

1 BEFORE THE BOARD OF MEDICAL EXAMINERS

2  
3 IN THE STATE OF ARIZONA

4 In the Matter of

5 **LEON DRISS, M.D.**

6 Holder of License No. 12761  
7 For the Practice of Medicine  
8 In the State of Arizona.

No. 01F-12761-MDX

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER FOR DECREE  
OF CENSURE**

9 On April 10, 2002, this case came before the Arizona Board of Medical Examiners  
10 ("Board") for oral argument and consideration of the Recommended Decision of the  
11 Administrative Law Judge ("ALJ") containing proposed findings of fact, conclusions of law.  
12 Leon Driss, M.D. ("Respondent") appeared and was not represented by counsel. The  
13 State was represented by Assistant Attorney General, Stephen A. Wolf. The Board was  
14 advised by its legal advisor, Christine Cassetta, Assistant Attorney General.

15 The Board, having considered the ALJ's recommendation, and the entire  
16 administrative record in this case, hereby issues the following Findings of Fact,  
17 Conclusions of Law, and Order.

18 **FINDINGS OF FACT**

19 1. The Arizona State Board of Medical Examiners ("Board") has been delegated  
20 by the legislature the regulatory oversight and control of the practice of allopathic medicine in  
21 the State of Arizona.<sup>1</sup>

22 2. Respondent holds license No. 12761 issued by the Board on or about July 1,  
23 1981, renewed December 14, 2000, due to expire on September 1, 2002.

24 3. Respondent also holds medical licenses issued by the State of California (Lic.  
25 No. G47566, issued on or about June 14, 1982) and the State of Washington (Lic. No.  
31347, issued on or about September 29, 1993).

1           4.       Respondent, a graduate of the Medical College of Wisconsin in May 1980, has  
2 been practicing continuously since obtaining his license in the State of Arizona, although for  
3 much of the time residing and practicing out-of-state. Respondent performed his internship  
responsibilities at *Maricopa Medical Center* in Phoenix from June 1980 through June 1981.

4           5.       Respondent holds board certifications in Geriatric Medicine as well as in  
5 Internal Medicine.

6           6.       The present matter does not arise out of an Arizona consumer generated  
7 complaint. The complaint has been initiated by the Board, *sua sponte*, as a result of action  
8 undertaken by the appropriate medical boards against the medical licenses held by  
Respondent in two other jurisdictions, California and Washington, respectively.

9           7.       On or about March 14, 1997,<sup>2</sup> the Medical Board of California ("California  
10 Board") found, after an evidentiary hearing, that Respondent had been grossly and  
11 repeatedly negligent in his care and treatment of patient E.S.<sup>3</sup>

12           8.       Specifically, the California Board found:

13                   (1) that Respondent had violated section 2234(b) of the California Business  
14                   and Professions Code, as alleged;<sup>4</sup>

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15 <sup>1</sup> A.R.S. § 32-1403.

16 <sup>2</sup> Hearing Exhibit 2. The California Board adopted therein a "Proposed Decision" that had been issued by a  
17 California Office of Administrative Hearings Administrative Law Judge on February 27, 2002. A copy of the  
"Proposed Decision" is found within the hearing file (also offered by the parties as Exhibits 2 and B), the  
contents of which have been noticed by the Administrative Law Judge herein without objection having been  
interposed.

18 <sup>3</sup> The patient's initials only are identified for purposes of confidentiality.

<sup>4</sup> The California statute reads as follows, in part:

19 Bus. & Prof. Code § 2234. Unprofessional conduct

20       The Division of Medical Quality shall take action against any licensee who is charged  
21 with unprofessional conduct. In addition to other provisions of this article,  
unprofessional conduct includes, but is not limited to, the following:

22                                   \*\*\*

23                   (b) Gross negligence.

24                   (c) Repeated negligent acts.

25                   (d) Incompetence.

   \*\*\*

1 (2) that Respondent had violated section 2234(c) of the California Business  
2 and Professions Code, as alleged; and

3 (3) that Respondent had not violated section 2234(d) of the California  
4 Business and Professions Code, as alleged.

