
Washington State Court of Appeals
Division II



Docket No. 39290-9-II

Thurston Cy. Sup. Ct. Cause No. 08-2-02789-6

KENNETH and NONNA NEWMAN,

Plaintiffs-Petitioners,

-against-

VETERINARY BOARD OF GOVERNORS, et al.,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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I. REBUTTAL STATEMENT OF FACTS

1. On Mar. 3, 2008, aside from agreement as to number (five board members), there is conflicting data concerning who was actually present when voting to close the Newmans' complaints against Harrington and Johnson. A May 29, 2008 email from DOH Public Disclosure Operations Manager Valerie Zandell stated there were three veterinarians – William Keatts, Willard Nelson, and Harmon Rogers (also the RBM) – a public member Holly Bard, and a non-voting veterinary technician Deborah Cofer. *Exh. 8 to 2nd Newman Decl.*¹ According to Ms. Zandell, “All votes were ‘yes’, none were ‘no’.” *Id.*

2. However, a Jan. 6, 2010 letter from DOH Public Disclosure/Records Coordinator Sibylle Oatney provided Disciplinary Meeting Minutes noting the absence of Ms. Cofer and the presence of a fourth veterinarian, Dr. Tim Gintz. *Exh. 1 to Karp Decl.*² The Minutes note that both complaints were closed for reason “CNAI,” which, as shown on the Case Disposition Worksheet signed by Dr. Rogers on Mar. 3, 2008, indicates “CNAI – Care rendered was within standard of care.”

¹ A RAP 9.11 motion seeks to supplement the record with this declaration and subjoined exhibits.

² See fn 1.

*Exh. 5 to Newman Decl.*³ No vote tallies are shown. And no RBM Worksheet (as to the original complaint or reconsideration), which is purported to justify the recommendation of the RBM for closing the file or recommending an SOC, STID, or SOA, exists, even though one was found with respect to Dr. Deaver, against whom an SOC was issued. *Newman Decl.*, ¶ 3 & Exhs. 9-12.

3. On Nov. 3, 2008, Ms. Oatney provided Conference Call Minutes identifying four board members in attendance – Drs. Rogers, Keatts, Nelson, and Carmen L. Czachor, noting:

No new information has been submitted – case will not be re-opened. ... Attorney submitted a reconsideration – no new information was received. The reconsideration included expert opinions, no new information.

Exh. 2 to Karp Decl. Accordingly, only two of the four board members who originally considered the Newmans' complaints on Mar. 3, 2008 (Keatts, Nelson) were involved in the reconsideration of Nov. 3, 2008. No vote tallies are shown.

4. If Ms. Zandell is to be believed, then the only individuals voting on the Newmans' complaints would have been Keatts, Nelson, and Bard, since Cofer and Rogers were ineligible to vote. If Ms. Oatney is to be

³ No mark is made with respect to the Case Disposition Worksheet for Dr. Johnson. *Exh. 6 to Newman Decl.*

believed, then the voting individuals would be Keatts, Nelson, Gintz, and Bard. It is doubtful that Bard has training in veterinary medicine, familiarity with the standard of practice, or clinical expertise. While Keatts,⁴ Nelson,⁵ Gintz,⁶ and Czachor⁷ were then licensed veterinarians, all were unboarded general practitioners. And Dr. Rogers, though boarded through the ABVP, does not have specialization in radiology or neurosurgery.⁸

5. Dr. Nelson had a long history of facing complaints for unprofessional and unethical conduct, including one complaint while he was serving on the VBOG. First, he defended against an SOC issued Aug.

⁴ At the time he joined the VBOG in 2006, he practiced at Vista Veterinary Hospital in Kennewick, Wash. There is no evidence he was ever board-certified in radiology, neurology, or surgery, if only because there are no diplomat credentials after his name, and it is highly doubtful he ever had an MRI on site. At the time he heard the complaint, Dr. Keatts was 67 years old (VT 1633 with 1941 year of birth).

⁵ At the time Dr. Nelson heard this complaint, Dr. Nelson's practice focused then on exotics, not canine neurosurgery or radiology, and it is doubtful he even had an MRI on site. Further, he was never boarded. *Exh. 3 to Karp Decl.* (CV of Nelson excluding bibliography and speaking engagements). He was 69 at the time he heard the complaint (VT 1437 with 1939 year of birth).

⁶ At the time he heard the complaint (if he did), Dr. Gintz was 52 years old (VT 3066 with 1956 year of birth). Dr. Gintz is a general practitioner and medical director at the VCA Pacific Avenue Animal Hospital in Tacoma. There is no evidence he is boarded or specializes in neurosurgery, radiology, or surgery, if only because of the absence of any diplomats after his name. It is not believed that his clinic has an MRI.

⁷ Dr. Czachor owns the Family Veterinary Clinic in Port Angeles. She received her DVM in 1995 and is not boarded.

⁸ See VCS Faculty screen dated 12/15/09. *Exh. 4 to Karp Decl.* ABVP diplomats are species-based certifications, not specialty-based. See www.abvp.com/what_cert.htm. Dr.

27, 1985 for violating WAC 308-150-050 (making it unethical to use, possess, dispense or prescribe noninjectable nonnarcotic Schedule II controlled substances in the practice of veterinary medicine) by allegedly ordering 500 Dextroamphetamine 10 mg. tablets and using them for himself, charges that, if found true, could have resulted in license suspension or revocation. *Exh. 5 to Karp Decl.* Dr. Nelson admitted ordering the tablets but denied using them for himself. Having complied with the terms of the Agreed Order, the SOC was dismissed on Jun. 24, 1986. *Exh. 6 to Karp Decl.*

Despite having dodged the bullet in 1985, Dr. Nelson since faced eight complaints, including three at one time (95-04-0016, 95-05-0024, and 95-05-0018), one resulting in an aborted SOC in 1996 (case 95-05-0024VT, where RBM Dr. Havens requested that an SOC be drafted) but apparently no action was ever taken, and legal review by a staff attorney responding to a query by the RBM in case 99-11-0001VT where it is undisputed that Dr. Nelson sent a client to collections in retaliation for the client filing a VBOG complaint. This was an action described by the staff attorney as “a direct violation of the governing statute.” *Exh 7 of Karp Decl, at 2.* Inscrutably, no action was taken on this complaint either.

