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BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF
THE IDAHO STATE BOARD OF MEDICINE

In the Matter of JOSEPH D.
LEGGETT, M.D., License No.
M-5108,

Respondent.

Case No. 87-040

COMPLAINT

Donald L. Deleski, Executive Director of the Idaho State Board of Medicine, hereinafter referred to as the Complainant, on behalf of the Board of Professional Discipline, hereinafter referred to as the Board, complains and alleges as follows:

I

Respondent, Joseph D. Leggett, M.D., a psychiatrist, is the holder of an Idaho license to practice medicine and surgery, License No. M-5108, issued by the Idaho State Board of Medicine on July 11, 1986. Said license is subject to the provisions of Title 54, Chapter 18, Idaho Code, commonly referred to as the Medical Practice Act.

II

This Complaint is brought and disciplinary review is sought for the reason and upon the grounds that Respondent, in the course of his practice, used his position as a physician and as a treating psychiatrist to engage in improper, inappropriate, unprofessional and unethical sexual contact or conduct with at

least three (3) female patients who were under his care and treatment for psychiatric therapy. The sexual contact or conduct included engaging in sexual intercourse with said patients. Respondent engaged in such inappropriate sexual conduct and contact with patients, including, but not limited to, the following patients:

1. On or around May, 1987, Respondent engaged in sexual intercourse and relations with Patient K.M. at the patient's residence in Coeur d'Alene, Idaho.

2. On or around May, 1987, Respondent engaged in sexual intercourse and relations with Patient V.L. at the patient's residence in Coeur d'Alene, Idaho.

3. On or around November, 1986, and continuing until January, 1987, Respondent engaged in sexual intercourse and relations with Patient J.W. at the patient's residence in Coeur d'Alene, Idaho.

III

Such conduct violates the Idaho Medical Practice Act, and warrants disciplinary action against Respondent on the following grounds:

(a) Provision of health care which fails to meet the standard of health care provided by other qualified physicians in the same or similar communities, in violation of Idaho Code §54-1814(7); and

(b) Conduct which results in an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient, in violation of Idaho Code §54-1814(22).

IV

The purpose of this disciplinary proceeding is to determine

whether Respondent's Idaho license to practice medicine and surgery should be suspended, restricted or revoked.

PRAYER FOR RELIEF

WHEREFORE, Complainant prays that the Board appoint a hearing committee or hearing officer and conduct a hearing upon the matters set forth herein and thereafter suspend, revoke or take such action with regard to Respondent's license as may be deemed just by the Board.

DATED This 6th day of April, 1988.

15/
DONALD L. DELESKI
Executive Director
Board of Professional Discipline

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF
THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:)	
)	Case No. 87-040
JOSEPH E. LEGGETT, M.D.,)	
License No. M-5108,)	STIPULATION
)	
Respondent.)	
_____)	

COMES NOW the Board of Professional Discipline of the Idaho State Board of Medicine, by and through its Chairman, Wayne F. Allen, M.D., and Joseph E. Leggett, M.D., and stipulate and agree as follows:

1. The Findings of Fact and Conclusions of Law of the Board of Professional Discipline of the Idaho State Board of Medicine dated September 29, 1989, shall remain in full force and effect, but the Order revoking Respondent's license to practice medicine and surgery in the State of Idaho is withdrawn;

2. In lieu of said revocation, Respondent hereby voluntarily surrenders his license to practice medicine and surgery in the State of Idaho and stipulates and agrees that he will never apply for reinstatement or for another license to practice medicine within the State of Idaho;

3. Respondent shall dismiss his pending Idaho Supreme Court appeal with each party to bear their own costs and attorney's fees.

DATED This 11th day of ~~Augst~~^{Sept.}, 1992.

BOARD OF PROFESSIONAL DISCIPLINE

Wayne F. Allen
WAYNE F. ALLEN, M.D.
Chairman

DATED This 31 day of August, 1992.

Joe E. Leggett
JOSEPH E. LEGGETT, M.D.

APPROVED AS TO FORM:

Jean R. Uranga
JEAN R. URANGA
Attorney for the Board

Glen E. Walker
GLEN E. WALKER
Attorney for Respondent

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Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Initially, the Board reviewed the pleadings and Hearing Officer's Record of Hearing and Recommendations, dated July 31, 1989, relative to Respondent's pending Motion for Reconsideration and Rehearing and Motion for Production of Tape Recording. The Board unanimously voted to adopt and approve the Hearing Officer's decision and the Board unanimously voted to deny both Motions.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 1 of 6

FINDINGS OF FACT

1. Respondent is currently a practicing psychiatrist in the State of Idaho, practicing under License No. M-5108. Respondent was issued an Idaho license on July 11, 1986. Respondent commenced practicing in Idaho as a private practitioner out of Pine Crest Hospital in June 1986, and assumed the role of Medical Board Director at Pine Crest Hospital in July 1986. Respondent took a leave of absence from Pine Crest Hospital in March 1988, but has continued to engage in private practice in Coeur d'Alene, Idaho from that time to the present.

2. Patient V.L. was admitted to the adult psychiatric unit of Pine Crest Hospital by Respondent on March 27, 1987, and was transferred on April 3, 1987, to the chemical dependency unit where she remained hospitalized until her discharge on May 1, 1987. Patient V.L. again consulted with Respondent in the summer of 1987 and Respondent and V.L. had counseling sessions on July 16, 1987, October 12, and October 26, 1987. V.L. accompanied Respondent to the Lewiston, Idaho area, where he had a speaking engagement, for the purpose of visiting her children. Respondent visited V.L. at her home in Coeur d'Alene, Idaho with respect to the purchase of a train set. There is insufficient evidence before the Board to find that the Respondent engaged in a sexual relationship with patient V.L. during her hospitalization at Pine Crest Hospital or during any subsequent contacts between V.L. and Respondent.

3. Patient K.M. was treated by Respondent on an out-patient basis in November and December of 1986. She was admitted to the adult psychiatric unit of Pine Crest Hospital by the Respondent on April 15, 1987, where she was treated as an eating disorder patient until her discharge on May 8, 1987. Respondent engaged in

sexual contact with patient K.M. in the form of kissing, fondling and caressing during private sessions in the course of her hospitalization at Pine Crest. After K.M. was discharged from Pine Crest Hospital, Respondent made frequent telephone calls to her and visited her at her workplace. Respondent engaged in sexual intercourse with patient K.M. at her apartment on or about May 12, May 14, or May 19, 1987.

4. Patient J.W. was admitted by Respondent to Kootenai Medical Center on November 7, 1986, for control and treatment of her eating disorder and she was discharged on November 12, 1986. Respondent engaged in sexual intercourse with J.W. at her residence on November 12, 1986 and on several additional occasions in November and December 1986. Respondent also visited J.W. at her residence on other occasions during these months when they engaged in kissing and caressing, but not intercourse.

5. None of the sexual contact between Respondent and the complaining witnesses K.M. and J.W. was forced or against their will. Once Respondent initially expressed his attraction, the sexual involvement was encouraged and even pursued by K.M. and J.W. Regardless of patient consent and/or invitation, intimate sexual contact between a psychiatrist and a patient constitutes an abuse or exploitation of the patient and a violation of the standard of care that the psychiatrist owes to the patient. Respondent's conduct is not excused or mitigated by the fact that the complaining witnesses themselves acted upon romantic feelings and/or sexual attraction for Respondent.

6. Difficulty in remembering precise dates and times does not discredit the complaining witnesses' testimony; all witnesses, including Respondent's witnesses and Respondent himself, had difficulty with accurate dates and times.

7. No convincing evidence was presented to establish that the complaining witnesses engaged in a conspiracy to bring their claims and accusations against Respondent for monetary gain or any other purpose.

8. Respondent has an appendectomy scar from surgery when he was a child, approximately 32 years ago. Said scar is approximately 3 1/2 inches long and about 1/4 inch wide. It is sometimes reddened in color so that it is quite obvious. K.M. saw Respondent unclothed on only one occasion. J.W. saw Respondent unclothed on four or five occasions. These occasions were for short periods dedicated to sexual intercourse. The complaining witnesses' failure to observe this characteristic does not discredit their testimony regarding the occurrences of sexual intercourse.

9. There was significant risk of discovery associated with Respondent's engaging in sexual conduct with K.M. in his offices at Pine Crest, but the risk was not so great that it is inconceivable that the risk was undertaken by Respondent.

10. The evidence establishes that Respondent's testimony and the testimony of several of his witnesses lacks veracity or reliability and the Board believes that the testimony of the complaining witnesses K.M. and J.W. has more credibility than Respondent's testimony and denials.

CONCLUSIONS OF LAW

1. Sexual conduct by a psychiatrist with his patient, including sexual intercourse and/or sexual fondling, kissing and intimate touching constitutes the provision of health care which fails to meet the standard of health care provided by qualified physicians in the same or similar communities. There is a pre-

ponderance of substantial competent evidence that the Respondent engaged in conduct in violation of Idaho Code §54-1814(7) (1977) with patients K.M. and J.W.

2. Sexual contact by a psychiatrist with his patient, including sexual intercourse and/or sexual fondling, kissing and intimate touching constitutes conduct which results in abuse or exploitation of the patient arising out of the trust and confidence placed in the physician by the patient. There is a preponderance of substantial competent evidence that the Respondent engaged in conduct in violation of Idaho Code §54-1814(22) (1979) with patients K.M. and J.W.

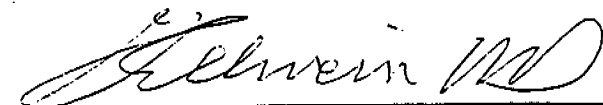
3. Substantial evidence is evidence which is valid, legal and persuasive and such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A preponderance of the evidence is not enough to wholly free the mind from reasonable doubt, but it is sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other.

ORDER

Based upon the foregoing, the Board hereby orders that Respondent's license to practice medicine and surgery in the State of Idaho is hereby revoked.

DATED This 29 day of September, 1989.

BOARD OF PROFESSIONAL DISCIPLINE



GARY E. ELLWEIN, M.D.
Chairman



WAYNE F. ALLEN, M.D.

Louise Shadduck

LOUISE SHADDUCK

John W. Swartley

JOHN W. SWARTLEY, M.D.

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF
THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:)	
)	Case No. 87-040
JOSEPH E. LEGGETT, M.D.,)	
License No. M-5108,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW ON
Respondent.)	REMAND AND FINAL ORDER
)	

This matter came on for reconsideration before the Board of Professional Discipline of the Idaho State Board of Medicine, hereinafter referred to as the Board, following receipt of supplementary evidence pursuant to the Order of Honorable Gary Haman, dated May 21, 1990. Prior to the reconsideration, each member of the Board was provided with copies of the supplementary record and all members of the Board who participated in this decision read the supplementary record. The Board also reviewed the Hearing Officer's Opinion on Remand, dated December 14, 1990.

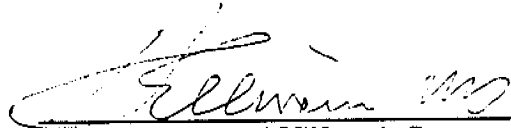
Having reviewed and discussed the record in this case, the Board unanimously voted to adopt and approve and hereby incorporates by reference the Hearing Officer's discussion and Findings of Fact and Conclusions of Law included in the Opinion on Remand dated December 14, 1990, with the exception of the proposed sanctions, and the Board unanimously voted to reaffirm its Findings of Fact, Conclusions of Law and Order dated September 29, 1989.

ORDER

Based upon the foregoing, the Board hereby orders that the Order dated September 29, 1989, revoking Respondent's license to practice medicine and surgery in the State of Idaho is hereby affirmed.

DATED This 15 day of January, 1991.

BOARD OF PROFESSIONAL DISCIPLINE



GARY E. ELLWEIN, M.D.
Chairman

STATE OF IDAHO }
COUNTY OF KOOTENAI }
FILED: 11-25-91
AT 10:30 A.M.
CLERK, DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JOSEPH LEGGETT, M.D.
License No. M-5108,

Appellant,

vs.

BOARD OF PROFESSIONAL DISCIPLINE,
THE IDAHO STATE BOARD OF MEDICINE,

Respondent.

CASE NO. 78390

MEMORANDUM OPINION
AND ORDER IN RE:
APPEAL FROM ORDER
REVOKING LICENSE TO
PRACTICE MEDICINE

Dr. Leggett appeals from an Order of the Board of Professional Discipline of the Idaho State Board of Medicine revoking his license to practice medicine in Idaho. Order affirmed.

Glen E. Walker, WALKER AND REAGAN, and Carl J. Oreskovich, HEMOVICH, NAPPI, ORESKOVICH & BUTLER, Attorneys for the Appellant.

Jean R. Uranga, URANGA, URANGA & BIETER, Attorneys for the Respondent.

PROCEDURAL BACKGROUND

On or about April 6, 1988, a Complaint was brought against Dr. Joseph D. Leggett, M.D., a psychiatrist. An Idaho license to practice medicine and surgery, License No. M-5108, had been issued to Dr. Leggett by the Idaho State Board of Medicine on July 11, 1988. MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 1

1986. The Complaint alleged that Dr. Leggett

used his position as a physician and as a treating psychiatrist to engage in improper, inappropriate, unprofessional and unethical sexual contact or conduct with at least three (3) female patients who were under his care and treatment for psychiatric therapy.

The Complaint further alleged that Dr. Leggett's conduct violated the Idaho Medical Practice Act; specifically, the Complaint alleged that there were violations of (a) Idaho Code § 54-1814(7) (health care which fails to meet the standard of health care provided by other qualified physicians in the same or similar communities), and (b) Idaho Code § 65-1814(22) (conduct which results in an abuse or exploitation of a patient arising out of the trust and confidence placed in the physician by the patient). According to the Complaint, its purpose was to determine whether Dr. Leggett's Idaho license should be revoked, restricted, or suspended. The Complaint sought appointment of a hearing committee or hearing officer to conduct a hearing on the matters set forth in the Complaint.

Heidi L. Fisher, Attorney at Law, was appointed to be the Hearing Officer. Pre-Hearing Conferences, which dealt with discovery and other matters, were held. The Disciplinary Hearing was held on October 10-14, 1988. Both parties submitted written closing arguments and briefs. Upon Dr. Leggett's motion to reopen the proceedings to permit additional testimony, the Disciplinary Hearing was continued on April 20, 1989. On May 24, 1989, the Hearing Officer issued FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION. The Hearing Officer found that Dr. Leggett had engaged in inappropriate sexual conduct with two

MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 2

patients, K.M. and J.W., but concluded that no such violation had occurred with respect to a third patient, V.L. The Hearing Officer found that the sexual conduct violated Idaho Code §§ 54-1814(7) and (22). The Hearing Officer recommended

consideration by the Board of Discipline of extended suspension of the Respondent's license with potential reinstatement on the condition that he acknowledge his violations and engage in counseling and/or treatment with respect to his conduct. In the alternative the Hearing Officer recommends revocation of Respondent's license.

