

# Refusal to Comply: Administrative Inspections and Audits and the Fourth and Fifth Amendments

## ▶ Fourth Amendment:

- ▶ *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated*, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ▶ Fifth Amendment:

- ▶ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ***nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation.

# Fourth and Fifth Amendments Apply to the States Through the Fourteenth Amendment's Due Process Clause

- ▶ *Mapp v. Ohio*, 367 U.S. 643 (1961).
  - ▶ The Fourth Amendment's "right of privacy" is enforceable against the States through the Due Process Clause of the Fourteenth Amendment.
  - ▶ All citizens are protected against unreasonable searches and seizures so that the Fourth Amendment does not become only "a form of words."
- ▶ Fifth Amendment is partially incorporated to the States.
  - ▶ Right against self-incrimination incorporated in *Malloy v. Hogan*, 278 U.S. 1 (1964).
  - ▶ Right to indictment by a grand jury (not incorporated) *Hurtado v. California*, 110 U.S. 516 (1884); Double jeopardy (incorporated) *Benton v. Maryland*, 395 U.S. 784 (1969); Protection against taking property without due compensation (incorporated) *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

# Another Consideration

- ▶ 42 U.S.C. § 1983
  - ▶ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, . . .

# What does this mean for Licensing Boards?

- ▶ *New York v. Burger*, 482 U.S. 691 (1987).
- ▶ 6 to 3 decision.
- ▶ The owner or operator of commercial premises in a “closely regulated” industry has a reduced expectation of privacy, and
  - ▶ Therefore, the warrant and probable cause requirements (which are generally required to make a search “reasonable” under the Fourth Amendment) have lessened application in this context.
    - ▶ Not totally gone, though.
  - ▶ Court cites to “special needs,” as recognized in *New Jersey v. T.L.O.*, 469 U.S. 325, (school locker searches) and recognizes the “closely regulated industry” as another “special situation.”
  - ▶ Rationale: The privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened.
- ▶ Threshold Issue: Business must be a “closely regulated” business.

# Burger Analysis for “Closely Regulated” Business

- ▶ Here, the business is a junkyard, part of which is devoted to vehicle dismantling.
- ▶ Review of statutory scheme.
  - ▶ Extensive provisions: License is required prior to engaging in the business; Operator must keep a record of acquisition and disposition of vehicles and vehicle parts; Record is available for inspection by the policy or any agent of the Department of Motor Vehicles; Registration number prominently displayed at business location, business documentation, and vehicle and parts that pass through his business.
  - ▶ Failure to comply subjects operator to criminal penalties, loss of license, or civil fines.
  - ▶ Review other state laws of the industry (they are similar and not just NY).
  - ▶ Duration of regulatory scheme is helpful factor. In this case, laws were added in 1973 and SCOTUS decision is dated 1987.
  - ▶ Court looks at similar business and the length of regulations there: general junkyards and secondhand shops (both with regulations to follow for a long time).
- ▶ Conclusion: Operator of junkyard engaged in vehicle dismantling has a reduced expectation of privacy in this “closely regulated” business.

# Three *Burger* Criteria for a “Pervasively Regulated Business”

- ▶ First: There must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made.
  - ▶ Example: “Substantial federal interest in improving the health and safety conditions in the Nation’s underground and surface mines.” *Donovan v. Dewey*, 452 U.S. 594 (1981).
- ▶ Second: The warrantless inspections must be “necessary to further the regulatory scheme.”
  - ▶ Example: In *Dewey*, the Court recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purpose of the Mine Safety and Health Act--to detect and thus deter safety and health violations.

# Three *Burger* Criteria for a “Pervasively Regulated Business” (cont.)

- ▶ Third: The statute’s inspection program, in terms of the certainty and regularity of its application must provide a constitutionally adequate substitute for a warrant.
  - ▶ In other words, the regulatory statute must perform the two basic functions of a warrant: (1) it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope and (2) it must limit the discretion of the inspecting officers.
    - ▶ For First Part: The statute must be “sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.”
    - ▶ For Second Part: The statute must limit the discretion of the inspectors by limiting the inspection with regard to “time, place, and scope.”
      - ▶ *U.S. v. Biswell*, 406 U.S. 311 (1972).

