March 1,

2010

**THE SUPREME COURT OF WASHINGTON**

COA No. 40948-8

SC **No: 82297-2**

# Appellant's Brief

**PROSECUTORIAL MISCONDUCT AND JUDICIAL BIAS**

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ORIGINAL

The Inability of an Appellant to adequately prepare his case skews the fairness of the entire system." **Barker, 407 U.S. at 532.** "There are some Constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." **Chapman v. California.** These violations include Judicial Bias and alteration of documents. "An agency abuses its discretion when it acts in an arbitrary and capricious manner. " **See Aponte, 92 Wash. App. At 604, 965 P.2d 626**.

**DQAC DID NOT FOLOW THEIR OWN LAWS AS THEY RELATED TO THE TIMELINES FOR HANDLING COMPLAINTS INVOLVING IMMINENT DANGER (2) DAYS ALLOWED**

**MOTION TO SEVER-DQAC and Mr. Carpenter chose to ignore** RCW 18.130.095 (4). The uniform procedural rules shall be adopted by all disciplining authorities listed in the RCW 18.130.040 (2) and shall be used for adjudicative proceedings conducted under this chapter as defined in chapters 34.05 RCW. The uniform procedural rules shall apply the use of a presiding officer authorized in subsection (3) of this section to determine and issue decisions on all legal issues and motions arising during the adjudicative proceedings.

Respondent objected to the consolidation of claims re: Patient 1 and 2 and

requested that the two charges outlined in the amended charges be separated and

addressed in separate proceedings (**CP000172 1.5** and 1.6) Mr. Carpenter and

DQAC made the decision that is Prehearing order #4; the order denying the motion

to sever which was contra to RCW 18.130.095.

(CP000172 1.6) reads: "September 19, 2005, the department objected to the respondent's request to sever. The department argued that the presiding officer did not consolidate the proceedings." Rather the Commission amended the charges pursuant to it's authority under **WAC 246-11-260. WAC 246-11-380 (**1) the presiding officer shall rule on motions. **(CP 000172)."** When the result is lack of due process, the action is arbitrary and capricious; **Stathis v. University of Kentucky not reported in 5.W.3d, 2005 WL112540 KY.App.1 2005 May 13, 2005**.

Somehow, the department (the entity who is the moving party) also gets to rule on respondent's motion. That seems to be anti-due process, unethical and contra to the spirit of a "fair and impartial hearing". This is yet another example of an agency out of control and an agency that is oblivious and disdainful of the law; and therefore acts outside of the law.

**Section 707 provided that "disciplinary action should stand unless the action was arbitrary and capricious or an abuse of discretion, or was taken in excess of statutory authority." Moore v. Curtis 565 F. Supp. 48, W.D. MO.1 June 2, 1983 (N.** 82-4335-CVC-5).

Mr. Carpenter was both prosecutor and presiding officer and was in charge of the

hearing process and the decisions made therein.

**"PROSECUTORIAL MISCONDUCT DOES NOT WARRANT REVERSAL UNLESS THE PROSECUTOR'S ACTIONS ARE SO EGREGIOUS THAT THEY INFECT THE TRIAL WITH SUCH UNFAIRNESS TO MAKE THE CONVICTION A DENIAL OF DUE PROCESS." Poole v. Slazar (Not Reported in CAL. Reports 3d, 2006 WL 177247, NON PU. (no-citable CAL Rules of Court, Rule 8 1105 +8, 1110, 8, 1115), CAL App. 2 Dist. Jan. 25, 2006 (No bill 7225).**

**"A DUE PROCESS CLAIM BASED ON PROSECUTORIAL MISCONDUCT REQUIRES (1) PROOF OF MISCONDUCT AND (2) PREJUDICE TO SUCH AN EXTENT THAT THE DEFENDANT IS DENIED A FAIR TRIAL. U.S.C.A Constitutional Amendment 14 Constitutional law 92 4629 92 Constitutional law 92 due process 92 XXVII (4) Criminal Law 92 XXVII**

Prehearing Order number six was written by Judge John Kuntz. A Constitutional

source of the misconduct, including the violation of the **5th Amendment (Double**

**Jeopardy**), has to do with Patient 3. There were three charges against me as far as

Patient 3 was concerned. There was charge 1.8.1 failure to inform the patient that

a root tip remained; 1.8.2 failure to write that information in the chart and lastly, failure to refer the patient to an oral surgeon. **Judge Kuntz ruled** that 1.8.1 and 1.8.2 be dismissed because he found evidence that both charges were false. He noted, in Prehearing Order No. 6, that he had found a notation in the chart that a part of the tooth remained and he also found in Patient 3's complaint that he had been told that a root tip remained. The only piece left to be adjudicated was whether or not he had been referred to the oral surgeon. I included the six or seven objections made by Ms. McDonald to the continuous attempts of Mr. Carpenter to relitigate the charges, 1.8.1 and 1.8.2; already dismissed by Kuntz in his "final summary judgment order"; as well as her objections made in response to Mr. Carpenter's continuous attempts to add additional charges regarding standard of care. Excerpts of this documentation follows.

**MS. MCDONALD'S OBJECTIONS TO RELITIGATION OF CHARGES DISMISSED BY KUNTZ AND ATTEMPTS TO ADD NEW CHARGES THEREBY OVERRIDING THE JUDGE'S FINAL ORDER AND INVOKING DOUBLE JEOPARDY**

**(1) (AR1271, Line 2) "The prehearing order you spoke of earlier, your honor, states that the only issue at hand with this particular patient is whether he was referred to an oral surgeon."**

**(2)(AR 001400, 13-25) (AR 001401 1-25) Kuntz: "Prior to going on break, there was an objection made by Ms. McDonald on behalf of her client**. The basis for the objection was the extent of the questioning of the expert witness in relation to the charges. Specifically, because I ruled, and I may have been remiss to not mention this earlier, I ruled in Prehearing Order No. 6, I granted Ms. McDonald summary

judgment motion as to two of the allegations which were contained in the statement of charges".

"And, I'll ask the Commission members to take a look at page 3 of the second amended statement of charges. We direct your attention specifically to the top of the page. Paragraph 1.8.1 and Paragraph 1.8.3 are no longer at issue. **Insofar as the allegations for Paragraph 1.8, the only piece that is still at issue speaks to subsection 1.8.2".**

**Judge Kuntz**: "So, having provided that explanation, Department's explanation was that, the line of questioning was not to speak to proving unprofessional conduct, but merely to provide a background for Dr. Grubb's expert opinion. Is that an accurate statement?" (Error/Judicial Bias). (Mr. Carpenter made no such explanation or statement and neither should have Judge Kuntz). Carpenter: "Yes, your honor."

**Judge Kuntz**:" I think the appropriate response is I'll allow a certain amount of background questioning, but I don't believe that it's appropriate for me to go into as great an amount of detail as I might have allowed were these two other subparagraphs still at issue."

**Mr. Carpenter:** "Your Honor, if I may. I should have raised this after the testimony of Patient 3, but I do believe that he testified under oath that he was never told by Dr. Daniels that she was unable to extract the root tip."

**(3)(AR 001401, Line 20) Ms. McDonald**: "I object. **(4) (AR1378, Line 4-11)** "This is confusing, under ER 611, "Counsel is trying to confuse the issues here, I brought it up before. I'm very concerned with the fact that the only issue here in regards to Patient 3 is whether or not respondent failed to meet the standard of care by referring the patient to an oral surgeon. This is the only issue. And, I'm objecting to counsel trying to "re-try" portions of the complaint that's already been dismissed. Counsel should contain his questions to issues dealing with referring patient 3 to an oral surgeon, period. Not having to deal with extraction or anything else that again is not the issue in this particular case."

**(5) (AR 001400, Line 10)** "But, I still object to the whole line of questioning, because counsel is basically trying to make that those issues are still up for decision, on whether she, my client, met the standard of care and that's already been dealt

with. And, this is unfairly prejudicial to my client to even be addressing this with the panel members in the room."

**(6) (AR001402, Line 21**) "My objection is to his question. I believe that was the extraction of the tooth did it meet the standard of care in regards to Patient 3. I do not see how that is at all relevant to whether my client should have referred this patient to an oral surgeon or not. I don't see the relevance in the question he asked."

**(7) (AR167)** Q. Carpenter: "Did she fall below the standard of care in performing a surgical extraction?" McDonald: "Objection, Your Honor, Again, I would ask that that question be stricken due to the fact that it's not relevant to the issue at hand."

**WHAT WAS THE INAPPROPRIATE QUESTION ASKED BY Mr. CARPENTER? -** Mr. Carpenter was examining DQAC's witness Dr. Grubb. Ms. McDonald's objection on AR1402, line 21 was provoked by Mr. Carpenter's relentless attempts to retry allegations that had already been ruled upon by Kuntz or allegations that had not been charged. Example: Mr. Carpenter asked Dr. Grubb: **"Did the extraction of tooth number 19 meet the standard of care in regards to Patient 3?"**

**Mr. Carpenter altered the Statement of Charges to try and show that there was another issue other than the three charges; in a desperate attempt to try and explain how they found me guilty of all three charges when Judge Kuntz had already dismissed two of the charges during summary judgment.**

**Ms. McDonald** objected because in the "unaltered" version of the second amended statement of charges, this charge was not mentioned, nor was it mentioned in the "legitimate version" of Prehearing order number six. It was not mentioned in Mr. Carpenter's response to Ms. McDonald's motion for

dismissal/summary judgment. It was not mentioned in AG O'Neal's response brief placed before Superior court Judge Gary Tabor.

**In fact, Ms. O'Neal's brief confirms that there was only one charge left to be adjudicated. (CP0-000000413, 21-25). After reading this document, DQAC agents deleted it from my brief.**

Judge Kuntz's remarks also confirm Ms. McDonald's statement that there was only one issue left to be adjudicated; (AR1403, Line 3) **Judge Kuntz:** "Okay, what is at issue is whether Dr. Daniels referred to an oral surgeon." (AR1403, Line 13) **Judge Kuntz**: "The point I think we are at now is there are x-rays available for the Commission panel's review. The Commission panel is allowed to use its professional expertise in reading the x-ray." Line 24**, Judge Kuntz**: The evidence, of course will speak for itself, the x-rays." However, the x-ray of the tooth showing the remaining root tip, the post-op x-ray (after the attempted extraction) was deliberately removed by Kuntz and Carpenter to make sure that the evidence could not speak for itself. "A due process claim based on **prosecutorial misconduct requires (1) proof of misconduct (2) prejudice to such an extent that the defendant was denied a fair trial."**

**THERE WERE ALTERATIONS TO THE AGENCY RECORD WHILE IT WAS AT THE SUPREME COURT. INAPPROPRIATELY, THE RECORD WAS CONSISTENTLY LEFT IN THE SMALL VIEWING ROOM AND SOMEONE TOOK ADVANTAGE OF THIS AVAILABILITY TO ALTER THE DOCUMENT.**

**Ms. MCDONALD IMPEACHES THE TESTIMONY OF PATIENT 3 WITH HIS DEPOSITION- Please note that Mr. Carpenter was at the deposition of Patient 3 and definitely had a copy of that document; but chose to commit misconduct by**

**trying to make the outcome of the charges what he wanted them to be.**

**Furthermore, Judge Kuntz was also aware that Patient 3 had been impeached; yet the panel was not properly advised during deliberations by Judge Kuntz.**

**(1)(AR001402, Line 8) Ms. McDonald's** states that she impeached Patient 3 with his Deposition testimony.

**(2) (CP---649-000670), (CP000655, Line 1-25, Line 9) Patient 3**: "Well, that's what I was there for. She was trying to extract the tooth. Q: "The tooth or the remaining--. A. "Well that's part of the tooth. (Line 2) A: "Part of the tooth that broke as a result of her extraction" Q: "how do you know that?" "Well, it was obvious."