Dr. Leggett filed a MOTION FOR RECONSIDERATION AND REHEARING, seeking to have the conclusions and findings in the matter reconsidered. An OFFER OF PROOF IN SUPPORT OF MOTION FOR RECONSIDERATION AND REHEARING was filed. Also, Dr. Leggett filed a MOTION FOR PRODUCTION OF TAPE RECORDING. The Motions were referred to the Hearing Officer for argument, consideration, and a proposed decision. After a telephonic hearing on July 21, 1989, the Hearing Officer filed her RECORD OF HEARING AND RECOMMENDATIONS. The Hearing Officer recommended against reopening the proceeding, with certain exceptions.

On September 29, 1989, the Board of Professional Discipline issued its FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER. The Board ordered that Dr. Leggett's license be revoked. The Board also denied Dr. Leggett's Motions to reopen the proceeding and for production of the tape recording.

On October 16, 1989, Dr. Leggett filed a PETITION FOR REVIEW/NOTICE OF APPEAL, thereby commencing the instant action before this Court. On March 13, 1990, Dr. Leggett filed a PETITION MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 3

TO REOPEN TESTIMONY; on May 8, 1990, a Hearing was held on the PETITION TO REOPEN TESTIMONY. By an Order dated May 21, 1990, the matter was remanded to the Hearing Officer for the purpose of taking limited supplementary testimony.

The Hearing Officer conducted a Hearing, commencing on July 9, 1990 and continuing on August 7, 1990. Again, both parties submitted written arguments and briefs. On December 14, 1990, the Hearing Officer issued an OPINION ON REMAND. The Hearing Officer affirmed all findings of fact and conclusions of law previously made.

On January 15, 1991, the Board of Professional Discipline issued its FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND AND FINAL ORDER. The Board affirmed its previous order revoking Dr. Leggett's license.

On February 22, 1991, Dr. Leggett filed an AMENDED PETITION FOR REVIEW/NOTICE OF APPEAL. On the same date, Dr. Leggett filed a SUPPLEMENTAL STATEMENT OF ISSUES ON APPEAL. Dr. Leggett asserts fifteen issues on appeal.

Both parties have submitted Briefs and a Hearing was held on the Appeal.

DISCUSSION

Standards on Appeal to District Court from a Decision in an Administrative Proceeding

The instant case arose pursuant to the provisions of the Idaho Medical Practice Act, Idaho Code § 54-1801 et seq. Specifically, this case was brought under Idaho Code § 54-1814, which sets forth the grounds for medical discipline of persons licensed to practice

MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 4

medicine. Idaho Code § 54-1806A provides for the procedure to be followed in disciplinary matters. Once a decision has been rendered by the Board of Professional Discipline, it is "subject to judicial review pursuant to the procedures of the administrative procedures act, chapter 52, title 67, Idaho Code." Idaho Code § 54-1806A(12).

Judicial review of an agency decision is provided for in Idaho Code § 67-5215(g), which reads as follows:

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In the recent case of Morgan v. Idaho Department of Health and Welfare, 91 I.S.C.R. 799 (June 14, 1991), the Idaho Supreme Court cited the statute above, reviewed case law, and set forth the applicable rules to be applied in cases where there is judicial review. According to Morgan, 91 I.S.C.R. at 799-800,

Judicial review pursuant to I.C. § 67-5215(g) allows a court to reverse or modify an agency decision only under limited

MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 5

circumstances, including a constitutional violation, action in excess of statutory authority, clearly erroneous findings of fact, an arbitrary and capricious decision or one characterized by an abuse of discretion. The hearing examiner, as the trier of fact, is entitled to place greater or less weight on any particular piece of evidence according to its relative credibility. Likewise, if the hearing officer's findings are clear, concise, dispositive, supported by the evidence and not affected by errors of law, they should be upheld by the court. Judicial review of an administrative order is confined to the record, and the reviewing court may not substitute its judgment for that of the administrative hearing officer on questions of fact. (Emphasis added; citations omitted.)

The credibility and weight to be given evidence falls within the province of the factfinder. Pointner v. Johnson, 107 Idaho 917, 695 P.2d 399 (1985). Deference must be given to the special opportunity that the factfinder has to judge the credibility of witnesses who appear personally before the factfinder. Hawkes v. Sparks, 108 Idaho 917, 702 P.2d 1377 (Ct. App. 1985).

Based upon the proper standard of review to be applied to the Appeal in the instant case, this Court will now proceed to address the Issues presented by Dr. Leggett on Appeal.

Issues Presented on Appeal

The central issue on appeal is one of whether or not the Hearing Officer's Findings of Fact, which were adopted by the Board of Professional Discipline, contained any clear error. There are other issues, however, which have been addressed in the Appellant's briefing. In order to make certain that no issue is overlooked, this Court will deal with each of the issues as they have been stated by the Appellant.

1. Was Dr. Leggett denied due process in the license revocation hearing due to the participation of the attorney who represents the claimants in three civil actions?

In order to make a determination here, the record must be reviewed regarding participation by the attorney. At the Disciplinary Hearing, the Board was represented by Jean R. Uranga, URANGA, URANGA & BIETER. Dr. Leggett was represented by Michael J. Hemovich and Carl J. Oreskovich, HEMOVICH, NAPPI, ORESKOVICH & BUTLER.¹ The attorney referred to above was Stanley D. Moore, WINSTON & CASHATT;² Mr. Moore had been retained by Kimberly Mould, Janene Waters, and Vicky Larabee to represent them in civil actions.

Unless otherwise ordered, hearings before the Board of Professional Discipline are open. Idaho Code § 54-1806A(8). However, prior to the Disciplinary Hearing, counsel for the parties stipulated that the

general public and press or media be excluded from said hearing because of the highly sensitive nature of the allegations and of the testimony and evidence which will be presented and that such exclusion would be in the interest of justice to all parties and witnesses concerned.

RECORD OF PRE-HEARING CONFERENCE AND RULINGS, dated September 30, 1988. The transcript of the Disciplinary Hearing is public record, as are the findings and recommendations. Transcript of the

¹Initially, Dr. Leggett was also represented by Bert Poole, who was Idaho counsel. Dr. Leggett's Idaho counsel at the time of this Appeal is Glen E. Walker, WALKER and REAGAN.

²At some points in time, Richard Relyea, WINSTON & CASHATT, was present.

Disciplinary Hearing, p. 386 (hereinafter "Tr., p. 386").

At the beginning of the Disciplinary Hearing, counsel for Dr. Leggett moved to exclude all witnesses and Mr. Moore. The Hearing Officer ruled that the witnesses should be excluded except when they were testifying and that Mr. Moore could be present only during his clients' testimony. (Tr., pp. 9, 13, 17)

At a later time in the proceedings, the question of Mr. Moore's presence was raised again. Mr. Moore argued that he should be permitted to remain in the proceedings to represent the interests of his clients and to assist Ms. Uranga. Ms. Uranga represented to the Hearing Officer that the Board had no interest in any civil lawsuits brought by Mr. Moore's clients. However, Ms. Uranga argued that the Rules of Professional Conduct require that, where persons are represented by counsel, an attorney must deal with that counsel when contacting the persons and meeting with them. See Idaho Rules of Professional Conduct, Rule 4.2. Since Dr. Leggett's defense would consist at least in part of an attempt to discredit the witnesses, it would be beneficial to the Board of Professional Discipline to have Mr. Moore present.

In reaching her decision on the question of Mr. Moore's continued presence, the Hearing Officer noted that, under the statute, the hearing is supposed to be open and public unless there is a finding that it should be closed in the interest of justice to all parties. The Hearing Officer believed that it was in the best interest of both the witnesses and Dr. Leggett to have the general public excluded; however, the Hearing Officer also believed

that the parties would agree to exceptions to that "blanket exclusion," but that had not happened. The Hearing Officer had permitted Mr. Moore to be present during his clients' testimony because a question of privileged communications could have arisen. The Hearing Officer then cited the Rules of Practice and Procedure in contested cases before the Board of Medicine. Rule 12(c) states that "[o]ther parties determined by the Board or Hearing Officer to be directly and/or substantially affected by the proceedings may enter an appearance, introduce evidence, and subject to the discretion of the Board or Hearing Officer, may otherwise participate in the conduct of the proceedings." (Emphasis added.) (Tr., p. 391) Relying upon the rule, the Hearing Officer then exercised her discretion to permit Mr. Moore to remain in the room as the Hearing progressed and to assist Ms. Uranga in her presentation of the case.

Initially, we must examine the actions that constituted "participation" by the attorney. Dr. Leggett's objections have been stated in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW as follows:

Mr. Moore was allowed to attend and to assist the Board of Medicine's attorney, Ms. Uranga in the prosecution of the case. This action was fundamentally unfair to Dr. Leggett in that it appeared that the Board of Medicine and the claimants retained counsel were corroborating to produce evidence against Dr. Leggett that could be used in a civil proceeding for damages. . . . The appellant's counsel had previously moved for the exclusion of witnesses, which was granted by the Hearing examiner. The purpose of the motion was to prevent the witnesses from corroborating their testimony. However, the order excluding

witnesses was compromised by allowing the witnesses counsel, Mr. Moore, to attend the entire proceeding and report back to his client's all impeaching evidence that had been presented in their absence. (Emphasis added.)

Dr. Leggett has failed to set forth specific examples in which Mr. Moore assisted Ms. Uranga or in which the two attorneys corroborated. However, the record indicates that Mr. Moore did assist Ms. Uranga in some manner. (Tr., p. 392) From the record, it is clear that Mr. Moore was present in the Disciplinary Hearing when his clients were testifying and at least during some of the testimony of other witnesses. Mr. Moore did not engage in examination or cross-examination of any witnesses.

Dr. Leggett has not cited any authority for the proposition that his due process rights have been violated by such "participation." Under the statute, the hearings are generally open to the public; the transcript of the hearings is public record. Under the rules, other parties may participate in the hearings at the discretion of the Hearing Officer. No authority has been presented for Dr. Leggett's argument that it is a violation of due process rights to permit an attorney for a witness, who represents a claimant and who is involved in a separate legal action arising out of the same events, to be present and to assist during an administrative hearing. See State v. Oakley, 91.12 I.S.C.R. 765 (May 31, 1991); I.A.R. 35(a)(6).

According to Idaho Code § 54-1806A(6)(d), hearings shall be conducted as provided for in the Administrative Procedures Act, Idaho Code §§ 67-5201, et seq. The procedures for a contested case

are set forth in Idaho Code § 67-5209 as follows:

(a) . . . all parties shall be afforded an opportunity for hearing after reasonable notice.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

Administrative hearings are not required to have all the formality of judicial procedure. The degree of formality may depend on the nature of the administrative proceeding. State of Utah v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980). According to Abrams v. Jones, 207 P. 724, 727 (Idaho 1922),

Due process of law is not necessarily satisfied by any process which the Legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade, or occupation, such license becomes a valuable personal right which can not be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

In the instant case, the question was one of professional discipline resulting in possible revocation of Dr. Leggett's medical license, which is an important property interest. Therefore, while all of the formality of judicial procedure was not required, Dr. Leggett was entitled to a fair hearing. Fallon v. Wyoming State Board of Medical Examiners, 441 P.2d 322 (Wyo. 1968).

The right to a fair hearing includes a reasonable opportunity to know the claims of the opposing party, to confront and cross-examine witnesses, to present evidence, to be heard in an orderly

proceeding adapted to the nature of the dispute, and to have the matter decided upon the record by an impartial fact finder. Federal Trade Commission v. National Lead Co., 352 U.S. 419, 1 L.Ed.2d 438, 77 S.Ct. 502 (1957); Hert v. J. J. Newberry Co., 179 Mont. 160, 587 P.2d 11 (1978); Wolfenbarger v. Hennessee, 520 P.2d 809 (Okla. 1974); Goranson v. Department of Registration and Education, 92 Ill.App.3rd 496, 415 N.E.2d 1249 (1980); Matter of Miller, 88 N.M. 492, 542 P.2d 1182 (1975); 73A C.J.S. Public Administrative Law and Procedure § 136. Generally, wide latitude is given to the administrative agency or hearing officer as to all phases of the conduct of a hearing. Monsanto Company v. Kennedy, 613 F.2d 946 (D.C.Cir. 1979); Matter of Miller, supra; 73A C.J.S. Public Administrative Law and Procedure § 139.

In this case, Dr. Leggett knew the claims that were being asserted against him. He had an opportunity to confront and cross-examine witnesses. Dr. Leggett presented evidence. The record reflects that the proceeding was orderly. The Hearing Officer was not biased. It appears that the procedures were adapted to the particular nature of this matter.³ There must be a balance between the interest of Dr. Leggett in preserving his license to practice medicine in Idaho and the interest of the Board in protecting the

³The action was brought by the Board of Professional Discipline against Dr. Leggett. There were three claimants, upon whose allegations the disciplinary action was based. Also, the defense was based, at least in part, upon attempts to discredit the testimony of the claimants. The procedure was adapted to this particular matter by presentation of the Board's case, followed by an opportunity for Dr. Leggett to cross-examine witnesses and present his case.

health, safety, and welfare of Idaho citizens from misconduct or unprofessional behavior of physicians. The Disciplinary Hearing was conducted in a manner that afforded Dr. Leggett the due process to which he was entitled as set forth above.

The Hearing Officer had latitude, as is generally the rule, in conducting the Disciplinary Hearing. The presence and assistance of Mr. Moore did not constitute a denial of Dr. Leggett's due process rights; Dr. Leggett was permitted to confront and cross-examine the witnesses and present evidence on his behalf.

This Court holds that there was no denial of Dr. Leggett's due process rights in the instant case by the limited "participation" of the attorney for the witnesses/claimants during the Disciplinary Hearing.

2. Was the Appearance of Fairness Doctrine
violated when the Hearing Officer allowed the counsel
for the claimants in three civil actions to participate
and assist the Board's attorney in the
license revocation hearing?

This question is closely related to the first issue. Some jurisdictions have recognized an "Appearance of Fairness Doctrine." See Belcher v. Kitsap County, 60 Wash. App. 949, 808 P.2d 750 (1991); City of Hoquiam v. Public Employment, 97 Wash.2d 481, 646 P.2d 129 (1982). Dr. Leggett has failed to cite any authority showing that the Appearance of Fairness Doctrine has been adopted in Idaho. Without authority, this Court declines to apply the doctrine here. See State v. Oakley, *supra*; I.A.R. 35(a).

It should be noted that fairness as it relates to the hearing process was addressed in the section above.

3. Did the Board breach the confidentiality requirement set forth in Idaho Code § 6-1008 dealing with Medical Malpractice and violate the Appearance of Fairness Doctrine in contacting and calling Dr. Roger White as an expert witness who had previously served as a panel member in a prelitigation screening panel between Kimberly Mould and Dr. Leggett?

