reject the agency's expert testimony, it could apply its own expertise in place of the absent evidence. But that *is* an assumption. It begs the question at issue: it provides no reason why doing so would not be prohibited by the

requirement that there be substantial competent evidence on the record. Had the issue been fully argued in 1983 and this and other indefensible assumptions articulated, it is highly doubtful that our courts would have relied on the *Jaffe* rule, even in *dicta*.

Respectfully submitted this 18th day of January 2008.

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DEAR CLERK:

THIS IS ANOTHER ATTEMPT TO SEND YOU BY-E-MAIL THE PETITIONER'S RESPONSE TO AMICUS WACHOICE'S AMICUS BRIEF. THE FIRST WAS SENT AT 10 A.M. THIS MORNING, THE SECOND AT AROUND 11:45 AM.

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PER MY CONVERSATION WITH THE COURT THIS MORNING, I WILL FAX THE MEMORANDUM IF I DO NOT RECEIVE CONFIRMATION OF RECEIPT FROM YOU IN ONE HOUR.

THANK YOU FOR YOUR KIND ASSISTANCE ON ALL OF THIS.

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