Note the complainant's concern that a non-veterinarian was the RBM of 99-11-0001VT. Assistant Attorney General Karen Ann Jensen wrote on Sept. 17, 2002 that the decision not to move forward was made by a panel of licensed veterinarians. *Exh. 8 to Karp Decl.* In the Newmans' case, however, a non-veterinarian (Bard) was making standard of care determinations when state law prohibited even a licensed technician (i.e., Cofer) from even voting. Lastly, a complaint was lodged against Dr. Nelson by Ken Pang on Apr. 13, 2006 (2006-04-0002), while Dr. Nelson was sitting on the VBOG and just before he became chair. *See Exh. 3.* Predictably, this case was closed in 2007, the year Dr. Nelson became chair of the VBOG.

6. Except for an email that fails to identify the individual, there is no evidence that the VBOG consulted with a veterinary radiologist or neurosurgeon, much less a boarded one in determining whether Harrington and Johnson violated practice standards. The Mar. 7, 2008 email notes:

It is the opinion of the Board in consultation with a veterinary neurosurgical specialist that dessicated disks are common findings in normal and abnormal animals.

Exh. 7 to Newman Decl. When pressed by the Newmans to produce the name of this "specialist" and her or his report, nothing was produced.

Newman Decl., ¶¶ 4-5 & Exhs. 13-14. Amazingly, Ms. Zandell surmises that it was Dr. Gavin who was this specialist. *Id.* Yet Dr. Gavin is a boarded radiologist, not a neurosurgeon. *Exh. 2 to Newman Decl.* Dr. Gavin also had a long-term financial arrangement with Dr. Johnson and his Tacoma Veterinary Imaging Center, making him far from an unbiased “expert.” *Id.*, at p. 2.

7. The bias was compounded when Dr. Rogers, the RBM, noted his concern on Jan. 28, 2008 that there was a “potential for misrepresentation of facts by Dr. Harrington and Dr. Johnson in an investigation of the Board.” *Exh. 1 to Newman Decl.* Such misrepresentation is also grounds for discipline. RCW 18.130.180(22)(willful misrepresentation of facts before the disciplining authority). This was based on sworn testimony from Dr. Johnson and Dr. Harrington having allegedly consulted with and spoken to Dr. Gavin prior to Trali’s euthanasia, even though Dr. Gavin’s letter clearly states that he did not receive the MRI until six days post-mortem.

Dr. Rogers, who runs the WSU Veterinary Teaching Hospital and was on staff with Dr. Gavin at the time of this complaint, wrote:

I hope that Dr. Gavin erred in his recollection of when he first saw and reported the images. If Dr. Gavin now recalls that the images were received and reported on January 10,

2007, then perhaps he might be asked to provide some proof of that.

Id. Dr. Rogers also suggests that Dr. Gavin should modify his letter to correct the statement that the disc herniation seen on May 12, 2006 at L2-3 was in fact at L1-2. As expected, on Feb. 4, 2008, Dr. Gavin modified his story to first correct this L2-3 error and also to state that he reads “all the studies for Tacoma Veterinary Imaging,” and that he recalls a “problem with receiving these images on the second study and that is the reason the report was done on January 16, rather than the typical January 10 or January 11.” *Exh. 3 to Newman Decl.* Then on Feb. 25, 2008, Dr. Gavin adds that the “most likely scenario is that I reviewed some of the study acutely and waited to do the final report after receiving some images that were missing.” *Exh. 4 to Newman Decl.* Of note is that the request to solicit a change in testimony from Dr. Gavin is reputed to come not from the RBM only but from “the Board.” *Exh. 1.* This would suggest that the board was previewing the case prior to bringing it to a vote, joining the entire board into the role of RBM instead of independent adjudicator.

8. It is undeniable that Johnson and Harrington violated WAC 246-933-320(7)(a)(x)-(xi), among other provisions, pertaining to mandatory documentation of anesthesia and other medication dosages and routes of administration. In stark contrast to the records produced from May 12,

2006, no record of vital sign monitoring, anesthesia monitoring, or an anesthesia report before or during the time Trali was under anesthesia was ever produced. Yet the Board completely ignored this obvious violation, which was demonstrated far beyond the “clear and convincing” burden of proof under which it mislabored.

II. REBUTTAL ARGUMENT

A. Lack of Ascertainable Standards Invite Unbridled and Abused Discretion at Each Stage of the Complaint-Driven Process.

Discipline of a veterinarian commences with a complaint lodged by a citizen, typically the victimized client, who has a statutory right to initiate the disciplinary process. RCW 18.130.080(1)(a). The overhauling of the disciplinary practice acts was based on this 2008 pronouncement:

From statehood, Washington has constitutionally provided for the regulation of the practice of medicine and the sale of drugs and medicines. This constitutional recognition of the importance of regulating health care practitioners derives not from providers’ financial interest in their license, but from the greater need to protect the public health and safety by assuring that the health care providers and medicines that society relies upon meet certain standards of quality. ... While those due process protections [for licensees] must be maintained, **there is an urgent need to return to the original constitutional mandate that patients be ensured quality from their health care providers....**

2008 c 134 Finding – Intent (Note to RCW 18.130.020)(emphasis added). This came seventeen years after the Supreme Court’s recognition that the Medical Disciplinary Board Act, Ch. 18.72 RCW, was passed in part to cure “the ineffectiveness of the disciplinary agency that had existed previously. RCW 18.72.010(2)-(4).” *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 727 (1991). A decade later the Court added, “We interpret the stated purposes of the Act as giving the Board a legislative mandate to pursue vigorously its disciplinary task.” *Nguyen v. State*, 144 Wn.2d 516, 551 (2001)(quoting, with emphasis, *Haley*, at 727). Further, “The sine qua non of professional licensure and discipline is *protection of the public* employing professional services.” *Id.*, (citing *Gandhi v. State Med. Examining Bd.*, 168 Wis.2d 299 (1992)(emphasis in opinion)).

Moreover:

The people of Washington certainly have a “compelling interest” in disciplining doctors who fail to meet standards of professional competence, who misprescribe medications, and who sexually abuse their patients.

Id., at 552. Lastly, as strong evidence that enforcement of the principles to be protected by the UDA was intended to broadly include any concerned citizen (and obviously the victim), RCW 18.130.185 expressly confers the right on “any other person” to “maintain an action in the name of the state of Washington to enjoin the [person or business regulated by Ch. 18.130

RCW] from committing [violations of RCW 18.130.170 or 18.130.180].” RCW 18.130.185(1993). In seeing that the Harrington and Johnson would not commit the type of violations alleged to be unprofessional and unethical by the Newmans in their complaint, they above all have the right, and the inclination that non-clients would not have, to ensure that the statutory mandates of Ch. 18.130 RCW are followed by the VBOG.

