Attorney for Amicus Curiae

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF PIMA

PAUL W. PRATT, Plaintiff/Appellant, vs. ARIZONA BOARD OF CHIROPRACTIC EXAMINERS, Defendant/Respondent.	C2006-4644 ***AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT**

The Arizona Chiropractic Society, through its Attorney, files this *amicus curiae* brief in support of Plaintiff, Dr. Paul W. Pratt, D.C.

I. INTEREST OF AMICUS CURIAE

The Arizona Chiropractic Society (ACS) is a non-profit state association founded in 1991 to serve Arizona's chiropractic community. The mission of the ACS is to strengthen and protect the chiropractic profession, safeguard the practices rights of all chiropractors, provide effective representation at the Arizona Legislature, make needed changes to health insurance and personal injury litigation, provide information regarding claims denials, IME and engineering reports, and advise doctors who have had complaints before the Arizona Board of Chiropractic Examiners (the Board). ACS actively seeks to achieve advances for the chiropractic profession by aiding the enactment of beneficial laws, promoting a collegial atmosphere in the profession, and assuring the Board of Chiropractic Examiners act within the boundaries proscribed by law.

This matter requires the Court to assess the contours of procedural due process, substantive due process, and freedom of speech as applied by the Arizona Board of Chiropractic Examiners (the Board). Additionally, this matter requires the Court to examine whether the Board relied on substantial evidence in rendering their opinion and whether the violations imposed in this case are arbitrary, capricious, or an abuse of discretion. The adjudication of the case before this Court is, therefore, a matter of great

concern to ACS and its members, as well as other chiropractic associations throughout Arizona.

II. ARGUMENT IN SUPPORT OF APPELLANT

A. Standard of Review

The role of the Superior Court when an administrative ruling is appealed is to determine whether the record contains substantial evidence to support the judgment. *Berenter v. Gallinger*, 173 Ariz. 75, 839 P.2d 1120, 1122 (App. 1992); *Havasu Heights Ranch and Development Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 807 P.2d 1119, 1123 (App. 1991). A.R.S. § 12-910(E) provides that on judicial review of an administrative decision:

> The court may affirm, reverse, modify or vacate and remand the agency actor. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E).

The clear meaning of this statute is to confer on the court the jurisdiction to take four different actions on judicial review of an administrative decision. The statute is clear that the court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. However, if the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion, the legislature gives the court jurisdiction to proceed in one of the other three manners.

The legislature clearly intended that the court could under certain circumstances substitute its judgment for that of the administrative agency. The Court of Appeals may substitute its judgment for an agency's conclusions regarding the legal effects of the facts presented. *Sanders v. Novick*, 151 Ariz. 606, 729 P.2d 960, 962 (App. 1986); *Gardiner v. Arizona Department of Economic Security*, 127 Ariz. 603, 623 P.2d 33, 35 (App. 1980). See also *Special Fund Division/No Insurance Section v. Industrial Commission*, 172 Ariz. 139, 836 P.2d 1029 (App. 1992) (court could determine legal relationship between employer and employee de novo where facts were undisputed). Administrative findings may

also be set aside if they are based on legal error. *Gorman v. Sullivan*, 751 F. Supp. 902 (D. Ariz. 1990). When a statutory interpretation involves a question of law, the Superior Court is not bound by the administrative agency's conclusions under the Administrative Review Act, A.R.S. § 12-901 *et seq*. *Siegel v. Arizona Liquor Board*, 167 Ariz. 400, 807 P.2d 1136, 1137 (App. 1991). Finally, if the court examines the evidence and determines that the agency action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion, the court has jurisdiction to modify or reverse the agency decision. *Ference By and Through Ference v. Kirschner*, 176 Ariz. 530, 533, 862 P.2d 903, 906 (App. 1993).

B. The Board's Decision is Contrary to the Law Because The Board Violated Dr. Pratt's Due Process Rights.

Of primary concern to ACS is the fairness and impartiality of the Board. In the present case, the Board continued its history of providing an unfair and partial tribunal for Dr. Pratt. Thus, the Board violated Appellant's due process rights and has acted contrary to the law.

