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☞ Details: Audit requests, 2005

(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

### 2005-06

(session year)

### Joint

(Assembly, Senate or Joint)

### Committee on Audit...

#### COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

#### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)  
(**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)  
(**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

BEFORE THE MEDICAL EXAMINING BOARD  
STATE OF WISCONSIN

In Re Investigation of  
Robert Scott Waters, M.D.

Respondent.

) #97 MED 101  
)  
) MOTION TO QUASH  
) SUBPOENA DUCES  
) TECUM ISSUED  
) FEBRUARY 25, 2002  
)  
) (Oral hearing requested)  
)

Now comes Respondent Robert Scott Waters, M.D., through counsel, and respectfully requests the Medical Examining Board to issue an order quashing the Subpoena Duces Tecum issued February 25, 2002, for the reasons set forth more fully in the Memorandum in Support attached hereto and incorporated herein by reference.

Respectfully submitted,

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Gregory D. Seeley (Wisconsin #997443)  
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Attorney for Respondent

**Enclosure 1**

## MEMORANDUM IN SUPPORT

On February 25, 2002, Arthur Thexton, Prosecuting Attorney of the Department of Regulation & Licensing, issued a Subpoena Duces Tecum to Respondent Robert Scott Waters, M.D. (hereinafter "Dr. Waters") directing him to appear before the Prosecuting Attorney in his offices in Madison, Wisconsin on Friday, March 15, 2002, at 9:00 a.m. to answer questions regarding Investigation #97 MED 101. The Subpoena Duces Tecum further directs Dr. Waters to bring with him a vast quantity of documents, divided into ten categories. These categories include, by way of example, the following:

- "Any professional literature relied upon by you in formulating your opinions on the efficacy and safety of chelation therapy as administered by you, including textbooks."
- "The labels and package inserts from all ingredients used by you in your chelation therapy admixture(s) (including DMSO), together with any literature (including textbooks) relied upon by you supporting the use of each such ingredient, from 1996-present."
- "Any IND, protocol, or other documentation concerning any experiments or studies you have conducted or participated in as a physician licensed in Wisconsin."
- "All logs or other records of compounding or preparing the chelation admixtures for patients, compounding/mixing instructions, administration/delivery instructions, order sheets, post-care instructions for patients, and all other forms used in relation to chelation therapy by your practice, for the years 1996—present."
- "All records relating to any billings sent to any insurance company or other third-party payor, from 1996-present."

The Subpoena Duces Tecum instructed that Dr. Waters "should expect to be present to answer questions for the entire business day." A copy of the Subpoena Duces Tecum is attached hereto as Exhibit "A" and is incorporated herein by reference.

Dr. Waters respectfully requests that the Medical Examining Board of the State of Wisconsin (hereinafter the "Board") order that the Subpoena Duces Tecum issued by the

Prosecuting Attorney on February 25, 2002 be quashed for the reason that it fails to comply with the procedures set forth in Wisconsin statutes and further that it is oppressive and unreasonable. As set forth hereafter, the Subpoena Duces Tecum overreaches the investigatory powers granted by the Wisconsin statutes and is substantively improper because of its overly broad and unduly burdensome nature. Dr. Waters requests that his Motion to Quash be timely ruled upon in order that he may avoid the potential of any allegation that, as of this Friday, March 15, 2002, he has failed to cooperate with the Board or the Prosecuting Attorney.

**A. The Subpoena Oppressively Raises Issues Previously Resolved in Respondent's Favor**

The Prosecuting Attorney is pursuing a matter that was already resolved in Dr. Waters' favor. In 1991, the Wisconsin Department of Regulation & Licensing commenced an investigation against Dr. Waters addressing the issue of "whether chelation therapy is a legitimate treatment for coronary artery disease." Investigation #91 MED 365 (attached as Exhibit "B" and incorporated herein by reference). A physician member of the Medical Board reviewed numerous articles regarding the effectiveness of chelation therapy and other items of relevant evidence. Based upon that physician's recommendation, "the Medical Board voted on January 21, 1993 to close the case due to insufficient evidence that a violation had occurred." Exhibit B.

The Subpoena Duces Tecum in this matter expressly seeks documents from Dr. Waters regarding the efficacy and safety of chelation therapy and the ingredients used in chelation therapy admixtures, among other things. There is no question that Investigation #97 MED 101 is largely redundant of Investigation #91 MED 365, which was resolved in Dr. Waters' favor.