5 9. As a result, the California Board revoked Respondent's California license.  
6 However, the revocation Order was stayed by the Board pending Respondent's completion  
7 of a two year probationary period during which time Respondent was required to satisfy  
8 certain conditions:

9 (a) that Respondent refrain from violation of any law governing the practice of  
10 medicine;

11 (b) that Respondent submit quarterly declarations attesting to his compliance  
12 with the terms of probation;

13 (c) that Respondent comply with the Division's surveillance program;

14 (d) that Respondent make himself available for interview by the Division's  
15 medical consultant upon request so to do;

16 (e) that the probationary period be tolled during any period wherein  
17 Respondent would be found practicing outside the State of California;

18 (f) that Respondent satisfy a CME course in medical Ethics within the first year  
19 of the probation, with prior approval of the contents thereof by the Board;

20 (g) that Respondent would be susceptible to an implementation of the  
21 revocation Order should Respondent be found to violate the terms of the  
22 probation; and

23 (h) that Respondent pay to the Board \$3,626 in costs.

24 10. Thereafter, Respondent appealed, on a writ of mandate, the California Board's  
25 decision to place his license on probation, to the Court of Appeal, Third Appellate District,  
the Superior Court having denied his petition for a writ of mandamus. Respondent  
complained therein that the California Board's decision (1) violated his due process rights  
and (2) was not, on any account, supported by substantial evidence. The Court of Appeal,  
Third Appellate District, rejected both grounds put forward by Respondent in his petition for a

1 writ of mandate. The Court denied the petition on October 5, 2001 (filed October 25, 1999).<sup>5</sup>

2 11. In the interim, that is between the time that Respondent had treated the patient  
3 who was the subject of the complaint (initiated by the Executive Director of the California  
4 Board) and the final Order in the matter issued by the Court of Appeals, Respondent had  
5 moved to the State of Washington (in 1994), obtained medical licensure in the jurisdiction,  
6 and assumed a medical practice.

7 12. Subsequently, having learned of the action undertaken by the California Board,  
8 the *Medical Quality Assurance Commission* ("Commission") of the State of Washington  
9 served upon Respondent a Statement of Charges and Notice of its intent to discipline  
10 Respondent's Washington license under the state's Uniform Disciplinary Act.<sup>6</sup>

11 13. Respondent chose to enter into an "Agreed Order" with the Commission on  
12 July 13, 1999, wherein and whereby Respondent and the Commission agreed to abide by  
13 the anticipated ruling of the California Court of Appeals in the California Board matter.  
14 Should the Court of Appeals uphold the California Board's imposition of discipline (as it has),

15 <sup>5</sup> An unpublished decision identified herein as Hearing Exhibit 5.

16 <sup>6</sup> Hearing Exhibit 3, issued on December 5, 1997, citing Rev. Code Wash. 18.130.180. The Washington  
17 statute identifies those acts and/or omissions that constitute unprofessional conduct. The relevant portions of  
18 the pericope are set forth below for purposes of convenience:

19 § 18.130.180. Unprofessional conduct

20 The following conduct, acts, or conditions constitute unprofessional conduct for any  
21 license holder or applicant under the jurisdiction of this chapter:

22 \*\*\*

23 (4) Incompetence, negligence, or malpractice which results in injury to a patient or  
24 which creates an unreasonable risk that a patient may be harmed. The use of a  
25 nontraditional treatment by itself shall not constitute unprofessional conduct, provided  
that it does not result in injury to a patient or create an unreasonable risk that a  
patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice any  
health care profession by competent authority in any state, federal, or foreign  
jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive  
evidence of the revocation, suspension, or restriction;

\*\*\*

(7) Violation of any state or federal statute or administrative rule regulating the  
profession in question, including any statute or rule defining or establishing standards  
of patient care or professional conduct or practice;

\*\*\*

1 the Commission would (1) recognize that Respondent's license was suspended by the  
2 California Board for a period of two years, a "suspension" then stayed, (2) recognize that  
3 Respondent had satisfied all outstanding additional continuing medical education ("CME")  
4 requirements, and (3) terminate the "Agreed Order" upon proof that Respondent had paid the  
California Board its awarded costs.

5 14. Having substantially complied with the conditions of the "Agreed Order,"  
6 Respondent's Petition to be released from the provisions and effect of the Order was granted  
7 by the Commission by Order issued on July 14, 2000.<sup>7</sup>

8 15. Respondent has moved back to the State of Arizona (September 2000) where  
9 he currently practices. Respondent is engaged in the practice of internal medicine in and  
around Lakeside, Arizona.

10 16. Because of his move to the state of Washington, Respondent put himself into a  
11 "catch 22"<sup>8</sup> whereby he was constrained not to move back to California for purposes of  
12 serving his probationary obligation, having been caring for patients for a period of three years  
in Washington awaiting the legal process to run in California.

