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Statement of Case

Appellant Dr. Miles J. Jones, M.D. attended Princeton University and received his medical training at Howard University Medical School. (App. A-68). Dr. Jones took postgraduate training in Anatomic and Clinical Pathology at Mayo Graduate School of Medicine and in General Surgery at Cleveland Clinic. (Id.). He is board-certified by the American Board of Pathology, in Clinical and Anatomic Pathology, Forensic Pathology, and by the American Board of Forensic Examiners. (Id.) He is the author of numerous peer-reviewed scientific papers, including two which involve Internet medicine, and has presented numerous continuing medical education lectures in various states. (Id.) Dr. Jones currently serves as a peer reviewer for Medical Laboratory Observer, a peer-reviewed journal for laboratorians. (App. A-69). Dr. Jones owns and operates Consultative and Diagnostic Pathology, which provides pathology services almost literally throughout the United States. (Id.) He also serves as medical director of two laboratory services, one in Illinois and another in Georgia. (Id.) In addition to his pathology and surgical experience, Dr. Jones has served as an emergency physician and covered for a family practitioner, as well as being a certified instructor in advanced cardiac life support. (Id.)

Until this matter arose, Dr. Jones held licensure in numerous states, which were mostly secured in order for him to provide *locum tenens* services. (Id.) This was the case with his North Dakota license, which was issued in 1995. (App. A-69).

Approximately seventy-five percent (75%) of Dr. Jones' practice consists of performing autopsies, while fifteen percent (15%) of his practice is devoted to his obligation of being a laboratory director of the two laboratory services mentioned above. (Id.) The final ten percent (10%) is divided equally between doing medical-legal consultations and the practice of Internet medicine. (Id.)

In reference to his practice of internet medicine, Dr. Miles J. Jones has served, without contract, as medical director of Net Doctor International since 1998. (App. A-69). Net Doctor International operates two websites, net-dr.com and maleclinic.com. (Id.) Dr. Jones is not paid on a per-patient basis, but rather by a loose arrangement with the organization wherein he receives payment when cash flow permits. (Id.) In fact, at one point he did not receive any payment at all for a two-year period. (Id.) More typically, however, he receives a payment of approximately \$5,000 every other month. (App. A-69).

The way the web site generally works is that a prospective patient is seeking one of six FDA-approved, US-manufactured non-narcotic medications. (App. A-70).

However, Dr. Jones testified that the vast majority, more than ninety percent (90%), of his prescriptions are for Viagra, a medication used to treat erectile dysfunction. (Id.). In the year 2002, Dr. Jones prescribed over 15,000 prescriptions. (App. A-75).

In order to obtain the medication, the prospective patient must complete a detailed questionnaire which is then screened by staff of Net Doctor International. (App. A-70) If it has been completed appropriately, the questionnaire is forwarded to Dr. Jones or some other physician for review and possible issuance of a prescription of one of the medications. (Id.) The physician -- in this case, Dr. Jones -- then reviews the questionnaire and determines whether and how much to prescribe to the patient. (App. A-70). Occasionally, a follow up telephone call to the patient is required to secure further information; however, Dr. Jones has not found a personal phone call to be necessary in the vast majority of cases. (Id.) This is because the forms are extensive and, in most cases, provide all of the essential information necessary to make an informed medical decision. (Id.) In addition, Dr. Jones has found that phone calls, when unnecessary, delay responsiveness to patient and client needs. (Id.) There is no evidence of actual harm to even a single one of Dr. Jones' internet patients. (App. A-79).

On April 25, 2002, an undercover North Dakota Bureau of Criminal Investigation agent, using a fictitious name, filled out a questionnaire and placed an internet order from Bismarck, North Dakota for the prescription drug Cipro with Net Doctor International. (App. A-71). The agent's credit card was billed by Net Doctor Group and a package of Cipro was shipped to the agent. (Id.) This prescription was filled by Community Drug of Pittsburgh, PA and prescribed by Dr. Jones. (App. A-71).