Since the Board already rejected the previous investigation by the Department of Regulation & Licensing into Dr. Waters' exercise of his medical judgment to utilize chelation

therapy as one of the treatments available to his patients, the current investigation takes on the appearance of a specious witch hunt. If the Prosecuting Attorney is permitted to bring repeated investigations against a doctor who has been exonerated, the doctor is thus subjected to the onerous burden, expense and imposition of again clearing his or her name. The principles of due process prohibits a prosecuting attorney, having once failed to make his case, from having "a second bite at the apple." A doctor who is investigated is not afforded such an opportunity to relitigate an unfavorable outcome, and fundamental fairness dictates a double standard ought not apply in favor of the Prosecuting Attorney.

## **B. The Subpoena Duces Tecum Is Procedurally Defective**

### **1. The Improper Request For Documents**

A subpoena duces tecum is a valid instrument only if (1) the investigation it serves is for a lawfully authorized purpose; (2) the document sought are relevant to the investigations; and (3) the documents sought are not excessive for the purpose of the inquiry. *State v. Washington*, 83 Wis. 2d 808, 840-42 (1978). A subpoena may be quashed or modified if compliance would be unreasonable or oppressive. *State v. Gilbert*, 109 Wis. 2d 501, 509-510 (1982); Wis. Stat. § 805.07(3).

The Subpoena Duces Tecum herein has not been issued for a lawfully authorized purpose. As noted in Part A, above, the Prosecuting Attorney has no authority to prosecute conduct from which a doctor has already been exonerated. As noted in Part C, below, the Prosecuting Attorney apparently is waging a widespread campaign against chelation therapy even though chelation therapy is not *per se* unlawful. Accordingly, the Subpoena Duces Tecum fails the first prong of the *Washington* test, in that the Prosecuting Attorney does not have the

legal authority to proceed with his unrelenting attacks on chelation therapy generally and Dr. Waters specifically.

*Washington, supra*, also directs that documents sought in a subpoena duces tecum be relevant to an investigation. According to the notice that Dr. Waters received from the Department of Regulation & Licensing (attached as Exhibit "C" and incorporated herein by reference), the scope of this investigation was defined as follows:

... unprofessional conduct regarding the advertising and use of chelation therapy in your practice.

It follows that the Subpoena Duces Tecum is invalid insofar as it seeks documents that are not relevant to the aforementioned issue.

First, the Subpoena Duces Tecum demands the production of all brochures, pamphlets, handouts and advertising distributed by Dr. Waters, without regard to whether these materials relate in any way whatsoever to "the advertising and use of chelation therapy." Second, the Subpoena Duces Tecum demands the production of all labels, package inserts and related literature for all supplements recommended by Dr. Waters, regardless of whether or not such supplements are related to chelation therapy. Third, the demand of the Subpoena Duces Tecum for any IND, protocol and documentation concerning experiments and studies Dr. Waters has conducted or participated in is not limited in any way to the topic of chelation therapy. Finally, the Subpoena Duces Tecum does not limit itself to billing records related to chelation therapy, but instead demands "All records relating to any billings sent to any insurance company or other third-party payor, from 1996—present." (Emphasis added.) Since the Prosecuting Attorney has made virtually no effort to limit the Subpoena Duces Tecum to documents pertinent to chelation therapy, it does not comply with the second prong of the *Washington* test.

The third prong of *Washington* sets forth that in order for a subpoena duces tecum to be valid the documents sought to be produced are not excessive for the purpose of the inquiry. Moreover, as set forth above, the Subpoena Duces Tecum may be quashed if compliance would be oppressive or unreasonable. The majority of the requests for production of documents and materials are excessive, oppressive and unreasonable in their scope.

Doctor Waters received notification of Investigation #97 MED 101 in 1997, which was triggered by an informal complaint. How any brochures, pamphlets, handouts and advertising copy from the years 2001—2002, as required by the Subpoena Duces Tecum could have any bearing on an informal complaint dating back to 1997 is beyond reasonable explanation. The provision of the Subpoena Duces Tecum requiring **“all logs or other records of compounding or preparing the chelation admixtures for patients, compounding/mixing instructions, administration/delivery instructions, order sheets, post-care instructions for patients, and all other forms used in relation to chelation therapy by your practice, for the years 1996—present (emphasis added)”** is both irrelevant to a 1997 informal complaint and onerous in terms of the sheer volume of responsive documents.