The concept that no person shall be deprived of life, liberty, or property without due process of law is part of both the federal and state constitutions. U.S. Const. Art. 14, § 1; Ariz. Const. Art. 2, § 4. For those who are qualified, the practice of a profession is a right, not just a privilege. *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994) (citing Application of Levine, 97 Ariz. 88, 90-91, 397 P.2d 205, 206-07 (1964)). Before the State can curtail that right, it must afford due process of law. *Id.* The due process clause of the Fourteenth Amendment of the Constitution of the United States requires that there must be given notice of time and place of hearing, a reasonable definite statement of the charge or charges, the right to produce witnesses and to examine adverse witnesses and to have a full consideration and determination according to evidence before the body with whom the hearing is held. In re Levine, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964) (citing Bennett v. Arizona State Board of Public Welfare, 95 Ariz. 170, 388 P.2d 166 (1963)).

Due process provided by the United States Constitution requires a neutral and detached judge in the first instance. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct 2264 (1993). Due process also requires that the tribunal be a fair and impartial one. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 100 S. Ct. 1610 (1980);

Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752 (1994); *State v. Neil*, 102 Ariz. 110, 112, 425 P.2d 842, 844 (1967).. The basic requirements of due process are applicable in administrative hearings, as well as in trials to a judge. *Schweiker v. McClure*, 456 U.S. 188, 102 S. Ct. 1665 (1982).

Due process requires a fair trial and a fair tribunal in front of administrative agencies which adjudicate. *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456 (1975). Cases in which the adjudicator has a pecuniary interest in the outcome, or in which he or she has been the target of personal criticism from the party before him or her, can constitute situations where the probability of actual bias on the part of the decision maker is too high to be constitutionally tolerable under due process of law. *Id.* When the decision maker has been the target of personal criticism from the party before him or her, the relevant inquiry must be not only whether there was actual bias by the decision maker, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Taylor v. Haynes*, 418 U.S. 488, 501, 94 S. Ct. 2697, 2705 (1974) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964)).

1. Dr. Pratt's Due Process Rights Were Violated Because He Was Not Afforded a Fair and Impartial Tribunal.

Dr. Pratt was denied due process because the Board failed to provide a fair and impartial tribunal. In the present case, the lack of a fair and impartial tribunal is evidenced by conflicted Board members failing to recuse themselves, bias resulting from personal criticism, and the Board's history of violating the law.

As stated in *Withrow*, cases in which the adjudicator has been the target of personal criticism from the party before him or her, can constitute situations where the probability of actual bias on the part of the decision maker is too high to be constitutionally tolerable under due process of law. 421 U.S. 35, 95 S. Ct. 1456 (1975). In the present case, Dr. Pratt filed motions to recuse/disqualify two of the members of the Board for prosecuting Dr. Pratt for violations they were committing themselves. At the time of Dr. Pratt's hearing, Dr. Haydon maintained a website (dcdoctor.com), whereby Board member Haydon consistently identifies herself as Dr. Dianne Haydon without appropriately affixing the term "D.C.", "chiropractic doctor," "chiropractic physician," or "doctor of chiropractic." This is a violation of A.R.S. § 32-924(A)(17), the same statute that Dr. Pratt had allegedly violated. Board member Haydon

subsequently refused to recuse herself and pulled her website from the internet. Additionally, a motion was made to recuse/disqualify Dr. Seitz who had also maintained a website entitled Sciatica Doctors. Dr. Pratt provided proof that Dr. Seitz had made misleading statements on his website that were unsupported by any research. Dr. Seitz failed to recuse himself and the Board failed to disqualify Dr. Seitz. In each case, these individual Board members were prosecuting Dr. Pratt for violations they were committing themselves. Additionally, no complaints were ever filed either before or after Dr. Pratt introduced this information to the Board.