**(3)(CP000656, Line 9)** Q: "During that time, did she ever inform you of what she was doing?" Line 11, **Patient 3**: "Well, I don't know. Informing me was a moot point. I was there to get the tooth extracted and she had difficulty getting it out, **and she told me so."**

**(4) (CP000656, Line 14** Q: "She told you she had difficulty?" Line 15- A: Patient 3: "She had difficulty getting it out. I don't know what exactly verbatim she said."

**(5) (CP000666, Line 10)** Patient 3: "I think at one point she said I can't get it out." Line 14: A: "Whether it was something that she explicitly told me, I can't get it out which I believe she did at some point."

**(6)(CP000666, Line 16-19)** A: "At some point during that afternoon, she said; I can't get it out, but she kept trying until she had to catch a plane and didn't come back to keep trying. It was obvious to me it was still there."

Under direct examination by Mr. Carpenter, Patient 3 changed his testimony and said that he was not told that a root tip remained or that he was told he would be referred to the oral surgeon. Under cross examination, he was impeached and waffled. Patient 3 committed perjury. **"The Court must consider the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party." Clements v. Travelers Indem. Co., 121, Wn.2d, 243, 249, 850, P.2d**

**1298 (1930).** At the end of the deposition, Mr. Carpenter should have dropped the charges related to Patient 3. Instead, for some reason, Patient 3 changed his testimony and one can infer that Mr. Carpenter encouraged him to do so. **The Rules of Professional Conduct 3.8 states: "The prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice."** Mr. Carpenter failed in his responsibility. **The Court must consider the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party." Clements v. Travelers Indem., 121, Wn. 2d, 243, 249, 850, P.2d 1298 (1930).**

**PATIENT 3 LACKED CREDIBILITY AND KUNTZ DID NOT ADVISE THE COMMISSION PANEL APPROPRIATELY DURING DELIBERATION**

**"When the trier of fact finds that any witness has willfully testified falsely to any material matter, it should take that fact into consideration determining what credit, if any, to be given to the rest of the testimony." Arthur Electric Co. v.Grove 236 N.W.2d 383,388 (Iowa, 1975)**

"Demeanor and conduct, including the frankness or lack thereof is also critical in determining what weight to give a witnesses' testimony." **In Re Moffatt, 279 N.W.2d 15, 17-18 (Iowa, 1979); Wiese v. Hoffman 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957) as well as the plausibility of the evidence.** "The fact finder may use its good judgment as to the details of the occurrence, and all proper and reasonable deductions to be drawn from the evidence."

**"A JUDGE MUST PERFORM JUDICIAL DUTIES IMPARTIALLY AND FAIRLY. A JUDGE WHO MANIFESTS BIAS IN A PROCEEDING IMPAIRS THE FAIRNESS OF THE PROCEEDING AND BRINGS THE JUDICIARY INTO DISREPUTE." RJC 3 E1 AND RJC 3E(1)A Judge Kuntz is required by rules of Judicial Conduct to disqualify himself in a proceeding in which the judge's impartiality might be questioned.**

Judge Kuntz abdicated his statutory responsibility in not properly advising the

Commission panel during deliberations as to how credibility of the witness is

assessed and how untruthfulness or perjury affects what weight should be applied to that persons' testimony.

**"In the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. NRLB v. Pittsburgh Steamship Co. 337 U.S.656, 659 (1949). Judge Kuntz's statutory responsibility is further elucidated by RCW 18.130.095 (1) (a) and (4).**

He had a statutory obligation to provide guidance regarding the application of the standard he assigned to the proceeding; i.e., preponderance of the evidence; but since the evidence was tainted by misconduct of both Kuntz and Carpenter, the evidence did not support the standard of even preponderance of the evidence, let alone clear, cogent and convincing evidence. **There was judicial bias and prosecutorial misconduct**; as well as obstruction of justice. It has to be that either the Commission Panel without proper guidance from Kuntz made an improper decision; or Carpenter and Kuntz bypassed the panel altogether and made the decision that DQAC had decided upon before the hearing. In either case presented, there had to be ex parte communication; because the last my attorney or I heard, was that Judge Kuntz correcting the record stating that he had been remiss in not informing the Commission panel that he had dismissed two of the three charges; and that there was only one charge left to be adjudicated.

Judge Kuntz stated that the preponderance of the evidence was the standard; however, he stated that he also applied the clear, cogent and convincing standard; but did not say to what. Recently, alterations to court documents show that Health Law Judge Kuntz has assigned to certain rulings the clear cogent and convincing standard and to other areas in the final order where he has specified the preponderance of the evidence standard. This is a structural error because there were changes to court documents in an effort to cover-up. Chapman v. California and also a mute point because the clear cogent and convincing standard is **"retroactive** (Robinson v. City of Seattle, 119 Wn..2d,34,77-78, 830 P2d 318, cert denied, 506 U.S. 1028 (1992) and should be applied to all findings of fact and conclusions of law and where the preponderance of the evidence has been applied by ALJ Kuntz and is unfavorable to me there is an error.

**"Risk of erroneous results requires an increased burden of proof. "Risk of error is high in a proceeding seeking to revoke a dental license; risk increases where the agency acts as investigator, prosecutor and decision maker. Id., at 941**

**"The reviewing court must grant relief if the Board's order violates the constitution, exceeds statutory authority, is the result of faulty procedure, involves error in interpreting or applying the law, is not supported by substantial evidence, omits issues requiring resolution, involves improper rulings on disqualification issues, is inconsistent with agency rules, or is arbitrary and capricious." Clausing, 90 Wn. App. At 870 I therefore dispute the following, 125, 1.26, 129, 1.30, 1.31, 2.4,2.5, 2.7, 2.8, 2.9,2.10, 2.11,2.12(2007)**

**Rules of Professional Conduct 3.8 states: "The prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility**

**carries with it specific obligations to see that the defendant is accorded procedural justice**. Mr. Carpenter failed his responsibility. JUDICIAL BIAS AND OBSTRUCTION OF JUSTICE. "Disqualification of Judge Kuntz was required under the principle that every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." **Tumey v. Ohio**: "Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." **Withrow v. Larkin, 421 U.S. 35, 47 1975)**

**Mayberry v. Pennsylvania, 400 U.S. 455, 466 states: "The dilemma rests on the relationship between the judge and the defendant, id., at 45.** The Court noted that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional "potential for bias," **id., at 466. Pp. 9-11**. Although this statement has merit, because Judge Kuntz is an employee of the DQAC, conflict of interest may be operative and it is impossible to determine how free is he to go against DQAC decisions?

**"ERROR IS SRUCTURAL BECAUSE IT BEARS DIRECTLY ON THE FRAMEWORK WITHIN WHICH THE TRIAL PROCEEDS. AS A STRUCTURAL ERROR, IT MUST REVERSE AUTOMATICALLY. BRECT V. ABRAMSON 507 U.S. 619 (1993 Yates V. U.S. 354 U.S. 298 (1957) Stromberg v. California 283 U.S. 359 (1931). Prosecutorial misconduct, judicial bias and obstruction of justice are structural error.**

Mr. Carpenter has compounded his rampant misconduct by attempting to cover it up, which consisted of altering the agency record resulting in a structural error, which is not harmless and which should result in immediate reversal because it calls into question the credibility of the proceedings and the trustworthiness of the agency record. It can be inferred that DQAC and Mr. Carpenter made the errors intentionally (including that all of the misconduct committed by DQAC

agents Kuntz and Carpenter were intentional and pre-meditated and were made to affect the outcome, deliberately to restrict my license).

Mr. Carpenter's actions were not harmless. His attempt to link the surgical extractions of patient 1 and Patient 3 together in order to restrict my dental license harmed me because it illegally restricted my license, caused me the assignment of a $10,000 fine, deliberate reduction to ridicule and humiliation for unprofessional conduct; of which I was not guilty. False information, based on false charges was forwarded to the National Practitioner data bank, which definitely hindered my job opportunities and ability to even obtain licensure in other states. I tried to resurrect my license in the State of Maryland and was told that until the situation with Washington was cleared; I could not. The same charges from the 2006 hearing were later used by Dr. Davis and DSHS as one of the rationales to illegally and prematurely terminate my DSHS provider contract which reduced my income substantially; since DSHS was 75% of my practice and negatively impacted my private practice . Also, these same findings of fact and conclusions of law would subsequently be incorporated into the findings of fact and conclusions of law of the summary suspension hearing and serve as part of the rationale for license revocation for 10 years. And, all the while my debt was ballooning. In other words, Mr. Carpenter's and DQAC's intentional illegal actions were the equivalent

of tortuous interference in the conduction of my business. Ultimately, I lost over 5000 DSHS patients, and over 1000 insurance patients as well as a lucrative Rural Health Shortage Area designation based on the judicial bias of Kuntz and the prosecutorial misconduct of Carpenter. In addition, I have lost income which has yet to be tallied.

**THE POST-OP X-RAY FOR PATIENT 3/MR CARPENTER AND JUDGE KUNTZ MANUFACTURE EVIDENCE AND THEN CONCEAL IT -** There was an **additional finding** added to the findings of fact and conclusions of law of the 2006 hearing related to Patient 3. There was no charge made in the statement of charges for this finding. However, the purpose of this finding was to link the surgical extraction of Patient 3 to the surgical extraction of Patient 1 in order that the Commission could restrict my license. The likeness between the extractions was contrived by Mr. Carpenter. However, the similarity between the two extractions was, in reality, completely non-existent.

**Both Mr. Carpenter and Judge Kuntz knew of the existence of the post-op x-ray for Patient 3. -** Dr. Sinha, Commission panel member, was questioning me about the post-op x-ray for Patient 3 when Judge Kuntz intervened and would not allow him to continue. Mr. Carpenter had been given copies of x-rays but had requested

the originals from me as well and I reluctantly provided those originals which

meant that I had none in my possession. (AR 338, 1-25) **(ATTACHMENT 1)**

**Dr. Sinha is asking me questions regarding the post-op x-ray for Patient 3:**

Q. "So you were aware at the end of the procedure that there was a fragment left?" A. "Yes." Q. "And, you verified that visually, or was it by some other method?" A. By x-ray.