The same is true for the item requiring “the labels and package inserts from all ingredients used by you in your chelation therapy admixture(s) ... together with any literature (including textbooks) relied upon by you supporting the use of each such ingredient, from 1996—present.” The paragraph requires the documentation without regard to whether it might be ordering files from hundreds or even thousands of patients. The Subpoena Duces Tecum is

drafted as if all of Dr. Waters' patients since 1996 have registered complaints, even though none of them has over the many years that Dr. Waters has administered the therapy.<sup>1</sup>

The Subpoena Duces Tecum demands "All records relating to any billings sent to any insurance company or other third-party payor from 1996-present." The request is excessive, oppressive and unreasonable in that it covers a six or seven-year period and requires the production of all insurance and third-party billings without regard to relevance to the subject matter of the Investigation.

Another example of over breadth and burdensomeness can be found in the paragraph that requires the following:

Any professional literature relied upon by you in formulating your opinions on the efficacy and safety of chelation therapy as administered by you, including textbooks.

A virtual mountain of professional literature has issued for many years that demonstrates the efficacy and safety of chelation therapy. That Dr. Waters might have knowledge of this body of information and rely on it in exercising his day-to-day medical judgment does not mean that he has it at his fingertips for presentation to the Prosecuting Attorney. Yet the Prosecuting Attorney might accuse Dr. Waters of failing to comply with the Subpoena Duces Tecum if he does not undertake to assemble **all** this professional literature of which he is aware and upon which he has relied over the years. If the Prosecuting Attorney has formed some preconception that chelation therapy is ineffective or unsafe in the treatment of certain conditions, he should not be allowed to misuse his subpoena powers to force Dr. Waters to do his research for him.

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<sup>1</sup> The only complaints have come from other doctors pursuing an unhidden agenda to restrict the right of Dr. Waters to recommend to his patients the mode of treatment that is best in his judgment. See Wis. Adm. Code Med § 18.03(2) (attached as Exhibit "F" and incorporated herein by reference) (recognizing the physician's professional discretion with respect to alternative modes of treatment).



Similarly, it is unlikely that any physician keeps accessible, as the Subpoena Duces Tecum requires "The labels and package inserts from all supplements recommended by you in your practice, together with any literature relied upon by you supporting the use of each such supplements." It is most unlikely that even an excessively fastidious doctor has all of this information readily available for production. Indeed, many supplements do not even have package inserts.

In *Horn v. Stone*, 126 Wis. 2d 447, 456 (1985) (attached as Exhibit "D-1" and incorporated herein by reference), the Court found that it was not an abuse of discretion by trial court to quash a subpoena "because compiling the records in the form requested would be unduly burdensome." See also *Ramsey v. Ellis*, 1995 Wis. App. LEXIS 946, Wis. App. No. 94-0524, unreported (1995) (attached as Exhibit "D-2" and incorporated herein by reference). Accordingly, Dr. Waters requests that the Board quash the Subpoena Duces Tecum in its entirety or, in the alternative, to modify each of the items set forth therein so as to make them reasonable and not unduly burdensome.

## **2. The Improper Deposition Demand**

The Subpoena Duces Tecum issued by the Prosecuting Attorney indicates that it was issued pursuant to Wis. Stat. § 440.03(4) (attached as Exhibit "E" and incorporated herein by reference), which provides:

The department may issue subpoenas for the attendance of witnesses and the production of documents or other materials prior to the commencement of disciplinary proceedings.

The "department" indicated in § 440.03(4) is the Department of Regulation & Licensing (hereafter, the "Department") which is authorized to promulgate rules defining uniform procedures to be used by all examination boards, including the Medical Examining Board. The

Department may also "investigate complaints made against a person who has been issued a credential," such as a medical license. Wis. Stat. § 440.03(3m). Wis. Stat. § 15.08 (attached as Exhibit "F" and incorporated herein by reference) governs examination boards in the State of Wisconsin. Section 15.08(5) provides that each examining board:

- (a) May compel the attendance of witnesses, administer oaths, take testimony and receive proof concerning all matters within its jurisdiction.
- (b) Shall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct in unethical practices not consistent with the law relating to the particular trade or profession.
- (c) May limit, suspend or revoke, or reprimand the holder of, any license, permit or certificate granted by the examining board.

The Wisconsin statutes set forth the procedure for investigating physicians. Section 448.02(3)(a) (attached as Exhibit "G" and incorporated herein by reference) directs the Board to "investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license, certificate or limited permit granted by the board." According to § 448.02(3)(b) (Exhibit G), "After an investigation, if the board finds that there is probable cause to believe that the person is guilty of unprofessional conduct or negligence in treatment, the board shall hold a hearing on such conduct." For purposes of a hearing, the board may "compel the attendance of witnesses, administer oaths, take testimony and receive proof . . ." § 15.08(5)(a).