13 17. Therefore, **the doctor has not served a period of probation as a**  
14 **consequence of the California Board's March 14, 1997 Decision and Order.**<sup>9</sup>

15 18. The Board issued a Complaint and Notice of Hearing ("Complaint") on  
16 November 5, 2001, in accordance with applicable law, wherein is alleged that the action  
17 undertaken by the California Board noted herein constituted a finding of unprofessional  
18 conduct, as such conduct is contemplated by the Arizona statute governing the conduct of  
19 practitioners of allopathic medicine in this state. The Complaint further gave Respondent  
20 notice that the action undertaken by the Commission, noted herein, likewise constituted a  
finding of unprofessional conduct, as such conduct is contemplated by the Arizona statute  
governing the conduct of practitioners of allopathic medicine in this jurisdiction.

21 19. The Board seeks to (1) censure Dr. Driss because his acts and omissions in  
22 the underlying California negligence case have been found by a California Administrative  
23 Law Judge (upheld by the California Court of Appeals) to constitute gross and repeated  
24

25 <sup>7</sup> Hearing Exhibit M.

<sup>8</sup> The doctor's observation. See, Hearing Transcript, page 49, line 16.

1 negligence;<sup>10</sup> and, (2) impose a two-year probationary course with periodic review.

2 20. Respondent desires to be relieved of any disciplinary penalty because (1) he  
3 has been extremely saddened by the death of his former patient, the subject of the  
4 underlying California inquiry; (2) the event in question occurred 13 years ago, during which  
5 time his practice endeavors have been closely monitored and positively appraised; (3) the  
6 Administrative Law Judge in the California matter misconstrued the evidence and improperly  
7 apportioned weight to the evidence submitted by the parties; (4) to discipline his license  
8 would be counterproductive to the explicit intent of the governing statute, that the Board  
9 safeguard the residents of Arizona, as the doctor is serving in a rural area of the state  
10 desperate for the services of one credentialed and competent in internal medicine, as is  
11 Respondent; (5) he has endeavored to keep apace CME requirements, and has exceeded  
12 those requirements, both as to substantive practice developments and ethical considerations;  
13 and (6) he has cooperated throughout the inquiry, manifesting his acknowledgment of and  
14 deep respect for the responsibilities that have been imposed upon this Board by law.

15 21. The weight and sufficiency of the evidence preponderates (1) that Respondent  
16 acted in a manner grossly and repeatedly negligent some ten to 13 years ago in his  
17 treatment of a patient while lawfully practicing in the state of California; (2) that Respondent  
18 has been disciplined therefor by the California Board; (3) that as a term of the California  
19 Board's decision to revoke Respondent's certificate in California, the revocation was stayed  
20 and Respondent was placed on probation for a period of two years; (3) that the course of  
21 probation would be tolled during a period when Respondent doctor was practicing or residing  
22 out of California; and (4) that Respondent has not subjected himself to the probationary  
23 period imposed by the California Board.

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24 <sup>9</sup> Hearing Transcript, page 49, lines 17-19 ("I wasn't about to give up my practice and move back to  
25 California and serve their two years.").

<sup>10</sup> See, Hearing Exhibits 2 and 5. The California Administrative Law Judge found, after an evidentiary hearing  
whereat the doctor was represented by counsel, that the doctor's failure to order a Prostate Specific Antigen  
(P.S.A.) test and/or refer the patient to a urologist in 1989 failed the standard of care. The patient had  
presented with a "hard" prostate in September 1989 and was seen in the office by the doctor on 13  
occasions thereafter (through July 1991). The doctor failed to perform a prostate examination or make a  
referral at any time. By not repeating a digital rectal examination at least once within a twelve month period,  
the doctor's treatment fell far below the standard of care. By failing to take appropriate diagnostic steps when  
presented with identifiable symptomatology, the doctor's treatment of the patient was grossly negligent. By  
failing to perform a repeat digital exam in 1990 after having observed that the patient's prostate was not  
normal, the doctor repeated his act and omission. The patient was, in due course, diagnosed with stage D

1 **CONCLUSIONS OF LAW**

2 1. The Board has been delegated authority by the legislature to discipline a  
3 license that it has issued for the practice of allopathic medicine in this state.<sup>11</sup>

4 2. The range of penalty and the procedure for investigation, with process  
5 available to the physician, is set out in statute.<sup>12</sup>

6 diffusely metastatic prostate cancer in July 1991, to which disease the patient succumbed in March 1992  
7 having undergone aggressive treatment therefor.