The failure of the Board to disqualify these individuals violates Dr. Pratt's due process rights. First, an impartial and fair tribunal does not exist where the adjudicators prosecute individuals for crimes they themselves commit. Additionally, the criticisms raised by Dr. Pratt create such a likelihood of bias or an appearance of bias that the adjudicators were unable to hold the balance between vindicating the interests of the court and the interests of the accused. Essentially, the Board had become so enraged with Dr. Pratt's criticisms that they maliciously prosecuted Dr. Pratt without giving his interests and constitutional rights due consideration. In fact, this only further proves that the mind of the decision maker was "irrevocably closed" or that the Board prejudged the specific facts that are at issue. *Berenter v. Gallinger*, 173 Ariz. 75, 83, 839 P.2d 1120, 1128 (App. 1992). This is a violation of due process and is contrary to the law. Thus, the Board's decision should be dismissed.

2. The Board Has a Reputation for Acting in Violation of the Law.

a. Equal Protection

The Board has a history of violating the law by providing disparate treatment to similar classes of persons with similar factual complaints. The 14th Amendment guarantees that the state cannot deprive a "person" of life, liberty or property without due process of law or deny any "person" equal protection of state law. U.S. Const. Art. 14, § 1. To establish an equal protection violation, a party must establish (1) that it was treated differently than those who are similarly situated, and (2) when disparate treatment does not implicate fundamental rights or suspect classification, that the classification bears no rational relation to a legitimate state interest. *Curtis v. Richardson*, 212 Ariz. 308, 313 (Ariz. Ct. App. 2006). ACS has become aware of many instances where the Board has treated certain individuals differently than those who are similarly situated without any bearing to a legitimate state interest.

The Auditor General's 2001 report for the State of Arizona stated that "the Board needs to consistently discipline Chiropractors who violate statute." For example, the Board received complaints regarding the following two factual circumstances:

Chiropractor A:
1. Dr. acknowledged not signing or initialing notes.
2. Dr. did not prepare a formal x-ray report.
3. Dr.'s records were illegible.
4. Dr. billed for 99204 CPT code, when her records did not show this level of service was performed (incidentally, the insurance company down coded this exam to a 99203, which is a lower CPT code.)
5. Dr. acknowledge losing the x-rays.
6. Dr. billed for a CPT code 70330 (TMJ study), when in fact she took cervical x-rays (7xxxx).
7. Dr. diagnosed patient with a Thoracic Plexus diagnosis with no radicular pain present.

Chiropractor B:
1. Dr. acknowledged not signing or initialing notes.
2. Dr. did not prepare a formal x-ray report.
3. Dr.'s records were illegible and used abbreviations without a key.
4. Dr. acknowledged there was not a patient signature for certain dates of services.
5. There was not a date on some of his forms.
6. X-rays were taken on a patient that he did not have them remove a nipple ring.
7. Dr. had no subjective, objective findings, as well as assessment and treatment plans on certain dates of service.

These two cases very similar to each other with regards to their facts and violations committed. However, Dr. A received a non-disciplinary advisory letter which provides no sanctions against Dr. A's chiropractic license and the advisory letter is not accessible to the public on the Board's official website. Dr. B received a letter of concern and 2 years of probation, 6 hours of continuing education in record keeping and 3 hours of history taking and 3 medical records audits. Additionally, Dr. B's order was posted on the Board's official website. Four additional equal protection violations can be found in Exhibit B.

In each instance observed by ACS, the Board has treated similarly situated chiropractors differently without any bearing to a legitimate state interest. The Board's continued violation of the law goes directly to their credibility of providing a fair and impartial tribunal that provides equal protection of the law.

b. Appearance of Impropriety Created by The Board's Pecuniary Interests.

The Board also has a history of violating due process and creating an appearance of impropriety by having Board members who receive compensation from insurance companies. Cases in which the adjudicator has a pecuniary interest in the outcome is a violation of due process and creates the appearance of impropriety. *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456 (1975).

The Board's reputation for acting in violation of the law is evidenced by the recent passing of HB 2644. The passing of HB 2644 forced the Board to alter their procedures to prevent the appearance of impropriety between Board members and insurance companies. HB 2644 added a clause to A.R.S. § 32-901(B) stating "[a] Board member shall not receive compensation as an agent or employee of or a contractor for an insurance company." The purpose of this clause was to eliminate the bias and conflict of interest among current Board members compensated by insurance companies through Independent Medical Examinations (IMEs).