Thus, while §§ 448.02 and 15.08 authorize the Board and the Department to subpoena the attendance of witnesses and the production of documents, neither statute empowers the Board to take a discovery deposition of a credentialed person prior to the hearing. The proper procedure, then, is 1) investigation 2) probable cause determination 3) hearing/disciplinary proceeding.

Only after an investigation and a determination of probable cause may the Board or Department compel the attendance of Dr. Waters for testimony. There is no provision authorizing either entity to conduct a discovery deposition of him.

The testimony envisioned in §§ 15.08 and 440.03 is testimony at a hearing, not deposition testimony as requested in the Subpoena Duces Tecum. The Prosecuting Attorney is demanding that Dr. Waters give an entire business day to be subjected to his interrogation, on topics that for the most part are far afield of the 1997 informal complaint that precipitated this investigation. The Board should promptly put a stop to this transparent abuse of power.

**C. The Prosecuting Attorney Is Abusing His Authority By Attacking The Entire Practice of Chelation Therapy**

The authority of the Prosecuting Attorney pursuant to Wis. Stat. § 440.03 (Exhibit E) is to “investigate complaints.” The Prosecuting Attorney does not have authority to lead a crusade against the practice of chelation therapy generally.

This history of this “crusade” demonstrates an abuse of authority that invalidates this entire investigation, not just the Subpoena Duces Tecum. As noted above, the Board determined nine years ago that there was insufficient evidence that Dr. Waters had violated Wis. Adm. Code Med § 10.02(2)(h). This regulation (attached as Exhibit “H” and incorporated herein by reference) defines as unprofessional conduct “Any practice or conduct which tends to constitute a danger to the health, welfare or safety of patient or public.” Significantly, Dr. Waters did not deny that he had been administering chelation therapy for degenerative conditions—he openly acknowledged it—thus putting directly at issue that his administration of chelation therapy was **not** a danger to the health, welfare or safety of his patients and the public.

The Department of Regulation & Licensing notified Dr. Waters of the instant case, Investigation #97 MED 101 in August 1997, although it withheld the name of the complainant. Doctor Waters fully cooperated in this investigation. In March 1998, Dr. Waters produced a collection of patient files to the Department of Enforcement (attached as Exhibit "J" and incorporated herein by reference).

In addition, Investigation #97 MED 108 (attached as Exhibit "K" and incorporated herein by reference) followed on the heels of Investigation #97 MED 101. The complainant in Investigation #97 MED 108 was Blue Cross and Blue Shield of Wisconsin. Doctor Waters fully cooperated in that investigation as well, and produced several patient files that were requested. More than four years have passed, and nothing further was done by the Department of Enforcement either regarding #97 MED 101 or #97 MED 108. Doctor Waters has no idea what, if anything, the Department of Enforcement has done with all the patient files that he submitted to it.

Throughout this entire time, Prosecuting Attorney Arthur Thexton has been employed by the Department of Regulation & Licensing and has been looking into the matter of the practice of chelation therapy as an alternative medical treatment. If chelation therapy were truly "a danger to the health, welfare or safety of patient or public," one cannot help but wonder why Mr. Thexton would let all these years pass in his seeming ambivalence of the situation.

Respectfully, Doctor Waters is of the opinion that this conduct is a manifestation of Mr. Thexton's abuse of his legal authority. If Mr. Thexton had pursued either of the investigations to a conclusion in a timely manner, Dr. Waters would have been exonerated just as he was in 1993. But as long as the two investigations are pending, a cloud of uncertainty hangs over Dr. Waters' head. This cloud of uncertainty creates a chilling effect throughout the medical community.

Other medical practitioners are reluctant to administer chelation therapy for degenerative conditions for fear of triggering similar investigations against them. Thus, Mr. Thexton has surreptitiously accomplished his objective to thwart the practice of chelation therapy.

One might ask, then, what would induce Mr. Thexton to revive one of the two investigations against Dr. Waters in 2002 (and also why he has chosen to allow the other, #97 MED 108, to remain dormant). Only Mr. Thexton knows for sure, but Dr. Waters would propose a credible explanation. Since 1996, Mr. Thexton has engaged in a similar course of conduct against Eleazar M. Kadile, M.D., who also practices chelation therapy when appropriate for degenerative conditions (*see* Exhibit "I" attached and incorporated herein by reference). Both doctors are represented by the same legal counsel, who knows that Mr. Thexton recently has been trying to exact concessions from Dr. Kadile, without success. The instant subpoena is consistent with the conduct of a prosecuting attorney who is trying to use one investigation in a desperate attempt to leverage an advantage in another investigation.