In satisfying the “urgent” need to return to principles, the UDA provides the statutory right of “[a]n individual” to submit a written complaint to the disciplining authority for the specific remedy of charging the license holder with unprofessional conduct and imposing sanctions. RCW 18.130.080(1)(a). So how is the legislative mandate to vigorously pursue discipline and our constitution safeguarded in this endeavor?

RCW 18.130.010 notes that the:

addition of public members on all health care commissions and boards can give both the state and the public, which it has a statutory responsibility to protect, assurance of accountability and confidence in the various practices of health care.

This language, in extolling the virtues of lay board members (there is only one of seven on the VBOG, however), also serves to cement the existence of statutory assurances not just to the state, but “the public, which it has a statutory responsibility to protect[.]” So, one must logically ask, if not the

complainant, who ensures compliance with the statutory responsibility identified in RCW 18.130.010? After all, the veterinarian who escaped discipline will not be seeking judicial review. And the VBOG itself has no intention of appealing its own decision. Thus, the Board can ignore its duties without fear or concern of further review by a disinterested governmental branch – even by the Governor.⁹ No self-audit takes place by statute or policy to determine whether the calibration of discipline is within normal limits.¹⁰ And when the State Auditor did evaluate the DOH, it found inconsistent and delayed discipline and ineffective performance management. *Exh. 15 to Newman Decl.* To follow Respondents’ logic

⁹ Intervenors’ reference to Governor Gregoire’s expression of strong opposition to the draft rule enacted by the Board of Pharmacy, in *Stormans, Inc. v. Selecky*, 524 F.Supp.2d 1245 (W.D.Wash.2007), has no bearing here, for (1) the Board adopted the Governor’s alternative rule voluntarily; (2) the Governor did not attempt to remove the entire Board with the legislature’s consent, so the legal issue was not even before the federal court; and (3) this dialogue took place with respect to rulemaking, not discipline in response to a complaint. RCW 34.05.330(3) expressly provides that the Governor may direct the Board to initiate rulemaking in response to a petition to adopt, amend, or repeal a rule.

¹⁰ Consider the Executive Summary of the Auditor General’s report by the State of Arizona, noting:

The Veterinary Board does not adequately discipline veterinarians. Without the Board taking appropriate disciplinary action, the public will not be protected. In three of the past four fiscal years, the Board dismissed more than 90 percent of consumer complaints. Veterinary consultants retained by the Auditor General reviewed complaints from fiscal year 1996 and found that as many as one out of every six complaints dismissed should have resulted in some discipline.

State of Arizona Office of the Auditor General (1997), *Performance Audit, Veterinary Medical Examining Board Report 97-7*, at p.2. These comments underscore the problem of having interested persons regulate an industry.

would mean condoning the operation of a malfunctioning system purportedly created to cure an inept and impotent disciplinary agency. At its worst, such head-in-the-sand rhetoric suborns acts seriously undermining the legislative mandate, and allows the VBOG to serve as a hotbed of nepotism, cronyism, and standard of practice deflation.

The VBOG is mandated to exercise its discretion to first determine if the complaint “merits investigation” – without (a) defining the word “merits,” (b) establishing a standard of review, or (c) identifying the vote count that will carry. RCW 18.130.080(2).¹¹ Then, if by chance the three-person panel of the VBOG (authorized by RCW 18.130.050(18)) makes this determination in complainant’s favor, the VBOG “shall investigate[.]” RCW 18.130.080(2).¹²

At that point, an RBM is assigned to the case to investigate the complaint – without requiring that the RBM provide any justification for his recommendation to close the file or pursue discipline. Upon completion of the investigation, ostensibly a panel of at least three individuals who are capable of voting on whether to issue an SOA or

¹¹ But who ensures that the VBOG has complied with this, particularly if the statute itself is vague and invites unbridled discretion?

¹² But who ensures that this happens?

SOC,¹³ and who do not include the RBM (per RCW 18.130.050(11)), must then decide if there is “reason to believe a violation of RCW 18.130.180 has occurred” – again, as with RCW 18.130.080, without (a) defining the phrase “reason to believe,” (b) establishing a standard of review, (c) identifying the vote count that will carry, and (d) specifying what deference, if any, is to be given to the RBM’s or investigator’s assessment of whether a violation has occurred.¹⁴ If the panel of the VBOG makes this second determination in complainant’s favor, the VBOG “shall [] prepare[] and serve[] upon the license holder or applicant at the earliest practical time [a statement of charge or charges].” RCW 18.130.090(1).¹⁵

And the “reconsideration” procedure is standardless as well, without any statutory authority to offer it, much less choice to treat it as part of the old complaint rather than as a new complaint under RCW 18.130.080(1).¹⁶ Further, it provides no guidance as to the standard of

¹³ Three because of the authority given in RCW 18.130.050(18) to “perform any duty or authority within the board’s jurisdiction.”

¹⁴ See fn. 11.

¹⁵ See fn. 12.

¹⁶ There is no indication that a complainant is limited to one complaint as to the same matter. RCW 18.130.080(1) describes “a” written complaint, not “the.”

review, who may vote, whether the RBM can be involved, and what vote will carry.

Finally, the threshold issue of the caliber of those appointed to the VBOG is worth review, for the only restrictions on appointment of the five licensed veterinarians are found in RCW 18.92.021(2)(a) (2007). They shall be (a) actual residents of the state (b) in active practice (c) and citizens of the United States with (d) not more than one licensed member from the same congressional district. The one licensed veterinary technician shall be trained in both large and small animal medicine (RCW 18.92.021(1)) but cannot vote with respect to decisions related to disciplining a veterinarian for an alleged standard of care violation (RCW 18.92.021(3)). This means that the veterinary technician can never serve as RBM over a veterinarian facing a standard of care complaint, vote to investigate that complaint, vote to close or issue an SOC on that complaint, or sit at the adjudicative hearing. Yet, for some reason, the lay member can do all of this. And as noted by Ms. Zandell, lay member Holly Bard voted to close the Newmans' complaints on Mar. 3, 2008.

Importantly, there is no requirement that the licensed members be in good standing and have no history of disciplinary complaints – founded

or unfounded.¹⁷ Nor is there a requirement that the lay member has any training in veterinary medicine whatsoever, or even possesses a high school diploma. This adds another dimension of arbitrariness by allowing those with a checkered past to sit in judgment of fellow miscreants, and those without adequate credentials to be buffaloed by such licensed members.