Prior to this legislative action, the Board did not feel it was necessary to regulate itself regarding the appearance of impropriety that exists when Board members are compensated by insurance companies through IMEs. IMEs are often criticized for being neither independent nor a real medical examination. The former complaint is because the doctors are hired and paid by the insurance carrier or a self-insured company. Both the company and the insurer have a financial interest in the outcome of the review. Additionally, insurance companies are able to refuse compensation when the Board determines a chiropractor committed a violation, such as inadequate record keeping. Although it was clear that an appearance of impropriety exists when a Board member finds a violation in favour of the insurance company that pays her, legislation was required to eliminate the appearance of impropriety because of the Board's inability to self-regulate their constitutional violations.

The Board's inaction also came in the face of substantial concern among chiropractors about the Board's appearance of impropriety. The ACS received a flood of comments concerning the Board and insurance companies. See Exhibit A. Some anonymous e-mails stated:

> I can't imagine ANYONE not being in favor of this legislation, whether they are a chiropractor or not. Only someone who has some financial stake involved could ever think having an IME on the board is a good idea!
>
> It is overly apparent, to me, that serving as a financially compensated IME and Chiropractic Board member has a potent odor of conflicting interests.

> Picture this scenario: After an IME the patient still gets a favorable award/settlement. To take one last jab at the doctor, the suggestion is made that maybe his record keeping isn't up to snuff. Sometime down the road a complaint is filed. If they can't win one way they will try another.

Exhibit A, pages 1, 2. Thankfully HB 2644 passed in the previous legislative session and Board members are now prohibited from serving on the board if they are compensated by insurance companies. However, the fact that legislative action was necessary to cure this obvious violation of due process demonstrates the Board's inability to recognize the importance of having an impartial tribunal to satisfy due process.

The Board's continued violation by the law, cured only through forced legislative action, goes directly to their credibility of providing a fair and impartial tribunal.

C. The Board's Findings Violate Dr. Pratt's First Amendment Rights.

The decision rendered by the Board of Chiropractic Examiners is contrary to the law. The Board has violated Dr. Pratt's First Amendment rights by infringing on his commercial speech. The Supreme Court has long protected speech even if it is in the form of a paid advertisement. See *Buckley v. Valeo*, 424 US 1 (1976), *New York Times Co. v. Sullivan*, 376 US 254 (1964), *Murdock v. Pennsylvania*, 319 US 105 (1943). In fact, the Supreme Court recognized that significant societal interests are served by commercial speech. *Bates v. State Bar of Arizona*, 433 US 350, 363 (1977). In *Virginia State Board of Pharmacy V. Virginia Citizens Consumer Council*, the Supreme Court opined that speech does not lose its protection because it is paid for, and that advertisements are generally in the public interest. *Virginia State Board of Pharmacy*, 425 U.S. 786 (1976). Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. *Id*. (quoting *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-604 (1967)). Finally, the Supreme Court, through the commercial speech doctrine, protects truthful advertising relating to lawful activities. *In re R. M. J.*, 455 U.S. 191, 204 (U.S. 1982).

Misleading advertising carries no First Amendment protection and may be prohibited entirely. *In re R. M. J.*, 455 U.S. 191, 204 (U.S. 1982). But, if the advertisement is only potentially misleading then an absolute prohibition is not allowed. *Id.* Where an advertisement has only the potential to mislead, disclaimers or explanations can be used to cure the potential for deception. *Id.*(citing *bates, 435*

us at 375). Restrictions upon potentially misleading advertising may be no broader than reasonably necessary to prevent the deception. *Id.*

Thus, as a threshold matter, the Board must make a showing that the advertisements were not truthful or related to unlawful activity before they infringe on Dr. Pratt's First Amendment commercial speech rights. However, at no time, during either formal hearing, did the Board claim that Dr. Pratt's advertisements were untruthful or related to unlawful activities. The crux of the Board's decision to infringe upon Dr. Pratt's speech was based solely on the Board's subjective opinion of the advertisements.