Q. "By radiography that you made that day?" A. "Yes."

Q. "Is that documented somewhere that I don't know about?" A. "The x-ray is there.

Q. What tab? A.. McDonald: 'This is respondent's Tab 8, and its page 15. If you're talking about December 23rd? Carpenter: There is a radiograph of December 23rd.

Q Sinha: "That was post-surgical? **A. Mr. Carpenter** says: "I'm not sure."

Q. Judge Kuntz: "I'm sorry?" A. Mr. Carpenter: Your honor, there's a question about the December 23rd radiograph of Patient 3. Judge Kuntz: "I don't have that one. Let's go off the record." (**ATTACHMENT 1** )

**MR CARPENTER AND JUDGE KUNTZ CONCEAL EVIDENCE**

Judge Kuntz: Back on the record. "It appears that the radiograph in question, **we are speculating,** that the radiograph was taken by Respondent's expert, Doctor Jurich, because it's not amongst the radiographs that I have, and there's the one envelope and sub-envelopes within that envelope. We have gone through that and the Department's Counsel has gone through that. We can't see it, so I'm making an assumption that it was inadvertently picked up by the expert, **and we will have to insure that that's returned".** (So, where is the x-ray? What happened to it? Why didn't the panel see it?) (**ATTACHMENT 2** )

**Judge Kuntz**: "Also, while we were off the record there was discussion amongst the Commission members regarding personal memory of what was viewed on the radiograph from yesterday, but that cannot be used to question the witness (Dr. Daniels) in terms of asking her whether this radiograph is pre or post, because the radiograph is not here. (AR 339, 1-25) (How convenient).

**PROOF POSITIVE THAT MR CARPENTER KNEW OF THE EXISTENCE OF THE POST-OP X-RAY SHOWING (2) REMAINING ROOT TIP AND WAS LYING TO DR. SINHA WHEN HE SAID HE DID NOT KNOW IF THERE WERE A POST SURGICAL X-RAY.**

Mr. Carpenter is questioning Dr. Daniels' expert witness, Dr. Michael Jurich about Patient 3. Carpenter: Q. "Doctor, hypothetically, if you have a patient and you perform an extraction of a first molar, and there are two root tips that remain, **which appear exactly like the radiograph that you have in your hand, is it standard of care in the State of Washington for you to refer that patient to an oral surgeon?** Yes."(AR 221,3-9) (**ATTACHMENT 3**)

**WHEN DID MR. CARPENTER FIRST BECOME AWARE THAT THERE WAS A POST-OP X-RAY FOR PATIENT 3?-(AR 001272) Mr. Carpenter: The question I have is dealing with the fact that I've got a radiograph in my hand dated 11/24/03 and no chart note. I just want to confirm with this patient that that crown was reseated on, excuse me---I misspoke, I misspoke Judge. I apologize. (AR 001272, Line 23) Carpenter: "I withdraw the question. I apologize to the court. "**

**"A due process claim based on prosecutorial misconduct requires (1) proof of misconduct and (2) prejudice to such an extent that the defendant is denied a fair trial." U.S.C.A. Constitutional Amendment 14, Constitutional Law 92 4629 92 Constitutional law 92 due process 92 XXVII (4) Criminal Law 92 XXVII. "Structural Error/Reverse**

**JUDGE KUNTZ WAS NOT IN CONTROL OF HIS COURTROOM/JUDICIAL BIAS-** Mr. Carpenter committed prosecutorial misconduct when he conspired with Judge Kuntz to first manufacture false evidence regarding the post op x-ray and then to conceal the post-op x-ray of Patient 3. (Also, Obstruction of justice.) The harm that resulted was that I was found guilty of all three charges including the two that Judge Kuntz dismissed during summary judgment.

**"Prosecutorial misconduct does not warrant reversal unless the prosecutor's actions are so egregious that they infect the trial with such unfairness to make THE CONVICTION A DENIAL OF DUE PROCESS" Poole v. Slazar (Not Reported in CAL Reports 3d, 2006 WL 177247, NON PU. (no citable CAL Rules of Court, Rule 8 1105 +8, 1110, 8, 1115), CAL App. 2 Dist. Jan. 25, 2006 (No. bill 7225).**

**DOUBLE JEOPARDY – A CONSTITUIONAL VIOLATION OF THE 5TH AMENDMENT-**

**Double Jeopardy as well as res judicata were at play when I was found guilty of charges that had been dismissed and charges that had been included in a final order that settled all the issues related to summary judgment. Reverse, structural error, harm**

**Double Jeopardy is in harmony with res judicata. Res judicata prevents courts from re-litigating the same issues which have already been subject to final judgment. (Ashe v. Swenson, 397 US 436 (1970)**

**Double Jeopardy applies when the initial motion was entered and there was a final adjudication. Retried again during the hearing; the concept applies: U.S. v. Schalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987) United States.**

In my case, the initial motion was the summary judgment dismissal and the final order of Kuntz settling all issues; double jeopardy occurred when Carpenter relitigated those issues and the Commission panel subsequently found me guilty of all three charges.

**State v. Lynch – Lynch argued, the state is precluded on the basis of collateral estoppels from re-litigation of the same facts for which Lynch was exonerated upon his appeal from the administrative disciplinary hearing. The basis of his**

**plea in bar is in reality the double jeopardy clause. State v. Lynch 248, Neb. 234, 533 N.W.2d 905, Neb., June 16, 1995 (No. 594-626).**

**Double jeopardy is punitive, not remedial. It is a procedural defense and forbids that a defendant be tried twice for the same crime or the same set of facts. Double Jeopardy applies to the States. (Benton v. Maryland).**

**IS A SUMMARY JUDGMENT ORDER A FINAL ORDER?- "A final judgment is an order that adjudicates all the claims, counts and liabilities of all the parties RAP2.2(d): See also CR54; Fox v. Sunmaser Products, Inc. 115 Wn.2d, 498, 503, 798 P.2d 808 (1990); Anderson and Middleton Lumber Co. v. Quinnet Indian Nation, 79 Wn. App. 221, 225, 901 P.2d 1060 (1995). "Final judgment is a judgment that ends the litigation" aff'd, 130 Wn.2d 390 (1976) (final judgment settles all issues in a case). It must be in writing and signed by the judge and filed forthwith CR 54(a) (1). An order granting summary judgment can be a final judgment if it meets the requirements Lee v. Ferryman, 88 Wn. App. 613, 622, 945 P.2d 1159 (1997). Prehearing order # 6 is a final order.**

**"Structural errors can involve a judge who was not impartial. "Tumey v. Ohio, 273, U.S. 510 (1927) "This is a structural error in the constitution of the trial mechanism which defies analysis by the "harmless error standards." The entire conduct of the trial, from beginning to end is obviously affected by the presence on the bench of a judge who is not impartial."**

**MR. CARPENTER WITHHOLDS EXCULPATORY EVIDENCE AS RELATED TO PATIENT 4 AND 5-** According to the testimony and declaration (0-0000000460) of Patient 4, Mr. Carpenter called Patient 4 in February or March of 2006 and asked her if she had received the dental records for her and her husband. She said she received those records in February or March of 2005. She also remembered that she waited to pick them up because she didn't need them immediately. Mr. Carpenter's call

took place **seven months before** the September 2006 hearing; yet, Mr. Carpenter told no one. On April 13, 2006, Mr. Carpenter filed his response to Ms. McDonald's motion to dismiss. With full knowledge at this point that Patient 4 and 5 had received their records; he writes: (CP 000287)

"On March 2, 2005, nearly three months after the initial request, and subsequent follow-ups, Respondent wrote Patient 4 acknowledging that she knew the law, but again willfully to disobey it. Respondent wrote Patient 4, telling her: "There is nothing untoward in any of your charts. You know that. Why would they be kept from you? The state law is that the office has 15 days to deliver the information to you. Again, my office is busy and there is no one there that can drop what they are doing to reproduce x-rays and copy charts." As a result, Patient 4 and 5 did not receive their charts and x-rays until a Department of Health Investigator compelled their release." Footnote: On or about March 31, 2005 these patients finally received their charts and dental records."

However, Patient 4 said she received her records February or March. A "new case analysis" was done on Patient 4 and 5; whereby Ms. Weinstein scoured the charts and noticed that there was no entry related to when the patients received their records. This became a charge. DQAC also did a new case analysis on Patient 2, 3, 4 and 5. Patient 4's original complaint was a fee dispute but this was out of DQAC's jurisdiction. DQAC wanted to pile up the charges and had no new complaints with which to accuse me. Consequently, it is Ms. Weinstein's job as State's Attorney to create charges from patient charts. This practice is contrary to the Appearance of Fairness Doctrine, the APA and due process. If the complaint does not originate with the Patient; then there should be no complaint. DQAC's obsession with finding me guilty of something has resulted in DQAC and associates committing criminal acts, Constitutional violations, prosecutorial misconduct, judicial bias, obstruction of justice and structural error.

**"There is a due process violation when DQAC is allowed to make up charges because they want to "get you." One can probably go in anyone's office and look through charts and find mistakes, omissions, and evidence that the dentist has not followed some rule or another. "When the result is lack of due process; the**

action is arbitrary and capricious. In this case, DQAC did not allow me to answer the new contrived charges before issuing a statement of charges.

"The reviewing court must grant relief if the Board's order violates the constitution, exceeds statutory authority, is the result of faulty procedure, involves error in interpreting or applying the law, is not supported by substantial evidence, omits issues requiring resolution, involves improper rulings on disqualification issues, is inconsistent with agency rules, or is arbitrary and capricious." Clausing, 90 Wn. App. At 870 I therefore dispute the following, 125, 1.26, 129, 1.30, 1.31, 2.4,2.5, 2.7, 2.8, 2.9,2.10, 2.11,2.12(2007)

Patient 4 and 5 -the charge was that I did not provide their dental records within the 15-day time frame. This charge was part of a "new case analysis" contrived by State's Attorney Weinstein because 4 and 5 's original complaint was a billing dispute and was outside of DQAC's jurisdiction. Patient 4 and 5 were married to each other, but divorced subsequently.

The dentist selected by DQAC looked through the chart and found no entry stating when the patients received their records and a charge was born. However, there is no requirement that the information regarding when the records were provided must be written on the charts. Instead, my staff placed the information in the computer.

DQAC's filed charges without requesting my written response to the newly contrived charges; contrary to the uniform disciplinary code. Carpenter covered

up the fact that he had no intention of providing access to Patient 4 since he had called her and found out that she had received the records she requested from me in a timely fashion. Carpenter sent e-mails to my attorney informing her of the Patient 4's availability for deposition. He did not inform my attorney that Patient 4 and 5 were divorced (and neither did Patient 5 provide her with that information). Patient 5 was deposed and stated that Patient 4 was the one who knew the information. At the time deposition was supposed to be taken, Mr. Carpenter said that Patient 4 did not want to be bothered, but could be subpoenaed. However, he provided no change of address.

Patient 4 returned to my practice and told me that Mr. Carpenter had called her 5 months before the hearing and knew that she had received her records in a timely fashion. She made a written declaration to that effect. My attorney gave the declaration to Mr. Carpenter and Judge Kuntz. Judge Kuntz never entered the declaration into evidence nor did he take any disciplinary action against Mr. Carpenter.