Additional defects in the VBOG framework include that 72 percent of the board is comprised of actively practicing veterinarians (as opposed to retirees with no concern of adverse business impact from making decisions to discipline) and one veterinary technician who cannot vote on standard of care challenges to a veterinarian – even though the lay member can. As discussed below, if an SOC is issued and the veterinarian applies for an adjudicative hearing, neither the veterinary technician nor the presiding officer can dispose of the license or issue sanctions in any case pertaining to standards of practice or where clinical expertise is needed. RCW 18.130.050(10). In virtually all cases, the presiding officer is an administrative law judge. Thus, in complaints involving questions of practice standards or where veterinary medical knowledge is required, a

¹⁷ Recall Dr. Nelson who received an SOC in 1985.

judge cannot even be delegated the task of adjudicating the merits or penalties, but a lay member can?

Given that the lay member has no familiarity with “clinical expertise” or “standards of practice,” it follows that the lay member might as well serve as a rubber stamp to the licensed veterinarians voting on whether to close a complaint or file an SOC since she will not be able to draw from any independent expertise – making her position superfluous at best. See RCW 18.130.050(10). With respect to the prohibition on allowing a veterinary technician or ALJ to hear the case because of insufficient expertise, the inference is that the licensed VBOG members must substitute their own expert judgment in determining whether a standard of care violation occurred. No requirement that outside, independent expert witnesses be consulted is found anywhere in the RCW or WAC. Nor are there any guidelines as to whether and how the licensed member – whether sitting as RBM or on the panel deciding whether to discipline – should test the respondent’s behavior against the member’s own presumably “expert” opinion.

In essence, the VBOG is required by statute to pre-“judge” standard of care violations even before an SOC is issued. But to make matters worse, they are to base that decision on what amounts to their own

internal compass or “testimony.” Thus, in addition to adjudicating the complaint before and after an SOC is issued, they serve as material witnesses to the entire process. This conduct, if engaged in by a judge or prosecutor would violate the canon of ethics. CJC 3(a)(4); RPC 3.7 (Lawyer as Witness). If engaged in by a jury, it would result in a mistrial. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 139 (1988)(“golden rule” argument improper because it encourages jury to depart from neutrality; applies even to defense counsel; may result in mistrial if prejudicial).

Indeed, the sop of one public member on a board of seven is purely for show where the only other non-veterinarian is barred from voting and the remainder of the board consists of DVMs who can easily outvote even a sophisticated and industrious lay member – that is, if a board vote to take action on a complaint must be anything other than unanimous (a procedural point that is unwritten).

Each member of the board is a political appointee. Except for the one lay member, every member of the Board practices within the industry they purport to regulate and have relationships with the Washington veterinary community that is relatively small compared to other industries

(such as human medical practices).¹⁸ The likelihood that a board disciplinary action would affect a colleague is significant. The inherent conflict of interest exists among the veterinarian members and their supermajority control of the Board allows them to arbitrarily enforce or decline to enforce their own rules.

One can readily see, without even alleging specific facts involving Trali, why the Newmans have significant doubts that the process was anything other than arbitrary and capricious, and unconstitutional, given the procedural infirmities of Ch. 18.92 and 18.130 RCW and Ch. 246-11 and 246-933 WAC.

B. The Complaint Process Implicates the Newmans' Own Constitutional Rights.

If the complaint is closed, the VBOG provides the complainant a right to submit new evidence and construes the submission as a request for reconsideration. Though there is no express statutory authorization for the VBOG to allow reconsideration, in so doing it is conceding that the complainant has adequate standing to wrest from the VBOG a reassessment of its adverse decision to dismiss the complaint. Further, if a person is entitled to re-consideration, then it presumes a right to the initial

¹⁸ On information and belief, there are approximately 3000 veterinarians licensed in the state.

consideration being conducted in accordance with state law. Only an aggrieved party would have such a right.

But consider the right to reconsideration as a restraint instead of a grant. By the VBOG regarding the “reconsideration” as a new complaint lodged pursuant to RCW 18.130.080(1), it chooses to limit the complainant to one grievance. If denied, then the government is preventing the complainant from airing grievances. Further, in preventing the Newmans access to superior court for judicial review of the adverse VBOG decision, the First Amendment right to petition the government for redress of grievances is impaired. Certainly, the right to petition is not absolute but is conditioned on obeying court rules and standing principles. *Filan v. Martin*, 38 Wash.App. 91 (1984). But provided that those conditions are satisfied, the government must ensure adequate, meaningful (i.e., nonarbitrary, constitutional), and fair access to its state agency and courts.

The Petition Clause of the First Amendment forbids Congress from “abridging the ... right of the people ... to petition the Government for a redress of grievances.” U.S.Const. Amend. I. The right to petition extends to all departments of government, and access to the courts is but one aspect of this right. *In re Marriage of Meredith*, 148 Wash.App. 887, 899

(II, 2009) (quoting *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609, 404 U.S. 508, 510 (1972)).

Thus, the right of petition includes the rights to (1) “complain to public officials and seek administrative and judicial relief,”; (2) petition “any department of the government, including state administrative agencies”; and (3) file a legitimate criminal complaint with law enforcement officers.

Id., at 899 (cit om.). Prongs 1 and 2 apply here.

Adequate, effective, and meaningful access to the courts is an aspect of and subsumed under the First Amendment right to petition government for redress of grievances. *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.1989)(citing *California Motor*, at 510); see also *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142 (1907)(recognizing right to access courts in diversity tort suit, founding right on P&I clause). The right of access is also protected by the Fourteenth Amendment’s procedural and substantive due process clause. *Jackson v. Proconier*, 789 F.2d 307, 310 (5th cir.1986).

As noted in *Putnam v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974 (2009), the Supreme Court struck down Ch. 7.70 RCW’s certificate of merit requirement on access to court grounds, noting that it violated the patient’s right to access the extensive discovery needed to effectively pursue her claims. *Id.*, at 979. As in *Putnam*, a process that

operates behind closed doors, without adequate procedures, which themselves are arguably not followed, and that deprives the complainant of the ability to ensure that there is redress for not only his benefit but to also fulfill the legislative and constitutional mandate to protect the public, significantly interferes with constitutional rights ensuring access to an impartial, compliant, and fair VBOG. When those rights are impaired, judicial review to cure those errors is presumed.