The Board has never directly challenged any of the factual assertions made in Dr. Pratt's advertisements. Instead, the Board simply presumes that this advertisement is false, deceptive and misleading and the only issues to resolve is what type of punishment to issue. In fact, the Board maintained their subjective conclusions in the face of an expert opinion stating that the advertisements were not misleading. The Board does not assert that Dr. Pratt's advertisements are inherently misleading, thus deserving no First Amendment protection. At most, the Board asserts that Dr. Pratt's advertisements have the potential to mislead.

If Dr. Pratt's advertisements are potentially misleading, which neither ACS or Dr. Pratt concede, then the punishment given to Dr. Pratt violates his First Amendment rights and is overly excessive. Although Dr. Pratt's advertisements already contain disclaimers and qualifying information, forcing Dr. Pratt to cease and desist from using these advertisements is a violation of his First Amendment rights because the Board has not given Dr. Pratt the chance to "cure the potential for deception." *Id.* This categorical ban on Dr. Pratt's advertisements is much broader than reasonably necessary to cure the potential deception. Additionally, given the law regarding potentially misleading advertising, a categorical ban on Dr. Pratt's advertising is so disproportionate to the offense as to shock one's sense of fairness. *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994)

The Board's findings violate Dr. Pratt's First Amendment rights because his advertisements are truthful and relate to lawful activity. Additionally, the Board violated Dr. Pratt's First Amendment rights because, even if the advertisements were potentially misleading, the Board did not give Dr. Pratt a chance to cure the deception. In either instance, the categorical ban the Board placed on Dr. Pratt's

advertisements is broader than reasonably necessary to cure any potential deception. Thus, the Board's findings should be dismissed as they are contrary to the law.

III. CONCLUSION

The Board has a history of operating in such a way as to violate fundamental constitutional rights, ethics, and protocol in their proceedings and subsequent punishments. As evidenced in this brief, the Board consistently violates equal protection and due process rights. The Board also has a history of conducting unprofessional hearings through the use of intimidation and humiliation while also issuing excessive penalties. See Exhibit B pages 6, 7, 16, 20. It is of great concern to ACS that these practices and procedures of the Board are stopped and corrected. This process continued in the proceedings against Dr. Pratt, whereby Dr. Pratt's due process and First Amendment rights were severely violated. Additionally, his proceedings were conducted unprofessionally and an excessive penalty was issued.

Based upon the foregoing, the Arizona Chiropractic Society respectfully requests that this court reverse the findings of the Arizona State Board of Chiropractic Examiners.

DATED this_____day of March, 2007.

By_____
Attorney for Arizona Chiropractic Society

Copy of the foregoing delivered
this_____day of March, 2007, to:

The Honorable Michael Miller
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF PIMA

PAUL W. PRATT, Plaintiff/Appellant, vs. ARIZONA BOARD OF CHIROPRACTIC EXAMINERS, Defendant/Respondent.	C2006-4644 **MOTION TO FILE *AMICUS CURIAE* BRIEF**

Pursuant to Rule 2 of the Arizona Superior Court Rules of Appellate Procedure - Civil, the Arizona Chiropractic Society (ACS) petitions the Pima County Superior Court for leave to file a brief as *amicus curiae* in support of Appellant.

ACS has read the appellate briefs filed by the parties and requests leave of this court to present additional, substantive arguments in support of Appellant.

This matter requires the Court to assess the contours of procedural due process, substantive due process, and freedom of speech as applied by the Arizona Board of Chiropractic Examiners (the Board). Additionally, this matter requires the Court to examine whether the Board relied on substantial evidence in rendering their opinion and whether the violations imposed in this case are arbitrary, capricious, or an abuse of discretion. The adjudication of the case before this Court is, therefore, a matter of great concern to ACS and its members, as well as other chiropractic associations throughout Arizona.

If leave is granted, ACS will present this Court with a substantive analysis which establishes that the Board incorrectly ruled against Appellant and violated Appellant's Constitutional rights. Leave should be granted in this case in the furtherance of justice. Ariz. Super. Ct. R. App. P. Civ. 2.

RESPECTFULLY SUBMITTED this _____ day of _____, 2007.

_____
Attorney for Arizona Chiropractic Society

Copy of the foregoing delivered
this_____day of March, 2007, to:

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