8 <sup>11</sup> A.R.S. § 32-1403(A) provides, in part:

9 **Powers and duties of the board;**

10 A. The primary duty of the board is to protect the public from unlawful, incompetent, unqualified, impaired  
11 or unprofessional practitioners of allopathic medicine through licensure, regulation and rehabilitation of the  
12 profession in this state. The powers and duties of the board include:

13 \*\*\*

14 Disciplining and rehabilitating physicians.

15 Engaging in a full exchange of information with licensing and disciplinary boards and medical associations or  
16 other states and jurisdictions of the United States . . . and the Arizona medical association and its  
17 components.

18 \*\*\*

19 <sup>12</sup> A.R.S. § 1451. The statute provides, in part:

20 A. The board on its own motion may investigate any evidence that appears to show  
21 that a doctor of medicine is or may be medically incompetent, is or may be guilty of  
22 unprofessional conduct or is or may be mentally or physically unable safely to engage  
23 in the practice of medicine. On written request of a complainant the board shall review  
24 a complaint that has been administratively closed by the executive director and take  
25 any action it deems appropriate. Any person may, and a doctor of medicine, the  
Arizona medical association, a component county society of that association and any  
health care institution shall, report to the board any information that appears to show  
that a doctor of medicine is or may be medically incompetent, is or may be guilty of  
unprofessional conduct or is or may be mentally or physically unable safely to engage  
in the practice of medicine. The board or the executive director shall notify the doctor  
as to the content of the complaint as soon as reasonable. Any person or entity that  
reports or provides information to the board in good faith is not subject to an action  
for civil damages. If requested, the board shall not disclose the name of a person who  
supplies information regarding a licensee's drug or alcohol impairment. It is an act of  
unprofessional conduct for any doctor of medicine to fail to report as required by this  
section. The board shall report any health care institution that fails to report as  
required by this section to that institution's licensing agency.

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E. If, after completing its investigation, the board finds that the information provided  
pursuant to Subsection A of this section is not of sufficient seriousness to merit

1 disciplinary action against the license of the doctor, the board or a board committee  
2 may take either of the following actions:

3 1. Dismiss if, in the opinion of the board, the information is without merit.

4 2. File an advisory letter. The licensee may file a written response with the board  
5 within thirty days after receiving the advisory letter.

6 F. If the board finds that it can take rehabilitative or disciplinary action without the  
7 presence of the doctor at a formal interview it may enter into a consent agreement  
8 with the doctor to limit or restrict the doctor's practice or to rehabilitate the doctor,  
9 protect the public and ensure the doctor's ability to safely engage in the practice of  
10 medicine. The board may also require the doctor to successfully complete a board  
11 approved rehabilitative, retraining or assessment program.

12 \*\*\*

13 H. If after completing its investigation the board believes that the information is or  
14 may be true, it may request a formal interview with the doctor. If the doctor refuses  
15 the invitation for formal interview or accepts and the results indicate that grounds  
16 may exist for revocation or suspension of the doctor's license for more than twelve  
17 months, the board shall issue a formal complaint and order that a hearing be held  
18 pursuant to title 41, chapter 6, article 10. If after completing a formal interview the  
19 board finds that the protection of the public requires emergency action, it may order a  
20 summary suspension of the license pending formal revocation proceedings or other  
21 action authorized by this section.

22 \*\*\*

23 K. If the board finds that the information provided in Subsection A or I of this section  
24 warrants suspension or revocation of a license issued under this chapter, it shall  
25 initiate formal proceedings pursuant to Title 41, Chapter 6, Article 10.

L. In a formal interview pursuant to Subsection H of this section or in a hearing  
pursuant to Subsection K of this section, the board in addition to any other action  
may impose a civil penalty in the amount of not less than one thousand dollars nor  
more than ten thousand dollars for each violation of this chapter or a rule adopted  
under this chapter.

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N. Any doctor of medicine who after a formal hearing is found by the board to be guilty  
of unprofessional conduct, to be mentally or physically unable safely to engage in the  
practice of medicine or to be medically incompetent is subject to censure, probation  
as provided in this section, suspension of license or revocation of license or any  
combination of these, including a stay of action, and for a period of time or  
permanently and under conditions as the board deems appropriate for the protection  
of the public health and safety and just in the circumstance. The board may charge  
the costs of formal hearings to the licensee who it finds to be in violation of this  
chapter.