While generally the Constitution does not require that a grievance be responded to in a particular way or at all (*see Rowe v. Davis*, 373 F.Supp.2d 822, 826 (N.D.Ind.2005)(context of prison or jail grievances by inmates)), once the legislature imposes statutory obligations on the agency to take the complaint, investigate it, and then file charges on that complaint when certain conditions are met, the state has created judicially enforceable liberty interests that provide the complainant a right to demand adherence to statutory protocols and, when those protocols are satisfied, a specific outcome (i.e., mandatory filing of an SOC premised on the complaint). In other words, the duties of the VBOG are not entirely discretionary, but constrained by legislative fiat and springing from the true “initiating document” – viz., the citizen’s complaint.

Aside from the First Amendment, the state-created procedural protections contained in Ch. 18.130 RCW are evidence of parent substantive rights that trigger a protected liberty interest under the Fourteenth Amendment. That interest is satisfied only when there is a neutral and impartial VBOG capable of fairly redressing grievances in compliance with state and federal law, without depriving the Newmans of their rights of access, petitioning of grievances, and due process to prevent unjustified or mistaken deprivations. “The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Nguyen v. State*, 144 Wn.2d 516, 544 (2001).

The existence of a liberty or property interest may be ascertained by reference to state law. *Vitek v. Jones*, 445 U.S. 480, 87 (1980)(finding that Supreme Court has “repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.”) Even administrative regulations can spawn a due process liberty interest. *Meachum v. Fano*, 427 U.S. 215, 229 (1976). Non-statutory sources can create them, too. *Arsberry v. Sielaff*, 586 F.2d 37, 46-47 (7th Cir.1978). The discretion of the VBOG is bounded by RCW 18.130.080(2) and RCW 18.130.090(1). This

establishes the existence of the liberty interest deserving of due process protection.

Though arising from a prisoner context, contrast the statutory restraints found in Ch. 18.130 RCW with the nonexistent restraints found in *Shango v. Jurich*, 681 F.2d 1091 (7th Cir.1982). The *Shango* court found that prison regulations governing the procedure for transferring a prisoner “for whatever reason or for no reason at all” do not allow the due process clause to attach “quite simply, because there is no substantive liberty interest at stake.” *Id.*, at 1100. A liberty interest “cannot be the right to demand needless formality. In order to establish such an interest, a ‘plaintiff must show a substantive restriction on the (official’s) discretion....’” *Id.*, at 1101 (quoting *Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir.1974)).

Further, the existence of state procedural protections is relevant to determining if a substantive interest exists, for, “A state often provides for specific procedures to ensure the realization of a parent substantive right[,]” and it is “not inconceivable that substantive protections could be inferred from the existence of procedural safeguards....” *Id.*, at 1100 (citing *Hughes v. Rowe*, 449 US 5, 15 (1980) (White, J., concurring) and quoting *Lombardo v. Meachum*, 548 F.2d 13, 16 (1st Cir.1977)). While the

state created procedural right is not itself a liberty interest within the Fourteenth Amendment, the statutory safeguards of Ch. 18.130 RCW spring directly from the complaint and reflect the “urgent need” of the legislature to return to our constitution’s first principles in vigorously pursuing the mandate of protecting the public from unprofessional and unethical health care providers. Thus, in addition to statutory rights, the Newmans have demonstrated both a constitutional injury and constitutional ground for standing.

C. The UDA Procedure is Utterly Unlike a Traditional Prosecutorial Function.

At page 12, the State argues that, “By issuing the statement of charges, the Board does not make any judicial determinations. The licensee is exposed to no liability or penalty. *See* WAC 246-11-010 (definition of “initiating document”).” This is false. RCW 18.130.090(1) states that “failure to request a hearing constitutes a default, whereupon the disciplining authority may enter a decision on the basis of the facts available to it.” *See also* WAC 246-11-270 (allows for “waiving the opportunity for adjudicative proceeding,” in which case “the board shall enter a final order without further contact with that party.”); WAC 246-11-280(1); WAC 246-11-270(2)-(3). Final orders of default must include “penalties or conditions imposed by the order.” WAC 246-11-270(4)(d).

Upon a finding that a license holder has committed unprofessional conduct, “the disciplining authority shall issue an order including sanctions[.]” RCW 18.130.160. In other words, the veterinarian may be found in violation and punished *in absentia*.

This *in absentia* procedure does not exist in criminal prosecution, where under no circumstance can liability be determined through judgment, and penalty through sentence, by default. CrR 3.4(a), for instance, notes that the defendant’s presence is “[n]ecessary” at “arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence...” *See also* CrR 3.4(c)(allowing bench warrant upon default); *see also Crosby v. U.S.*, 506 U.S. 255 (1993)(unanimously deciding that FRCrP 43 does not permit trial *in absentia* of a defendant absent at the beginning of trial).

Another key distinction between the SOC issuance process and the filing of criminal charges is that while a prosecutor is simply an advocate for the state, the VBOG becomes the advocate, witness, jury, and executioner. VBOG adjudicative proceedings are governed by Ch. 246-11 WAC. WAC 246-933-190. The VBOG “shall make the final decision regarding disposition of the license unless [delegated to the presiding officer].” RCW 18.130.050(10). However, “[d]isciplining authorities

identified in RCW 18.130.040(2)(b) may not delegate the final decision regarding the disposition of the license or imposition of sanctions to a presiding officer in any case pertaining to standards of practice or where clinical expertise is necessary.” *Id.*; see also RCW 18.130.095(3); RCW 18.130.020(2)(defining “clinical expertise”); RCW 18.130.020(11)(defining “standards of practice”). The VBOG is an authority identified in RCW 18.130.040(2)(b)(xiv).

And because it is the same VBOG that issued the SOC who will be statutorily obligated to determine whether to find the licensee liable and impose a penalty, the board is statutorily installed in the position of judge, jury, and executioner even before the SOC is answered. There is utterly no parallel to criminal cases, for the prosecutor cannot serve as an advocate for the state and then sit in judgment on the same charged defendant. Either this court must regard the entire VBOG who votes to issue an SOC as the prosecutor – in which case it would be entirely impermissible for the same body to sit in judgment on the SOC it issued – or the VBOG is regarded as making a *preliminary* judicial determination at time of charging and a *permanent* judicial determination whether or not the licensee answers the SOC.

To the extent the board is drawing from the “collective expertise” trumpeted by the Intervenors (at Section IV(C)) to make a charging decision, it is in actuality applying standards of practice and clinical expertise to the complainant’s allegations to see if there are grounds to proceed – no differently than a judge resolving a pretrial CR 12 or CR 56 motion in a civil case; or a probable cause determination or warrant issuance in a criminal case. Yet in meting out this preliminary adjudication, the VBOG is also expected to serve as expert witnesses.