# Burger Holding

- ▶ All three criteria are met and warrantless inspections are reasonable under the NY laws in this case.
- ▶ Court uses statistics to show increase of motor vehicle theft.
- ▶ “Regulation of the vehicle-dismantling industry reasonably serves the State’s substantial interest in eradicating automobile theft. It is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property.”
- ▶ Warrantless inspections are necessary. No difference here than in *Dewey*.
  - ▶ Frequent and unannounced inspections are needed to detect theft.



# Burger Holding (cont.)

- ▶ New York law provides a “constitutionally adequate substitute for a warrant.”
  - ▶ Statute states:
    - ▶ Inspections will be regular.
    - ▶ Scope of inspection and place of inspection are defined.
    - ▶ Who is authorized to conduct an inspection.
  - ▶ Time, place, and scope of the inspection is limited:
    - ▶ Only “during the regular and usual business hours.”
    - ▶ Only may examine the records and “any vehicles or parts of vehicles which are subject to the record-keeping requirements of this section and which are on the premises.”

# What About Criminal Ramifications?

- ▶ The *Burger* Court says the administrative scheme is not unconstitutional “simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself.”
  - ▶ See *U.S. v. Biswell*, 406 U.S. 311 (1972) and *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983).
- ▶ In this case, policy officers were conducting inspections, not administrative agents.
  - ▶ The Court says this is okay, even though, the police officers have the power to arrest. Police officers have “numerous duties” in addition to those associated with traditional police work.

# Some Question (Perhaps) in 2015

- ▶ *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015).
  - ▶ 5 to 4 decision.
  - ▶ Hotel operator challenged municipal code requiring hotel operators to provide police officers with specified information concerning guests upon demand.
  - ▶ Court reminds us that searches without a warrant are the exception and not the rule, i.e., well delineated and “special needs.”
  - ▶ The Court classified this as an “administrative search.”
- ▶ “Absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.”
- ▶ Facts not as detailed as *Burger*; municipal code not as specific. For example, provide information “upon demand.”
- ▶ Holding: “[H]otel owner must be afforded an opportunity to have a neutral decisionmaker review an officer’s demand to search the registry before he or she faces penalties for failing to comply.”
- ▶ Administrative subpoena is an option.
  - ▶ But still no probable cause required and may be issued by officers in the field seeking the record.

# Patel Addresses Burger

- ▶ In 45 years, only four industries that “have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.” Cites to *Marshall v. Barlow’s*, 436 U.S. 307 (1978).
  - ▶ Liquor sales (*Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970)),
  - ▶ Firearms dealing (*U.S. v. Biswell*, 406 U.S. 311 (1972)),
  - ▶ Mining (*Donovan v. Dewey*, 452 U.S. 594 (1981)), and
  - ▶ Automobile junkyard (*New York v. Burger*, 482 U.S. 691 (1987)).
- ▶ “Nothing inherent in the operation of hotels poses a clear and significant risk to public welfare.”
- ▶ “To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule.”
- ▶ Requirements for hotels with regard to licensure are the same as for all business in Los Angeles.
- ▶ Historical record does not support that hotels are “closely regulated.”
  - ▶ This is still an important factor in the analysis of whether a business is “closely regulated.”
  - ▶ Even if historical record supports it, the three *Burger* criteria need to be satisfied. Here, only the first is established not the second or third.
- ▶ Ex parte warrant allows a surprise inspection.

# What about Licensing Boards?

- ▶ No U.S. Supreme Court decisions yet.
- ▶ Burger is still good law, but statutes need to meet all the requirements.
  - ▶ Threshold question (yes, closely regulated so less expectation of privacy) PLUS three *Burger* criteria.
- ▶ Prior to a sanction, is an opportunity to obtain pre-compliance review required after *Patel*?
  - ▶ No, if in one of the four recognized industries and all *Burger* requirements met.
  - ▶ If not, in one of the four recognized industries, it depends. If *Patel* had met all *Burger* requirements, result would have likely been different.
  - ▶ For licensing boards, generally we have a hearing before a sanction, so maybe this is not a necessary question.
  - ▶ What about citations?
  - ▶ What are we “proving” in our hearing?