DQAC/Carpenter violated my due process rights by withholding exculpatory evidence and denying me a fair hearing. Judge Kuntz would protect Mr. Carpenter and participate in his cover up because he never entered Patient 4's declaration dated 8/25/06) into evidence. In addition, Judge Kuntz would not allow my

**attorney to Question Patient 4 about Mr. Carpenter's phone call.** Judicial Bias, prosecutorial misconduct, obstruction of justice. "Several other circuits have recognized a 1983 **malicious prosecution-type claim under similar circumstances. See Moran v. Clarke, 296 F.3d 638, 647 (8th cir. 2002) "This claim has Constitutional weight: The Supreme Court in Brady v. Maryland, 373 U.S. 83, 87** (1963)."Structural error can involve a judge who is not impartial". Tumey v. Ohio: 273, U.S. 510 (1927) "This is a structural error in the trial mechanism, which defies analysis by the "harmless error standard. The entire conduct of the trial, from the beginning to end is obviously affected by the presence on the bench of a judge who is not impartial. "**Automatic Reversal**

**MR CARPENTER SUBORNS PERJURY FROM DOH INVESTIGATOR MARY CREELEY TO COVER UP HIS MISCONDUCT AND TO CONTINUE HIS ATTEMPT TO MAKE FALSE CHARGES STICK-** Judge Kuntz had a responsibility to report Mr. Carpenter's misconduct according to Judicial **Canon.**

**RJC 3D(2) "A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional conduct. The Judge should take appropriate action**. This applies to Superior Court Judge Gary Tabor, as well. (Patient 4's declaration)**.(0-0000000470)**

Recently, after the appeal before Judge Tabor, Mr. Carpenter began his project of altering the agency record in order to" **comport"** with his attempts to cover-up his

misconduct, before and during the hearing. In documents that he altered, he stated that Ms. McDonald did not provide a copy of Patient 4's declaration with her motion. Ms. McDonald gave the declaration to both Mr. Carpenter and Judge Kuntz. Mr. Carpenter felt safe altering the records because he knew DQAC agents and MFCU had me under surveillance 24hours a day and that they were stealing documents from me at will. **Prosecutorial misconduct does not warrant reversal unless the prosecutor's actions are so egregious that they infect the trial with such unfairness to make the conviction a denial of due process." Poole v. Slazar (not Reported in CAL. Reports 3d, 2006 WL 177247, NON PU. (no citable CAL Rules of Court, Rule +8 1105 +8, 1110, 8, 1115) CAL App. 2 Dist. Jan. 25, 2006 (No. bill 7225). "A due process claim based on prosecutorial misconduct requires (1) proof of misconduct and (2) prejudice to such an extent that the defendant is denied a fair trial. U.S.C.A. Constitutional Amendment 14; Constitutional law 92 4629 92 Constitutional law 92 due process 92 XXVII 4 Criminal Law 92 XXVII.**

**PROOF POSITIVE OF JUDICIAL BIAS**- Respondent's attorney, Ms. Cynthia McDonald attempted to examine Patient 4 during the hearing regarding Mr. Carpenter's phone call to her **seven months before the hearing.**

McDonald: Q. "Did you inform Mr. Carpenter about your records." A. Patient 4: Yes, I did.

Judge Kuntz interrupted and asked my attorney: "Where are you going with this"? Ms. McDonald replied: "I wanted to see if she remembered when she told him, to try to find out the timing, because that's the issue, the `15 days. That's where I'm trying to go." **(AR349, line 17-25). (ATTACHMENT 6)**

Judge Kuntz: "Okay. Well, I don't think Mr. Carpenter is the person you should start with, if that's the question. The question is probably more correctly, Madame, do you remember talking to an investigator from the Department of Health? Judge Kuntz then took over the questioning and culminated his questioning of Patient 4 with the following statement: "That's probably as far into the questioning as I feel comfortable going." (Judicial Bias) Obstruction of Justice **(AR351, Line 3**) " There are some Constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." **Chapman v. California "Abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable ground. Griggs, 92 Wn.2d at 582; Prest v. American Bankers Life Assurance Co., 79 Wn. App. 93,900, P.2d 595 (1995) review denied, 129 Wn.2d 1007 (1996). "Structural errors can involve a judge who was not impartial Tumey V. Ohio, 273, U.S. 510 (1927) "This is a structural error in the trial mechanism, which defies analysis by the harmless error standard. The entire conduct of the trial, from beginning to end is obviously affected by the presence on the bench of a judge who is not impartial." (8th cir. 2002) ""The reviewing court must grant relief if the Board's order violates the constitution, exceeds statutory authority is the result of faulty procedure, involves an error in interpreting or applying the law, is not supported by the evidence, omits issues requiring resolution, involves improper ruling, or is arbitrary and capricious Clausing, 90 Wn. App. At 870**

**MR CARPENTER CONTINUES TO TRY AND SHOW THROUGH FALSE INFORMATION AND PERJURED TESTIMONY THAT THE PATIENTS DID NOT RECEIVE THEIR RECORDS IN A TIMELY FASHION** - Mr. Carpenter then called DOH investigator Mary Creeley, to the stand and introduced a "red herring" which was a statement from Ms. Creeley that she had (1) come to my office specifically about Patients 4 and 5 on March 31, 2005 (0-0000000468); and (2) that she had contacted Patient 4 by phone and found out that they had received their records.( AR 001367) Ms.

Creeley was asked by Commission panel members Sinha and Peterson if she asked Patient 4 what date she had received their records. Ms. **Creeley testified that she did not ask. Wasn't that the purpose of the investigation? Wasn't that specifically why charges were brought against me? (AR 001372, L9)**

**"An agency abuses its discretion when it acts in an arbitrary and capricious manner." See Aponte, 92 Wash. App. At 604, 965 P.2d, 626.**

**MR. CARPENTER/SUBORNATION OF PERJURY-** Ms. Creeley came to my office on March 31, 2005, but not about Patient 4 or 5. Ms. Creeley came to my office specifically about Patient 3. At this visit, Ms. Creeley took my narrative about Patient 3's complaint and then asked for 10 random additional insurance patient charts; none of which included Patient 4 or 5. **(Exhibit 5, CP000864**). The memorandum is dated March 31, 2005. The case # **is 2004-12-0023DE** (Stephen Ides, Patient 3; Subject: interview conducted with Dr. Daniels. The memorandum starts: "On March 31, 2005, I presented to Dr. Daniels' office in Shelton, Washington and presented her with a letter of cooperation and a copy of the complaint from Stephen Ides. (Patient 3). Not Patient 4 or 5. Ms. Creeley committed perjury at the behest of Mr. Carpenter.

I'm also suspicious about Ms. Creeley's activity report that Mr. **Carpenter just happened to have at the ready. Appendix G, activity report; Inv. 334, Department's exhibit 39.** It appears that Ms. Creeley did not know that she had called Patient 4 on March 31. She thought she had called her earlier; but the

activity report that Mr. Carpenter presented to her "refreshed" her memory and she **reluctantly stated** that her memory of calling earlier was incorrect and Mr. Carpenter says "mistaken". I believe the correct word is "altered" to cover-up his misconduct. '**"The court must consider the facts and all reasonable inferences from those facts** in a light most favorable to the non-moving party." **Clements v. Travelers Indem. Co., 121, Wn.2d, 243, 249, 850, P.2d 1298 (1930). What are the facts? Mr. Carpenter has committed more misconduct in an attempt to cover-up the previous misconduct. Mr. Carpenter changed Ms. Creeley's activity report to coincide with his version of the events related to Patient 4 and Ms. Creeley allowed herself to participate and commit perjury.**

**MR. CARPENTER DELIBERATELY WITHHOLDS THE IDENTITY OF THE DEPARTMENT'S EXPERT WITNESS AND WITHHOLDS HIS CV AS WELL**

DQAC hired Dr. Terry Grubb in 2002, at which time Dr. Grubb testified that he provided Mr. Carpenter with a copy of his CV. Dr. Grubb testified during voir dire that this CV had information regarding his relationship to Nordic and therefore his relationship to me. (AR 108, L 11). **(Attachment 8)**

**DQAC HIRES DR. GRUBB, THE CHAIRMAN OF MY MALPRACTICE INS. CO. AS THEIR EXPERT WITNESS Dr.** Grubb testified that Mr. Carpenter sent him x-rays and copies of information regarding a patient and asked for his opinion. Dr. Grubb provided his opinion and sent the x-rays back. Carpenter said he'd get back to him. (AR 108, 4-10).

**JUDGE KUNTZ WOULD RULE THAT HE DID NOT FIND UNREASONABLE BIAS IN DR. GRUBB'S VOIR DIRE TESTIMONY. HOW WAS THAT POSSIBLE? JUDICIAL BIAS**

In Dr. Grubbs' zeal to be a part of the action, Dr. Grubb **breached my confidentiality** and informed Mr. Carpenter of personal, protected insurance information and an unprecedented occurrence that happened at Nordic that he learned about, by virtue of his position, as Chair of the Board. Dr. Grubb told Mr. Carpenter, in order to provide full disclosure that the staff of Nordic had come to him and asked that they settle a claim because I had refused to settle. Nordic 's public position is that they do not settle the claim, unless the dentist agrees to settle. The staff told the Board that I had liability in this matter. (AR 104, 6-10). The Board voted unanimously to settle. According to Grubb's testimony, he could not vote; but he could offer his opinion. (AR 105, 17-20). He testified that "we were at loggerheads with Dr. Daniels". (AR 105). Dr. Grubb also testified that he was made aware by the Executive Director of Nordic that I had filed a complaint with the Insurance Commissioner against Nordic; because of their tactics. (AR 106, 1-16). Dr. Grubb testified that the staff only brought the Board claims that had the potential to be worth $100,000 and up. (AR 101, 3) The claim that Nordic settled without my signing off on it was for $15,000. So, why was the Nordic Board involved if they only handled big money claims? This is one incident that caused me to believe that Nordic was acting in concert with DQAC, against me.

Nordic was the same company who had called Patient 1 to settle the claim with Patient 1 (a 2006 witness); when it appeared that Patient 1 had abandoned the claim. The same company that settled a claim with Patient 1 for $8000 more than the claim was worth (AR 108, 11-14). Dr. Grubb would now be testifying on behalf of patient 1; and against me, the insured.

**CARPENTER WITHHOLDS GRUBBS CV THAT HE HAD SINCE 2002** - Mr. Carpenter sent my attorney a letter on April 13, 2007 and stated that he would send Dr. Grubb's CV shortly. He later wrote in Prehearing Order No. 7 that he would provide the CV of Grubb at the hearing. Dr. Grubb's CV was entered into evidence on the day of the hearing but was never directly given to Ms. McDonald. Mr. Carpenter did not tell us who Dr. Grubb was until the afternoon of the day before the hearing; and he had known since 2002.