Whatever his motivations, Mr. Thexton can offer no legitimate explanation for why he has allowed the two investigations against Dr. Waters to become stale—why Mr. Thexton has sat idly by while Dr. Waters has administered chelation therapy to hundreds of patients during the five or six years that these two investigations against him have been pending. His own conduct suggests that his intentions are disingenuous. This is simply a crusade against one aspect of legitimate alternative medicine, not a bone fide investigation into actual complaints pursuant to Wis. Stat. § 440.03. Because this crusade has floundered for so many years, it should not be permitted to persist. The Board should decisively thwart the abuse of authority represented by the Subpoena Duces Tecum.

**D. Conclusion**

Based upon each of the reasons set forth above, Dr. Waters respectfully requests that the Board enter an order quashing the Subpoena Duces Tecum. In the alternative, Dr. Waters requests an order modifying the Subpoena Duces Tecum to cure it of its over breadth, so that he will reasonably be able to comply with its terms.

Respectfully submitted,

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(216) 566-8200  
(216) 566-0213 (Fax)  
Attorney for Respondent

**REQUEST FOR HEARING**

An oral hearing is respectfully requested so that Respondent can more fully make a record in demonstration of the merits of the instant Motion. *See Hanley v. Medical Examining Board*, 166 Wis. 2d 1050 (1992) (appellate review declined for failure to cite to support in the record).

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Gregory D. Seeley (Wisconsin #997443)

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon Arthur Thexton, Esq., Prosecuting Attorney, Department of Regulation & Licensing Division of Enforcement, 1400 E. Washington Ave. Madison, WI 53708-8935, via Federal Express Overnight Delivery, this 11<sup>th</sup> day of March, 2002.

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Gregory D. Seeley (Wisconsin #997443)

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STATE OF WISCONSIN

DEPARTMENT OF REGULATION AND LICENSING

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In the matter of the disciplinary proceedings against:

Eleazar M. Kadile,  
Respondent.

Case Number *LS-10112061* 1012061-MED  
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Day 1 Hearing before John N. Schweitzer

October 28, 2002  
1400 East Washington Avenue  
Madison, Wisconsin

APPEARANCES

For the State of Wisconsin:  
Department of Regulation and Licensing  
By: Arthur K. Thexton  
1400 East Washington Avenue  
Madison, Wisconsin 53708-8935



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1 is pervaded with -- with impropriety and sham science,  
 2 including the so-called Institutional Review Board which  
 3 purported to approve the research. Now, I do want to say  
 4 and emphasize again, that I have nothing again  
 5 alternative or complementary medicine, as such. I am  
 6 well aware -- and this is something that Dr. Olmstead  
 7 says in his monograph, that things which are not accepted  
 8 today may well become accepted tomorrow. But it is also  
 9 true that things which are not accepted today and things  
 10 indeed which are accepted today, are then rejected  
 11 tomorrow because of the utter inadequacy of proof or  
 12 because the proof becomes positive that they don't work  
 13 and Dr. Olmstead, in his monograph, presents examples of  
 14 both of these kinds of things. You know, the old  
 15 practice of bleeding and leaches -- although leaches are  
 16 back actually but in a very narrow, small way -- except  
 17 in medical treatment has proved to be ineffective and  
 18 science moves on so -- and I have nothing against  
 19 alternative and complementary medicine which can be shown  
 20 to be rooted in science -- in scientific theory, in  
 21 scientific practice, in a scientific hypothesis which can  
 22 be tested scientifically. The problem that we have is  
 23 when there is, in fact, none of this rooting in science  
 24 and yet it is to be called medicine. Now, I have no  
 25 problem with people engaging in alternative therapies