# *Stogner v. Commonwealth of KY, 638 F.Supp. 1 (W.D. Ky. 1985)*

- ▶ Kentucky Board of Barbering revoked the licenses of a barber shop because the owner failed to allow inspections of the shop. Barber alleged violation of the Fourth Amendment.
- ▶ Owner filed suit under 42 U.S.C. § 1983 alleging constitutional violations.
- ▶ District Judge held:
  - ▶ Barbering and barber shops are regulated and licensed industries such that the Board may conduct routine inspections of barbershops without a search warrant.
  - ▶ Barbering is “closely regulated, supervised, and inspected by the state” and it is “not unreasonable for the Board to conduct warrantless inspections to protect the health and safety of the public.”
  - ▶ Private booths are subject to inspection as well as the barbershop, itself.

# *Luzzi v. Com., State Horse Racing Com'n,* 548 A.2d 659 (Pa. Ct. App. 1988)

- ▶ Search of jockey's person revealed cocaine straws. His jockey license was subsequently revoked. Jockey alleged violation of the Fourth Amendment.
- ▶ Court rules:
  - ▶ "Warrantless searches in closely regulated industries are permissible when such searches are authorized by statute or by a duly promulgated regulation."
    - ▶ *Commonwealth v. Black*, 530 A.2d 423 (Pa. 1987).
- ▶ Former jockey argued that he thought that "the search permitted by this regulation was limited to a search 'for drug devices or drugs that would-could affect the speed or racing conditions of a horse only.'"
- ▶ Court was not persuaded. Relevant laws prohibit a licensee from being under the influence of alcohol or drugs while on the grounds of a racetrack and being in the possession of any unlawful drug. "Clearly, jockeys under the influence of alcohol or drugs could affect the 'speed or racing condition of a horse.'"

# *Hansen v. Illinois Racing Board*, 534 N.E.2d 658 (Ill. Ct. App. 1989)

- ▶ Licensed driver, trainer, and owner of standard bred horses appealed decision of Racing Board suspending his occupational license for refusing to consent to search of his pick-up truck in violation of a Racing Board rule. Licensee alleged violations of the Fourth Amendment.
- ▶ Here, statute was not detailed enough.
  - ▶ First *Burger* criteria met: Substantial government interest in regulating the horse-racing industry in order to protect the public.
  - ▶ Second *Burger* criteria semi-met: Some justification for allowing warrantless searches.
  - ▶ Third *Burger* criteria not met: Discretion of inspecting officers was not limited—no time limit or procedure delineated.
- ▶ Racing Board rule declared unconstitutional.



# *Humenansky v. Minn. Bd. of Medical Exam., 525 N.W. 2d 559 (Mn. Ct. App. 1995)*

- ▶ Psychiatrist brought action against the Minnesota State Board of Medical Practice seeking to enjoin the Board's order that she submit to mental and physical examination and seeking to declare statute authorizing mental examination and access to medical data unconstitutional. Dr. H. alleged violations of the Fourth Amendment.
- ▶ Board received twelve disciplinary complaints against Dr. H alleging nine different grounds for disciplinary action.
- ▶ Board needs "probable cause" to order this examination under Minnesota law.
- ▶ Court upheld the statute because:
  - ▶ Board made probable cause finding prior to ordering the examination.
  - ▶ Dr. H can refuse to participate in any part of the examination; no coercion is present. (Would this be effective?)
  - ▶ Examination was scheduled to be conducted in a professional medical environment at a hospital (not intrusive).
  - ▶ Dr. H is deemed to have consented to such an examination as a condition of licensure.