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V. In determining the appropriate disciplinary action under this section, the board shall



1 3. Specifically, the Board is authorized to discipline a doctor for acts and  
2 omissions constituting unprofessional conduct.<sup>13</sup> Within the statutory delineation of bases  
3 for discipline is included physician conduct that the Board determines is gross negligence,  
4 repeated negligence, and/or negligence that results in the death of a patient.<sup>14</sup>

5 4. The legislature has further empowered the Board to impose discipline  
6 reciprocally upon an action taken against an Arizona licensed physician by another  
7 jurisdiction whereby and wherein the physician is also licensed.<sup>15</sup>

8 5. The enabling statute further prescribes the nature of the penalty that may be  
9 assessed when proscribed conduct is identified.<sup>16</sup>

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10 **consider all previous nondisciplinary and disciplinary actions against a licensee.** (Emphasis  
11 added).

12 <sup>13</sup> A.R.S. § 32-1401(25) identifies those acts and omissions that constitute unprofessional conduct.

13 25. "Unprofessional conduct" includes the following, whether occurring in this state  
14 or elsewhere:

15 (a) Violating any federal or state laws or rules and regulations applicable to the  
16 practice of medicine.

17 \*\*\*

18 (o) **Action that is taken against a doctor of medicine by another licensing or  
19 regulatory jurisdiction due to that doctor's mental or physical inability to engage safely  
20 in the practice of medicine, the doctor's medical incompetence or for unprofessional  
21 conduct as defined by that jurisdiction and that corresponds directly or indirectly to  
22 an act of unprofessional conduct prescribed by this paragraph. The action taken may  
23 include refusing, denying, revoking or suspending a license by that jurisdiction or a  
24 surrendering of a license to that jurisdiction, otherwise limiting, restricting or  
25 monitoring a licensee by that jurisdiction or placing a licensee on probation by that  
jurisdiction.**

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(II) **Conduct that the board determines is gross negligence, repeated negligence or  
negligence resulting in harm to or the death of a patient.**

(Emphasis added).

\*\*\*

<sup>14</sup> A.R.S. § 32-1401(25)(II).

<sup>15</sup> A.R.S. § 32-1401(25)(o).

<sup>16</sup> See, A.R.S. § 32-1401 cited *supra*.

1           6.     The issue presented concerns whether Respondent has violated the  
2 standards established by the legislature whereby conduct is circumscribed as either  
3 professionally acceptable or professionally unacceptable. Has the Board persuaded that  
4 Respondent has committed an act or omission that warrants sanction? If so, what should  
5 be the nature and extent of the penalty?

6           7.     The burden of proof generally at an administrative hearing falls to the party  
7 asserting a claim, right or entitlement or seeking to impose a penalty.<sup>17</sup> Further, the  
8 standard of proof is that of the "preponderance of the evidence".<sup>18</sup> Proof by a  
9 preponderance means that the evidence is sufficient to persuade the finder of fact that the  
10 proposition is "...more likely true than not."<sup>19</sup> The evidence taken as a whole must  
11 convince the decision maker that the party who bears the overall burden of persuasion is  
12 more probably correct on the issue(s) in dispute.

13           8.     In this proceeding, the Board bears the burden of establishing that  
14 Respondent has committed an act or omission making him susceptible to Board discipline.

15           9.     The underlying presumed purpose of a Board oversight commission is to  
16 protect the public interest.<sup>20</sup>

17           10.    The Arizona state legislature has directed that statutes be liberally construed  
18 in an effort to effect their objects and promote justice.<sup>21</sup> Technical words and phrases are  
19 to be construed according to their peculiar and appropriate meaning.<sup>22</sup>

20           11.    The Rules that have been adopted by the Board in an effort to implement the  
21 Board's statutorily delegated responsibilities and authority have the force and effect of  
22 law.<sup>23</sup>

23 <sup>17</sup> *Culpepper v. Arizona Board of Nursing*, 187 Ariz. 431, 930 P.2d 508 (App. 1997); See also Ariz. Admin.  
24 Code R2-19-119 (B).

25 <sup>18</sup> *Smith v. Arizona Department of Transportation*, 146 Ariz. 430, 706 P.2d 756 (App. 1985); See also Ariz.  
Admin. Code R2-19-119 (A).