**WHAT WAS THE HARM - VOIR DIRE TOOK PLACE ON THE FIRST DAY OF THE HEARING, MS. MCDONALD REVEALS THAT SHE HAD NOT YET BEEN GIVEN DR. GRUBB'S CV BY MR CARPENTER . McDonald:**

**"Well, did your CV that was, well it was going to be provided to us, respondent." (AR 108, 15-18)**

**"An Administrative agency's decisions on questions of law are fully reviewable on appeal, competent expert testimony must be introduced if the issues in Administrative hearings require establishing the applicable standards and**

determine whether a particular conduct fell below the standards. It is the agency's responsibility to assess the credibility of witnesses and to resolve conflicts of interest in testimony." Huff v. Dakota State Board of Medicine: 690, Wn.2d, 221 N.D. (2002)

MS. MCDONALD OBJECTS- Mr. Carpenter attempts to introduce the April 13, 2007 letter to the panel. Although Mr. Carpenter had not included that letter in his exhibits; he had it at the ready, Mr. Carpenter wrote the letter to cover himself in case the withholding of Grubb's identity and CV became an issue of misconduct. One can infer that he never really intended to notify Ms. McDonald of Dr. Grubbs availability to be deposed; any earlier than it actually occurred; that is the afternoon of the day before the hearing. (AR 114, 1-25).

Carpenter : "A concern that the Department might have in the exclusion of this witness is related to a discovery violation; and if that is what Ms. McDonald is alleging..." Ms. McDonald: "Objection, Your Honor, the issue has to do with the State's failure to disclose pertinent information in regards to Dr. Grubb and his relationship to Nordic. According to Dr. Grubb, they've had this information from somewhere between 2002 on down." So, it's unexplainable why Mr. Carpenter had not provided Dr. Grubb's CV before September 9, 2006. Prosecutorial misconduct, obstruction of justice. "A due process claim based on prosecutorial misconduct requires (1) proof of misconduct and (2) prejudice to such an extent that the defendant is denied a "fair trial". U.S.C.A. Constitutional Amendment 14. I believe I have met this burden.

There should have been no contact by DQAC with Dr. Daniels' insurer, Nordic and certainly the insurer's testimony where he breached confidentiality should not have been introduced.

See Erickson v. Newmar Corp., 87, F.3d 298 (1996), In re Firestorm, 129 Wn.2d 130, 916 Pd 411 996), and also, Sorenson v. Barbuto, 2006 UT App. 340, 558 Utah Adv. Rep. 18, 143 P.3d 295 (2006) (breach of confidentiality and fiduciary duty of physicians to agree to testify as expert witness against their own patient).

What was on Dr. Grubbs' CV THAT DQAC and Carpenter wanted to keep it hidden?

**WHAT HARM DID WITHHOLDING DR. GRUBB'S CV CAUSE/LACK OF DUE PROCESS-**

Dr. Grubb was allowed to testify as DQAC's expert witness in all three hearings. He was not independent and basically stated what DQAC wanted him to say. He provided hearsay upon hearsay testimony at the "Show Cause" hearing and provided no substantial evidence. He continued to do so during the May 3, 2007 hearing. DQAC violated my Constitutional guarantee of a "fair trial" As expert witness, in each proceeding, his testimony added credence to charges of complainants who were not even available to testify. Dr, Grubb made a major contribution to the negative outcome of the hearing and I suspect that he even participated in writing the final order. The reviewing court must grant relief if the Board's is not supported by substantial evidence, is inconsistent with agency rule: Clausing, 90 Wn. App. At 870. Dr. Grubb's presence and testimony violated the **Appearance of Fairness Doctrine** which states that the judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair and impartial and neutral hearing. **State v. Ladenbug: 67, Wn. Ap. 749, 754-55, 840 P.2d, 228** (1992)

**Under CR26(g) and RPC 3.4(c)**, "When one party has a business relationship with an expert, the other party is precluded from retaining that person or otherwise engaging in ex parte contacts for the purpose of securing valuable testimony or

**other information." The Constitutional issue that gives me the ability to appeal is the violation by DQAC and Grubb to my guarantee to a "fair trial" and the due process requirement of an impartial and independent trier of fact. In order to obtain appealability, one must make a substantial showing of the denial of a Constitutional right." 28 U.S.C. 2253 (c) (2); See Barefoot v. Estelle 463 U.S. 880, 893, 74 (1983).** I believe that I have met that burden.

**DR GRUBB HIRED AGAIN BY DQAC FOR THE "SHOW CAUSE HEARING FOR THE EMERGENCY SUMMARY SUSPENSION HEARING-Dr.** Grubb was again hired by DQAC to submit a declaration in support of suspension at the "show cause" hearing. In actuality, Dr. Grubb provided hearsay upon hearsay testimony in his affidavit; which is in no way was representative of "substantial evidence" or clear cogent and convincing evidence. (**ATTACHMENT 9** ) Although DQAC stated that the decision to proceed with the emergency summary suspension was based on "substantial" evidence, when opposing my request for a Stay. The expert testimony that should have been provided was absent and decidedly biased. Furthermore, the clear cogent and convincing evidence was stated; but not applied.

**"An Administrative agency's decision on questions of law is fully reviewable on appeal. Competent expert testimony must be introduced if the issues in administrative hearing require establishing the applicable standards and determining whether a particular conduct fell below the standards. " <u>It is the agency's responsibility to assess the credibility of witnesses and to resolve</u>**

conflicts of interest in testimony" **Huff v. No. Dakota State Bd. Of Medicine 690, Wn.2d 221 N.D. (2002).**

**Judge Kuntz had a chance to fully assess the conflicts of interests and credibility of Grubb during voir dire. He opted to ignore the evidence. More Judicial bias, judicial misconduct and prosecutorial misconduct. Structural error.**

Dr. Grubb was again hired by DQAC to serve as expert witness on the May 2007 hearing. My attorney, Ms. Sharonda Amamillo motioned that Dr. Grubb stand down because of **bias, his obvious conflict of interest, breach of fiduciary duty as well as the fact that the evidence he was credited with providing to support the claim of imminent danger was not substantial and it was hearsay upon hearsay. Judge Kuntz did not employ the clear and convincing standard during the "show cause" phase.** Judge Canner overruled my attorney's motion to dismiss Dr. Grubb. DQAC and Judge Canner erred when they refused to accept their responsibility to resolve conflict of interest as it related to Dr. Grubb. However, DQAC didn't see Dr. Grubb's conflict of interest as their responsibility to resolve; rather they seemed to enjoy the conflict of interest, as is attested to by their continued use of Dr. Grubb over multiple objections. Judge Kuntz and Judge Canner's refusal to exclude Dr. Grubb can only be explained by Judicial Bias. Clausing 90 Wn.App. at 870 (error in interpreting or applying the law." **Automatic reversal/Structural error.**

**THE FINDINGS OF FACT AND CONCLUSIONS OF LAW in 2006 and 2007 DECLARED FRAUDULENT BECAUSE OF MISCONDUCT/ILLEGAL SELECTION AND USE OF EXPERT WITNESS GRUBB /Judicial Bias/Prosecutorial misconduct withholding /Grubb's CV, Withholding Grubb's identity, Canner not writing the final order. The final order of the 2007 hearing was late by six days. REVERSE and VACATE THE 2007 ORDER.**

**"IN ORDER TO OBTAIN APPEALABILITY ONE MUST MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.' 28 U.S.C. 2253 (c ) (2); See Barefoot v. Estelle 463 U.S. 880, 893 and 74 (1983)**

**Because of a lack of an impartial or independent trier of fact, Prosecutorial misconduct, judicial misconduct and bias and multiple due process violations and Constitutional violations; as well as alteration of the agency record and other structural errors: Automatic Reversal of 2006 and 2007; vacating both orders.**

**JUDGE KUNTZ SHOULD HAVE DISQUALIFIED HIMSELF DUE TO JUDICIAL BIAS, JUDICIAL MISCONDUCT /JUDGE TABOR SHOULD HAVE DISQUALIFIED HIMSELF AS REQUESTED BECAUSE JUDGE TABOR THAT DQAC COMMITTED NO ERRORS.**

> "A judge must perform judicial duties impartially and fairly. A judge who manifests bias in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."As a result of /RJC 3(E)(1), 3(E) ((1) Judge Kuntz and Tabor were required to disqualify themselves in a proceeding in which the judge's impartiality was questioned. I made a motion asking Judge

Tabor to disqualify himself based on the fact that he ignored and gave no weight to so many issues in the case; for example :

Due process requires an impartial and independent trier of fact (Kuntz, Canner and Tabor were not(new case analysis in 2,3,4,5,A

**1.Improper notification of charges in Patient A and 2(2007 and 2006 respectively**

**2. Double jeopardy as it related to Patient 3 and Prehearing Order No. 6 in the 2006 hearing**

**3.Double Jeopardy as it related to the negation of the final order of 2006 and the increased punishment by the author of the 2007 hearing**

**4.Judicial bias( 2006 and 2007 and show cause**

**5.Ignored evidence of extreme bias with DQAC's expert witness( all three proceedings)**

**6.Refused to allow respondent's attorney to examine her own witness(2006 hearing, Patient 4)**

**7.Conspired with Carpenter to manufacture evidence and conceal evidence(Kuntz 2006)**

**8.Concealed exculpatory evidence in order to protect Carpenter (Pt. 4)(2006)**

**9..Allowed Carpenter to relitigate charges that he had already dismissed(Kuntz, 2006)**

**10.Allowed panel members to find me guilty of charges he'd already dismissed and more(Kuntz, 2006)**

**CONFRONTATION HEARSAY CLAUSE PATIENT 2 (2006) AND PATIENT A (2007)-1.4, 1.8, All findings and conclusions related to the complainant not being made available for deposition or for cross examination and thereby violating the Sixth Amendment Confrontation hearsay clause regarding Patient 2(2006) and Patient A (2007) should be declared fraudulent and dismissed/reversed. Patient 2's complaint:**

- **was not under oath**
- was "altered by state's attorney Weinstein *** "new case analysis" and I was not given an opportunity to respond as per RCW 18.130.095 (4); before a statement of charges was issued (2006) Patient 2's complaint was past the timeline for regular complaints (171 days) in violation of Wac 246 14. Her complaint was over 730 days old. No new evidence was provided following the new case analysis. "An agency must follow their own rules"
- DQAC guilty of improper notification of charges (Constitutional violation) The Amended Statement of Charges read that I did not diagnose irreversible pulpitis. I wrote to AG Rob McKenna (Exhibit 29) and laid out the entire case. DQAC realized that I had diagnosed irreversible pulpitis and noted it in the chart; but instead of dropping the charge; DQAC added an additional charge; that I failed to use a pulp test to diagnose irreversible pulpitis. I had also been given no opportunity to answer this new charge (A Constitutional violation of Proper Notification of Charge) (2006) (Patient 2)
- Patient 2 was not made available by Carpenter for deposition or cross examination, violation of the right to face my accuser. Three emails which stated: I talked to her, I'm waiting to hear from her and I can't find her.(CP 00543,546,544) (2006)
- Indicia of reliability of this witness was low due to contradictory statements made that precluded the legitimate legal use of her complaint; but her complaint had been altered by DQAC's "new case analysis and therefore unusable. (2006) (2007)
- In addition, DQAC "altered" the charges and made up a charge they knew to be false; and that charge was that I failed to notify the