# Let's Compare a Similar Law from Nevada

## ▶ NRS 641.272 (Board of Psychological Examiners)

1. Notwithstanding the provisions of chapter 622A of NRS, the Board may require the person **named in a complaint** to submit to a mental examination conducted by a panel of three psychologists designated by the Board or a physical examination conducted by a physician designated by the Board.
2. Every psychologist licensed under this chapter who accepts the privilege of practicing psychology in this State shall be **deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the Board**. The testimony or reports of the examining psychologists or physician are privileged communications, except as to proceedings conducted pursuant to this chapter.
3. Except in extraordinary circumstances, as determined by the Board, **the failure of a psychologist to submit to an examination as provided in this section constitutes grounds for the immediate suspension of the psychologist's license**.

## ▶ What do you think?

- ▶ Only a person named in a complaint. No probable cause requirement.
- ▶ Deemed to consent. Okay—similar to Minnesota. (But is this true “consent”?)
- ▶ Sanction is immediate suspension without a hearing.
- ▶ Verdict: Constitutional or Not?

# *Medical Society of New Jersey v. Robins,* M.D., 321 N.J. Super. 586 (N.J. Ct. App.1999)

- ▶ Physician sought review of Board of Medical Examiners' order imposing stayed sanctions for violation of duty to cooperate regulation, and upon amendment, requiring physician to cooperate with Attorney General's demand for inspection of office and records. Dr. Robins alleged Fourth Amendment violations.
- ▶ Court dismisses as moot given Board's vacation of administrative sanctions.
- ▶ Court addresses the underlying issue, though, in a published decision, and says that the State can delegate authority to an administrative agency to adopt regulations regarding inspections that are consistent with *Burger*.
- ▶ The Court notes that the Legislature has "expressly authorized 'inspection of any premises' of a licensed professional for 'any act or practice declared unlawful by a statute or regulation administered by such board.'"
- ▶ Note: The Board's procedure here seems to be presenting an administrative warrant to the licensed professional.
  - ▶ "A sufficiently detailed administrative demand (or warrant) specifying the legal authority for the demand and its limitations as to time, place and scope."
  - ▶ Does anyone else solely rely on administrative warrants?

# *Beck v. Texas State Board of Dental Examiners*, 204 F.3d 629 (5th Cir. 2000)

- ▶ Dentist sued the State Board of Dental Examiners alleging § 1983 violations. One alleged violation that the warrantless search of his office violated the Fourth Amendment.
- ▶ The Court said that the search in this case did not violate the Fourth Amendment. “[A]dministrative or regulatory searches are exceptions to the warrant requirement.” *Burger* criteria must be met.
- ▶ There is a substantial state interest in regulating and monitoring the use of controlled substances, particularly in dentistry.
- ▶ Inspection conducted pursuant to two co-existing regulatory schemes: the Dental Practice Act and the Texas Controlled Substance Act.
- ▶ Dr. B argues that the purpose was really for criminal and not administrative purposes.
- ▶ Court says no: “Administrative searches conducted pursuant to valid statutory schemes do not violate the Constitution simply because of the existence of a suspicion of wrongdoing.”
- ▶ *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983); *U.S. v. Thomas*, 973 F.2d 1152 (5th Cir. 1992).
- ▶ Administrative search here was not unreasonable.

# *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002)

- ▶ Horse owners, drivers, trainers, and groom brought a § 1983 actions against the New York State Racing and Wagering Board (RWB) challenging the lawfulness of warrantless administrative search for unauthorized drugs and drug paraphernalia at racetrack.
- ▶ Court said that the searches were lawful and the RWB had the authority to promulgate such a rule.
- ▶ Similar analysis to Pennsylvania in the *Luzzi* case and followed *Burger*.

# *Anobile v. Pelligrino*: Waiver Signed by All Licensees

- ▶ Interesting point: the RWB requires each licensee to execute a written waiver of the right to object to an administrative search by the RWB.
  - ▶ By the acceptance of a license issued pursuant to this application, I waive my rights to object to any search, within the grounds of a licensed racetrack or racing association, of any premises which I occupy or control and of my personal property, including a personal search, and the seizure of any article, the possession of which may be forbidden within such grounds.
- ▶ The Court did not solely focus on the waiver, but it was an important factor.