The record reflects that the Board called Dr. Roger K. White as an expert witness on Tuesday, October 11, 1988. (Tr., p. 394) The record further reflects that the Board withdrew Dr. White as a witness. Dr. White testified that he did not discuss the results of the prelitigation screening panel with the Board attorney. He was called to testify as to standard of care; he was not called to testify regarding the details of any of Dr. Leggett's alleged sexual contacts. However, the important fact is that Dr. White did not testify and there was no testimony from Dr. White that the Hearing Officer considered in the matter here. Therefore, Dr. Leggett was not prejudiced and there was no error.

4. Did the Hearing Officer err in allowing a psychologist, Dr. Jack Oakwright, to testify as to the standard of care of a psychiatrist practicing in Coeur d'Alene, Idaho?

The issue as it is stated in the SUPPLEMENTAL STATEMENT OF ISSUES ON APPEAL appears to challenge the ability of a psychologist to testify to the standard of care of a psychiatrist practicing in Coeur d'Alene, Idaho. There is no argument or authority in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW regarding this issue.

"[F]ailure to support the alleged error with argument and authority is deemed a waiver of the issue." State v. Oakley, 91.12

I.C.A.R. 765 (May 31, 1991). See also Idaho Appellate Rules 35(a)(4), (6), and (7). Although this issue was included in the SUPPLEMENTAL STATEMENT OF ISSUES ON APPEAL, Dr. Leggett failed to support it with argument or authority. Therefore, this issue is deemed to have been waived.

5. Did the Hearing Officer err in applying the preponderance of evidence standard of proof rather than the substantial evidence standard?

In the FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, the Hearing Officer concluded that "[t]here is a preponderance of substantial competent evidence that [Dr. Leggett] engaged in conduct in violation of [the] Idaho Code" The Hearing Officer further concluded that

Substantial evidence is evidence which is valid, legal and persuasive and such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A preponderance of the evidence is not enough to wholly free the mind from reasonable doubt, but it is sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other.

In DR. LEGGETT'S FINAL BRIEF, p. 13, he claims that the burden of proof is "on a more probable than not" basis and it is error to require him to "conclusively" establish his alibi. There was oral argument at the Hearing on this Appeal to the effect that the Board of Medicine's burden of proof was by a "preponderance of the evidence," but Dr. Leggett's burden of proof as to the alibi defense was "convincingly."

It is unclear exactly what error is being alleged here; i.e., whether it is being asserted that there was (1) error as to the

standard that was applied throughout the proceeding, or (2) error in applying different standards to the opposing parties. Furthermore, this Court is uncertain as to the basis for these contentions and no reference to the record has been provided by the Appellant here.

However, in the FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, the Hearing Officer stated that she was not "convinced" of certain facts. For example, the Hearing Officer found that "[n]o convincing evidence was presented to establish that the complaining witnesses engaged in a conspiracy to bring their claims and accusations against Respondent for monetary gain or any other purpose." Findings of Fact 7. Also, the Hearing Officer wrote,

The Hearing Officer is not entirely convinced that the trip to Lewiston occurred on May 12. . . . Therefore, the Hearing Officer concludes that there is not convincing evidence that Respondent was not with K.M. for some time on the evening of May 12, 14, or May 19, 1987.

Again, the Hearing Officer stated that she was "convinced that there is no collusion by the complaining witnesses . . . " and that she was "not convinced that Respondent's fear of being interrupted while engaged in fondling or carressing K.M. necessarily rules out this activity."

Here, the use of the word "convince" or its derivative appears to be synonymous with "persuade." It was not being used as a standard of proof, but rather it was being used in its common meaning. Convince is defined in Webster's Dictionary as "to

persuade." That is the way that the Hearing Officer used the word. It is also consistent with the definition of "substantial evidence" set forth by the Hearing Officer in Conclusion of Law 3.

As set forth above, failure to support alleged error with argument and authority is deemed a waiver of the issue. Dr. Leggett has failed to present authority to show that there was error. In fact, Dr. Leggett has failed to set forth any authority as to the proper burden of proof to be applied here. Therefore, this issue is deemed to have been waived. State v. Oakley, supra; I.A.R. 35(a).

6. Was the Hearing Officer biased and prejudiced against Dr. Leggett?

As set forth above, failure to support alleged error with argument and authority is deemed a waiver of the issue. Dr. Leggett has failed to point to any factual basis showing bias or prejudice toward Dr. Leggett on the part of the Hearing Officer; Dr. Leggett has failed to argue this issue, or to present authority to show that there was error. Therefore, this issue is deemed to have been waived.' See State v. Oakley, supra; I.A.R. 35(a).

7. Did the Board of Professional Discipline err in denying Dr. Leggett's request to reopen the proceeding?

After the Hearing Officer filed the FINDINGS OF FACT,

*See also RECORD OF HEARING AND RULING, Paragraph 3, dated June 5, 1990, wherein the Hearing Officer states as follows:

Having thoroughly and thoughtfully searched her conscience, the Hearing Officer finds that she harbors no actual bias or prejudice toward the Respondent. The Hearing Officer has no antagonism or animosity toward the Respondent or his counsel nor any favoritism toward the Board of Medicine or its counsel. . . .

CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION dated May 24, 1989, Dr. Leggett filed a MOTION FOR RECONSIDERATION AND REHEARING and a MOTION FOR PRODUCTION OF TAPE RECORDING. Dr. Leggett also filed an OFFER OF PROOF IN SUPPORT OF MOTION FOR RECONSIDERATION AND REHEARING. A Hearing was conducted and the Hearing Officer made recommendations dated July 31, 1989 to the Board of Professional Discipline regarding the requests in the two motions. The Board denied both motions.

Subsequent to the filing of this Appeal, Dr. Leggett brought a PETITION TO REOPEN TESTIMONY in the action here. The Petition included the Offer of Proof which had previously been filed in support of the Motion for Reconsideration. Following a Hearing, this Court ordered that a supplementary evidentiary hearing be held on certain issues, including the issue of the tape recording; the matter was remanded to the Hearing Officer to make recommendations to the Board. Thereafter, the supplemental evidentiary hearing was held and the Hearing Officer issued an OPINION ON REMAND. The Board then issued its FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND AND FINAL ORDER.

The Appellant challenges the Board's denial of Dr. Leggett's request to reopen the proceeding. First, this issue was addressed when this Court ruled upon the PETITION TO REOPEN TESTIMONY. The Appellant cannot now complain of error on the part of the Board when relief was previously sought and addressed in the process of

this Appeal.⁵ This Court has ruled upon the issue and will not reconsider its decision; in effect, this question as an issue on appeal is moot. Second, Dr. Leggett has failed to support this alleged error with argument and authority. Therefore, the issue is deemed to have been waived.

8. Did the Hearing Officer breach confidentiality restrictions, the Appearance of Fairness Doctrine, and/or violate Dr. Leggett's due process rights when she had ex parte contact and disclosed her findings to a psychologist, Pam Olsen, on June 6, 1989 prior to her ruling on Dr. Leggett's request for reopening and reconsideration, prior to the Board's ruling?

The Hearing Officer issued FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION on May 24, 1989. It appears that the findings and recommendations were public records. (Tr., p. 386) This Court's attention has not been brought to anything which indicates that said document was confidential after it was issued, although it is clear from the cover letter addressed to the Board of Professional Discipline from the Hearing Officer that copies of the document were not sent to the parties at that time.

In the Fall of 1988, the Hearing Officer, Heidi Fisher, retained Dr. Pamela Olsen to perform an evaluation and testify as an expert witness on behalf of a client that Ms. Fisher was representing in a domestic relations matter. Thereafter, Dr. Olsen suggested that there might be a need to involve a psychiatrist in the evaluation and suggested various psychiatrists by name without mentioning Dr. Leggett. In the Spring of 1989, Dr. Olsen mentioned

⁵The ORDER addressing Appellant's PETITION TO REOPEN TESTIMONY was filed on May 23, 1990. The SUPPLEMENTAL STATEMENT OF ISSUES ON APPEAL was filed on February 22, 1991.

the possibility of using Dr. Leggett. At that time, Ms. Fisher told Dr. Olsen that she preferred not to use Dr. Leggett. According to the Affidavit of Heidi Fisher dated April 13, 1990,‘

On or around June 6, 1989, I spoke to Dr. Olsen again about the domestic relations matter and she advised me that she had, without my knowledge, scheduled an appointment for my client to meet with Dr. Leggett within the next few days. I initially simply expressed to Dr. Olsen my preference that the appointment be cancelled and rescheduled with one of the other psychiatrists we had talked about. However, Dr. Olsen objected to doing this for no reason. I then advised Dr. Olsen that I preferred not to use Dr. Leggett because there were proceedings regarding him pending in front of the Board of Medicine. She responded that she was familiar with the claims; but that it was her opinion that the allegations were groundless and that she had heard that no action was being taken against Dr. Leggett at all.

At that point, I advised Dr. Olsen that I had been the Hearing Officer in the case; that the case was not yet finally resolved by the Board of Medicine and that Dr. Leggett's license may be in jeopardy and I could not agree with her opinion that his license was not at any risk;

At no time did I ever discuss the nature of the claims or the facts or details of the case or my findings with Dr. Olsen
(Emphasis added.)

“The Affidavit was attached to a Brief, which was “lodged” in the record of Leggett v. Board of Professional Discipline, Kootenai County Case No. 78390. To assure that this Affidavit and any others that have been “lodged” rather than “filed” are properly a part of the record in this case, this Court orders that the evidence be deemed filed. Therefore, the evidence will be considered in arriving at a determination.

This Court could have given the parties an opportunity to supplement the record by “filing” the Affidavits. However, the more expeditious procedure is to order that the evidence, which is presently “lodged” with this Court, be filed.

See Shacocass, Inc. v. Arrington Construction Co., 116 Idaho 460, 776 P.2d 469 (1989).

In her Affidavit filed in this case on May 29, 1990, Dr. Pamela Olsen states as follows:

I did have contact with Heidi Fisher . . . on June 6, 1989, in reference to a mutual client that Ms. Fisher and I had. I had suggested to my client that she should schedule her child an appointment with Dr. Joe Leggett. My client did schedule the appointment with with Dr. Leggett for June 9, 1989. During my contact with Ms. Fisher I informed her of this appointment. Ms. Fisher told me that she didn't think it would be a good idea to have the client see Dr. Leggett because he would probably not be licensed after June 28, 1989, and thus would not be able to testify in court.

Ms. Fisher then told me that she had been the hearing officer at Dr. Leggett's hearing and she felt there was some merit to the allegations against Dr. Leggett and that she further felt that there would be some disciplinary action taken against Dr. Leggett.

[O]n or about June 23, 1989, in a session in my office . . . Ms. Fisher told me again about Dr. Leggett's potential for losing his license. She mentioned this in the presence of our client. (Emphasis added.)

In her Affidavit, Heidi Fisher states that she does not "know what the significance is of the phrase that Dr. Leggett would not have a license 'after June 2[8], 1989'; To my recollection, no proceedings by either myself or the Board were scheduled for June 26, 1989"

On June 16, 1989, Dr. Leggett filed the MOTION FOR RECONSIDERATION AND REHEARING.' That Motion was heard by the Hearing Officer

'At the time that Dr. Leggett's Motion for Reconsideration was filed, the Hearing Officer's findings and conclusions had already been forwarded to the Board of Professional Discipline. Therefore, it was uncertain whether the Hearing Officer or the Board would hear the Motion. On July 5, 1989, a hearing was held. Counsel for Dr. Leggett requested that the Motion be deferred to the Board.

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on July 21, 1989 and a RECORD OF HEARING AND RECOMMENDATIONS was signed by the Hearing Officer on July 31, 1991. The Board of Professional Discipline rendered its FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER on September 29, 1989.

This issue was argued in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW. It appears that the Appellant relies upon the Appearance of Fairness Doctrine as authority to support his contention, although he also mentions a breach of confidentiality restrictions and denial of due process rights in the statement of this issue.

No statute, rule, or agreement has been cited which would provide for confidentiality. See Idaho Code § 54-1806A(8); RECORD OF HEARING AND RULING, Paragraph 5, dated June 5, 1990. Also, as set forth in the preceding Section 2 above, the Appearance of Fairness Doctrine has not been recognized in Idaho.

However, there is still the issue of denial of due process rights, which includes fairness in the proceedings. Ex parte

That request was granted by the Hearing Officer, who advised the parties that the Board would determine whether the Board would hear and decide the Motion or would direct the Hearing Officer to hear and decide the Motion. The Board ordered the Hearing Officer to hear and decide the Motion. However, it is clear that, at the time of the communications with Dr. Olsen that are complained of here, the Hearing Officer either did not know of any Motion for Reconsideration or did not know for certain that she would be hearing the Motion. It does not appear from the record that Dr. Leggett objected to the Hearing Officer at this point.

After the Board issued its FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER and an Appeal was brought by Dr. Leggett, this Court remanded certain items to the Board and the Hearing Officer. At that point, Dr. Leggett filed a MOTION FOR DISQUALIFICATION OR RECUSAL of the Hearing Officer, dated May 25, 1990. After a hearing, the Hearing Officer denied the Motion for Disqualification.

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consultations are prohibited under Idaho Code § 67-5213. However, this statute does not apply here. First, the statute applies to "consultations," which would occur prior to the rendering of a decision. The Hearing Officer was not "consulting" ex parte with Dr. Olsen about the facts or the law of the case. Second, the statute prohibits employees of an agency assigned to render a decision in a contested case from communicating with any person or party in connection with any issue of fact in an ex parte manner. According to her Affidavit, the Hearing Officer did not discuss the nature of the facts or details of the case with Dr. Olsen. Third, the statute prohibits employees of an agency assigned to render a decision in a contested case from communicating with any party or his representative in connection with any issue of law in an ex parte manner. Here, there was no ex parte communication with any party about an issue of law. The statute was enacted so that decisions would be rendered in fairness, with both sides having an opportunity to present their case. This was simply not that kind of situation.

This matter can be analogized to an action in the court system. The fact that an action is pending is public record, as is the status of a case. Anyone can be informed about the potential dispensations under the law in the case. If one of the parties moves to reconsider, the judge will consider the arguments and reach another decision.

In this case, Heidi Fisher informed Dr. Olsen on June 6, 1989, of the proceedings against Dr. Leggett after the decision had been

signed on May 24, 1989. The information which Ms. Fisher gave to Dr. Olsen was public information; i.e., that there was a disciplinary proceeding against Dr. Leggett, that the disciplinary matters were unresolved, and that there was potential that his license might be at risk. At that time, Ms. Fisher did not know that the Motion to Reconsider would be filed. Even if Ms. Fisher spoke with Dr. Olsen again on June 23, 1989, after the Motion for Reconsideration had been filed on June 16, 1989 but before the Motion for Reconsideration was heard on July 21, 1989, the matter was public record.

Furthermore, it should be noted that Ms. Fisher was protecting her client, to whom she had an obligation.* If another individual had served as the Hearing Officer and Ms. Fisher had repeated what she knew from public information about a disciplinary action against Dr. Leggett, there would have been no question.