On November 20, 2001, a Complaint was filed with the North Dakota Board of Medical Examiners (hereinafter "Board") by its Investigative Panel B requesting revocation of Dr. Jones' license to practice law in the State of North Dakota even though there was no evidence Dr. Jones actual harmed any patients in North Dakota or anywhere else. (App. A-79; A-110). On May 22, 2002, an Administrative Law Judge (ALJ) recommended to the Board that revoked Dr. Jones' license to practice medicine in North Dakota be revoked, which the Board did. (App. A-122).

Dr. Miles Jones filed an appeal with the Burleigh County District Court and also sought an order granting him leave to offer evidence at an administrative hearing. (App. A-108). In an order dated December 10, 2002, the Honorable Gail Hagerty, Judge of District Court, granted the request for an administrative hearing under N.D.C.C. §28-32-45 and the appeal was dismissed as moot. (App. A-109).

On January 17, 2003, the same ALJ as before was designated to conduct the appropriate administrative proceedings. (App. A-85, A-107). A Pretrial Conference was scheduled and held on January 28, 2003. (App. A-85; A-103 - A-106). A two-day hearing was held on May 13 and 14, 2003, wherein both parties presented evidence and afterward both parties submitted post-hearing briefs. (App. A-85 - A-86).

On July 25, 2003, Administrative Law Judge Allen Hoberg issued his Recommended Findings of Fact, Conclusions of Law and Recommended Order. (App. A-83 - A-102). The ALJ recommended that Dr. Jones' North Dakota medical license not be revoked. Instead, he recommended a fine of five thousand dollars (\$5,000) payment of "reasonable and actual costs, including reasonable attorney's fees", and a letter of censure. (App. A-102).

Before the matter was considered by the Board, Dr. Jones, through his counsel, expressed his desire to make a personal appearance before the full Board in an e-mail to the counsel for the Board. (App. A-27 - A-34). Originally, the hearing was originally planned to be held at the Board's November regular meeting. (App. A-27). However, on August 7, 2003, counsel for the Board notified Dr. Jones' counsel that the hearing would instead be held by teleconference within approximately two weeks. (App. A-28). Dr. Jones, through his counsel, again subsequently sought to obtain the desired personal appearance before the full Board in a letter

to the Executive Secretary for the Board. (App. A-35). The Board's Executive Secretary confirmed the denial of Dr. Jones' request on August 15, 2003.

On September 12, 2003, Panel A of the Board held a short telephonic hearing on the matter. (App. A-37 - A-56). At that hearing, Panel A voted to adopted the ALJ's Recommended Findings of Facts and Recommended Conclusions of Law. (App. A-49 - A-51; A-65 - A-81). However, the Board did not adopt the ALJ's Recommended Order, rather the Board voted to adopt an Order to continue the revocation of Dr. Jones' North Dakota medical license. (App. A-53 - A-55; A-82). According to the transcript, the Board did not vote nor adopt any rationale to explain why they did not adopt the ALJ's Recommended Order.

Dr. Jones appealed the Board's Decision to the Burleigh County District Court. (App. A-64). On March 26, 2004, the Honorable Robert O. Wefald, Judge of District Court, signed an Order Affirming Findings of Fact, Conclusions of Law, and Order of the State North Dakota Board of Medical Examiners. (App. A-17 - A-26). Notice of Entry of the Order was served on Dr. Jones' counsel on April 21, 2004. (App. A-16).

An appeal to this Court of the District Court's Order Affirming Findings of Fact, Conclusions of Law, and Order of the State North Dakota Board of Medical Examiners was filed on June 17, 2004. (App. A-15). Subsequently, Judgment in

the District Court was entered on July 23, 2004.<sup>1</sup> (App. A-14). Notice of Entry of Judgment was served on or about July 28, 2004. (App. A-13).