# *Shell v. Ohio Veterinary Med. Licensing Bd., 827 N.E.2d 766 (Ohio 2005)*

- ▶ After an investigation, the Ohio Veterinary Licensing Board conditionally suspended the licenses of two veterinarians.
- ▶ Statute in Ohio required the Board to provide five days' written notice prior to conducting an **inspection**.
- ▶ The statute "clearly" provides that when conducting an **investigation**, the Board need not provide notice.
- ▶ The words "investigation" and "inspection" are not defined.
- ▶ The issue here: as part of an investigation, the Board conducted an inspection. No notice was given.
- ▶ The Court held that the notice must be given in the instant case.

# *Williams v. Kentucky*, 213 S.W.3d 671 (Ky. 2007)

- ▶ This is a criminal case. Physician was convicted of unlawfully prescribing a controlled substance. Dr. alleges that search of his office was unlawful and the evidence obtained should not have been used in his criminal case.
- ▶ Sheriff received complaints about traffic problems at Dr.'s medical clinic. A large number of out-of-state vehicles were parked in the clinic's lot and people loitering in and about the clinic. Sheriff observed numerous people coming out of the clinic who appeared to be under the influence of intoxicants.
- ▶ Sheriff arrested people on Dr.'s premises. Requested AG's assistance and pharmacy prescribing report for Dr. reviewed.
- ▶ Joint sting set up between the Sheriff and the Office of Drug Control.
- ▶ A search ensued and many patient files and other evidence was seized.



# Williams v. Kentucky (cont.)

- ▶ State argued search was permissible under *Burger*.
- ▶ Court stated: “In *Burger*, the U.S. Supreme Court held that a warrant was not required for ‘administrative inspections’ of ‘commercial property employed in ‘closely regulated’ industries.”
- ▶ Search in instant case fails second of two threshold questions that: (1) the medical profession is a “closely regulated industry” and (2) this search was conducted for administrative, rather than law enforcement purposes.
- ▶ Court says the State “failed to make any credible showing that the search in this case was conducted for an administrative rather than law enforcement purpose. Accordingly, the *Burger* exception is not applicable.”
- ▶ How can we change the facts so that this might have passed muster under the Fourth Amendment and *Burger*?

# *Knoblet v. Alabama Bd. of Massage Therapy, 963 So.2d 640 (Al. Ct. App. 2007)*

- ▶ Massage therapist sought review of decision by Board of Massage Therapy, revoking license to practice massage therapy and assessing an administrative fine totaling \$10,000.
- ▶ T.D. is hired by the Board to receive massages from licensee.
- ▶ She reports that licensee illegally massaged portions of her body (breasts, buttocks, and genitalia) and failed to follow proper draping procedures.
- ▶ Licensee asserts that T.D.'s massage, which she was hired by the Board to receive, was a warrantless administrative search and was unlawful under the Fourth Amendment.
- ▶ Court says licensee has not established that he had a reasonable expectation of privacy when conducting typical business with the public in the massage therapy establishment.
- ▶ "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. U.S.*, 389 U.S. 347 (1967).
- ▶ Court says here: No search.

# *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014)

- ▶ Licensed funeral directors, funeral services corporations, and cemeteries filed § 1983 action against PA Board of Funeral Directors alleging the law regarding Funeral Directors violated the Fourth Amendment because it authorized warrantless searches of “any place where the business or profession of funeral directing is carried on or advertised as being carried on, for the purposes of inspection and for the investigation of complaints coming before the Board, and other such matters as the Board may direct.”

# Heffner v. Murphy (cont.)

- ▶ Court used *Burger* in its analysis.
  - ▶ Threshold Question: Funeral industry is closely regulated due to extensive regulations at the state and federal levels.
  - ▶ “Factors to consider when determining whether a particular industry is closely regulated include: duration of the regulation’s existence, pervasiveness of the regulatory scheme, and regularity of the regulation’s application.”