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1 which are not represented as medicine. No problem there  
 2 at all if people want to go out and do energy crystals  
 3 with some practitioner who holds him or herself out as  
 4 that type of practitioner, but that's not what's going on  
 5 here. What's going on here is being represented to the  
 6 public as the practice of medicine and by a licensed  
 7 medical doctor. That is where the problem lies. This  
 8 case, your honor, is about the reasonable practice of  
 9 medicine which is rooted in that science and I believe  
 10 the evidence will show, your honor, that respondent's  
 11 actions are not those of a physician and they are not  
 12 those of a scientist. Thank you.  
 13 HEARING EXAMINER: Thank you. Before I turn to  
 14 you, Mr. Seeley, I want to ask one really basic question  
 15 of you, Mr. Thexton. It has to do with how we are going  
 16 to handle a lot of things. And I'll get to it quickly  
 17 here. I see this -- the issues in this case on two  
 18 different levels. One is simply the patient care issues,  
 19 Dr. Kadile's care and treatment of various treatments,  
 20 whether he used techniques rightly or wrongly. The other  
 21 is what you earlier referred to as quackery and I have  
 22 been trying for a long time to figure out whether this  
 23 administrative hearing is one in which you are -- are you  
 24 going to argue at the end for a finding of fact that  
 25 chelation therapy, for example, is ineffective for

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1 cardiovascular and peripheral vascular disease? Is that  
 2 something you think should come out of this  
 3 administrative hearing? You understand my question?  
 4 MR. THEXTON: I do, your honor. If I may have  
 5 a moment to just think and form my words.  
 6 HEARING EXAMINER: Thank you.  
 7 MR. THEXTON: Your honor, that statement, that  
 8 it is ineffective, is one that has been adopted by every  
 9 reputable medical organization that has considered the  
 10 matter. It would be nothing new for the Medical  
 11 Examining Board to draw the same conclusion as all of the  
 12 other organizations of physicians and scientists who have  
 13 considered this issue, who are considered reputable in  
 14 the field. I do not refer to those -- to the  
 15 organizations of a few hundred physicians who -- around  
 16 the world who have joined the organizations that we will  
 17 hear about today, but in terms of other organizations,  
 18 the American Medical Association, the Osteopathic  
 19 Association, the Cancer Association, the Heart  
 20 Association, those others, all have made these kinds of  
 21 statements. The Federal Trade Commission, which has  
 22 studied the issue. The Federation of State Medical  
 23 Boards, to which the board belongs. I do -- so, in some  
 24 sense, it doesn't matter because that statement has been  
 25 made by -- by far more over-arching organizations than

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1 the Wisconsin Medical Examining Board. I do believe --  
 2 and whether -- and I'd like to see the evidence come in  
 3 before I make -- I commit myself to a final position,  
 4 particularly in view of your ruling about -- about the  
 5 state's expert, but I do think that a statement which I  
 6 will certainly argue as a minimum, is that chelation  
 7 therapy has not been shown to be effective for the  
 8 conditions that these patients had by substantial  
 9 scientific evidence.  
 10 HEARING EXAMINER: Okay. I am not sure how --  
 11 MR. THEXTON: I hope that answers your  
 12 question.  
 13 HEARING EXAMINER: Adequately. I'm not sure  
 14 how I'm going to deal with this and I'm not sure how the  
 15 hearing is going to go because I am concerned that this  
 16 hearing is perhaps being used for what I think is a  
 17 legislative process -- whether it's the legislature or  
 18 the board or someone else, to take a position on reading  
 19 all of the treatises, making -- doing the research itself  
 20 and coming up with a reasoned position on chelation or  
 21 any other therapy. I -- it's appropriate for somebody to  
 22 do that. I really don't think it's appropriate for a  
 23 disciplinary hearing. I'm not saying I won't handle it.  
 24 I'm not saying I won't rule. I'm much more comfortable  
 25 with the patient care issues. I realize at some point

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STATE OF WISCONSIN

BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY :  
PROCEEDING AGAINST :  
ELEAZAR M. KADILE, MD : CASE NO. LS0112061 MED  
RESPONDENT. :

DEPOSITION OF ROBERT S. BARATZ, MD, Ph.D., DDS,  
a witness in the above-entitled cause, taken on behalf of  
the Respondent, before Carole J. Ogden, Registered  
Professional Reporter, a Notary Public in and for the  
State of Rhode Island, at the Law Office of Matthew L.  
Lewiss, 79 Franklin Street, Westerly, Rhode Island on  
August 19, 2002 at 9:00 a.m.

APPEARANCES:

FOR THE RESPONDENT... SEELEY, SAVIDGE & EBERT CO., LPA  
800 BANK ONE CENTER  
600 SUPERIOR AVENUE, EAST  
CLEVELAND, OHIO 44114-2655  
BY: GREGORY D. SEELEY, ESQUIRE

FOR THE STATE..... STATE OF WISCONSIN  
DEPARTMENT OF REGULATION & LICENSING  
DIVISION OF ENFORCEMENT  
1400 E. WASHINGTON AVENUE  
MADISON, WISCONSIN 53703  
BY: ARTHUR THEXTON, ESQUIRE

ALLIED COURT REPORTERS, INC.  
115 PHENIX AVENUE  
CRANSTON, RHODE ISLAND 02920  
(401) 946-5500

1 look it up.