Such conduct seriously strays from the traditional prosecutorial role. For as noted in *Kalina v. Fletcher*, the United States Supreme Court found that the deputy prosecuting attorney was largely insulated from suit due to prosecutorial immunity *except* with respect to her decision to become a witness by swearing under oath to certain facts in the Certification for Determination of Probable Cause. *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997). This was not routine for prosecutors to do, thereby removing her cloak of immunity. *Id.*, at 130.

Indeed, tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding. ... Testifying about facts is the function of the witness, not of the lawyer.

Id. Yet here, we find the RBM trying to alter material witness testimony and purportedly make his own decisions as to whether standards of practice and clinical expertise were followed. We then find that the Board concluded that there was no malpractice, but this was not based on anyone other than the Board alone. No expert opinion was sought from a person outside the Board except an unidentified veterinary neurosurgical specialist – who turned out to be Dr. Gavin, a fact witness financially benefited by Harrington and Johnson, with experience limited to radiology. *Exhs. 2, 13 to Newman Decl.* At a minimum, we know that the veterinarians, including the RBM, served as their own experts in deciding whether or not to issue charges. This is not something a traditional prosecutorial function.

Lastly, the VBOG is free to disregard the RBM's recommendation in adjudicating whether there is "reason to believe" a violation has occurred. In other words, where a prosecutor (analogously, the RBM) files a criminal charge or seeks a warrant on a certification of probable cause, the judge may affirm or deny the request, as with the VBOG. However, if the RBM declines to prosecute, the VBOG is free to overrule that decision and issue the SOC. There is no such counterpart in criminal practice.¹⁹

¹⁹ Except CrRLJ 2.1(c), but then the matter is returned to the prosecuting attorney's

D. The “Locality” Rule, and Ch. 7.70 RCW, Do Not Apply to Veterinarians.

Intervenors argue that the Legislature “re-adopted the ‘locality’ rule. RCW 7.70.040.” Intervenors’ Brief 5 fn. 2. Yet they ignore that *Sherman v. Kissinger*, 146 Wash.App. 855 (2008) held that Ch. 7.70 RCW does not apply to veterinarians. Accordingly, the “locality” rule is not “re-adopted” for veterinarians. Unless the experts offered by the Newmans were rejected as completely baseless, noncredible, or some other nonarbitrary reason, those experts provided more than ample “reason to believe” a licensing violation occurred. And if the VBOG followed the logic of the Intervenors, then this is another basis of illegal and arbitrary misconduct worthy of judicial review.

E. Determining Whether to File An SOC Based on A “Clear and Convincing” Evidentiary Standard is Arbitrary and Illegal and Undermines the Legislative Mandate to Protect the Public.

As noted in the opening brief, an erroneous and insufficient standard of proof cannot be cured by appellate review. *Mansour*, at 267 (quoting *Nguyen*, 144 Wn.2d at 530 (citing *Santosky v. Kramer*, 455 U.S. 745, 757 n.9 (1982))). Here, the misapplication of the correct standard of proof is patently obvious. “Reason to believe” does not equate with “clear

office for prosecution or dismissal in its sole discretion. Here, the RBM has no ability to

and convincing evidence.” Indeed, “reason to believe” is tantamount to probable cause, which is less burdensome than evidentiary preponderance. *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975). When the VBOG decides whether to close a complaint or issue an SOC, it is adjudicating the viability of what amounts to an RBM’s certification of probable cause (or lack thereof), except that it can overrule the RBM’s position and issue the SOC or not, within its discretion. Hence, the VBOG acts in a quasi-judicial capacity at the moment of filing an SOC and hearing a contested SOC.

Notably, nowhere does the State clarify what “reason to believe” means. Instead of defining the standard of proof for establishing a “reason to believe” (e.g., by probable cause, evidentiary preponderance, clear and convincing evidence, or lack of arbitrariness), it ignores that issue and focuses instead on what factors must go into the “assessment” that “provides the Board with ‘reason to believe’[.]” Respondents Brief at 14. But a close look at the “assessment” does not tell the court (or the VBOG) how much evidence or certainty is required before the reason to believe is established. The three factors are (1) whether the complaint alleges a violation of the UDA within the board’s jurisdiction; (2) whether the

veto the VBOG.

available evidence supports the allegation; and (3) whether there is sufficient evidence to prove a violation in a contested hearing. Respondent's Brief at 14. Note that the state does not cite to any authority that answers this question. This is because it does not exist, thereby inviting highly arbitrary conduct.²⁰ It goes without saying that proving a violation of the UDA through clear and convincing evidence is not at all the same as having a reason to believe the UDA was violated.

F. The State Puts the Chicken Before the Egg in Assessing the Vitality of a Constitutional Writ.

The shell game played by the State is seen when it concedes that the constitutional writ “will issue only if the petitioner can allege facts that, if verified, would establish” illegal or arbitrary misconduct. Respondent's Brief at 20 (emphasis added). But on the next page, the State contends that the Newmans “cannot show” that the Board's decision was willful and unreasoning or taken in disregard of facts and circumstances. Respondent's Brief at 21 (emphasis added). The distinction

²⁰ While it is simple enough to understand whether there is an “allegation” that is within the board's jurisdiction, how much support must the “available evidence” give to the allegation, and how sufficient must the evidence be to prove a violation in a contested hearing? Indeed, must the board even consider whether they can prove a violation at the contested hearing – a hearing at which the board itself will decide the violation? Such a requirement is nowhere to be found in the statutes and, indeed, would produce precisely the type of confusion and flawed prejudgments made by the VBOG when instead of vetting a complaint against the “reason to believe” standard, it uses the clear and convincing standard.

between pleading mere allegations, which are accepted as verities, and proving misconduct on the merits is as significant as the contrast between resolving a CR 12(b)(6) motion and a trial on the merits, except that the latter, the court has the benefit of reviewing the entire administrative record. But the court did not have the chance to determine if the Newmans could “show” illegal or arbitrary misconduct because it failed to issue the writ at the outset. Advancing to the merits without permitting record review was error.

The simplest example of illegality and arbitrary behavior arises from the misapplication of proper standard of review (i.e., clear and convincing). Whether this is the fault of the *ad hoc* VBOG panel hearing the Newmans’ complaints or a systemic deficiency perpetuated by vague and incomplete statutes and regulations is immaterial, for we know that the VBOG closed the complaint based on an belief that it could not clear an erroneously elevated evidentiary hurdle. Other examples of arbitrary and capricious behavior, both structural and fact-specific include that the state prohibits a licensed veterinary technician from evaluating a complaint but permits a lay member to do so; fails to specify vote tallies; fails to properly screen licensed members for prior discipline; fails to establish guidelines for determining when there is a “reason to believe”;

fails to require that the RBM and VBOG prepare a cogent worksheet that addresses each contention directly; and fails to ensure that discipline follows from undisputed violations (e.g., the evident recordkeeping violation). Yet, a discretionary writ need not issue where the Newmans have a statutory right under Ch. 7.16 RCW, as described in the opening brief.