# Heffner v. Murphy: Burger Criteria Applied

- ▶ First: PA has a substantial interest in public health, safety, and consumer protection.
- ▶ Second: Warrantless searches prevent unscrupulous funeral practitioners from bringing establishments into compliance prior to an inspection and then let them fall below standard when threat of detection passes.
  - ▶ Court also notes that warrantless searches need not be only necessary or most necessary way, but the standard is “whether the government’s objectives would be frustrated by requiring a warrant or notice.” *Contreras v. City of Chicago*, 119 F.3d 1286 (7th Cir. 1997).
- ▶ Third: Law provides adequate substitute for a warrant by limiting inspector’s discretion.
  - ▶ Here, the scope is limited to property where business is occurring or held out to occur.
  - ▶ “Such matters as the Board may direct” is limited to funeral directing business. Not fully open-ended
- ▶ Would another Court reach a different result?

# *Alsager v. Bd. of Osteopathic Medicine and Surgery*, 384 P.3d 641 (2016)

- ▶ Board of Osteopathic Medicine and Surgery initiated a disciplinary investigation of physician.
- ▶ Dr. A alleges Fourth Amendment and Fifth Amendment violations.
- ▶ Dr. A alleges the search of his prescription records in the prescription monitoring program database and gathering those records from the database and pharmacies is an unreasonable search and seizure.
- ▶ The Court says no.
  - ▶ First question: Does Dr. A have a protected privacy interest in the prescription records held by the State or a third party?
  - ▶ No. Other cases say only a limited expectation of privacy by a patient. *Murphy v. State*, 62 P.3d 533 (Wa. Ct. App. 2003). Plus, long history of government regulation and oversight.
  - ▶ Dr. A should be even more aware than a patient that the gov't exercises tight regulatory oversight of controlled substances.
- ▶ Court adopts *Murphy* holding regarding patient rights of privacy in prescription records and hold that there is no expectation of privacy to these records by physicians, which ends the Fourth Amendment analysis.

# Fifth Amendment Issues

- ▶ Prevailing rule seems to be that “Taking the Fifth” may occur in an administrative case.
  - ▶ Example: Witness refuses to testify or answer a question on the grounds that his answer may tend to incriminate him.
- ▶ An administrative body may legitimately draw a negative inference from an individual’s invocation of his right to remain silent.
- ▶ Usually not enough alone to meet administrative burden.
  - ▶ Preponderance of the Evidence? Clear and Convincing? Other?
- ▶ *Baxter v. Palmigiano*, 425 U.S. 308 (1976): Decision-maker can consider the evidentiary significance of a party’s choice to remain silent in a non-criminal forum. In this case, it was a state prison disciplinary board drawing a negative inference from an inmate’s silence at a disciplinary hearing.

## Back to Dr. A: *Alsager v. Bd. of Osteopathic Medicine and Surgery*, 384 P.3d 641 (2016)

- ▶ Dr. A argues that professional disciplinary proceedings are quasi-criminal in nature and the Board violated his Fifth Amendment right against compelled self-incrimination by requiring him to testify and produce testimonial records.
- ▶ Court says no: Medical license revocation proceedings are not “sufficiently criminal in nature to require application of the Fifth Amendment protection against self-incrimination.”
- ▶ Court analysis is under both WA Constitution and U.S. Constitution.
- ▶ Court cites *Boyd v. U.S.*, 116 U.S. 616 (1886), *One 1958 Plymouth v. PA*, 380 U.S. 693 (1965), *In re Daley*, 549 F.2d 469 (7th Cir. 1977), and *U.S. v. Ward*, 448 U.S. 242 (1980).



# Are Administrative Proceedings “Quasi-Criminal”?

- ▶ “A civil action is sufficiently criminal in nature if ‘its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.’”
- ▶ “Although the ‘consequence [of disciplinary sanctions] is unavoidably punitive,’ such sanctions are ‘not designed entirely for that purpose.’”
  - ▶ *In re Kindschi*, 319 P.2d 824 (Wash. 1958); *Nguyen v. State*, 29 P.3d 689 (Wash. 2001).
- ▶ Licensure of doctors and the disciplinary procedures used to enforce it are intended not simply to ensure that doctors comply with applicable law, but “to assure the public of the adequacy of professional competence and conduct in healing arts.”
- ▶ Purpose is public health and confidence, rather than seeking punitive goals like vengeance.