<sup>19</sup> *In re Arnold and Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994). See also, J. Livermore, R.  
Bartels, & A. Hameroff, LAW OF EVIDENCE § 301.1(4<sup>th</sup> ed. 2000) (One party bears the overall burden of  
persuasion on each fact material to the party's claims and defenses. Further, the party with the burden of  
persuasion on a particular fact is required to satisfy the burden of production of enough qualitative evidence  
sufficient to support a finding of the existence of the fact, following a reasonable person standard.)

<sup>20</sup> See A.R.S. §§ 32-1403(A).

<sup>21</sup> A.R.S. § 1-211(B);

<sup>22</sup> A.R.S. § 1-213.

1           12. The imposition of discipline upon the license that Respondent holds in the  
2 State of California, by the Agency empowered by the California legislature to impose such  
3 discipline, constitutes an act of unprofessional conduct under the Arizona regulating  
4 statute.<sup>24</sup>

5           13. Further, the California Board's determination, upheld by a California Court of  
6 Appeal, that the doctor's acts and omissions in his treatment and care of a patient whose  
7 care was scrutinized by the California Board constituted repeated and gross negligence, may  
8 be used by the Board to estop<sup>25</sup> Respondent from a denial of the findings and conclusions of  
9 the California Board in its Decision and Order of March 14, 1997.<sup>26</sup>

10           14. The State has proved by a preponderance of the evidence that Respondent  
11 has engaged in acts and/or omissions constituting unprofessional conduct as envisaged  
12 by and as defined in the governing statute. The conduct and circumstances described in  
13 the Findings of Facts set out above constitute unprofessional conduct under A.R.S. § 32-  
14 1401(25)(o). The California Board has revoked Respondent's license to practice medicine  
15 in the State of California on the basis of certain findings of unprofessional conduct. Those  
16 findings of unprofessional conduct correspond directly or indirectly to the following acts of  
17 unprofessional conduct proscribed by Arizona law:

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18 <sup>23</sup> *Red Carpet-Barry & Associates v. Apex Associates*, 130 Ariz. 302, 304, 635 P.2d 1224, 1226 (App. 1981).  
19 See also, NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 65.5 ( 6<sup>th</sup> ed., vol. 3,  
20 2001 Revision).

21 <sup>24</sup> A.R.S. § 32-1401(25)(o).

22 <sup>25</sup> See, the Administrative Law Judge's ruling on the *Board's* Motion in *Limine*, filed on November 7, 2001,  
23 issued on November 19, 2001, wherein was determined, *inter alia*:

24 The State's *Motion in Limine* is granted. Dr. Driss is foreclosed from raising matters previously decided by  
25 the Medical Board of California in its February 27, 1997 Decision.<sup>25</sup> The Dr. may, however, point to facts  
found in the California Board's Decision to support an argument in mitigation.  
See also, *Gilbert v. Board of Medical Examiners*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (Ariz. Ct. App. 1987)  
(collateral estoppel, or issue preclusion, "bars a party from relitigating an issue identical to one he had  
previously litigated to a determination on the merits in another action."); *Hawkins v. Arizona Dep't of  
Economic Security*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (Ariz. Ct App. 1995) (applying the use of  
collateral estoppel to administrative agencies when those agencies are found acting in a quasi-judicial  
capacity). On the offensive use of the doctrine of estoppel, see, *Wetzel v. Arizona State Real Estate Dep't*,  
151 Ariz. 330, 333, 334, 727 P.2d 825, 828, 829 (Ariz. Ct. App. 1986).

<sup>26</sup> Hearing Exhibit 2.

1 A.R.S. § 32-1401(25)(II) (conduct that the Board determines is  
2 gross negligence, repeated negligence or negligence resulting  
3 in harm to or the death of a patient).

4 Albeit Respondent's license to practice in California has been restored, Respondent has  
5 yet to have fulfilled the probationary order imposed against his license by the California  
6 Board, imposition of the penalty having been tolled during his absence from the  
7 jurisdiction.<sup>27</sup>

8 15. A careful review of the totality and preponderance of the evidence presented  
9 at the hearing of this complaint supports the Board's imposition of discipline against the  
10 license of Respondent in the form of (1) a censure, and (2) a two year probation.