OFFICE OF THE  
CLERK OF THE  
SUPREME COURT

AUG 30 2004

Standard of Review

In reviewing appeals from decisions by administrative agencies, this Court reviews the agency decision, not that of the district court. Gale v. N.D. Board of Podiatric Medicine, 1997 N.D. 83, ¶10, 562 N.W.2d 878. Under N.D.C.C. §28-32-46, this Court will affirm the order of the agency unless it finds that any of the following are present:

- 1.) The order is not in accordance with the law.
- 2.) The order is in violation of the constitutional rights of the appellant.
- 3.) The provisions of Chapter 28-32 of the North Dakota Century Code have not been complied with in the proceedings before the agency.
- 4.) The rules or procedure of the agency have not afforded the appellant a fair hearing.
- 5.) The findings of fact made by the agency are not supported by a preponderance of the evidence.
- 6.) The conclusions of law and order of the agency are not supported by the findings of fact.

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<sup>1</sup> An administrative agency appeal before this Court is appropriate from an order when the record contains a judgment consistent with the order. See Rist v. N.D. Dept. of Trans., 2003 N.D. 113, ¶1 n. 1, 665 N.W.2d 45.

7.) The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8.) The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

In reviewing whether the Board's findings of fact are supported by the preponderance of the evidence, the Court will exercise restraint and will not make independent findings of fact or substitute its judgment for the Board's decision. Gale, 1997 N.D. 83, ¶10. However, if the order of the agency is not affirmed by the Court, this Court will modify or reverse the order, and the case shall be remanded to the agency for disposition in accordance with the order of the Court. N.D.C.C. §28-32-46.

Statement of Issues

- I. THE BOARD ERRED IN FAILING TO PROVIDE DR. JONES AN OPPORTUNITY TO PERSONALLY APPEAR BEFORE THE BOARD.
- II. THE BOARD ERRED IN CONSIDERING AND NOT FOLLOWING THE ADMINISTRATIVE LAW JUDGE'S "RECOMMENDED ORDER".
- III. THE BOARD'S CONCLUSION THAT JONES' VIOLATED N.D.C.C. §43-17-31(6) & (21) IS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

## Argument

I. The Board erred in failing to provide Dr. Jones an opportunity to personally appear before the Board.

As is reflected in the record, on August 5, 2003, Mr. John Olson, counsel for Panel B, e-mailed Dr. Jones counsel indicating that the full Board would be considering the issue of Dr. Jones fate at their November meeting. (App. A-27). However, on August 7, 2003, Mr. Olson e-mailed Dr. Jones counsel again and indicated that the Board would, in fact, consider the matter "in 2 weeks or so." (App. A-28). Ultimately, after a series of letters back and forth from Dr. Jones' counsel to Rolf Sletten in mid- to late-August, the Board ultimately held a telephonic hearing on September 12, 2004. Despite repeated attempts to get the hearing at which Dr. Jones could appear personally, the Board refused to do so

In upholding the Board's decision, the district court noted that N.D.C.C. §28-32-39(3) states only that the agency "MAY" allow oral arguments. (App. A-21). However, "[a] state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment." Schwartz v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1971). "Due process requires notice and a meaningful opportunity for a hearing appropriate to the

nature of the case." Powell v. Hjelie, 408 N.W.2d 737, 738 (N.D. 1987). In an administrative context, this Court must "consider a number of factors, including the private interest that will be affected by the official action, the potential for governmental error, and the magnitude of the state's interest." Id.

In making these decisions, the Board decides the fate on whether or not a licensed doctor will be permitted to continue to make a living in his or her chosen occupation. This clearly differs from agency decisions made by, for example, the Worker's Compensation Bureau where a "claimant must prove entitlement to receive benefits. See Blanchard v. N.D. Workers Compensation Bureau, 1997 N.D. 118, ¶23 565 N.W.2d 485. This Board is potentially taking away an individual's right to practice medicine and acting in an enforcement capacity. Given the gravity of the decision the Board is charged with making, it certainly should not be too much to expect that the Board could convene a quorum of members to hear arguments on Dr. Jones' fate.