Commission that I had caused Patient 2 to be hospitalized by the treatment I provided to her.*** A DQAC in-house clerical document dated 6/04 clearly states that there was no evidence of Patient 2 being hospitalized.(0-0000000460) (2006)

- DQAC's witness, PA John O'Neil testified that he had no knowledge of Patient 2 being hospitalized. Surely, AG Carpenter questioned Mr. O'Neil before he testified in court; so why wasn't the charge dismissed? Why was it brought in the first place? Answer: Defamation of character. (Attachment 10) (2006)

***** "Altering or offering the preliminary testimony violates the defendant's right of confrontation." Douglas v. Alabama, Bruten v. United States. Constitutional Confrontational/hearsay clause violation. Reverse**

**WHAT CHARGE DID DQAC AND CARPENTER KNOW TO BE FALSE?- Hospitalized as a result of treatment I provided. DQAC's clerical form that is entitled: Daniels, Shirley – 2004-06-009DE and the date reads 6/3/04 "NO REPORT OF HOSPITALIZATION", line 2 ( 0-0000000460 ). "Risk of erroneous results requires an increased burden of proof. "Risk of error is high in a proceeding seeking to revoke a dental license. Risk increases where the agency acts as investigator, prosecutor and decision maker." Id. At 941. In reviewing sanctions, the appellate courts are not bound by a trial court's findings of fact and conclusions of law; rather, appellate courts must independently review the entire record to determine whether the trial court abused its discretion. See Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992) (citing Rossa v. United States Fidelity & Guar Co., 830 S.W.2d 668, 672 (Tex. App. –Waco 1992, writ denied)**

**WHAT'S THE HARM IF THE CHARGE WAS DROPPED?- Defamation of character, their contracts, dismissal from insurance contracts, loss of patients, increase in insurance rate, difficulty getting malpractice insurance, placement in a high risk malpractice insurance category.**

Although there were charges dismissed as related to Patient 2, Patient 4 and 5, Patient A; in the 2007 hearing; these charges should not have been brought in the first place. The fact that the charges were dismissed is irrelevant because harm was done.

Judge Souter's concurrence in Albright suggested the possibility "that initiating an unwarranted prosecution that is dismissed may in some unusual circumstances result in substantive due process violations."

"There may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed." Whether any such cases may reveal a substantial deprivation of liberty are issues to be faced only when they arise." Albright, 510 U.S. at 291 (Souter, J. concurring) See also, Darrah v. City of Oak Park, 255 F.3d 301, 309 (6th Cir. 2001) (noting " 1983 malicious prosecution claims may still be available pursuant to the Fourteenth Amendment's substantive due process rights in cases that do not involve the Fourth Amendment.

Libel via media release, loss of business, loss of revenue, false charges reported to the National Practitioner Data Bank, Insurance Companies refuse to enlist me in What was the harm? First, I believe that Judge Canner did write a final order; but after reading it and rejecting it; DQAC wrote another final order and that is why the 2007 final order was six days late. The harm was what DQAC intended the harm to be and that was defamation of my professional character. A reason to suspend and then revoke my license to practice dentistry for 10 years; thereby allowing DQAC and the State of Washington to acquire and control the Rural Health Shortage Area Designation and steal my business and patients. This was

accomplished by filing groundless charges in 2006 that were so non-existent that they could only be supported by prosecutorial misconduct, judicial bias, new case analysis, using extremely old complaints to file for summary suspension, double jeopardy, improper notification of charges. Also, DQAC was willing to disregard their own rules to accomplish their goals. Anti- trust issue: The ultimate goal of DQAC was to steal my practice and the Rural health shortage area designation . I HAVE NOT BEEN ABLE TO PRACTICE MY PROFESSION FOR MORE THAN 3 YEARS BECAUSE OF Dr. Davis and DQAC'S QUEST FOR MY BUSINESS. IN FACT, DQAC ALSO NEEDED TO ENSURE I WAS OUT OF COMMISSION BECAUSE THEY FELT THEY WOULD FAIL IF THEY HAD TO COMPETE AGAINST ME. THE LICENSE REVOCATION WOULD GIVE THEM TIME TO POSSIBLY MAKE A SUCCESS OF THE COMMUNITY HEALTH CENTER THEY BUILT TWO BLOCKS FROM MY OFFICE. "To obtain reversal one must not only show error, he must show injury from error. Robbins v. Los Angeles Unified School District (1992 3CAL., App., 4th 313,318. See also 9 within CAL Procedure, supra 8 409, P.4) See also Hughs v. Wheeler (1888) 76 CAL., 230, 234, 9 within CAL Procedure (4th CAL 1997) Appeal 8 518; pp. 562-563.

To watch my savings disappear, to have my sister watch her savings disappear trying to support me. To know that the people who have initiated these actions have broken the law.

**JUDGE KUNTZ SHOULD HAVE DISQUALIFIED HIMSELF/JUDGE TABOR SHOULD HAVE DISQUALIFIED HIMSELF AS REQUESTED-**

"A judge must perform judicial duties impartially and fairly. A judge who manifests bias in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. "

As a result of /RJC 3(E)(1), 3(E) ((1) (a); Judge Kuntz and Tabor were required to disqualify themselves in a proceeding in which the judge's impartiality was questioned. I made a motion asking Judge Tabor to disqualify himself based on the fact that he ignored and gave no weight to so many issues in the case; for example the misconduct of Carpenter and the judicial bias of Kuntz, the double jeopardy, the fact that the final order was 16 days late in 2006, 6 days late in 2007; and the fact that the wrong standard was used in the 2007 show cause proceeding.

RJC 3(D) (2) "A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct, the judge should take appropriate action."

When Mr. Carpenter withheld exculpatory evidence re: Patient 4 and 5, my attorney informed Judge Kuntz. Judge Tabor was informed via my brief upon appeal. I was denied due process and a fair hearing from both Judge Kuntz and Judge Tabor.

"Procedural due process ensures that individuals are entitled to certain procedural safeguards before a state can deprive them of life, liberty or property. " See Albright, 510 U.S. at 275 (Scalia, J., concurred)

Judge Tabor -Judge Tabor was neither fair nor impartial. Judge Tabor stated that there were no errors by DQAC and refused on two occasions grant stays even though I satisfied hardship. He also gave no weight to the following:

1. **Prosecutorial misconduct,**
2. **Judicial bias,**
3. **Withholding evidence and**
4. **Withholding the identity of DQAC's expert witness**

**DQAC not following their own rules regarding the timelines for handling emergency summary suspensions; my loss of liberty and license**

1. **Prosecutorial misconduct**
2. **Improper notification of charges**
3. **Double jeopardy as it related to Patient 3 and Prehearing Order No. 6**
4. **Double Jeopardy as it related to the negation of the final order of 2006 and the increased punishment**
5. **The fact that the 2006 final order was 16 days late and the 2007 final order was 6 days late**
6. **Canner ex parte communication**
7. **Canner's testifying using her recollection to assist DQAC-judicial bias**
8. **Obstruction of justice**
9. **Judge Kuntz not allowing my attorney to question Patient 4 about Mr. Carpenter's misconduct**
10. **The findings of fact not being written by Canner in 2007;**
11. **Use of the Chair of the Board of my malpractice company used as their expert witness**

12. **The wrong standard of proof used in the show cause hearing and the lack of substantial evidence in reaching the conclusion to suspend my license**
13. **Abuse of discretion by DQAC in issuing a revocation following a decrease in the number of charges and the fact that I could not apply for reinstatement until after the 10 years**
14. **The fact that there are no guidelines and cases were presented to show that DQAC cronies and former board members had near death and death cases and there was no emergency summary suspension and there was definite imminent danger**

Imminent danger involves death or near death; however, since DQAC has resisted guidelines; DQAC leadership handles each case as they see fit. The charge related to infections control and patient safety was false. It is clear from the two surprise inspection of my facility and the measures that I instituted from the time I opened until I was closed that Infection Control was a priority.(0-0000000535). The DOH investigator visited my facility and gave a surprise inspection; her report states that my office was very clean and well organized.

In addition, I provided extensive infection control training to my staff. I hired a company ( from 2001, the year I opened until 2007, the year I closed ) that specialized in teaching infection control, provided annual training for my staff, and provided infection control updates between yearly visits. Staff was also required to watch the ADA video on Infection Control and safety when

they were first hired. They are also required to take an exam and pass it before they were allowed to work with patients. They were required to view those videos every six months and take the test and pass it again. The training that I provided for my staff was above average and above stated requirements. (See 0-000000590) Physician's Compliance Connection.

**REAL IMMINENT DANGER AND CRONISM DUE TO NO GUIDELINES**

Please compare and contrast the danger to the public by charges that were not proven, using complaints that were all older that a year and were available to be heard during the September 2006 hearing (res judicata) Lang and Paxton, oral surgeons v. the Washington State Medical Board. Dr.'s Lang and Paxton allowed their unlicensed dental assistants to administer General Anesthetic to their patients; even when they were out of the room. A patient almost died and had to be resuscitated with Narcan. The same drug that is provided to heroin addicts to bring them back from an overdose. An employee reported the doctors. Near death and allowing dental assistants unsupervised to administer general anesthetic is imminent danger; however, there was no summary suspension issued. Neither Dr. Paxton or Dr Lang demonstrated any remorse or empathy for their patients. There

was no license revocation for 10 years Punishment: cease and desist and a $4000 fine. Dr. Paxton was a former board member.

Imminent danger (death or harm to the patient ) also oral surgeon. Dr. Thomas Laney took weekend course and started to perform plastic surgery, below the neck. Dr. Laney had numerous high dollar lawsuits. One of Dr Laney's patients lost consciousness. Dr. Laney removed a huge amount of fat from the neck. Instead of Dr. Laney calling 911, he attempted to revive the patient himself. The patient died Not only did Dr. Laney not show any remorse; he refused to take the CE courses prescribed by the Dental Commission. Punishment: There was no summary suspension even though the patient died. There were no charges of failure to cooperate with the dental commission when Dr Laney refused to take the CE courses. Dr. Laney was given a $5000 fine and that was it.. There were no inflammatory footnotes placed Dr. Laney was also a former board member.

Imminent danger, death cause by a dentist Dr Laney hired, Dr Robert Solomon; but there were no charges filed against him. Dr Solomon was doing some sort of controversial drug detox program under general anesthesia and the patient who had diabetes, asthma and sleep apnea died. Dr Solomon was not even sanctioned Solomon stated that sleep apnea was a condition that is exacerbated by General

anesthesia. Dr Solomon took up the controversial drug detox procedure by reading some articles and talking to another doctor.

Punishment: no charges, no emergency summary suspension or license revocation for 10 years. You cannot place the public in a more imminent danger situation that killing them; can you?

