

CONFIDENTIAL MEMORANDUM

To: Federico Cruz-Uribe, Director  
Victor Harris, Deputy Director  
David Vance, Senior Public Health Manager  
Members of the Tacoma-Pierce County Board of Health  
From: Susan L. Ferguson, General Counsel  
Date: April 17, 2006  
Re: Illegal Importation of Generic Tamiflu

As your attorney, I am required by the Rules of Professional Conduct ("RPC") to exercise independent professional judgment and render candid advice. RPC 2.1. I write this memo with the deepest respect for Dr. Cruz and his desire to protect the health and lives of first responders and Pierce County citizens. As a consequence of recent events, I am withdrawing as your attorney related to this issue, am requesting the appointment of separate outside counsel, and recommend that each affected person receive separate legal counsel as well. This memo explains the reasons for this decision.

On April 5, 2006, I was called during the Tahoma Resilience Exercise and advised to report to the Department for a Board of Health executive session that I did not know was going to occur. When I arrived, the session was in progress. The Director asked this Board to consider authorizing the illegal importation of the antiviral, generic Tamiflu, from Cipla, an Indian pharmaceutical corporation, either directly from India or through a Canadian drug wholesaler, in order to stockpile the drug for first responder use in what he believes is an impending influenza pandemic. As you are aware, this generic drug is not approved by the United States' FDA for importation into the United States and its importation and distribution violates state and federal law. It is my understanding that the Director plans to ask this Board to take action at the next Board of Health meeting on May 3, 2006 or soon thereafter.

Board members asked for an update on the status of the FDA's stance regarding importation of drugs that are not FDA approved for importation. Copies of two FDA documents are enclosed for your review.

The first document relates to a 2005 Washington State inquiry. In the 2005 legislative session, the Washington State Legislature directed the state's Board of Pharmacy to request a waiver from the FDA to license Canadian pharmacies and other foreign pharmaceutical wholesalers to enable Washington citizens, governments and companies to legally import drugs from Canada, and other nations. On March 17, 2006, the FDA denied Washington's request in a letter. The letter includes a legal analysis of the illegality of importing from Canadian and foreign pharmacies and wholesalers. The FDA is aware that many of the drugs imported from Canada are actually manufactured in India. Federal courts have upheld the FDA's position on this issue.

The second document is the "FDA Statement on Fraudulent, Unapproved Influenza-Related Products" dated January 20, 2006. It emphasizes that it considers the "sale of

unlicensed or unapproved influenza-related products as a potentially significant threat to the public health and is taking measures to protect consumers from fraudulent products.” It notes that products promoted to consumers without a valid prescription written by a health care professional are not approved by the FDA and have not been determined to be safe and effective. The FDA specifically describes generic Tamiflu confiscated at the US border, and emphasizes that the FDA is committed to “investigating these matters and seeking federal prosecution of those individuals and companies who are involved in the manufacture, promotion, or distribution of illegal influenza-related products.”

I have previously advised you and the Board of the illegality of importing pharmaceuticals from India that are not FDA approved, and that are not prescribed in accordance with law. You are now being placed in the position of being asked to take illegal action.

I reviewed the Rules of Professional Conduct that govern lawyers in the State of Washington. I cannot and will not counsel you to engage in illegal conduct and may not assist you in engaging in that conduct. RPC 1.2(d).

I am concerned about my possible obligation to disclose a future criminal act. I have to advise you that I am authorized by RPC 1.6(b)(1) to reveal a client’s confidence or secret to the extent I reasonably believe necessary to prevent the client from committing a crime. Thus, I am questioning whether I have a responsibility to do so.

I am also concerned about the intention to take action in open session without revealing the true nature of the illegal action. It has been suggested by others that the Board resolution authorizing the illegal action would merely appropriate a sum of funds for the purchase of antivirals, and remain silent on the tacit approval of buying the drugs illegally. If the Board were to approve purchase of generic Tamiflu from India illegally, it is important that that action be taken with full disclosure to the public, and not simply that monies are appropriated for the purchase of antivirals, with a secret understanding that the Board is authorizing illegal activity. Not to do so involves deceit or misrepresentation. RPC 8.4 states it is professional misconduct for a lawyer to... engage in conduct involving dishonesty, fraud, deceit or misrepresentation. I cannot and will not participate in that process.

Thus, given the facts as they currently stand, I believe that we each need our own separate legal counsel related to this issue, as conflicts exist between individuals as employees and the department and/or Board as their employer, as well as between the department and Board, and its individual members. In addition, conflicts exist between your interests as my employer and client, and my interests as your employee and attorney.

RPC 1.15 states that where legal representation has commenced, a lawyer shall withdraw from representation of a client if the representation will result in the violation of the Rules of Professional Conduct or other law. I believe that departmental and impending Board actions have put me in the position of being compelled to withdraw from

representing you on this issue. I need to consult with an attorney that represents me in my official capacity to know whether I need to withdraw completely as your attorney (as opposed to withdraw solely on this issue), and what my obligations are with respect to RPC 1.6 (b)(1).

I recommend the Department and Board engage separate outside counsel for itself and its affected employees and members.

Thank you.

Cc: Vivienne Kamphaus, HR/Risk Manager