Furthermore, these decisions are not made by law-trained professions, but by doctors and laypersons. The potential for the Board to make rash decisions, based upon passion and professional malice, is presumably much greater than that by a Court or Administrative Law Judge. In fact, in this particular case, the ALJ even noted that "[i]t is tempting to let one's personal feelings rule in a case such as this

one..." (App. A-86). By at least requiring that the Board grant personal appearances scheduled with sufficient notice, the formality of the proceeds lessens the chance that the Board would make decisions based upon the improper considerations. Given the authority which is vested upon it and the consequences in the event of an unjust decisions, Dr. Jones maintains that such requirements are not, to say the least, overly burdensome. In fact, Dr. Jones maintains that such requirements are essential.

Based upon the above stated law and facts, Appellant Dr. Miles Jones urges this Court to reverse the Board's Findings of Fact, Conclusions of Law and Order and remand this case to the N.D. Board of Medical Examiners to reconsider the case in it's entirety. See Blanchard, 1997 N.D. 118, ¶29 (providing similar remedy); N.D.C.C. §28-32-46. Given that many of the Board members have prejudged Dr. Jones and some have even voted twice to revoke his license, Dr. Miles Jones urges this Court to, in the interests of justice, order the Board to convene an independent, new Board on the remand of this case. See Graves v. State Board of Law Examiners, 2004 N.D. 64, ¶17, 677 N.W.2d 215 (finding new board necessary to reconsider bar applicant's application after disclosure that one of the board who had heard the matter had a conflict of interest).

**II. The Board erred in considering and not following the Administrative Law Judge's "Recommended Order".**

In the case at hand, the Administrative Law Judge held an extensive hearing. The parties and their attorney's presented evidence and expert testimony and submitted briefs on the relevant issues. (App. A-85). After considering all of this, the Administrative Law Judge issued a Recommended Order which censured Dr. Miles Jones. (App. A-102). In reaching this conclusion, the ALJ "encouraged the Board to review Jones' brief in regard to remedy." (App. A-101).

Despite this plea, the Board met in a telephonic hearing on September 12, 2003. (App. A-37 - A-56). At the hearing, there was no testimony taken or evidence presented. (Id.) After establishing a quorum, the Board adopted the ALJ's Findings of Fact and Conclusions of Law. (App. A-49 - A-51). After doing so, the Board moved quickly on to disposition. (App. A-51). The only mention made that detailed any rationale for not adopting the ALJ's Recommended Order was made by Panel B's attorney, John Olson. (App. A-51 - A-53). After hearing Mr. Olson's argument, the Board merely adopted an Order, which had been prepared beforehand by Mr. Rolf Sletten. (App. A-53 - A-54). The Board members themselves did not discuss what disposition was appropriate and did not vote to adopt any rationale for why it was not adopting the ALJ's Recommended Order. (App. A-53 - A-56). In fact, the only language in the Order, other than that

stating the disposition, is a boiler plate statement that "[t]he evidence of record has been considered and appraised..." (App. A-53, A-82). Except of the last page and the exclusion of the ALJ's "Analysis" section, the Board's Findings of Fact, Conclusions of Law, and Order dated September 12, 2003 is virtually identical to the ALJ's Recommended Findings of Fact, Conclusions of Law and Order dated July 25, 2003. (App. A-65 - A-102).

Under N.D.C.C. §28-32-46(8), the Board must "sufficiently explain" their rationale for not adopting an administrative law judge's recommendations. This requirement was no doubt changed by the North Dakota legislature as a result of a series of cases issued by this Court and culminating in the Court's decision in Blanchard v. N.D. Workers Compensation Bureau, 1997 N.D. 118, 565 N.W.2d 485. Despite the fact that the statutory meaning is quite clear, the Board has chosen to completely ignore it and revoked Dr. Jones license without any explanation of why he merits revocation rather than being censured as the ALJ recommended.