# Three Factors from *U.S. v. Ward*, 448 U.S. 242 (1980)

- ▶ One: Whether penalty imposed has a “correlation to any damages sustained by society or to the costs of enforcing the law”;
- ▶ Two: Whether the available sanctions include traditionally punitive penalties associated with criminal actions, like imprisonment or fines; and
- ▶ Three: Whether the proceedings present some anger that the subject practitioner will prejudice himself with respect to possible criminal proceedings.
- ▶ The Washington Court of Appeals says *Ward* factors do not support that the Board’s disciplinary actions are sufficiently criminal.

# Dr. A and the Fifth Amendment

- ▶ **Ruling:** No constitutional right against compelled testimony and evidence production for Dr. A.
- ▶ “The Board may sanction noncompliance with its valid questions and requests for documents.”
- ▶ “The Board is also free to draw adverse inferences from a physician’s refusal to testify or produce requested documents, as long as such adverse inferences are supported by some other evidence.”
- ▶ Court provides small concession to Dr. A with regard to incriminating himself in a criminal proceeding through his answers.
  - ▶ Need specific, individual objections, not a blanket invocation to avoid participating in the proceedings.
- ▶ Is this case an outlier?
- ▶ Currently Petition for Writ of Certiorari pending at the Washington State Supreme Court as of June 20, 2017. Conference scheduled for September 25, 2017.

# Other Cases re: Witness Testimony in Administrative Proceedings

- ▶ *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977)
  - ▶ Medical disciplinary board was entitled to draw an adverse inference from a physician's refusal to testify before the board; he was also subject of a pending criminal indictment.
- ▶ *Giampa v. Illinois Civil Service Commission*, 411 N.E.2d 1110 (Ill. Ct. App. 1980)
  - ▶ State employee invoked the Fifth Amendment during an disciplinary hearing. Negative inference by hearing officer.
  - ▶ "The constitutional guarantee against self-incrimination protects a witness from being forced to give testimony leading to the imposition of criminal penalties, but it does not insulate a witness from every possible detriment resulting from his testimony."

# Other Cases re: Witness Testimony in Administrative Proceedings (cont.)

- ▶ *Cantor v. Cook County Officers Electoral Board*, 523 N.E.2d 1299 (Ill. Ct. App. 1988)
  - ▶ Negative inference on the basis of a non-party witness' refusal to testify upheld.
- ▶ *LiButti v. U.S.*, 107 F.3d 110 (2d Cir. 1997)
  - ▶ Lengthy discussion of factors to consider before drawing negative inference against a party in a civil action regarding a non-party's failure to testify.
  - ▶ Factors are: (1) nature of relationship between the parties, (2) the degree of control the party has over the non-party, (3) the compatibility of interests of the parties in the outcome, and (4) the role of the non-party witness in the case.
  - ▶ In this case, daughter was a party and father refused to testify. Court said negative inference regarding daughter was okay.
  - ▶ Quotes Justice Brandeis: "Silence is often evidence of the most persuasive character." However, "negative inference alone cannot automatically result in the assessment of a serious penalty against the person who exercises his Fifth Amendment privilege."

# Lessons Learned

- ▶ What business is your agency regulating?
  - ▶ Is it closely regulated?
    - ▶ Example: Taxidermy v. Dentistry
- ▶ Review your governing statutes and regulations.
  - ▶ Do they pass muster under *Burger*?
  - ▶ Do you need to define terms?
  - ▶ Do you have clear procedures for inspectors/investigators?
    - ▶ Inspect all? Opening unlocked doors? Single person or more?
- ▶ Are you satisfying *Patel*, i.e., option to show compliance before sanction?
- ▶ Have you discussed the Fifth Amendment with your client and your board members?