2 Q. That's the only one?

3 A. There may have been some other ones here and there  
4 of similar nature or someone didn't deliver goods, I  
5 think. Something to do with our house.

6 Q. Your house?

7 A. Yes. Basically, you know, contractor who didn't  
8 perform and then had to have discussions about what  
9 would happen afterwards. That sort of thing. A  
10 moving company who damaged goods, things of that sort,  
11 but they've been all resolved without courts to the  
12 best of my knowledge. That's all I can recollect at  
13 the moment.

14 Q. Okay. How many different states have you worked for?

15 MR. THEXTON: Objection to the  
16 question. That's vague.

17 THE WITNESS: In what capacity?

18 Q. In any capacity? I'll answer it for you in one  
19 respect. You worked for Wisconsin, correct?

20 A. I do.

21 Q. What other states?

22 THE WITNESS: Presently?

23 Q. There is no time limit to this.

24 A. Presently I'm doing some work for the State of

1 Ohio. In the past I've worked for the state of  
2 California. I've worked for Minnesota. I've worked  
3 for Iowa, New York. I've worked for the State of  
4 Florida. I've donated services to the State of  
5 Arizona, Massachusetts -- well, I've been paid by the  
6 State of Massachusetts and also donated services to  
7 Massachusetts. I donated services to Maine and Rhode  
8 Island. I've worked for the State of Kentucky. I  
9 think that's all I can remember at the time.

10 Q. Of these --

11 A. I mentioned Colorado, did I not?

12 Q. No.

13 A. I'm sorry.

14 Q. In your capacity as a consultant, did you work for all  
15 of these states?

16 A. I have consulted for all of them, yes.

17 Q. And did -- which states did you provide them medical  
18 opinions?

19 A. Well, to save time, if you could read the list, I  
20 could answer yes or no.

21 Q. Wisconsin?

22 A. Yes. When -- by a medical opinion, I take it you  
23 mean what?

24 Q. Did you prepare a report in reference to any charges

1 being brought by a licensee of that state?

2 MR. THEXTON: Medical as opposed to  
3 dental?

4 MR. SEELEY: Correct.

5 MR. THEXTON: This is the distinction  
6 you're drawing?

7 MR. SEELEY: Correct.

8 THE WITNESS: The way you phrased your  
9 question, I think, is you said charges brought by a  
10 licensee, and not to mince words, you mean charges  
11 brought against a licensee is what I thought you meant  
12 to say.

13 MR. SEELEY: Yes.

14 A. Well, I have been taught to just answer the  
15 question that I'm asked.

16 Q. Wisconsin?

17 A. I've been asked to prepare a medical report for  
18 the State of Wisconsin, yes.

19 Q. You prepared a medical report?

20 A. A report on the records and quality of care  
21 issues, yes.

22 Q. Ohio?

23 A. I can't discuss the Ohio case, because it's  
24 currently in confidential guise, and I can't discuss

1 any aspect of it. It's an investigation that is going  
2 on. It's not -- charges haven't been filed. It's  
3 something I can't discuss. It's under Board  
4 confidentiality.

5 Q. California?

6 A. California I was asked to be a rebuttal witness at  
7 a trial. I don't believe I prepared a report.

8 Q. Minnesota?

9 A. I believe I prepared a report -- not medical.  
10 Dental. You asked me medical.

11 Q. Iowa?

12 A. Dental.

13 Q. New York?

14 A. Dental, and not a report, just testimony.

15 Q. Florida?

16 A. Dental.

17 Q. Massachusetts?

18 A. No prepared reports.

19 Q. You testified?

20 A. No.

21 Q. Did you examine a patient in conjunction with your  
22 services?

23 A. There are several things I've done for  
24 Massachusetts. One was dental. I have submitted, I

1 think, just forms to the Department of Employment for  
2 Massachusetts. You said any work I had done for the  
3 state in a medical capacity, but that wasn't involving  
4 any litigation. That involved --

5 Q. A license?

6 A. That involved a license. It was more disability  
7 exam types of things that we do all the time in  
8 medicine, but they were paid for by the state. I  
9 think we're paid \$25 to fill out the form. Maybe  
10 they've upped it recently.