Imminent danger- Dr Clem Pellet, Bellvue had two patients die soon after being treated in his office. He was not found at fault in either case. His case does not appear on the credentials website.

INFLAMMATORY AND WRECKLESS REMARKS IN THE FOOTNOTES- I do not believe that the incident of the patient dropping the instrument and allegedly picking it up and putting it in the patient's mouth ever occurred. The patient told no one, not even me and he returned for additional treatment. The DOH investigator failed to put this complaint of Patient A into his general summary; why? The evidence of the training I provide is irrefutable (0-0000000535) and it was demonstrated that because of the direction in which the patient was faced, the fact that the patient was laying down and the fact that the dental tray holding the instruments was

behind him showed that he would have to sit up and turn around to have seen whether or not the dental assistant picked up the instrument from the floor. There was also a discussion that the instruments on the tray are difficult to distinguish, one from another and so therefore it would have been unlikely that Patient A would have been able to tell if the dental assistant placed the instrument back on the tray.

Furthermore, the discussion described in the findings of fact by whoever the author was clearly doubts that Patient A knew whether or not the instrument was placed back on the tray. This does not represent clear cogent and convincing evidence. The author of the finding of facts then speculates wildly and states that before the dental assistant picked up the instrument from the floor she should have changed her gloves. There was never any evidence presented about gloves or no gloves. IT IS HIGHLY UNLIKELY THAT ANY JUDGE WOULD MAKE THIS MISTAKE AND SUBSTITUTE SPECULATION FOR FACT, THUS CALLING INTO QUESTION THE AUTHORSHIP OF THE PARAGRAPH ON THE FINDINGS OF FACT.

Page 6 of 23 Findings of fact (2007 final order) "As a licensed professional they are not free to make claims recklessly" In re Wilkins, 78N.E. 2d 985, 986 (Ind2003), certdenied,1245 Ct 63: "

The Author inferred that the abrasion occurred at work and that the accident arose in the course of employment. It was held that there was no evidence to support the inference. In the findings of fact and conclusions of law of the 2006 hearing similar inferences are made and are not supported by law I refute those findings as being fraudulent and libelous. 13, 1.4. No clear cogent and convincing evidence was submitted to prove deception, only Ms. Neil's opinion. In fact, amidst her inflammatory footnotes, she herself makes the following statement:

**"Since the statement of charges did not include an allegation of altering the record, that issue will not be addressed in this order. What is clear is that the Respondent did not even start these restorations on teeth 8,9,10 and 11. (Page 6 of 23, 2007 final order).**

**DOUBLE JEOPARDY CAUSED BY WHOMEVER WROTE THE CONCLUSIONS OF LAW IN THE 2007 FINAL ORDER** -The 2006 order was a final order. Continuing education was issued in order for me to remove the restriction from my license which stated that I could not perform surgical extractions. I completed all of the requirements and my license was unrestricted. The author of the 2007 emergency summary suspension hearing placed the findings of fact and conclusions of law into the findings of fact

and conclusions of law of the 2006 hearing. Then the author wrote the following:

"The respondent's pattern of substandard practice in various areas of dental care compounded by dishonest billing, failure to cooperate with a Commission investigation, and the presentation of deceptive testimony to the Commission, clearly demonstrates that her continued practice of dentistry would place the public at an unreasonable risk of harm. The respondent's completion of the remedial education outlined in the 2006 Commission order would not sufficiently protect the Public"

"The Respondent demonstrated a lack of remorse/empathy to her patients for the results of her substandard care or remorse for her dishonest behavior. Allowing the respondent to return to the practice of dentistry would place the public at an unreasonable risk from substandard care, dishonest billing and obstruction of Commission investigations The timely completion of investigation is critical in protection of Public Health and Safety."

Yes, the timely investigation is critical not only to the public; but is critical to protect the provider from frivolous and unwarranted attacks This is why the legislature set up timelines and made the requirement (2) days for handling complaints related to emergency summary suspension.

As an agency DQAC needs to follow their own rules. "A divergence from policy and failure of the agency to follow its own rules and procedures establishes a procedural due process violation because I have been prejudiced" Motley-Motley, Inc v Pollution Control Hearing board: 127 Wn. App 62, 81, 110 .3d 812 (2005) Review denied, 156 Wn. 2d 1004 (2006). "An administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefits or

entitlements. Ritter v. Board of Commissioners: 96 Wn. 2d, 503, 507, 637 P2dn940 (1981).

I therefore dispute findings of fact 1.24 as being fraudulent, arbitrary and capricious, intentionally punitive, vindictive, malicious, and engineered to serve the Agency.

The complaints DQAC used to initiate the emergency summary suspension were 678 days old, 432 days old and 462 days old for Patients A, B, and C, respectively. DQAC removed two emails from the "certified record" that showed that DQAC had issued docket numbers for Patients A and B. Also removed from the certified record by DQAC was the reports that showed the age of the complaints (The individual case summary reports for Patient A and B (CP 0-0000000796 an795). Also, removed from the agency record by DQAC were the three color photographs that were supposed to show the defect left by me on the lingual side of the crown of Patient A.

My former attorney counted the pages in the certified record and noticed that there were 18 missing pages from the certified record; and he filed a motion to supplement the record or reverse. Judge Tabor, Superior Court Judge of

Thurston County granted the motion to supplement (CP 0-0000000811) and nine pages were entered.

"The reviewing court must grant relief if the Board's order violates the constitution, exceeds statutory authority, is the result of faulty procedure, involves an error in interpreting or applying the law, is not supported by substantial evidence, omits issues requiring resolution, involves improper rulings on disqualifications issues, is inconsistent with an agency rule, or is arbitrary and capricious." Clausing, 90 Wn. App. At 870

The day of the hearing Ms. O'Neil entered the three photos into evidence that were supposed to show the defect in the crown and promptly removed them before the hearing started. I think these factors represent deception.

There was no evidence cited by Ms. O'Neil that represented deceit on my part, and there were no charges made; simply her inflammatory and reckless comments.

**BILLING ISSUES-**The billing issues related to Patient A were outside of the jurisdiction of DQAC; and should have never been charged because they were answered and disproven with evidence; and they were done so again and dismissed. The billing issues that were allegedly related to the termination of my provider contract were outside the jurisdiction of DQAC; and that was written on an in-house DQAC clerical form and was part of the

agency record. Judge Canner issued a ruling sua ponte that the issue of billing would not be addressed at the hearing because the matter had not been before a judge. Therefore, the only thing that could be said, according to her ruling, was that my provider contract had been terminated by DSHS and was up for appeal; pursuant to WAC 388-502-0240 13© and 14.

DQAC violated Judge Canner ruling by writing in the conclusions of law that my provider contract was terminated because of irregular billing

The letter apprising me of the rationale for terminating my provider contract contained no billing issues. Dr. Davis, et al intentionally and illegally terminated my provider contract, in violation of WAC 388-502-0240 13 © and 14.

## JUDGE TABOR REFUSED TO DISQUALIFY HIMSELF; BUT HE SHOULD HAVE

Based on the evidence and his conflict of interest related to DQAC , I motioned that Judge Tabor recuse/ disqualify himself and he declined. (Automatic Reversal)

The Due process clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, **Tumey v.**

**Ohio, 273 U.S. 510, 523,** but the Supreme Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the decision maker is too high to be constitutionally tolerable, " **Withrow v. Larkin, 421 U.S. 35, 47**

**In re Murchison**, it has been determined that no man is permitted to try cases where he has an interest in the outcome, " **id., at 136,** the Court noted that the circumstances of the case and the prior relationship required recusal.

I requested a stay twice and was denied twice. I believe that my request for a stay should have been granted and I think now, especially with all of the misconduct that has come to light, it definitely should have been granted. I demonstrated a hardship and submitted enough evidence to support my claims.

Because the objective standards implementing the Due Process clause do not require proof of actual bias, the Court does not question Justice Benjamin's subjective findings of impartiality and propriety and need not determine whether there was actual bias. Rather the questions is whether, "under realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, 421 U.S., at 47.

"There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the bench by raising funds or directing the judge's election campaign when the case was pending or imminent."

"The proper inquiry centers on the contribution's relative size in comparison to the total amount contributed to the campaign. The temporal relationship between the campaign contributions, the justice's election and the pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly re-elected justice."

Judge Tabor was up for re-election and faced an opponent in that election. The 2006 appeal was originally in the hands of Judge Strophy who would not be susceptible to the same temptation because Judge Strophy is retiring.

On June 8, 2009, the U.S. Supreme Court issued a split decision regarding the standards for a judge's recusal in cases where one of the parties has made substantial election donations to a judges' campaign. The question was whether a West Virginia Supreme Court Justice's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the 14th Amendment. The Court held that Due Process requires recusal under these circumstances and issued clarification on the standards for a judge's recusal for due process compliance.

"If the judge's livelihood is being threatened by a lawyer running against him or her, the appearance of lack of impartiality must exist. Even if the judge and attorney are able to place their professional responsibilities above their personal biases, it is inevitable that the parties will perceive an appearance of bias or impropriety. This leaves both parties of the litigation with a legitimate basis for questioning the legal process." "A possible temptation for the judge is to forget the burden of proof and generate a biased decision making process." **Tumey, 273 U.S. at 532. I maintain that this is exactly what happened.**

**The Show Cause Hearing should be vacated because:**

1. Judge Kuntz should have disqualified himself and did not (judicial bias);

2. Judge Kuntz did not use the clear cogent and convincing standard and the evidence was not substantial;

3. Dr. Grubb should not have been used because of his conflict of interest, his bias, his breach of confidentiality as my insurer and because his hearsay upon hearsay affidavit provided no evidence that was substantial or that could support the clear, cogent and convincing standard;

4. The findings of fact were not supported by the evidence presented and the conclusions of law were not supported by the findings. Neither was supported by clear, cogent and convincing evidence;

The complaints used to demonstrate imminent danger Patients A, B and C were extremely old 678 days old, 421 days old and over 400 days old and violated the WAC 246 14 that states that all complaints used emergency summary suspensions are to be handled within (2) days. No viable explanation was provided as to why DQAC chose to use these complaints other than possibly they were holding them in reserve to use strategically; in hopes of new complaints that did not materialize In addition, a docket number was given November 21,2006, five months before the Emergency summary suspension was issued. Emails showing that dates were removed from the certified record were obtained by my former attorney and; he therefore, produced a motion to supplement or reverse; forcing DQAC to replace the emails and other documents that would demonstrate their duplicity; including documents that showed the age of the complaints. DQAC never provided the complaint for Patient C; which was used to support the request for an emergency summary suspension hearing.. Rather than provide the complaint, because on the day one of the hearing, AG O'Neil said that the Commission had closed the complaint regarding Patient C; and no action

had been taken; as usual, DQAC decided to replace Patient C's complaint with the charge of failure to cooperate with the Commission. Sanctions should be imposed to stop DQAC from violating the Constitutional rights of dentists by improper notification of charges and abuse of their discretion when they fail to follow their own rules.