G. The Newmans Have Standing Under the WAPA.

If the Newmans had standing to appeal under the WAPA, the trial court correctly denied the statutory writ on that basis. Still, it would not require denial of the constitutional writ. If the Newmans did not have standing to appeal under the WAPA, then the statutory writ was the proper vehicle if the other prongs were satisfied. First, the Newmans adopt the arguments raised by the State itself at the trial level, and which bind the state as a judicial admission. *In re Lynch*, 114 Wn.2d 598, 603 (1990); RCW 2.44.010. Next, they note that they uniquely, if not exclusively, have standing to challenge statutory noncompliance by the VBOG. *Heinmiller v. DOH*, 127 Wn.2d 595, 602-03 (1995) stated:

The goal of the Uniform Disciplinary Act, of which RCW 18.130.180 is a part, is to protect the public from the hazards of health care professional incompetence and misconduct. See RCW 18.130.010. Disciplinary action is the tool provided by the Act for the achievement of this goal. See RCW 18.130.160.

When the agency charged with wielding that “tool” fails to maintain or use it properly, the foreseeable class of individuals ostensibly injured by these performance failures is “the public” exposed to “professional incompetence and misconduct.” The Newmans serve as class representatives, having suffered direct and irreversible injury-in-fact from the alleged unprofessional and unethical misconduct of the licensees.

As additional evidence that the Newmans fall within the UDA’s zone of interest, consider RCW 18.130.185, providing explicitly that a private citizen has standing to obtain injunctive relief to prevent licensees from engaging in unprofessional and unethical conduct. If “any other person” has standing to hold a particular licensee liable for misconduct under Ch. 18.130 RCW, even where he or she has suffered no harm by that licensee, then the primary victims – the complainants – must have standing to do so.

Further, had the matter been contested, there is little doubt that the Newmans could have successfully intervened. It follows that only those with standing can intervene.²¹ RCW 34.05.443(1) provides that the

²¹ It would make no sense to allow a person to intervene but deny him the right to appear as a party in the same action on the basis of lack of standing. Indeed, the veterinarians retain rights of parties in this case even though they were not originally party defendants or plaintiffs.

presiding officer may allow a person or entity interested in the proceedings to intervene in an adjudicative proceeding “at any time.” Intervenors are deemed statutory “parties” under the WAPA. RCW 34.05.010(12)(b). Intervention is governed by court rule “to the extent not inconsistent” with the WAPA. RCW 34.05.510(2). As in federal courts and other jurisdictions, the requirements of the counterpart civil rule CR 24 are “liberally construed in favor of intervention.” *Columbia Gorge Audubon Soc. v. Klickitat Cy.*, 98 Wash.App. 618, 623 (III, 1999). The Newmans had a demonstrable interest in the discipline of the veterinarians since they initiated the entire process by filing the complaint, as was their statutory right under RCW 18.130.080. Their diligent and ongoing efforts to remain involved in the complaint process, request an adjudicative hearing, and seek reconsideration demonstrate that they were essentially requesting intervention.

As with the Yakima Nation in *Columbia Gorge*, there would have been no just basis to deny their intervention. In reversing and remanding to permit intervention by the Yakima Nation, the Court of Appeals noted:

Here, the Yakama Nation does have a demonstrable interest. And it has participated in the prior proceedings. The court acknowledged that participation by the Yakama Nation was appropriate. It nonetheless concluded that an informal association with the existing plaintiff would provide the opportunity to advocate, consult, and be

otherwise represented. **However, the intervention rules entitle an interested party to legal standing as a party plaintiff with the right to define, explain and defend its own interests directly. There is no more reason to suppose that the Audubon Society can advocate effectively for the Yakama Nation than that the Yakama Nation, however willing, could adequately present the concerns of the Audubon Society.**

Id., at 630 (emphasis added). Unlike the Yakima Nation, which had a purported “informal association” with the Audubon Society in whom it could find an effective advocate, the appellate court nonetheless concluded that there was no reason to deny their involvement. But here, there is ample basis to show that the VBOG was not in “association” with the Newmans at any level – formal or informal – and that it was not following statutory guidelines or giving competent consideration to the claims, evidence, and expert opinions provided by the Newmans. Rather, the presumptive “association” was between the regulator (VBOG) and regulated (Harrington and Johnson). For that reason, the case for intervention is stronger and, as noted by Division III, would “entitle an interested party [as intervenor] to legal standing as a party plaintiff with the right to define, explain and defend its own interests directly.” *Id.*

Standing also exists based on taxpayer status. Over a half-century long line of Washington Supreme Court precedent requires no personal stake or injury to challenge illegal acts of government, so long as the

condition precedent of Attorney General declination is met. *See Reiter v. Wallgren*, 28 Wn.2d 872 (1947); *State ex rel. Boyles v. Whatcom Cy.*, 103 Wn.2d 610, 613-14 (1985)(citations omitted).²² Divisions I (*Robinson*) and II (*Kightlinger*) have reaffirmed this holding. *Robinson v. City of Seattle*, 102 Wash.App. 795 (Div.1,2000); *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501 (Div.2,2003), *rev. granted*, 152 Wn.2d 1001 (2004).

It is well settled that taxpayers, in order to obtain standing to challenge the act of a public official, **need allege no direct, special or pecuniary interest in the outcome of their action**, there being only a condition precedent to such standing that the Attorney General first decline a request to institute the action.

City of Tacoma v. O'Brien, 85 Wn.2d 266, 269 (1975)(emphasis added).²³

Arguably, any citizen who pays sales tax to the State of Washington, gasoline taxes, business license taxes, and/or driver's license tabs has standing to challenge the actions of the State since, ostensibly, any and all of these revenue sources finance the operations of the DOH and VBOG.²⁴

²² See also *Walker v. Munro*, 124 Wn.2d 402 (1994).

²³ See also *Tabor v. Moore*, 81 Wn.2d 613, 617+ (1972) and *Farris v. Munro*, 99 Wn.2d 326, 329+ (1983).