In Blanchard, this Court held that, if an administrative agency rejects a hearing officer's recommendation, the agency should sufficiently explain its rationale for not following the recommendation. 1997 N.D. at ¶21 (citing Maginn v. N.D. Workers Comp. Bur., 550 N.W.2d 412, 414 n.1 (N.D. 1996), Carlson v. Job Service North Dakota, 548 N.W.2d 389, 393 (N.D. 1996), Kackman v. N.D. Workers Comp. Bur., 488 N.W.2d

623, 625 (N.D. 1992), Marion v. Job Service North Dakota, 470 N.W.2d 609, 613 (N.D. 1991)). The need for such a requirement is very clear. Like the Worker's Compensation Bureau, the N.D. Board of Medical Examiners acts as both a "fact finder" and as "advocate" which necessitates the the Board "must not place itself in a full adversary position" to someone it is prosecuting. See Blanchard, 1997 N.D. at 118, ¶23. However, as in this case, when no rationale is presented, Dr. Jones cannot think anything but that the Board "had it in for him from the start".

Furthermore, the need for the Board to explain its rationale for not following the ALJ's recommendation, along with the opportunity for judicial review, "provides the ultimate due process protection to those aggrieved by agency decisions." Feist v. N.D. Workers Comp. Bureau, 1997 N.D. 177, ¶10, 569 N.D. 01 (quoting Municipal Services Corp. v. State, 483 N.W.2d 560, 563 (N.D. 1992)). Given the constitutional implications, Dr. Jones submits that the due process and equal protection requirements should be diligently followed since the revocation of his professional license and livelihood is involved. See Schwartz v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1971).

In Dr. Jones case, how can this, or any reviewing court, guarantee that the Board's decision regarding the disposition meets constitutional muster? As the Court is aware, the Board cannot abridge or deny Dr. Jones on the account of his

race. U.S. Const. Amend. 14. As is reflected in the record, Dr. Miles Jones is an African-American. Given this fact and without any rationale being adopted by the Board, how can Dr. Jones or this Court know if the basis for the N.D. Board of Medical Examiners decision was racial motivated? In truth, an off-hand comment made by one boardmember about the amount of money Dr. Jones makes from internet medicine shows exactly how possible it is that Board voted for revocation on personal bias rather than on legitimate grounds. (App. A-47).

In alternative to the remand detailed in Issue I, Appellant Dr. Miles Jones urges this Court to reverse the Board's Findings of Fact, Conclusions of Law and Order and remand this case to the N.D. Board of Medical Examiners to reconsider the disposition of this case. See Blanchard, 1997 N.D. at 118, ¶29 (providing similar remedy); N.D.C.C. §28-32-46. As noted previously, given that many of the Board members have prejudged Dr. Jones and some have even voted twice to revoke his license, Dr. Miles Jones urges this Court to, in the interests of justice, order the Board to convene an independent, new Board on the remand of this case. See Graves, 2004 N.D. at 64, ¶17.

III. The Board's conclusion that Jones' violated  
N.D.C.C. §43-17-31(6) & (21) is not supported  
by a Preponderance of the Evidence.

The Administrative Law Judge's Findings of Fact and Conclusions of Law, which were adopted by the Board, found that Dr. Jones "engaged in unprofessional conduct that is likely to deceive, defraud, or harm the public" in violation of N.D.C.C. §43-17-31(6). (App. A-81). The Administrative Law Judge's Findings of Fact and Conclusions of Law also found that Dr. Jones "engaged in a continued pattern of inappropriate care" in violation of N.D.C.C. §43-17-31(21). (App. A-81). Jones counters that a preponderance of the evidence shows that the Board has completely failed to prove that his practice of internet medicine was in anyway "unprofessional" or "likely to deceive, defraud, or harm the public." Likewise, Jones counters that a preponderance of the evidence also shows that the Board has completely failed to prove he engaged in any "continued pattern of inappropriate care".

First, no evidence of actual harm to any of Jones' internet patients was ever submitted to the ALJ in North Dakota or from anywhere else in the United States. (App. A-79). Second, no evidence or testimony was submitted that showed that Dr. Jones was "deceiving" or "defrauded" anyone. In fact, the only individuals whose acts were deceptive was the undercover investigator who misrepresented themselves and

their medical conditions to Dr. Jones over the internet.  
(App. A-94 - A-95).