"If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes an indictment which does not contain such an allegation is defective." 141 U.S. v. Cook, 84 U.S. (17 Wall)

DQAC knew that they would be filing an emergency summary suspension in November 2006; five months before the actual emergency summary suspension was issued. DQAC filed docket numbers for Patient A and Patient B five months before the actual emergency summary suspension was issued. (Attachment 11)

DQAC illegally removed the documents containing evidence of the docket numbers for A and B from the certified agency record.(CP0-00000809) AND (CP0-000000800) Also, removed from the certified record were documents that showed the age of the complaints. ( CP 0-000000795) AND (CP0-000000796)

A motion made by my attorney: **Supplement or Reverse** uncovered DQAC misconduct and those documents were added back in the certified record.(With Subjoined Declaration in Support of Motion) No. 07 2 00829 0 "If the DQAC refuses to submit the complete administrative record, this court should reverse the Respondent's determination."(Attachment 12)

Another document that had been removed from the record was a receipt for 3 color photographs. The three color photographs that Dr. Hackney wrote would show the huge defect in the crown of Patient A (AR1091) DQAC had the 3 color photographs on their exhibits list but removed them the morning of the hearing. (000002)2007 hearing. (Attachment 13). Reverse

Respondents' expert witnesses, Dr. Hudson Schmuland said (AR 1169) ""I cannot come to agree with the conclusion that DQAC made that things were not done to the standard of care (AR 1091) "I cannot see anything that says that there is a defect there; and, expert witness, Dr. Lynne Kessler testified regarding the void in the crown of Patient A" "In my opinion it appears to be sealed". (AR 1130).

Dr. Hackney was not available for the hearing

Ms. O'Neil failed to produce Dr. Hackney for cross examination.

Hearsay upon hearsay testimony was provided by expert witness Grubb who was illegally representing DQAC and lending credence to Hackney's alleged accusations with hearsay upon hearsay testimony

Dr. Hackney's charts notes were not signed by anyone, thus creating very low indicia of reliability

Confrontation/hearsay violation of the sixth amendment

Patient A's complaint was 678 days old and was in violation of WAC246-14; sanctions should be applied to DQAC and O'Neil

Dr. Grubb's testimony should be stricken because Grubb had a conflict of interest, a breach of fiduciary duty and DQAC should not have used his services because of his legal connection to me.CR26(g)

**PUBLIC MEMBER ALKEZWEEN**-Public member Alkezweeny

participated in the show cause hearing and signed the final order A

motion had been made during the prehearing conference to have Dr.

Alekezweeny replaced because of his language problem in the 2006

hearing (AR 1575) Judge Canner said she spoke to Alkezweeny and

he said he wasn't biased. Ex parte communications; meanwhile she did not address the issue of the language problem nor did she address his illegal participation in the 2007 hearing where he had already provided his opinion that an emergency summary suspension should be issued. Judge Canner denied the motion to dismiss Dr. Alkezweeny; in violation of ( Page 36, line 9) (Error)

**DR ALKEZWEENY/PUBLIC MEMBER WAS NOT COMPETENTTO SIT ON THE PANEL OF THREE MEMBERS /2PRO TEM DENTISTS AND DR ALKEZWEENY-** Three competent and knowledgeable members should have been on the Panel.

**Due to the language problems of public member Alkezweeny; I don't believe he is qualified to sit on a panel member of only three. He does not know dental; he cannot make an independent intelligent decision based on the evidence; (he cannot read dental x-rays) that is either legal or dental in nature. He has received no training in either dental or the laws of the state of Washington; or the difference between preponderance of the evidence and clear cogent and convincing evidence**

**" An administrative agency's decision of law is fully reviewable on appeal. Competent expert testimony must be introduced if the issues in administrative hearing require establishing the applicable standards and determining whether a particular conduct fell below the standards. It is the agency's responsibility to assess the credibility of witnesses and to resolve conflict of interest in testimony." Huff v. North Dakota State Bd. Of Medicine 690, Wn.2d 221 N.D. (2002)**

We may grant relief from an agency's order if we determine that the agency has erroneously applied the law. RCW 34.05 570 3(d) add that if a public member is to

have a full vote; he needs to be fully trained. He cannot be just a rubber stamp who signs final orders to protect Commission members; there's no due process in that.

Huff v. No. Dakota State Board of medicine.

"When the result is lack of due process; the action is arbitrary and capricious. Stathis v. University of Kentucky not reported in S.W.3d, 2005 WL 1125240 KY. App. 2005, May 13, 2007.

"In reviewing an administrative action, we sit in the same position as the trial court and apply the APA standards directly to the Administrative record. Superior Asphalt and Concrete Co., v. Department of Labor and Industries., (12 Wn App. 291, 296, 49 P.3d 135 (2002) (citing Tapper, 122 Wn. 2d at 402, review denied, 149 Wn.2d 1003 (2003).

**ERRORS MADE BY JUDGE ZIMMIE CANNER/JUDGE CANNER TESTIFIES**

Patient B, during her first visit back with Dr. Busaca, told Dr. Busaca that she left my office because a filling fell out and she couldn't floss in between her teeth, she didn't like the color I had chosen and it hurt for her to chew on the right side.

When Dr, Busaca was asked:

"Could it be that patient B left Dr. Daniels and returned to you because she just didn't like the color. Dr. Busaca: "That's entirely possible. Dr. Daniels' attorney tried to ask a follow up question: "So, could it be that because of what she represented to your assistant, and if I told you that that's the reason that there's a great contrast." AG O'Neal: Objection, I don't believe Patient B testified to anything along those lines. Judge Canner: "I'm going to sustain the objection regarding the testimony of Patient B. "I do not recall that either." (AR 945) During cross-examination of Dr. Busaca: Q. "And when I asked her what additional work had been done by Dr. Daniels, she said you performed the work that Dr. Daniels had not gotten to yet. So based on Patient B's testimony, the work that is in Dr.

Daniels' records, the patient testified that it was done; it just wasn't satisfactory. (AR 957). AG O'Neal: Objection, Patient B never testified anything about whether restorations had been done or not done. She said they'd been worked on. Judge Canner responded: "I can't remember exactly what she said. I'm sort of recalling what of what the witnesses say and not what either attorney says and that's important." **ERROR by CANNER (AR 956 and 957)**

**DR DANIELS' ATTORNEY MAKES STATEMENT TO THE RECORD REGARDING IMPROPER RECOLLECTIONS OF JUDGE ZIMMIE CANNER**

"I just want to say for the record, it's fine if Counsel for the Department disagrees with me, but if you then say that's kind of your recollection, and we have the record, and I know I wrote verbatim when the witness was speaking, then it probably would be better to go back and get the record from the official court reporter. (Ar 957). Judge Canner: "We can't go back each time. It would take too long (AR 956 and 957, 1-25) Judge Canner: I'm going to sustain the objection regarding the testimony of Patient B. I do not recall that either. (AR945) Judicial Bias/Error

**WHOSE RECOLLECTION WAS CORRECT/WHAT PATIENT B ACTUALLY SAID**

Dr Daniels attorney, Sharonda Amamillo, asked Patient B: "Okay, so the ones you had redone at Dr. Busaca's office were the ones that she had done prior, but they were not satisfactory." **Ms. Amamillo was correct.**

**Patient B's complaint was made by her dentist, Dr. Busaca. The dentist was allowed to use photographs to illustrate his allegations; however, x-ray is the standard of care in dentistry (AR 1290). Dr. Busaca's partial dental record were allowed into evidence (over the continued objections of my attorney ( AR 808,**

812, 840, and 795). Judge Canner (Ar 863) made admission of Dr. Busaca's partial record based on AG O'Neil's confirmation that she would have Dr. Busaca bring his whole record. The judge asked Ms. O'Neil to confirm that she would bring the whole record, which she did.

Judge Canner: " I will admit those documents if you confirm that he is bringing his whole file "(AR 863). Judge Canner (AR 874) " I am admitting the partial record because we have her reassurance (AR 875) so the record is incomplete. Amamillo objection (AR 861)- evidence rules require completeness of the record.

The whole record was not provided; therefore, the testimony provided should not have been allowed since Ms. O'Neil did not follow the judge's ruling. As a result, the evidence produced should be disallowed and the findings of fact and conclusion of law associated with that evidence are being disputed.

On 6/20/06 DOH investigator Nancy Maxsom wrote a letter to Dr. Busaca requesting his treatment records, x-rays and new photos were requested to substantiate Dr. Busaca's original allegations(CP0001). X-rays, standard of care, that would have either substantiated or refuted Dr. Busaca's allegations were never produced.

**DQAC KNOWS THAT THE FORMS INVOLVING THE RESPONSE TO AN EMERGENCY SUMMARY SUSPENSION IS CONFUSING/ CHANGE THEM**

**PUNISHMENT- DQAC EXCEEDED ITS STATUTOTY AUTHORITY WHEN ASSIGNING THE PUNISHMENT-** "Although the trial court exercises its independent judgment when reviewing a misconduct finding, it reviews the agency's selection of a penalty for abuse of discretion." (Deagan v. City of Mountain view (1999) 72.2d, App., 4th 37, 45-46.

Charges fell away; however, punishment increased from suspension to 10 years

license revocation, with no possibility to get my license back within that

timeframe.

**DAMAGES - $15, 000000**

**How am I injured?**

**Currently, 3 YEARS OUT OF WORK with the prospect of an additional 7 years**

**(based on the loss of my license).**

**For full description, see attached damages statement**

Shirley O. Daniels, DDS

March 1, 2010

DAMAGES - $15, 000,000

How am I injured?

Currently, 3 YEARS OUT OF WORK with the prospect of an additional 7 years (based on the loss of my license).

I have lost my business, I have huge debts, I do not have a profession, a profession that costs me over $100,000 dollars in student loans, I have lost all of my insurance contracts. I have a fully equipped dental office; but I can't even hire other dentists to work there. I was forced to sell my building. Before my license was revoked my malpractice insurance premium was $1600 per year; during the course of the DQAC involvement it rose from $1600 t0 $20,000/year ; and unless this stigma of unprofessional conduct is removed, with complete exoneration; I will have to pay that and more. DQAC has had me excluded from the OIG Federal exclusion program and that means ; unless I'm exonerated; I will not be able to even work for a dentist who sees DSHS patients. Although I never had any issues with dispensing drugs I had to turn in my DEA license. A form from the DEA was presented to me and fortunately I realized that if I signed it as written; there was a probability that I was admitting to a crime. I cannot be hired in or outside of this state as a dentist or hygienist. I have been humiliated, discriminated against, retaliated against. I have had to pay extensive fees for attorneys. DQAC and DSHS filed criminal charges against me, 5 counts, totaling $1183, (a sum which had already been paid). The charges were dismissed subsequently.

Shirley O. Daniels August 31, 2009

I affirm that I have mailed Ms. Kim O'Neil a copy of this document.

Ms. Kim O'Neil

1125 Washington St. SW

Olympia, Wa. 98502

THE SUPREME COURT OF WASHINGTON

No: 82297-2

PROSECUTORIAL MISCONDUCT AND JUDICIAL BIAS

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On behalf of Shirley O. Daniels, DDS

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