²⁴ The legislature and Supreme Court have permitted similarly broad standing vehicles for those seeking to protect the public when the government lacks the resources, political will, clarity of judgment, or honesty to do so. See CrRLJ 2.1(c)(citizen criminal complaint); 31 U.S.C. s 3729-3733 (False Claims Act *qui tam* actions); RCW

In addition to qualifying as taxpayers with generalized injury standing (i.e., misuse of tax money in failing to fulfill legislative mandate of protecting the public through effective and competent monitoring and discipline), who need have no connection at all to the complaint at bar, the Newmans suffered a special injury as primary victims of the alleged incompetence and unprofessionalism of the Intervenors, thereby providing stronger standing grounds. *See Kightlinger*, at 506 (“A taxpayer must show special injury where he or she challenges an agency's *lawful, discretionary* act.”)

Respondents note that the Newmans suffered no injury on account of the complaints being closed. This is false if only for the reason that their tax dollars have been squandered on wasted, biased, and noncompliant acts by the VBOG and the staff attorneys and program managers responsible for shepherding the agency through the UDA. But more importantly, consider the reason why the Newmans had to file complaints in the first place.

Had Harrington and Johnson not been given a professional license through the state, they would not have been in a position to even touch

18.130.185; *see also Justice for Animals, Inc. v. Robeson Cy.*, 164 N.C.App. 366 (2004) (finding nonprofit corporation was “aggrieved person” with standing under APA to challenge euthanasia procedures and record keeping of county animal control facility).

Trali – the **first** act causing foreseeable injury to the Newmans and the public generally. Had the VBOG taken seriously its legislative mandate by proactively monitoring Harrington and Johnson through means other than a complaint-driven process (e.g., by random audit), at least some of the alleged unprofessional conduct would have been caught and remedied by discipline – the **second** act causing injury to the Newmans. Had the VBOG taken seriously prior complaints, if any, against Harrington and Johnson and fulfilled its legislative mandate through reactive monitoring, the misconduct that led to the injuries suffered by the Newmans would have been redressed – the **third** act causing injury to the Newmans. And now that the VBOG closed the Newmans’ complaint, the board has again shirked its obligation to satisfy the legislative mandate to protect the public – of which the Newmans are members and serve as class representatives, signifying the **fourth** act causing injury. Other evidence of injury arises from impairment of the Newmans’ First and Fourteenth Amendment constitutional rights discussed above.

At what point may the VBOG be taken to task for its ongoing, shoddy, and willful noncompliance? The only way that the system will be remedied and the injuries of the Newmans redressed through the issuance of sanctions that only the VBOG can levy (and not the Newmans in a civil

suit) is by granting them (and other taxpayers) standing. Redress for the Newmans will occur as allowed by RCW 34.05.574(1)(b), providing that the court may order the agency to act as required by law, exercise discretion as required by law, set aside agency action, enjoin or stay agency action, remand for further proceedings, or issue a declaratory judgment order.

H. Equitable Tolling.

Should the court find that the Newmans had standing under the WAPA but failed to timely file their petition for judicial review, in addition to the arguments raised in the opening brief, the Newmans note that the doctrine of equitable tolling applies in accord therewith. *See Trotzer v. Vig*, 149 Wash.App. 594, 607 (2009)(bad faith, deception, or false assurance by defendant and exercise of diligence by plaintiff permit extending statute of limitations).

I. Attorney's Fees.

The Newmans are entitled to fees based on preserving the common tax fund that finances disciplinary-related actions of the DOH – at a tune of 23 million dollars per year – to ensure that the money is spent in fulfillment of legislative mandate and in protection of constitutional principles. *See Exh. 15 to Newman Decl.*, vii. *See McCready*, at 276

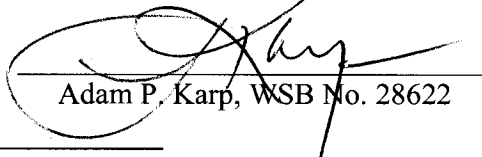
(protecting constitutional rights is variation of common fund basis for fees). A litigant who confers a substantial benefit on an ascertainable class – whether protecting a specific monetary fund or not – is entitled to fees. *Grein v. Cavano*, 61 Wn.2d 498 (1963).

III. CONCLUSION

The Newmans have a statutory right to a full and fair investigation and issuance of an SOC if there is a “reason to believe” a violation has occurred. Who other than the complainants may enforce this mandatory duty without turning the UDA into an unregulated system lending itself to corruption, self-serving actions, and abuse? The Board owes a duty to the complainant and the public to properly investigate the complaint, consider all the evidence presented, follow statutory guidelines and constitutional principles, ultimately render a decision, implement disciplinary action, and enforce laws when they are violated. Here, the Board failed to do so. Furthermore, the Board’s failure to discharge its duty is an issue of great public importance, and such issues are likely to recur. Moreover, if no one other than a licensee or the Board can seek review of a decision, no other agency or entity can police the Board’s activities.

Civil actions by complainants do not protect the public.²⁵ A private action for negligence, destruction of property, or contract-based claims merely provides monetary recovery when successful. Such penalties do not prevent a veterinarian from engaging in unprofessional conduct. Moreover, a civil suit has no effect upon the Board and does not provide the Board with any incentive to faithfully discharge its duties. The system is broken, and few have the wherewithal of the Newmans to see to it that it is repaired, not just in Trali's memory, but for all Washingtonians exposed to the thousands of state licensed health care professionals subject to the UDA. The foxes are watching the henhouse, but who is watching the foxes?

Dated this Jan. 14, 2010
ANIMAL LAW OFFICES



Adam P. Karp, WSB No. 28622

²⁵ See Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 *Animal L.* 163, 183-188 (2004), discussing the insufficient oversight of veterinarians by state veterinary boards and the current inability of litigation to restrain veterinary negligence. "Several commentators have drawn a direct link between the laxity of state professional boards and the incidence of malpractice. It may be no coincidence that Pennsylvania has both the most lenient record for punishing doctors and the highest rate of medical mistakes." *Id.*, at 186 (cit. om.); see also 183-84.

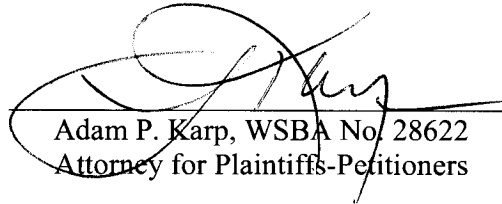
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Jan. 14, 2010, I caused a true and correct copy of the foregoing REPLY BRIEF, to be served upon the following person(s) in the following manner:

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