There is nothing to indicate that the Hearing Officer did not

*See RECORD OF HEARING AND RULING, Paragraph 4, dated June 5, 1990, wherein the Hearing Officer writes:

The disclosures made by the Hearing Officer to Pamela Olsen were made in the context of a confidential professional agency relationship and solely for the purpose of furthering the Hearing Officer's legal representation of a mutual client of the Hearing Officer and Dr. Olsen. The disclosures were not motivated by any feeling of any kind in favor of or against Respondent. The disclosures were not made in such a way as to influence or affect in any way the matters pending before the Board of Medicine involving Respondent. Similarly, disclosures made to the mutual client or in the client's presence, if any, were made solely for the purpose of advancing the client's case and coordinating the efforts of the Hearing Officer and Dr. Olsen to promote the client's interest. The Hearing Officer believes that she had an obligation to the Respondent and to the Board of Medicine to avoid any involvement with the Respondent until the matter pending before the Board of Medicine was finally resolved. The disclosures by the Hearing Officer were made purely to that end. (Emphasis added.)

fairly or properly consider the Motion for Reconsideration when it was presented. In fact, she recommended that the matter be reopened on certain limited items, which the Board denied. Dr. Leggett has not shown that there was unfairness to him in the context of this particular proceeding by the communication from Heidi Fisher to Dr. Olsen.

9. Did the Board of Professional Discipline's denial of Dr. Leggett's request to appear personally or through counsel before the Board violate his constitutional right to due process?

Dr. Leggett represents to this Court that he had requested a meeting, in person, with the Board of Professional Discipline' to discuss the case before the Board made a final determination. According to Dr. Leggett, the Board simply refused his request. This Court is unable to find a record of this request or its denial in the file. For purposes of this Appeal, it is assumed that such a request was properly made and that it was denied.

The question then becomes whether Dr. Leggett's due process rights were violated by his lack of opportunity to appear before the Board personally. Dr. Leggett contends that his constitutional right to due process was violated. However, Dr. Leggett has not presented any authority supporting his contention that he was entitled to appear before the Board personally and that denial of his request to appear was a violation of due process. Therefore, this issue is deemed to have been waived. State v. Oakley, supra;

'It is believed that the request was to the Board of Professional Discipline, although Dr. Leggett states in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW that he made such request to the Board of Medicine.

Simmons v. Ewing, 96 Idaho 380, 529 P.2d 776 (1974); I.A.R. 35(a).

Furthermore, see also Idaho Code § 67-5211, which provides that a party shall be afforded an opportunity to present oral argument to the officials who are to make the decision when a majority of the officials who are to render the final decision have not heard the case or read the record. The record in this case reveals that the members of the Board were provided with copies of the record and that they read the record. Therefore, under the statute, Dr. Leggett was not entitled to meet with the Board.

10. Did the Board err in admitting the tape recording and transcript of Dr. Leggett's alleged telephone call(s) with Kimberly Mould?

During the testimony of K.M. at the Disciplinary Hearing, the Board's attorney sought to introduce Exhibit 7, which was a tape recording of two telephone conversations between K.M. and Dr. Leggett that were made in late May or early June of 1987 by K.M. During the discovery process prior to the Disciplinary Hearing, counsel for Dr. Leggett was provided with a copy of the original tape recording.

At the Disciplinary Hearing, the original tape recording was admitted into evidence as Exhibit 7 and played before the Hearing Examiner.¹⁰ While the tape was being played, it became apparent

¹⁰There was some discussion as to whether the original or the copy that was made of the original should be admitted. Counsel for the Board wanted to have the copy admitted; counsel for Dr. Leggett, although objecting to admission of the tape recording, preferred to have the original admitted. When it became apparent that there were some gaps in the original which were not present on the copy, the parties stipulated as to the conversation that was missing. The missing conversation was general in nature and not specific to the allegations here. Transcript of the Disciplinary

that (1) Exhibit 7 contained additional telephonic conversations between K. M. and third persons that were not on the copy that was provided to counsel for Dr. Leggett, and (2) Exhibit 7 had lapses during the conversations between K.M. and Dr. Leggett that called into question the authenticity of the tape.

Dr. Leggett has not referenced this Court to the admission of proposed Exhibits 9 and 10, which were the transcripts of the telephone conversations between K. M. and Dr. Leggett. According to the record, the Hearing Officer declined to admit Exhibits 9 and 10. (Tr., p. 94) Therefore, there is no issue of transcripts erroneously being admitted into evidence.¹¹

First, we address the additional telephonic conversations that were found on the original tape recording, but which were not found on the copy of the tape recording that was provided to counsel for Dr. Leggett. There were two telephone conversations between K.M. and Dr. Leggett. Between the two telephone conversations with Dr. Leggett, K.M. received additional telephone calls. Those conversations were not taped in full. They included a conversation between K.M. and her parents and another conversation between K.M. and her first attorney. It is unclear what error, if any, Dr. Leggett asserts here. The additional, partial telephonic conversations did not contribute to the case for either side and

Hearing, p. 261 et seq.

¹¹The Hearing Officer prepared a transcript of Exhibit 7 and appended it to the FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION dated May 24, 1989, for the benefit of the Board of Professional Discipline in listening to the tape and evaluating its significance.

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were not the basis for any finding of fact by the Hearing Officer. Dr. Leggett has not shown that he was prejudiced in any way by the omission of those additional, partial telephonic conversations on the copy of the tape recording provided to Dr. Leggett's counsel and the inclusion of those additional, partial telephonic conversations on the original that was admitted into evidence.

Second, we address the gaps during the conversations between Dr. Leggett and K.M.¹² The issue can be divided into two parts: (1) whether the gaps in the original tape recording omitted important evidence, and (2) whether there had been alteration of the tape.

Initially, we turn to the question of whether the gaps omitted important evidence. The Hearing Officer stated the problem as follows in RECORD OF HEARING AND RECOMMENDATIONS dated July 31, 1989:

Respondent's counsel asserts that in preparation for hearing on the merits, request was made of the Board of Medicine for the original tape and in response to that request, the Board of Medicine provided what was represented to be a copy of the original tape, which Respondent relied upon as being an exact duplicate of the original. . . . [W]hen Exhibit 7 was admitted and played at hearing, there appeared to be some discrepancy between its content and that of the copy which was provided to Respondent's counsel. For that reason, in the course of the hearing, opportunity was given to the Board of Medicine and Respondent's counsel to compare the tape recordings and the parties stipulated on the

¹²The cause of the gaps on the original tape recording is unknown. Counsel for the Board suggested that she may have inadvertently caused erasures to the original tape during attempts to play the tape at the hearing.

record as to the discrepancies between the tape which was admitted into evidence as the original tape and the copies.

See Transcript of the Disciplinary Hearing, pp. 264-266, for the content of the conversation that was omitted on the original tape recording, but included on the copy of the original tape recording. The Hearing Officer then found that "there is evidence of deletions and/or omissions from the tape admitted as Exhibit 7, but that these omissions and deletions do not alter the material content of the conversations" After reviewing the record, this Court finds that the evidence supports that finding.

Then, we address the question of authenticity. The initial argument with regard to this issue dealt with the admission of the original tape recording into evidence without ordering its production to Dr. Leggett. After the Hearing Officer issued the FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION on May 24, 1989, Dr. Leggett filed a MOTION FOR PRODUCTION OF TAPE RECORDING on July 20, 1989. The Hearing Officer recommended against ordering that the original tape be produced for evaluation by Dr. Leggett for the purpose of determining its authenticity on grounds that there had been ample time during the proceedings to have pursued this matter, but Dr. Leggett had failed to do so; thereafter, the Board of Professional Discipline denied Dr. Leggett's MOTION FOR PRODUCTION OF TAPE RECORDING.

After this Appeal was brought, Dr. Leggett filed a PETITION TO REOPEN TESTIMONY. The Petition included a request that Dr. Leggett be permitted to present the testimony of a tape analysis

expert. Following a Hearing, this Court remanded the matter to the Hearing Officer for the purpose of receiving testimony on the issue of the authenticity of the tape recording. After a hearing, the Hearing Officer issued an OPINION ON REMAND. The Board then issued its FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND AND FINAL ORDER. The argument in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW dealt with the denial of Dr. Leggett's MOTION FOR PRODUCTION OF TAPE RECORDING. As we have noted here, relief was sought and addressed during the pendency of this Appeal. Any error that might have been asserted by Dr. Leggett based upon the failure to produce the original tape recording and to take testimony from Dr. Leggett's expert on the issue of authenticity has been cured by this Court's ruling and is now moot.

However, remaining at issue is the question of whether the evidence supports the findings of the Hearing Officer upon remand regarding the authenticity of the tape. It will be addressed in the next section.

11. Did the Hearing Officer err in concluding
that the tape was not altered?

In the FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATIONS dated May 24, 1989, the Hearing Officer found that "the tape is genuine and does record the voices of Respondent and K.M. and that there is no evidence of tampering or altering the content of the conversations." As noted above, eventually the matter was remanded to the Hearing Officer for additional evidence on this issue. Thereafter, in the OPINION ON REMAND dated December 14, 1990, the Hearing Officer affirmed that finding.

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In order to make a determination here, this Court must review the record on remand. At the hearing, Dr. Leggett submitted the testimony of Lawrence L. Porter and Dr. Allen Reich; the Board of Professional Discipline submitted the testimony of Fausto Pozo to rebut the testimony of Dr. Reich and Mr. Porter and to substantiate the authenticity of Exhibit 7. As noted by the Hearing Officer, the testimony and evidence was "voluminous and complex."

The Hearing Officer found that Dr. Leggett's experts focused upon a small portion of Exhibit 7, which exhibited what they considered to be unusual characteristics indicative of tampering.¹³ In fact, the section was approximately 5 seconds in duration; the tape recording was 22 minutes in length. (Tr. 7/9/90, pp. 65, 85, 189, 256) Mr. Porter and Dr. Reich developed a hypothesis as to how these unusual characteristics came to be on the tape record, which is explained by the Hearing Officer as follows:

Exhibit 7 was actually a tape recording produced by microphone re-recording of one or more original tape recordings made by K.M. with the Phone Mate answering machine. This hypothesis supposes that a tape was played to the point in the recorded conversation where the question, "Do you ever think about the time we made love?", is asked; immediately prior to that question, the tape was stopped and removed, another tape was inserted and played through the question, then apparently at some point (probably just before the answer "Yeah" where another transient occurs) that tape was stopped and removed and yet a third tape, or the first tape again was inserted and continued for the duration of the recording.

OPINION ON REMAND, P. 2-3. (Tr., pp. 180-81, 219, 240, 252, 255)

¹³The experts indicated that they had spent about 200 hours in analysis of the tape and, in particular, that small section.

The findings of the Hearing Officer included the following review of the testimony presented by Dr. Leggett's experts. Mr. Porter and Dr. Reich pointed to four unusual characteristics. (Tr., pp. 144, 156) First, there was a change in tonal quality or overall mood of the tape recording, which indicated an interruption in the flow of the recording. (Tr., pp. 153, 156, 240) Second, there was a whine which was present over the tape recording, which could have come from a second recording device. (Tr., pp. 129, 138, 143-44, 221, 226) Third, there were four transients¹⁴ which occurred immediately prior to the question and which were "unusual transients of unknown origin." (Tr., pp. 52, 120, 144, 155, 221, 226, 231-33, 250, 252) The experts proposed that these transients were created in the process of inserting the second tape into the machine. (Tr., pp. 145, 227-28) Fourth, Dr. Reich found speech formants immediately preceding the question which he identified as comprising the word "Kim." (Tr., pp. 36, 126, 156, 235-39, 260, 265.

The Hearing Officer then reviewed the testimony presented by the Board's expert, Mr. Poza, to counter the hypothesis of Dr. Leggett's experts. Mr. Poza had isolated the record-head stop/start signatures¹⁵ on Exhibit 7 and compared them to record-

¹⁴A transient was defined as a short duration noise consisting of an audible click, pop, or thud. (Tr., p. 81) Transients may be electronic, which are caused by the recording machine, or acoustic, which are noises like a lip smack or tongue pop that are picked up by the telephone receiver. (Tr., p. 178)

¹⁵Record-head stop/start signatures would be electronic transients.

head stop/start signatures that he created by using K.M.'s Phone Mate machine. (Tr. 8/7/90, pp. 17, 18/23, 29-33, 38, 40, 94) Mr. Poza testified that the identified stop/start function signatures on Exhibit 7 were consistent with the test signatures that he created and they did not reveal any evidence of accoustical reverberation. (Tr., pp. 29-33, 42, 45, 47, 85, 164) "Because of the absence of accoustical reverberation, which would occur if there was a microphone re-recording, Mr. Poza concluded that Exhibit 7 was an original tape rather than a microphone re-recording." (Tr., pp. 48-49, 96) Mr. Poza acknowledged the whine, but noted that it could have been created by many likely sources beside a second recording machine. (Tr., pp. 46, 76-80) Mr. Poza also acknowledged that the formants were consistent with the formants for the sounds in "Kim," but questioned the conclusion that, therefore, the utterance was in fact "Kim." (Tr., pp. 59-147, 153) Mr. Poza testified that the "abnormal" transients were most like the result of K.M.'s breathy rendition of a pause filler before she uttered the question. (Tr., pp. 73, 136, 138, 142) Mr. Poza testified that, in his opinion, Exhibit 7 was an authentic original tape and not produced by microphone re-recording. (Tr., pp. 20, 48-49, 185)

The Hearing Officer found that the evidence produced by Mr. Poza, i.e. that Exhibit 7 contained numerous record/stop/start functions that showed no evidence of accoustical reverberation, was never effectively countered by Respondent's witnesses. The Hearing Officer noted that Mr. Porter and Dr. Reich hypothesized about what

they considered to be "anomalies," but they did not establish that the "anomalies" of unknown origin were consistent with known and identified occurrences. The Hearing Officer was persuaded by the scientific methods and processes employed by Mr. Poza in descrediting the hypothesis of Dr. Leggett's expert witnesses."

The Hearing Officer did not rely solely on the testimony of the Board's expert witness. Based upon her own aural experience, the Hearing Officer was of the opinion that the question by K.M. on the tape recording was consistent with the mood and tone of the remainder of the taped conversations." Furthermore, except for this small portion surrounding the question, Dr. Leggett's expert witnesses did not allege that there was evidence of tampering. See fn. 16, supra.