11 Q. Kentucky?

12 A. Dental.

13 Q. Colorado?

14 A. Dental, and that involved a report and testimony.

15 Q. That was Dr. Hal Huggins?

16 A. It involved a -- more than Dr. Huggins, but he was  
17 the principal in that particular action.

18 Q. It was the licensee?

19 A. There were a license revocation proceeding taken  
20 against Dr. Huggins, and eventually the state revoked  
21 his license.

22 Q. What about Arizona?

23 A. Dental.

24 Q. You say you donated services to Massachusetts?

1 A. Yes. There were just some simple questions they  
2 wanted to ask about a few things, so there was no  
3 formal -- I wasn't paid. It was maybe an hour on the  
4 telephone kind of thing, but I did work with the  
5 state.

6 Q. Maine?

7 A. Same. Dental.

8 Q. Rhode Island?

9 A. Same. Dental.

10 Q. Have you served as a witness in any litigation on  
11 behalf of any insurance company?

12 THE WITNESS: Can I interpret your  
13 question to mean as part of the defense from an  
14 insurance company?

15 MR. THEXTON: On behalf of means on  
16 the side of.

17 A. Well, typically I'm retained by counsel who is  
18 working for a client. The client is usually a  
19 defendant doctor, let's say. The attorney may be paid  
20 by an insurance company, but I'm not always aware of  
21 that. Sometimes I'm working to help defend a case  
22 where the insurance company may be the ultimate payor,  
23 but usually the case is against -- if it's a tort it  
24 may be against a doctor or in a Workers' Comp. case it



1           may be against the insurance company. So if you can  
2           clarify your question, I think I can give you a  
3           better, a clearer answer, because there are different  
4           circumstances.

5           Q. The first question was have you been a witness on  
6           behalf of an insurance company?

7           A. In court or in -- yes. Let me think.

8                           MR. THEXTON: While he does that --

9                           (DISCUSSION OFF THE RECORD)

10          A. I'm trying to think specifically. I think there  
11          might be two instances that I am familiar with, and  
12          both -- let's see. One was a Workers' Comp. case in  
13          Florida years ago where I had been retained by the  
14          insurance company through their counsel, and it was  
15          clear to me that the insurance company was depending  
16          this -- defending this. I was retained as a rebuttal  
17          witness in a malpractice case brought against a  
18          dentist in Massachusetts by a plaintiff, which the  
19          Promutual, which was his insurance company, through  
20          their counsel as a rebuttal witness, it was an oral  
21          surgery case. It involved alleged failure to diagnose  
22          on the part of the dentist.

23          Q. You were testifying on behalf of the --

24          A. The dentist as a rebuttal witness in a malpractice

1 case. I was defending the dentist.

2 Q. The Workers' Comp. case, you were on the opposite  
3 side? You weren't supporting the party who was -- who  
4 had made the claim?

5 A. Correct.

6 Q. Was that -- did that involve a dental issue?

7 A. It involved alleged poisoning from mercury.

8 Q. Now, have you been a witness on behalf of any  
9 physicians?

10 THE WITNESS: You mean as a defense  
11 witness?

12 MR. SEELEY: Uh-huh.

13 A. Not that I can recall.

14 Q. Have you been a witness providing testimony against  
15 any physicians?

16 A. Not that I can recall.

17 Q. So you've never testified for or against any medical  
18 physician in a court of law?

19 A. Correct.

20 Q. Have you been a witness in any medical board  
21 proceeding against any medical doctor?

22 A. No, except for potentially the State of Wisconsin  
23 here today if you want to consider this as part of a  
24 proceeding of that nature, but we're not in court.

1 Q. Well, I didn't say in court.

2 A. I'm sorry. I thought you did. I apologize.

3 Q. Have you testified, I said, in any proceeding brought  
4 by the medical board against any physician?

5 A. I believe this would be the first time.

6 Q. What is IMCSI?

7 A. It stands for International Medical Consultation  
8 Services, Inc. It's a corporation in Massachusetts.

9 Q. I assume that the fee I give you will be deposited  
10 into that company?

11 A. No, it will not.

12 Q. So you have -- you don't use it for this type of  
13 consulting?

14 A. I do not.

15 Q. It is consulting that is for what purpose?

16 A. Well, the company was founded as a medical device  
17 tracking company, and we continue to do that. We  
18 track medical devices for medical device manufacturers  
19 according to FDA regulations as a service. That is  
20 what the company principally does and has some other  
21 activities that have nothing to do with medicine.

22 Q. Explain how the medical device tracking -- is this a  
23 piece of software?

24 A. We developed our own software.