Rather, the entire focus in Dr. Jones' case was on whether his conduct was "likely to harm the public" and was "inappropriate". In regards to these aspects, testimony from the Board's expert witnesses, Drs. Guy Tangedahl, George Porter and William Vilensky focused on their belief that Dr. Jones did not have a physician/patient relationship. (App. A-77 - A-78). This testimony was countered by Dr. Jones' experts, Drs. Henry Jones and Bernard Bloom. (App. A-78 - A-79). Ultimately, given the fact that the Conclusions of Law section repeatedly refers to Dr. Jones' "patients", the ALJ--and hence the Board--must have concluded that, in fact, Dr. Jones did have a physician/patient relationship in the course of his practice of internet medicine. (App. A-80 - A-81). This conclusion is well supported at law. See Peterson v. St. Cloud Hospital, 460 N.W.2d 635 (Minn. App. 1990) (finding physician/patient relationship existed for radiologist who never met or communicated with patient); Wheeler v. Yettie Kersting Memorial Hospital, 866 S.W.2d 32 (Tex. App. 1983) (finding physician/patient relationship existed when doctor made a determination of a pregnant woman's delivery status was made via telephone).

Rather, the Board's decision centered around the nature of his internet practice and on their conclusion that Dr. Jones internet practiced "without adequate safeguards, and, at times, without adequate information" (App. A-80). However, the Findings of Fact does not make a finding of any studies, statistics, or testimony which were presented indicating what constitutes the standard of care in regards to "adequate safeguards and adequate information" for prescribing medicine over the internet. As the Board's expert witness, Dr. Guy Tangedahl did not state what safeguards need to be in place to allow internet prescribing of drugs. (App. A-77). Likewise, no finding of such a standard was determined from Dr. Porter and Dr. Vilensky's testimony except 1.) that a physician/patient relationship must exist, and 2.) that internet prescribing based solely upon a questionnaire is inappropriate. (App. A-78). As noted previously, in Dr. Jones case, a physician/patient relationship was found to exist and Dr. Jones did not rely solely on a questionnaires since it was found he would make follow up telephone calls to the patients when it was necessary to obtain necessary information. (App. A-70).

As a point of fact, the only Finding of Fact which did detail a standard of care specifically for prescribing drugs over the internet was made by Drs. Henry Jones and Bernard Bloom who found that Dr. Miles Jones did not violate the standard of care. (App. A-99).

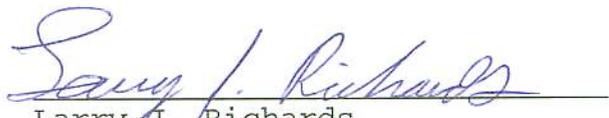
Given the above-stated law and facts, the Board failed to establish exactly what standard of care Dr. Jones was alleged to be breaking. Without establishing the standard of care, it cannot be determined that Dr. Jones breached anything and that his conduct was "inappropriate" and "likely to harm anyone". Therefore, the North Dakota Board of Medical Examiner's Findings of Fact, Conclusions of Law, and Order revoking Dr. Miles Jones license should in all things be reversed and remanded to the Board with instructions to dismiss the Complaint filed against him.

Conclusion

Based upon the above stated law and reasoning, Appellant Miles J. Jones, M.D. requests, on Issues I and II, that this Court reverse the Board's Findings of Fact, Conclusions of Law and Order and remand this case to the N.D. Board of Medical Examiners to reconsider this case consistent with the Court's decision on those issues. Further that, in the interests of justice, order the Board to convene an independent, new Board on the remand of this case.

In alternative, based upon the above stated law and reasoning, Appellant Miles J. Jones, M.D. requests, on Issue III, that this Court reverse the North Dakota Board of Medical Examiner's Findings of Fact, Conclusions of Law, and Order revoking Dr. Miles Jones license and remanded to the Board with instructions to dismiss the Complaint.

Dated: This the 25<sup>th</sup> day of August, 2004.

  
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