Conflicting evidence, including the hypothesis, was presented. The Hearing Officer weighed the evidence and made findings of fact. In this case, the Hearing Officer was persuaded by the testimony and evidence presented by the Board's expert witness to the effect

¹⁶Dr. Leggett's experts had used a "spectogram," which shows patterns of power and noises. Mr. Poza used an "oscillogram," which establishes whether there is inconsistency in the way in which a tape was made and the way in which it was supposed to be made. (Tr., p. 18)

¹⁷In FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, p. 18, the Hearing Officer finds that, from the content of the taped conversations, Dr. Leggett was initiating telephone contacts with K.M. and that they were engaged in a "companionable" relationship that was not professional. In addition to the question posed by K.M., there were other exchanges that suggest the nature of their relationship. For example, K.M. asks Dr. Leggett if he can't say anything because someone is nearby and he agrees that is the case. The Hearing Officer found the tone of the telephone conversations to be "flirty and playful, or personal and familiar."

that the tape recording was authentic. This Court has reviewed the whole record regarding the authenticity of the tape recording and holds that the findings were supported by substantial evidence, as referenced above. The findings were not clearly erroneous and will not be set aside.

12. Did the Hearing Officer err in disallowing Dr. Leggett's alibi?

Alibi testimony was presented as to the claims of K.M. and J.W. Alibi testimony was presented by Dr. Leggett both at the initial Disiplinary Hearing and upon remand.

Alibi Testimony as to the Claim of K.M.

The Hearing Officer found that Dr. Leggett "engaged in sexual intercourse with patient K.M. at her apartment on or about May 12, May 14, or May 19, 1987."¹⁸ The Hearing Officer recited the testimony as follows:

K.M. testified that Respondent came to her apartment and they had sexual intercourse on an evening after her second or third outpatient meeting following her discharge from Pine Crest Hospital. This means that the incident of intercourse would have occurred on Tuesday May 12, Thursday May 14 or Tuesday May 19, 1987.

See Exhibit 1, Kim's medical record, which indicates that she attended outpatient group meetings on May 12, 1987, May 14, 1987, and May 19, 1987.

¹⁸There was argument that the finding was clearly erroneous because the incident occurred after the second or third group meetings, which were on May 14 and May 19. Therefore, May 12 should not have been included as a date when the intercourse might have occurred. It should be noted that the Hearing Officer found that Dr. Leggett the sexual intercourse occurred "on or about May 12, May 14, or May 19, 1987."

Before making the finding, the Hearing Officer recited the evidence from the Disciplinary Hearing, which was presented by Dr. Leggett to establish an alibi. Thereafter, the Hearing Officer disallowed the alibi. To establish his alibi, Dr. Leggett presented testimony from his wife, Diane Leggett; his receptionist, Marlene Musch; and his babysitter, Jefferi Heffley. Marlene Musch testified that she did insurance work some evenings in April, May, and June, 1987; however, she did not testify regarding any specific dates on which this occurred. (Tr., pp. 575, 602) Diane Leggett testified that she recalled being at Pine Crest with Dr. Leggett specifically on May 14 and May 19 from 6:30 to 9:00 P.M. (Tr., pp. 667-68) Jefferi Heffley testified that she babysat for the Leggetts on May 13, May 14 and May 19; she understood that the reason she was babysitting on May 13 and May 14 was that Diane Leggett was doing insurance work at Pine Crest, but that, on May 19, the Leggetts went out to dinner. (Tr., pp. 644-45) Both Dr. Leggett (Tr., p. 878) and Mrs. Leggett (Tr., p. 664) testified that on May 12, 1987, Dr. Leggett went to Lewiston, accompanied by V.L., to give a lecture and returned very late in the evening."

As a part of the recitation of the evidence presented at the Disciplinary Hearing, the Hearing Officer then stated:

Diane Leggett also testified that the same week following her return from Texas for Mother's Day weekend, she spent several evenings visiting a friend of hers who was hospitalized.

Mrs. Leggett's testimony accounting for her

¹⁹The recitation of the evidence presented above has not been challenged.

and Respondent's whereabouts the evenings of May 12, 13 and 14 is difficult to reconcile with her testimony that she also spent several evenings visiting a hospitalized friend. Mrs. Leggett further testified that she and Respondent had guests visiting from Wyoming the following week and her son injured himself on the intervening weekend. The Hearing Officer concludes that there is a substantial likelihood that Mrs. Leggett is mistaken about the precise dates on which she worked evenings at Pine Crest, and/or that she always went to the hospital and returned home with Respondent in the same car, particularly in view of her conflicting testimony that she also spent several evenings visiting her friend the same week.

The Hearing Officer is not entirely convinced that the trip to Lewiston occurred on May 12. V.L. was not certain of the date, but thought it to have been in late May. Marlene Musch testified she had scheduled it on Respondent's book and she thought it was in June. Respondent's appointment book, although presumably available, was not offered as an exhibit to support the May 12 date.

Therefore, the Hearing Officer concludes that there is not convincing evidence that Respondent was not with K.M. for some time on the evening of May 12, 14, or May 19, 1987.
(Emphasis added in part.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATIONS
dated May 24, 1989.

Dr. Leggett contends that the Hearing Officer misinterpreted Diane Leggett's testimony. Dr. Leggett argues that Diane Leggett did not testify that there were some evenings when she worked and others when she visited her friend; rather, the evenings that she worked at the hospital were the same evenings that she saw the hospitalized friend. Therefore, according to Dr. Leggett, the Hearing Officer was clearly erroneous in her finding.

A review of the Transcript of Disciplinary Hearing, p. 680,

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indicates that Diane Leggett testified as follows:

Q. You were testifying to times and dates you worked during May of 1987?

A. Yes.

Q. How do you recall those dates so specifically?

A. Because there was some memorable events that happened. For instance, when we went to Texas, that weekend was the first Mother's Day I mentioned I had been away from my children.

That week when we got back an acquaintance I knew had been admitted to the hospital. I was there several evenings. She saw me-- I had cut my hair off. I had very long hair, and I had my hair cut very short. She commented on my short hair when I saw her in the hospital. . . .

Q. Do you regularly work in your husband's office?

A. Not--

Q. During 1987 did you regularly work in your husband's office.

A. Yes.

Q. Did you have scheduled hours?

A. No, I did not.

Q. You came in when the work needed to be done?

A. I came in during the day and also in the evenings when the work needed to be done. I was there usually every week, though, at least 2 to 3 times a week.

Q. Did you come in in the daytime sometimes?

A. Yes, I did.

Q. Is it your testimony that during May 1987 when you would return to the office to work in the evening that you always rode in your husband's car, you always rode together?

A. Yes.

Q. There was never anytime he took his own car?

A. No.

The testimony regarding the friend in the hospital is ambiguous;²⁰ the Hearing Officer could have reached her

²⁰It should be noted that the interpretation of Diane Leggett's testimony urged by Dr. Leggett's counsel is in the form of argument in a brief; it is not testimony that was given by the witness on

interpretation from the evidence that was presented. However, the Hearing Officer did not disallow the alibi based solely upon that testimony. Viewing the evidence that supported the findings, this Court notes that, although that evidence was persuasive, the Hearing Officer also relied upon other evidence or the lack thereof. Furthermore, the Hearing Officer was assessing and weighing the credibility of the testimony of the alibi witnesses and, in particular, Diane Leggett.

The question is whether the finding of the Hearing Officer was clearly erroneous. According to the standard to be applied, the finding should be upheld by this Court if it was supported by the evidence. There was conflicting evidence. However, the credibility and weight to be given the evidence fell within the province of the Hearing Officer, who had an opportunity to judge the credibility of the witnesses personally. Here, after observing Diane Leggett and hearing her testimony, as well as the testimony of others, the Hearing Officer disallowed the alibi, concluding that there was not evidence that Dr. Leggett was not with K.M. for some time in the evening on May 12, 14, or May 19, 1987. This Court holds that the finding was supported by the evidence and was not clearly erroneous.²¹

the record.

²¹It must be noted that, even if the finding regarding the testimony dealing with the friend had been found to be clearly erroneous, such testimony only applied to May 12, 13, and 14; there is still the date of May 19 which would not have been tainted. Furthermore, it must be noted that K.M. claims that the sexual intercourse occurred after the group meetings, which were held in the evening. Dr. Leggett might have left again after he returned

Alibi Testimony as to the Claim of J.W.

The Hearing Officer found that

Patient J.W. was admitted by Respondent to Kootenai Medical Center on November 7, 1986, for control and treatment of her eating disorder and she was discharged on November 12, 1986. Respondent engaged in sexual intercourse with J.W. at her residence on November 12, 1986 and on several occasions in November and December 1986. Respondent also visited J.W. at her residence on other occasions during these months when they engaged in kissing and caressing, but not intercourse.

At the Disciplinary Hearing, J.W. testified that she engaged in sexual intercourse with Dr. Leggett on the date of her discharge from KMC at her home in Coeur d'Alene, Idaho. On Appeal here, Dr. Leggett challenges the failure of the Hearing Officer to allow his alibi, particularly for November 12, 1986, which was the date that his younger son was born.

In the FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, the Hearing Officer related the evidence regarding the alibi issue that was presented at the Disciplinary Hearing. Later, in the OPINION ON REMAND, the Hearing Officer again addressed the evidence that had been presented at the hearing.

Dr. Leggett attempted to assert the defense of alibi in two respects: (1) an alibi as to date of November 12, 1986, and (2) an alibi as to the other dates. We will address the alibi regarding the other dates first.

home, although Diane Leggett testified that she did not recall that he left their residence after they returned in the evening on May 14 and 19. (Tr., p. 668)

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A. Dr. Leggett's Alibi as to Other Dates

J.W. testified that Dr. Leggett came to her trailer house on eight to ten occasions after November 12, 1986; she testified that most of these visits occurred in the afternoon between 3:00 and 6:00 p.m., but about three visits took place in late evening. She testified that four or five of these visits included sexual intercourse. (Tr., pp. 289-94) Dr. Leggett admitted that he had been to J.W.'s home on two or three occasions. (Tr., pp. 847, 935) Raymond P. Lepagnol, a neighbor, testified that Dr. Leggett was at J.W.'s residence on at least one occasion. (Tr., p. 1004) Dr. Leggett presented alibi testimony from his wife, Diane Leggett, and from himself. Diane Leggett testified that Dr. Leggett was home for dinner by 6:00 P.M. and she did not recall him leaving after dinner to return to the hospital at any time during the months of November and December, 1986. (Tr., p. 659) But see Exhibit 3, which shows at least three occasions when Dr. Leggett was at Kootenai Medical Center between 6:00 and 7:00 P.M. (11/7, 11/10, and 11/11). Dr. Leggett admitted that he may have been absent in the evening for a medical staff meeting, to run to the store, etc. (Tr., p. 958) Dr. Leggett testified that he was at J.W.'s home, but for reasons other than those set forth here. (Tr., p. 847) The Hearing Officer observed that Diane Leggett's recollection was undermined by other evidence that Dr. Leggett had been absent in the evening. Finding it implausible, the Hearing Officer rejected Dr. Leggett's explanation that he was at J.W.'s home because of an entirely chance encounter with her at the mall and an invitation

to take her daughter and his son to lunch together.

The facts recited above are supported by substantial evidence in the record. The Hearing Officer weighed the evidence and determined the credibility of the witnesses after observing them in person, which is within the province of the factfinder. The finding of the Hearing Officer, which disallowed the alibi evidence, was not clearly erroneous.

B. Dr. Leggett's Alibi as to November 12, 1986

At the Disciplinary Hearing, J.W. testified that her first sexual intercourse with Dr. Leggett occurred on November 12, 1986, somewhere between 5:00 and 7:00 P.M. and that Dr. Leggett was at her house for approximately one hour. That was the date of her release from hospitalization at Kootenai Medical Center; it was also the date of the birth of Dr. Leggett's younger son.

To establish his alibi, Dr. Leggett presented certain testimony and documentary evidence. Some of the evidence was presented at the Disciplinary Hearing and other evidence was presented at the Hearing on Remand. This Court will review the findings of the Hearing Officer as a result of the evidence presented at both hearings.

The baby was born at 4:40 P.M. Dr. Leggett was present at the birth of his son, David Leggett.

Dr. William Tarnasky delivered Dr. Leggett's son. Dr. Tarnasky testified that he was around the birthing room and checked periodically on Diane Leggett until about 5:30 P.M. Dr. Tarnasky believed that Dr. Leggett remained until after he left. (Tr., pp.

Nancy Berry, R.N., attended Diane Leggett on the birth of her son. Nancy Berry testified that Dr. Leggett accompanied her when she delivered David Leggett to the KMC nursery, which established Dr. Leggett's presence at KMC until 5:45 P.M. (Tr. Remand, p. 20)

Cheryl Waldvogel, who worked at Pine Crest Hospital, testified that she dropped by the Kootenai Medical Center birthing room on her way home from work and saw Dr. Leggett there between 5:45 and 6:00 P.M. (Tr., Vol. VI, p. 11)

From the foregoing evidence, produced by Dr. Leggett's witnesses, the Hearing Officer concluded that Dr. Leggett was present at Kootenai Medical Center until at least shortly before 6:00 P.M. This fact is supported by the evidence submitted by Dr. Leggett himself and is certainly not erroneous.

Nancy Berry also testified that she did fundus checks or uterine massages on Diane Leggett and did not recall Mrs. Leggett being alone for any of these. By inference, she concluded that Dr. Leggett was present. (Tr. Remand, pp. 21, 13, 30) She stated the following sequence: 5:00, 5:15, 5:30, 5:45, 6:15, 7:00, 7:30 P.M. (Tr. Remand, pp. 17, 21) The Hearing Officer found that this time sequence "does not rule out a trip by [Dr. Leggett] to J.W.'s residence for a visit of 30 minutes duration with 15 minutes travel time allowed" This fact is supported by substantial evidence in the record and is not erroneous. At this point, Dr. Leggett's presence at Kootenai Medical Center has been established until 6:15 P.M. and again at 7:00 P.M.

In support of his alibi, Dr. Leggett presented the testimony of Lisianne Mohlman, Diane Leggett's mother. Lisianne had been taking care of Robert Leggett, the Leggetts' older son. Lisianne testified that the babysitter, Jefferi Heffley, arrived at the Leggett home between 4:30 and 5:00 P.M.,²² (Tr., p. 696) after which Lisianne and her husband, Harry Mohlman, departed for the hospital. Lisianne estimated the drive to be seven to ten minutes in duration. (Tr., p. 700) They arrived at Kootenai Medical Center a little after 6:00 P.M. and Dr. Leggett was there when they arrived. According to Lisianne, the Mohlmans visited Diane for about one-half hour and then returned to the Leggett residence about 7:00 P.M. The babysitter left about 7:00 P.M.; the Mohlmans stayed and talked with Dr. Leggett until about 11:00 P.M. (Tr., p. 699)

In support of his alibi, Dr. Leggett also presented the testimony of Jefferi Heffley. She testified that she got off work at 6:00 P.M. and then proceeded to the Leggett residence, where she arrived between 6:00 and 6:30 P.M. (Tr., p. 632) She stayed with Robert while Lisianne and Harry Mohlman went to the hospital. According to Mrs. Heffley, the Mohlmans returned with Dr. Leggett at about 8:00 P.M. and she then left around 9:00 P.M., having been at the Leggett residence for a total of 2 to 2 1/2 hours. (Tr.,

²²It should be noted that this time frame potentially puts the babysitter at the Leggett residence prior to the birth of the baby. However, the testimony is also that Mohlmans were going to see the baby, which had already been born. (Tr., p. 696) Also, it should be noted that, according to Mrs. Mohlman's time frame, it took over an hour to drive to the hospital.

p. 634)

Diane Leggett testified that Dr. Leggett was with her constantly and never left from the time of the birth until he left later with the Mohlmans. (Tr., p. 656) Diane Leggett testified that the Mohlmans left after visiting with her in the birthing room for about one hour at 7:00 P.M. (Tr., p. 658) However, Nancy Berry and Dr. Leggett testified that he at least left Diane Leggett to take the baby to the nursery.