11 16. In mitigation is noted the following considerations: (1) Respondent's lack of  
12 previous disciplinary sanction in Arizona; (2) Respondent's manifest desire for  
13 rehabilitation and his potential for continued improvement; and (3) the period of time that  
14 has elapsed since the occurrence in question and current efforts by the Board to sanction  
15 Respondent's Arizona license.

16 17. In aggravation is noted the following factors: (1) the underlying conduct has  
17 been found, both through the administrative process in California as well as reviewing  
18 courts of general jurisdiction in that state, to have constituted gross misconduct; (2) in his  
19 treatment and care of patient E.S., Respondent has been demonstrated to have acted with  
20 reckless indifference to the welfare of the patient;<sup>28</sup> and, (3) Respondent has not  
21 completely fulfilled the disciplinary obligation imposed upon him by the California Board.

22 18. "An administrative penalty is excessive only if it is so 'disproportionate to the  
23 offense as to shock one's sense of fairness'.<sup>29</sup> Placing Respondent on a two year  
24 Probation and issuing Respondent a letter of Censure wherein is delineated the findings  
25 set forth herein is neither an excessive sanction nor does it shock one's sense of fairness.  
Such exercise of discipline is required by a recognition of the obligations that have been

<sup>27</sup> See, Findings of Fact ¶¶ 9(e) and 11 above.

<sup>28</sup> See, *Caldwell v. Arizona State Board of Dental Examiners*, 137 Ariz. 396, 670 P.2d 1220 (Ariz. App. 1983)(equating "gross negligence" with "wanton negligence").

<sup>29</sup> *Culpepper, supra*, 187 Ariz. at 438, 930 P.2d at 515, citing *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994) (professional board sanction (revocation) of chiropractor's license not found to be

1 imposed upon the Board by statute to protect and inform the public, as well as the  
2 oversight responsibilities that the Board has concerning those within its care.

3 **ORDER**

4 In view of the foregoing, it is ordered that Respondent is issued a Decree of  
5 Censure.

6 **RIGHT TO APPEAL TO SUPERIOR COURT**

7 Respondent is hereby notified that this Order is the final administrative decision of  
8 the Board and that Respondent has exhausted his administrative remedies. Respondent  
9 is advised that an appeal to superior court in Maricopa County may be taken from this  
10 decision pursuant to title 12, chapter 7, article 6.

11 DATED this 15<sup>th</sup> day of April, 2002.

12 BOARD OF MEDICAL EXAMINERS  
13 OF THE STATE OF ARIZONA

14 (SEAL)

15 By: Claudia Foutz  
16 CLAUDIA FOUTZ  
17 Executive Director

18 Original of the foregoing filed this  
19 15<sup>th</sup> day of April, 2002, with:

20 Arizona Board of Medical Examiners  
21 9545 East Doubletree Ranch Road  
22 Scottsdale, AZ 85258

23 Copy of the foregoing filed this  
24 15<sup>th</sup> day of April, 2002, with:

25 Cliff J. Vanell, Director  
Office of Administrative Hearings  
1400 W. Washington, Ste. 101  
Phoenix, AZ 85007

Executed copy of the foregoing mailed

so disproportionate to the offense as to shock one's conscience); See also, *Bear v. Nicholls*, 142 Ariz. 560, 563, 691 P.2d 326, 329 (App. 1984).

1 by Certified Mail this  
2 15<sup>th</sup> day of APRIL, 2002, to:

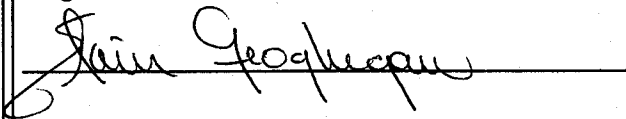
3 Leon Driss, M.D.  
4 Aspen Ridge Medical Building  
5 5448 Highway 260  
6 Suite 270  
7 Lakeside, Arizona 85929-5187

8 Executed copy of the foregoing mailed  
9 this 15<sup>th</sup> day of APRIL, 2002, to:

10 Stephen Wolf, Assistant Attorney General  
11 Office of the Attorney General  
12 1275 W. Washington  
13 Phoenix, AZ 85007  
14 Attorney for the State

15 Executed copy of the foregoing hand delivered  
16 this 15<sup>th</sup> day of APRIL, 2002, to:

17 Christine Cassetta, Assistant Attorney General  
18 Arizona Board of Medical Examiners  
19 9545 East Doubletree Ranch Road  
20 Scottsdale, AZ 85258  
21 Legal Advisor to the Board

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23  
24  
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