The Hearing Officer noted that there was inconsistency in the evidence and found that the testimony of the babysitter, Jefferi Heffley, was the most reliable regarding the timing of the Mohlmans' departure and return with Dr. Leggett to the Leggett residence. The Hearing Officer then found that

the likely time of the Mohlman's arrival at Kootenai Medical Center was probably around 7:00 p.m. Thus, the period from 6:15 p.m. to 7:00 p.m. remains accounted for only by the testimony of [Dr. Leggett] and Mrs. Leggett, or to the contrary by J.W. J.W.'s testimony places the likely time of [Dr. Leggett's] arrival at her house sometime between 4:30 p.m. and 5:30 p.m., and the duration of his stay at about one hour or less.

Dr. Leggett also presented the testimony of John Smith, who is a private investigator. He testified that a round trip from the birthing room at Kootenai Medical Center to J.W.'s residence took 12 to 16 minutes to complete. (Tr. Remand, p. 35) The Hearing Officer then found that "on November 12, 1986, a round trip by [Dr. Leggett] to J.W.'s home probably would have taken 12 to 16 minutes."

The factual determinations above are not clearly erroneous.

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There is substantial evidence, albeit conflicting in some cases, to support the Hearing Officer's determinations. The Hearing Officer has weighed the evidence, including that which was conflicting. Furthermore, this Court must defer to the findings of the Hearing Officer regarding credibility because of the special opportunity that the Hearing Officer had to judge the credibility of the witnesses after observing them when they appeared in person. Findings of fact will not be set aside unless they are clearly erroneous; here, the findings are supported by the evidence in the record and will not be set aside. The Hearing Officer did not err in disallowing the alibi evidence.²³

Dr. Leggett argues that it was improbable that he would have engaged in sexual intercourse with J.W. near the time that his son was born. However, the Hearing Officer weighed the evidence and rendered findings of fact based upon that evidence. This Court is not in a position to substitute its judgment for that of the Hearing Officer.

13. Were the Findings of Fact and Conclusions of Law Issued on Remand supported by substantial evidence?

In the FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND AND FINAL ORDER, dated January 15, 1991, the Board of Professional Discipline stated as follows:

the Board unanimously voted to adopt and approve and hereby incorporates by reference the Hearing Officer's discussion and Findings of Fact and Conclusions of Law included in the

²³In essence, on remand, the Hearing Officer shortened the period for which Dr. Leggett was accounted for only by himself and his wife.

Opinion on Remand dated December 14, 1990, with the exception of the proposed sanctions, and the Board unanimously voted to reaffirm its Findings of Fact, Conclusions of Law and Order dated September 29, 1989.

In the OPINION ON REMAND dated December 14, 1990, the Hearing Officer discussed three issues: (1) the authenticity of Exhibit 7, which was the tape recording of the telephone conversations between Dr. Leggett and K.M., (2) the use of conversations on Side B of Exhibit 7 to show that there was collusion between the claimants and to discredit their testimony, and (3) additional alibi evidence as to the date of November 12, 1986, which was the date that J.W. claims that she first had sexual intercourse with Dr. Leggett. The first and third issues have been addressed by this Court in Sections 11 and 12, infra; the second issue will be addressed as part of the discussion below. The Hearing Officer then stated in a section entitled FINDINGS OF FACT AND CONCLUSIONS OF LAW as follows:

Taking into consideration the additional evidence on remand and the evidence previously submitted, the Hearing Officer affirms all findings of fact and conclusions of law previously made in her Opinion and Recommendation, dated May 24, 1989, based upon a preponderance of all the evidence.

This Court will address the Findings of Fact and Conclusions of Law set forth in the Board's FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER dated September 29, 1989 as well as the underlying basis for that order which is the opinion of the Hearing Officer dated May 24, 1989 and referred to above; the second issue above from the Opinion on Remand will be incorporated into the

discussion. Only those findings of fact and conclusions of law that are challenged as set forth in Appellant's Briefs will be addressed; any issues included within the findings of fact and conclusions of law that have been previously addressed will be referenced to the appropriate section above. Attached to this Memorandum Opinion on Appeal as Appendix "A" and incorporated herein is a copy of the Findings of Fact and Conclusions of Law adopted by the Board dated September 29, 1989.

For ease of discussion, this matter has been divided into two sections dealing with the claims of K.M. and J.W., rather than addressing each of the findings of fact and conclusions of law separately. We will follow the outline as presented in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW. However, each of the findings will be referenced where appropriate. Furthermore, we point out that Findings of Fact 1, 2, and 5 and Conclusions of Law 1, 2, and 3 are not at issue; i.e., there is no argument in the briefs nor was there any argument at the hearing on the appeal and no authority has been presented to challenge them. See State v. Oakley, supra; I.A.R. 35.

A. Findings of Fact Relating to the Claims of K.M.

Finding of Fact 3, which relates to the Claims of K.M., states as follows:

Patient K.M. was treated by [Dr. Leggett] on an out-patient basis in November and December of 1986. She was admitted to the adult psychiatric unit of Pinecrest Hospital by [Dr. Leggett] on April 15, 1987, where she was treated as an eating disorder patient until her discharge on May 8, 1987. [Dr. Leggett] engaged in sexual contact with patient K.M. in

the form of kissing, fondling and caressing during private sessions in the course of her hospitalization at Pine Crest. After K.M. was discharged from Pine Crest Hospital, [Dr. Leggett] made frequent telephone calls to her and visited her at her workplace. [Dr. Leggett] engaged in sexual intercourse with patient K.M. at her apartment on or about May 12, May 14, or May 19, 1987.

It is the latter part of this Finding of Fact that is challenged here. There is evidence in the record in the form of testimony by K.M. that Dr. Leggett engaged in kissing, fondling and caressing with her during her hospitalization at Pine Crest. (Tr., pp. 32, 33, 34, 35, 41, 42) There is also evidence in the record in the form of testimony from K.M. and the tape recording that Dr. Leggett made frequent telephone calls to K.M. and visited her at her workplace. (Tr., pp. 60, 66; Section 11 above) There is also testimony from Dr. Leggett regarding the telephone calls to K.M. (Tr., pp. 908-14) There is evidence in the record in the form of testimony from K.M. that Dr. Leggett engaged in sexual intercourse with her at her apartment on or about May 12, May 14, or May 19, 1987. (Tr. pp. 60, 61, 64; Exhibit 1). There is substantial evidence in the record to support Finding of Fact 3.

Dr. Leggett argues that Finding of Fact 3 with regard to the claims of K.M. is erroneous for the following reasons: (1) K.M. was not credible when her demeanor was observed during her testimony at the hearing; (2) It was improbable that Dr. Leggett would engage in misconduct with K.M. in his office at Pine Crest; (3) It was improbable that Dr. Leggett would engage in misconduct with K.M. because of fear of discovery; (4) Dr. Leggett established an Alibi

for the dates of sexual intercourse (see Section 12 above); (5) K.M. could not describe Dr. Leggett's appendectomy scar; and (6) the tape recording was not authentic (see Section 11 above).

1. K.M.'s Credibility

The Hearing Officer found K.M. to be more believable than Dr. Leggett. See Finding of Fact 10. Dr. Leggett argues that this finding was colored by the tape recording of the telephone conversations and that, except for the tape recording, K.M.'s credibility would not have withstood scrutiny. Since the tape recording has been found to be authentic, this argument fails. See Section 11 above.

Dr. Leggett also argues that, when viewing the record as a whole, the facts found by the Hearing Officer do not support the finding by the Hearing Officer that K.M. was credible. When reciting the facts, the Hearing Officer found that K.M. was

generally overly dramatic in her testimony. She was also evasive in that she often offered unelicited testimony while failing to respond to the questions actually asked. The Hearing Officer feels that K.M.'s manner tended toward the theatrical, but believes that the essential crux of her testimony that she had sexual contact with [Dr. Leggett] while he was engaged as her psychiatrist.

It does appear from her own testimony that K.M. may be motivated by the prospects of recouping some of her family's expenditures for her treatment at Pine Crest and her previously rocky inter-family relationships seem to have been cemented by her taking action against [Dr. Leggett]. The depth and sincerity of the personal "devastation" to which K.M. testified is not entirely convincing, but the ambiguous nature of K.M.'s motives for pursuing action against [Dr. Leggett] does not belie the truth of her

accusations in this case. (Emphasis added.)

In this discussion, the Hearing Officer was weighing the credibility of K.M. Here, the Hearing Officer determined that, while there may have been some problems, K.M. was credible as to the heart of the claim. Under the law, the credibility to be given K.M. falls within the province of the Hearing Officer; this Court must give deference to the special opportunity that the Hearing Officer had to observe K.M. and judge her credibility. Based upon application of the proper standard, the finding of the Hearing Officer was not clearly erroneous and will not be set aside. See Finding of Fact 10.

2. Observing Dr. Leggett's Office from the Parking Lot

K.M. testified that she engaged in acts of kissing, hugging and fondling in Dr. Leggett's office in Pine Crest both during the day and in the evening. (Tr., pp. 32, 33, 34, 35, 41, 42) Dr. Leggett sought to discredit this testimony by showing that it was improbable that this would have occurred because his blinds were open and any misconduct could have been easily observed by passersby on the sidewalk or in the parking lot adjacent to the office.

Dr. Leggett presented the testimony of his receptionist, Marlene Musch, who testified that Dr. Leggett's blinds were never closed, that the shrubbery was trimmed below the window at the time of the hospitalization of K.M., and that it was easy to see inside of the office by any person that was passing by outside. (Tr., pp. 581-82, 585) Dr. Leggett testified that a person could see from

the sidewalk into his office and that the shrubs were substantially smaller than they were at the time of the Disciplinary Hearing. (Tr., pp. 865-66, 868) K.M. testified as to the conduct that occurred in Dr. Leggett's office as follows:

"We were sitting down when we kissed first." (Tr., p. 32)

"He also used to stand against the wall near the door. And we'd be pressed up against the wall kissing. I don't know why he did that. For some reason he thought he wouldn't be seen somehow." (Tr., p. 41)

I was standing in the middle of the room with Dr. Leggett kissing. (Tr., p. 107)

K.M. testified that a person inside the office could see outside, but that she did not know if a person outside the office could see inside. Also, she did not know about the location of the blinds. (Tr., p. 108)

The Hearing Officer personally inspected the premises at Pine Crest. The inspection occurred upon Dr. Leggett's request. (Tr., p. 566) The inspection took place in mid-afternoon in October 1988, approximately 17 months after the actions complained of by K.M. The Hearing Officer stated as follows:

Contrary to the Respondent's assertion that the interior of Respondent's office and what occurred there could be clearly and easily observed from the outside, at the viewing it was possible to discern figures standing in Respondent's office, but one could not readily identify those individuals or even differentiate their sexes. This may have been possible if one was concentrating upon distinguishing individuals inside the office, but would be nearly impossible if a passer-by was casually walking by on the sidewalk or in the parking lot.

At the time of the viewing, the poor visibility was primarily due to the reflection off the windows in Respondent's office and the

shrubbery which obscured a large portion of the windows. Although the reflection off the glass may vary depending upon the time of day and year and the shrubbery may have been somewhat smaller in the spring of 1987, it is doubtful that any circumstances would change the visibility to such an extent so that persons and their activities within Respondent's office could be identified with ease from the viewpoint of the adjacent sidewalk or parking lot. Furthermore, from the Hearing Officer's view of the interior premises of Respondent's office outward toward the sidewalk and parking lot, it is apparent that it would be extremely difficult--if not completely impossible--to see persons within the office from the sidewalk at all if they were seated or in almost any position other than standing erect. This would be true even with the blinds open and/or at night with the lights on inside the office. Therefore, the Hearing Officer is persuaded that Respondent would not have been dissuaded from engaging in the alleged behavior by his fear of being observed by persons walking by the exterior of his office. Certainly it is more in keeping with the confidential nature of psychiatric treatment to provide offices in which patients can meet with the psychiatrist without being concerned about being observed by the public. (Emphasis added.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, p. 13-14. This Court has also reviewed photographs admitted as Exhibits C through K, which provide visual evidence of the premises. Although Dr. Leggett asserts that the Hearing Officer's finding was erroneous because all of the acts complained of by K.M. occurred while the parties were standing erect, the evidence is to the contrary. (Tr., pp. 32, 41)

There was conflicting evidence before the Hearing Officer, which had to be weighed. The Hearing Officer's findings regarding visibility are supported by substantial evidence in the record,

particularly by her own observations and the photographs. The Hearing Officer's finding is not clearly erroneous and will not be set aside. See Finding of Fact 9.

3. Interruptions by Staff

As noted above, K.M. testified that she engaged in acts of kissing, hugging and fondling in Dr. Leggett's office in Pine Crest both during the day and in the evening. Dr. Leggett sought to discredit this testimony by showing that it was improbable that this misconduct would have occurred because the door was never locked and there were constant interruptions by staff members.

Dr. Leggett presented the testimony of Marlene Musch to the effect that he never locked his door and that she entered the office while he was with patients. (Tr., pp. 572-74) She frequently delivered drinks to patients who had requested them and she went into his office if he had to sign a prescription or an emergency occurred. (Tr., p. 599) Dr. Leggett testified that he did not lock the door, that he did not like interruptions unless they were necessary, and that the person would usually knock before entering. (Tr., p. 872) K.M. testified that, on at least one occasion, she recalled Dr. Leggett stating that he would lock the door. (Tr., pp. 41, 130) The Hearing Officer personally checked the door during the viewing of the premises. K.M. also testified that, on at least one occasion, she and Dr. Leggett were interrupted by the receptionist while they were engaged in sexual misconduct and, on another occasion, Dr. Leggett was kissing her in an examination room with the door unlocked when a nurse walked

in. (Tr., pp. 30, 33) K.M. testified that some of the misconduct occurred in the evening. (Tr., p. 32)

The Hearing Officer stated as follows:

The Hearing Officer is likewise not convinced that Respondent's fear of being interrupted while engaged in fondling or caressing of K.M. necessarily rules out this activity. . . . The locking mechanism on the dorr of Respondent's Pine Crest office was examined by the Hearing Officer and it is of the button-on-knob type and could be used readily and casually without the patient even noticing. K.M. testified that she and Respondent never disrobed in the office and that their conduct consisted of kissing, caressing and fondling. This behavior could be quickly halted and fairly readily covered upon interruption.

Marlene Musch, the receptionist at Pine Crest in the spring of 1987, testified that she frequently interrupted Respondent during the day with messages regarding telephone calls from other physicians, prescription requests and other emergencies. She also testified that she interrupted Respondent to deliver beverages that were requested by patients on their way into his office; this was often the case with K.M. Interruptions of this nature were easily anticipated by the Respondent and K.M. and any compromising activity could have been postponed until after the beverage was delivered. Ms. Musch testified that on no occasion did she ever attempt to enter Respondent's office and find the door locked. However, just because she went to his office on several occasions during each day and never encountered a locked door does not establish that it was not locked on other occasions. Some of the meetings between K.M. and Respondent apparently occurred in the evening after the clerical staff had left. If evening meetings between Respondent and K.M. occurred even while Ms. Musch or Diane Leggett were working in the outer office on insurance billings, it appears unlikely that either Ms. Musch or Mrs. Leggett would have had any pressing reason to interrupt Respondent during these after business hours sessions.

The Hearing Officer does not believe the

testimony of Marlene Musch that she interrupted Respondent many times every day and routinely did not knock and wait for any response or otherwise announce herself before barging in on private patient sessions with Respondent. Respondent's own testimony is to the contrary. The Hearing Officer concludes that although it may have been risky for the Respondent to engage in sexual contact with K.M. in his office during daytime or evening hours, the risk was not so substantial that it is inconceivable that Respondent engaged in such activity. (Emphasis added.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, pp. 14-15.

There was conflicting evidence before the Hearing Officer. The Hearing Officer had to weigh that evidence; the Hearing Officer was also in a position to observe the witnesses personally and to judge their credibility. This Court defers to the judgment of the Hearing Officer with regard to the credibility of Marlene Musch. This Court further holds that there was substantial evidence, although conflicting, in the record as set forth above to support the findings of the Hearing Officer. This finding was not clearly erroneous. See Finding of Fact 9.

4. Dr. Leggett's Alibi

See holding in Section 12 above.

5. Dr. Leggett's Appendectomy Scar

In attempting to discredit K.M.'s claim that she had sexual intercourse with him, Dr. Leggett presented evidence that he has an appendectomy scar. See Exhibit N; Hearing Officer's observation of the scar. Dr. Leggett asserts that, if K.M. had actually had sexual intercourse with him, she would have noticed the scar.

The scar was not observed by K.M. (Tr., pp. 128-29) K.M. testified that she was not sure, but she thought the lights were on. (Tr., pp. 142, 156) K.M. testified that she didn't look at his body very much because he told her it was terrible. (Tr., p. 142)

The Hearing Officer stated as follows:

K.M. testified to only a single incident of sexual intercourse, this being the sole occasion among their sexual contacts on which Respondent was unclothed or even partially unrobed. Therefore, K.M. had only a single opportunity to observe the Respondent's intimate physical characteristics and this was during a period of passion and love-making. K.M. testified that Respondent expressed insecurity about his body, telling her he had a 'terrible' body. Thus, it is reasonable that K.M. would not make a close enough inspection of Respondent to see his appendectomy scar. K.M. did not have additional opportunities to gain more familiarity with Respondent's body from which one would expect her to discover the scar.

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, p. 17. While dealing with the claim of J.W., the Hearing Officer also stated that Dr. Leggett's "scar is relatively inconspicuous except for the reddened coloration which was less dramatic on personal observation than it appears in Exhibit N." Thereafter, the Hearing Officer found that "[t]he complaining [witness's] failure to observe this characteristic does not discredit [her] testimony regarding the occurrences of sexual intercourse." Finding of Fact 8.

The findings that were made by the Hearing Officer with regard to Dr. Leggett's appendectomy scar are supported by substantial

evidence in the record. It should be noted that the Hearing Officer relied upon evidence in the form of testimony and personal observation. The Hearing Officer weighed the evidence and arrived at a finding as to whether it was reasonable for K.M. not to have observed the scar while having sexual intercourse with Dr. Leggett on one occasion. The finding was not clearly erroneous and will not be set aside.

6. Tape Recording of Telephone Conversations

See holding in Section 11 above.

CONCLUSION AS TO CLAIM OF K.M.

This Court holds that Finding of Fact 3 with regard to the claim of K.M. is supported by substantial evidence; it is not clearly erroneous and will not be set aside. This Court further holds that the Findings of Fact 8, 9, and 10 dealing with the assertions of Dr. Leggett in his defense are supported by substantial evidence; they are not clearly erroneous and will not be set aside. This Court will not retry the facts nor will it substitute its judgment for that of the Hearing Officer as to the weight of the evidence on questions of fact. I.C. § 67-5215(g). Where the Hearing Officer's findings are clear and supported by the evidence, they must be upheld. Morgan v. Idaho Department of Health and Welfare, supra.

B. Findings of Fact Relating to the Claim of J.W.

Finding of Fact 4, which relates to the claim of J.W., states as follows:

Patient J.W. was admitted by Respondent to Kootenai Medical Center on November 7, 1986,

for control and treatment of her eating disorder and she was discharged on November 12, 1986. Respondent engaged in sexual intercourse with J.W. at her residence on November 12, 1986 and on several additional occasions in November and December 1986. Respondent also visited J.W. at her residence on other occasions during these months when they engaged in kissing and caressing, but not intercourse.

It is the latter part of this finding that is at issue. There is evidence in the record in the form of testimony of J.W. that Dr. Leggett engaged in sexual intercourse with her at her residence on November 12, 1986. (Tr., pp. 289-90) There is evidence in the record in the form of testimony of J.W. that Dr. Leggett engaged in sexual intercourse at her residence on several additional occasions in November and December 1986. (Tr., p. 291) There is evidence in the form of testimony of J.W. that Dr. Leggett visited her at her residence on occasions during the months of November and December 1986 when they engaged in kissing and carressing. (Tr., p. 292) There is also evidence in the record in the form of testimony of Raymond P. Lapagnol, a neighbor, and Dr. Leggett that Dr. Leggett visited J.W. at her residence on other occasions during the months of November and December 1986. (Tr., pp. 292, 846-47, 1004) There is conflicting evidence in the form of the testimony of Dr. Leggett that he did not go to J.W.'s residence and have intercourse with her at any time. (Tr., p. 844, 849) There is substantial evidence, although some is conflicting, to support the finding of the Hearing Officer.

Dr. Leggett argues that Finding of Fact 4 regarding the claim of J.W. is clearly erroneous for the following reasons: (1) J.W.

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was not credible; (2) The history of the initiation of J.W.'s claim shows collusion; and (3) Dr. Leggett established an alibi (see Section 12 above).

1. Credibility of J.W.

This argument can be broken into several components. First, Dr. Leggett challenges the Hearing Officer's findings that, "[o]f the complaining witnesses, J.W.'s demeanor was most appropriate to her accusations and these proceedings." The Hearing Officer then explained the observations upon which that determination was made. The credibility to be given the testimony of J.W. falls within the province of the Hearing Officer, who could observe J.W. in person. This Court will defer to the Hearing Officer's judgment as to the credibility of J.W. The finding is not clearly erroneous.

Second, Dr. Leggett challenges the findings of the Hearing Officer as to J.W.'s credibility based upon the testimony of Dr. Jack E. Wright. Dr. Wright testified as follows: he had experience working with persons who have been sexually abused; he had worked with J.W. in a rape trauma support group since July 1988; J.W. had attended six or seven meetings of the group; J.W. exhibits symptoms of a sexual abuse victim; J.W. shows emotional instability, guilt, blame, embarrassment, shame, and depression; J.W. disclosed that she had sexual intercourse with Dr. Leggett to the group while he was present; J.W. also related to the group in his presence that she'd had difficulty with abusive relationships and, in particular, her recent past husband; he believed that J.W. had been "victimized by Doctor Leggett;" J.W. expressed a fear of her vulnerability to

a sexual encounter with a person in a position of power like a therapist. (Tr., pp. 530-34, 554) Dr. Wright also testified on cross-examination as follows: the purpose of the group meetings was for treatment and not investigation; no notes of the meetings were taken; emphasis at the group meetings was on feelings and not specific details; in groups, he starts out with a bias in favor of truthfulness. (Tr., pp. 535-550, 559)

The Hearing Officer stated as follows:

Dr. Wright expressed his opinion that J.W.'s behaviors and manner of relating her experiences with Respondent cause him to believe the truth of her claims of sexual involvement with Respondent. . . and that these qualities he had observed in her were characteristic of sexual abuse victims. However, Dr. Wright stated that he believes J.W. to have been involved in other sexually exploitative relationships in her life as well and admitted that it was not possible for him to confidently differentiate as to which relationship may be the cause of her symptoms of humiliation and depression. Nonetheless, Dr. Wright was confident that J.W. had been sexually involved with Respondent because of her considerable fear and reluctance to develop trust and confidence in him as a therapist. (Emphasis added.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, pp. 19-20. The Hearing Officer then recounted the testimony of Dr. Billy Oral Barclay as to the vulnerability of patients to sexual involvement with their psychiatrists. The Hearing Officer stated that "Dr. Wright's actual observations and opinion of J.W. are consistent with Dr. Barclay's testimony. The Hearing Officer observed J.W. to be very credible in her demeanor and behavior, especially in context of the expert testimony." (Emphasis added.)

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These findings of the Hearing Officer regarding the testimony of Dr. Jack Wright are supported by the evidence in the record. It is within the purview of the factfinder to decide the weight to be given the testimony of Dr. Wright, considering the number, type, and purpose of the group meetings. The Hearing Officer reached her determination regarding the credibility of J.W. from personal observation, which is within the province of the factfinder. However, the personal observation of the Hearing Officer was supported by the testimony in the record of two experts. This finding was not clearly erroneous.²⁴

Third, Dr. Leggett attempts to discredit J.W. by pointing out that J.W.'s testimony as to the date and time of her first sexual intercourse with Dr. Leggett changed from her deposition to the hearing. However, J.W. explained that she was mistaken at her deposition as to the date of her discharge because she did not have her hospitalization records; when she had access to the records, she realized the correct date. J.W. was mistaken as to the time of day at her deposition because she failed to remember that she had made a trip to Spokane in the afternoon of that day; when she

²⁴The testimony of Dr. Jack E. Wright was also challenged on grounds that it was a violation of the Appearance of Fairness Doctrine. See APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW, p. 44. The argument appears to be that it was fundamentally unfair to allow Dr. Wright to testify as to his conclusions and belief in the claim of J.W. when they were not based on a detailed clinical interview or investigation, but were premised upon six or seven group counseling sessions. First, as noted above, the Appearance of Fairness Doctrine has not been recognized in Idaho. Second, the basis upon which the opinion is given goes to the weight of the evidence. Third, no legal authority has been cited to support a challenge based upon this issue; see State v. Oakley, supra.

learned the correct date and reviewed her calendar, she found the notation of the appointment in Spokane. (Tr., p. 319) The Hearing Officer found that this was a reasonable and believable explanation. This finding is supported by the evidence in the record in the form of the testimony of J.W. and is not clearly erroneous. Furthermore, the Hearing Officer had an opportunity to observe J.W. as she testified to this fact; deference will be given to the determination of credibility by the factfinder. See Finding of Fact 6, wherein the Hearing Officer finds that difficulty in remembering precise dates and times does not discredit the testimony of witnesses; it is noted that Respondent and his witnesses also had difficulty with accurate dates and times.²⁵ It should be noted that J.W. steadfastly maintained that she had sexual intercourse with Dr. Leggett for the first time on the day that she was discharged from the hospital, which actually was November 12, 1986, and she did not change that date upon learning when Dr. Leggett's son was born. See Exhibit 4.

Closely related to the argument immediately above, there was a question raised by Dr. Leggett regarding when J.W. learned of the date and hour of David Leggett's birth. At the Disciplinary Hearing, J.W. testified about when she found out the date and hour of the birth. (Tr., pp. 325-31, 370) The Hearing Officer found that

[t]here is confusion in the record as to

²⁵For example, Dr. Leggett testified at his deposition that his son, David, was born on November 19, 1986, when the correct date was actually November 12, 1986.

exactly when and how J.W. learned of the date and hour of David Leggett's birth. But from all the evidence, the Hearing Officer is persuaded that J.W. only became aware of the correct date and time in the course of her own testimony. (Emphasis added.)

This Court has reviewed the record and holds that there was substantial evidence to support the finding of the Hearing Officer and further holds that the finding was not clearly erroneous. Various dates and at least general times had been discussed. However, there is evidence in the record to support the finding that J.W. did not actually learn of the correct date and precise time until the Disciplinary Hearing.

Fourth, Dr. Leggett argues that the Hearing Officer's finding was erroneous with regard to J.W.'s credibility in that it was based in part upon the gift of a toy reindeer to J.W.'s daughter. There is evidence in the record that Dr. Leggett gave J.W.'s daughter a toy reindeer a day or two before Christmas. (Tr., pp. 295-96) The toy reindeer given to J.W.'s daughter was similar in significant respects (stuffed toys that play Christmas music) to one belonging to Robert Leggett. See Exhibits 14 and M. J.W. testified that she knew that Robert Leggett also had a toy reindeer because Dr. Leggett had told her about it when he gave the reindeer to her daughter. (Tr., p. 296) Diane Leggett testified that Robert Leggett often carried the toy reindeer around. (Tr., p. 689) Dr. Leggett argues that J.W. might have learned about Robert's toy reindeer when she saw him carrying it. The Hearing Officer found that

Respondent failed to effectively counter

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[J.W.'s] testimony by showing another likely source of her knowledge. The Hearing Officer believes that all the evidence regarding the reindeer, taken together, is more supportive than damaging to J.W.'s credibility.

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND RECOMMENDATION, p. 23. Here, there is conflicting evidence in the record, which the Hearing Officer weighed. The Hearing Officer also considered the credibility of the witnesses as they appeared in person. This Court defers to the finding of the Hearing Officer regarding credibility; the finding regarding the reindeer is supported by substantial evidence and is not clearly erroneous.

Fifth, Dr. Leggett asserts that the Hearing Officer was erroneous in finding that J.W. was credible because she could recall that Dr. Leggett wore jockey shorts.²⁶ As to specific characteristics, J.W. testified that Dr. Leggett wore jockey shorts, probably wore undershirts, had sparse chest hair, had blond pubic hair, and was circumcised. (Tr., pp. 372-73) Diane Leggett testified that Dr. Leggett never wore an undershirt; he was not wearing one on the day of the Disciplinary Hearing. (Tr., pp. 381, 660) Diane Leggett also testified that Dr. Leggett had dark brown pubic hair. (Tr., p. 661; Exhibit N) There was no evidence to the contrary regarding the jockey shorts or the circumcision. There was conflicting testimony regarding specific characteristics. For two of the characteristics, J.W. may have been in error; for the

²⁶This issue was incorporated into the section on collusion in APPELLANT'S MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW, p. 36. However, it appears to be more appropriately addressed in this section.

majority, J.W. was accurate. This Court cannot hold that the Hearing Officer was clearly erroneous in finding that J.W. was credible and that she engaged in sexual intercourse with Dr. Leggett.

Based upon the discussion in this section, this Court holds that the findings of the Hearing Officer were supported by substantial evidence. The Hearing Officer weighed the evidence, including the conflicting evidence. The Hearing Officer observed the witnesses in person; determining the credibility is within the province of the factfinder and this Court will defer to that finding. The Hearing Officer did not clearly err in determining the credibility of J.W. See Finding of Fact 10.

2. History of J.W.'s Claim/Collusion by the Complain-
ing Witnesses

Dr. Leggett asserts that the finding of the Hearing Officer is clearly erroneous with regard to the fact that the history of J.W.'s claim supported her credibility. The Hearing Officer found that

The history of J.W.'s initiation of her claim was also supportive of her credibility. From the record it appears that J.W. related her experiences to two friends while it was ongoing; then to her general physician in the summer of 1987; and finally in February 1988, to a therapist at Pine Crest who was helping her to find an eating disorder support group. J.W. was encouraged by both professionals to report her allegations to the appropriate authorities and finally did so later in the summer of 1988 by writing a statement to the Board of Medicine. There is no evidence that J.W. sought out an attorney to pursue a civil action against Respondent or attempted any extortion. This history is certainly not consistent with an intent to fabricate

accusations and pursue them for monetary gain.
(Emphasis added.)

The record reflects that the history in the finding is supported by the evidence in the form of testimony from J.W. (Tr., pp. 296-98, 313) There was no showing of any connection between J.W. and K.M., except for their employment of Mr. Moore as their attorney; that connection didn't exist until August 1988. (Tr., p. 379) J.W. first met K.M. after J.W.'s deposition on August 26, 1988. (Tr., pp. 94, 301)

During the course of the proceedings, Dr. Leggett attempted to discredit the complaining witnesses by showing that they engaged in a conspiracy to bring their claims against him for monetary gain. Dr. Leggett argues that Side B of Exhibit 7 shows that there were telephone conversations between K.M. and J.W. that were recorded in late May or early June 1987, thereby supporting his claim that the complaining witnesses knew each other at that time and colluded in bringing their claims. K.M. testified that Side A of Exhibit 7 was recorded in late May or early June 1987. (Tr., p. 72) Lawrence Porter, Dr. Leggett's witness, testified that he was unable to place the recordings on Side B in any sort of time reference to the recordings on Side A. (Tr., pp. 188-89) There is no evidence which directly establishes when Side B was recorded. However, the cassette remained in the possession of K.M. from the time that the conversations on Side A of the tape were recorded until the tape was admitted in evidence at the hearing in October, 1988. (Tr., p. 70) Therefore, the recordings could have been made anytime prior to October 1988. The Hearing Officer concluded that

MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 67

the content of the conversations suggested a later time. J.W. testified that she first met attorney Stan Moore at her deposition in August, 1988 and initiated contact with K.M. at that time as well. (Tr., pp. 301, 314, 379) In the telephone message on Side B of Exhibit 7, J.W. requests Stan Moore's home telephone number. The Hearing Officer found that "Side B of Exhibit 7 does not provide any persuasive evidence to discredit the testimony of K.M. and J.W." As set forth above, this finding is supported by substantial evidence in the record. It is not clearly erroneous and will not be set aside. See Finding of Fact 7.

3. Dr. Leggett's Alibi

See holding in Section 12 above.

CONCLUSION AS TO CLAIM OF J.W.

This Court holds that Finding of Fact 3 with regard to the claim of J.W. is supported by substantial evidence; it is not clearly erroneous and will not be set aside. This Court further finds that the Findings of Fact 6, 7, and 10 dealing with the assertions of Dr. Leggett in his defense are supported by substantial evidence; they are not clearly erroneous and will not be set aside.

The Appellant has argued strenuously that the Hearing Officer was clearly erroneous in making certain findings; to that end, he has pointed out the conflicting evidence. However, this Court is not in a position to retry the matter. Indeed, this Court cannot substitute its judgment for that of the Hearing Officer as to the weight of the evidence on questions of fact. I.C. § 67-6215(g).

Where the Hearing Officer's findings are clear and supported by the evidence, as they have been found to be here, they will be upheld.

14. Was the Hearing Officer's recommendation to the Board of Professional Discipline for revocation of Dr. Leggett's license supported by substantial expert testimony?

As set forth above, failure to support alleged error with argument and authority is deemed a waiver of the issue. The Board of Professional Discipline presented expert testimony from Dr. Billy Oral Barclay and Dr. Jack E. Wright. Dr. Leggett has failed to point to the factual reasons for his allegation, i.e. to present any argument, that the recommendation was not supported by substantial expert testimony. Furthermore, Dr. Leggett has failed to present any legal authority to show that there was error. Therefore, this issue is deemed to have been waived. See State v. Oakley, supra; I.A.R. 35(a).

15. Was the sanction applied in this case an abuse of the Board's discretion considering the record as a whole?

In his briefs and at oral argument, Dr. Leggett has failed to point to any factual basis showing why the sanction was an abuse of discretion, i.e. why it was not an appropriate sanction. Dr. Leggett has also failed to present any authority upon which his allegation would be based. Therefore, this issue is deemed to have been waived. See State v. Oakley, supra; I.A.R. 35(a).

CONCLUSION AND ORDER

Based upon the foregoing discussion, it is ORDERED that, on Appeal, the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER of the Board of Professional Discipline of the Idaho State Board of Medicine be and is hereby affirmed as set forth above.

DATED this 22nd day of November, 1991.



Gary M. Haman
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing
MEMORANDUM OPINION AND ORDER IN RE: APPEAL FROM ORDERS REVOKING
LICENSE TO PRACTICE MEDICINE was mailed, postage prepaid, or by
interoffice mail, on the 25 day of Nov, 1991, to the
following:

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Boise, Idaho 83701

ALL FIRST JUDICIAL DISTRICT COURT JUDGES

The Honorable Don L. Swanstrom
Magistrate
Interoffice Mail

Idaho District Judges Association
c/o The Honorable Daniel B. Meehl
Resident Chambers
Judicial Building
Twin Falls, Idaho 83301

The Honorable Darla Williamson
District Court of the Fourth Judicial District
Valley County, State of Idaho
Cascade, Idaho 83611

Tom Taggart
Clerk of the Court

By: Sam Conley
Deputy Clerk

MEMORANDUM OPINION AND ORDER IN RE: APPEAL: 71

APPENDIX "A"
FINDINGS OF FACT

1. Respondent is currently a practicing psychiatrist in the State of Idaho, practicing under License No. M-5108. Respondent was issued an Idaho license on July 11, 1986. Respondent commenced practicing in Idaho as a private practitioner out of Pine Crest Hospital in June 1986, and assumed the role of Medical Board Director at Pine Crest Hospital in July 1986. Respondent took a leave of absence from Pine Crest Hospital in March 1988, but has continued to engage in private practice in Coeur d'Alene, Idaho from that time to the present.

2. Patient V.L. was admitted to the adult psychiatric unit of Pine Crest Hospital by Respondent on March 27, 1987, and was transferred on April 3, 1987, to the chemical dependency unit where she remained hospitalized until her discharge on May 1, 1987. Patient V.L. again consulted with Respondent in the summer of 1987 and Respondent and V.L. had counseling sessions on July 16, 1987, October 12, and October 26, 1987. V.L. accompanied Respondent to the Lewiston, Idaho area, where he had a speaking engagement, for the purpose of visiting her children. Respondent visited V.L. at her home in Coeur d'Alene, Idaho with respect to the purchase of a train set. There is insufficient evidence before the Board to find that the Respondent engaged in a sexual relationship with patient V.L. during her hospitalization at Pine Crest Hospital or during any subsequent contacts between V.L. and Respondent.

3. Patient K.M. was treated by Respondent on an out-patient basis in November and December of 1986. She was admitted to the adult psychiatric unit of Pine Crest Hospital by the Respondent on April 15, 1987, where she was treated as an eating disorder patient until her discharge on May 8, 1987. Respondent engaged in

sexual contact with patient K.M. in the form of kissing, fondling and caressing during private sessions in the course of her hospitalization at Pine Crest. After K.M. was discharged from Pine Crest Hospital, Respondent made frequent telephone calls to her and visited her at her workplace. Respondent engaged in sexual intercourse with patient K.M. at her apartment on or about May 12, May 14, or May 19, 1987.

4. Patient J.W. was admitted by Respondent to Kootenai Medical Center on November 7, 1986, for control and treatment of her eating disorder and she was discharged on November 12, 1986. Respondent engaged in sexual intercourse with J.W. at her residence on November 12, 1986 and on several additional occasions in November and December 1986. Respondent also visited J.W. at her residence on other occasions during these months when they engaged in kissing and caressing, but not intercourse.

5. None of the sexual contact between Respondent and the complaining witnesses K.M. and J.W. was forced or against their will. Once Respondent initially expressed his attraction, the sexual involvement was encouraged and even pursued by K.M. and J.W. Regardless of patient consent and/or invitation, intimate sexual contact between a psychiatrist and a patient constitutes an abuse or exploitation of the patient and a violation of the standard of care that the psychiatrist owes to the patient. Respondent's conduct is not excused or mitigated by the fact that the complaining witnesses themselves acted upon romantic feelings and/or sexual attraction for Respondent.

6. Difficulty in remembering precise dates and times does not discredit the complaining witnesses' testimony; all witnesses, including Respondent's witnesses and Respondent himself, had difficulty with accurate dates and times.

7. No convincing evidence was presented to establish that the complaining witnesses engaged in a conspiracy to bring their claims and accusations against Respondent for monetary gain or any other purpose.

8. Respondent has an appendectomy scar from surgery when he was a child, approximately 32 years ago. Said scar is approximately 3 1/2 inches long and about 1/4 inch wide. It is sometimes reddened in color so that it is quite obvious. K.M. saw Respondent unclothed on only one occasion. J.W. saw Respondent unclothed on four or five occasions. These occasions were for short periods dedicated to sexual intercourse. The complaining witnesses' failure to observe this characteristic does not discredit their testimony regarding the occurrences of sexual intercourse.

9. There was significant risk of discovery associated with Respondent's engaging in sexual conduct with K.M. in his offices at Pine Crest, but the risk was not so great that it is inconceivable that the risk was undertaken by Respondent.

10. The evidence establishes that Respondent's testimony and the testimony of several of his witnesses lacks veracity or reliability and the Board believes that the testimony of the complaining witnesses K.M. and J.W. has more credibility than Respondent's testimony and denials.

CONCLUSIONS OF LAW

1. Sexual conduct by a psychiatrist with his patient, including sexual intercourse and/or sexual fondling, kissing and intimate touching constitutes the provision of health care which fails to meet the standard of health care provided by qualified physicians in the same or similar communities. There is a pre-

ponderance of substantial competent evidence that the Respondent engaged in conduct in violation of Idaho Code §54-1814(7) (1977) with patients K.M. and J.W.

2. Sexual contact by a psychiatrist with his patient, including sexual intercourse and/or sexual fondling, kissing and intimate touching constitutes conduct which results in abuse or exploitation of the patient arising out of the trust and confidence placed in the physician by the patient. There is a preponderance of substantial competent evidence that the Respondent engaged in conduct in violation of Idaho Code §54-1814(22) (1979) with patients K.M. and J.W.

3. Substantial evidence is evidence which is valid, legal and persuasive and such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A preponderance of the evidence is not enough to wholly free the mind from reasonable doubt, but it is sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other.

ORDER

Based upon the foregoing, the Board hereby orders that Respondent's license to practice medicine and surgery in the State of Idaho is hereby revoked.

DATED This 29 day of September, 1989.

BOARD OF PROFESSIONAL DISCIPLINE


GARY E. ELLWEIN, M.D.
Chairman


WAYNE F. ALLEN, M.D.

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF
THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:

JOSEPH E. LEGGETT, M.D.,
License No. M-5108,

Respondent.

Case No. 87-040

CERTIFICATE OF APPROVAL

I, WAYNE F. ALLEN, M.D., being a member of the Board of Professional Discipline of the Idaho State Board of Medicine, hereby certify that I participated in the conference call meeting on January 3, 1991, in which the Board considered the additional matters presented on remand and decided this case. I further certify that I have read the Findings of Fact and Conclusions of Law on Remand and Final Order of the Board in this matter and concur with the Findings of Fact and Conclusions of Law on Remand and Final Order set forth therein.

DATED This 11 day of January, 1991.


WAYNE F. ALLEN, M.D.

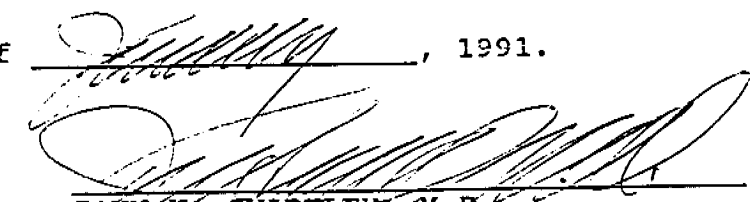
JAN 15 1991

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF
THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:)	
)	Case No. 87-040
JOSEPH E. LEGGETT, M.D.,)	
License No. M-5108,)	CERTIFICATE OF APPROVAL
)	
Respondent.)	
_____)	

I, JOHN W. SWARTLEY, M.D., being a member of the Board of Professional Discipline of the Idaho State Board of Medicine, hereby certify that I participated in the conference call meeting on January 3, 1991, in which the Board considered the additional matters presented on remand and decided this case. I further certify that I have read the Findings of Fact and Conclusions of Law on Remand and Final Order of the Board in this matter and concur with the Findings of Fact and Conclusions of Law on Remand and Final Order set forth therein.

DATED This 12 day of January, 1991.



JOHN W. SWARTLEY, M.D.

JAN 23 1991

BEFORE THE BOARD OF PROFESSIONAL DISCIPLINE OF
THE IDAHO STATE BOARD OF MEDICINE

In the Matter of:

JOSEPH E. LEGGETT, M.D.,
License No. M-5108,

Respondent.

Case No. 87-040

CERTIFICATE OF APPROVAL

I, LOUISE SHADDUCK, being a member of the Board of Professional Discipline of the Idaho State Board of Medicine, hereby certify that I participated in the conference call meeting on January 3, 1991, in which the Board considered the additional matters presented on remand and decided this case. I further certify that I have read the Findings of Fact and Conclusions of Law on Remand and Final Order of the Board in this matter and concur with the Findings of Fact and Conclusions of Law on Remand and Final Order set forth therein.

DATED This 12th day of January, 1991.

Louise Shadduck
LOUISE SHADDUCK