

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)
Against:)

KEITH ROBERT DEORIO, M.D.)

Case No. 17-2013-234390

Physician's and Surgeon's)
Certificate No. G74544)

OAH No. 2016080769

Respondent)
_____)

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 21, 2017.

IT IS SO ORDERED June 22, 2017.

MEDICAL BOARD OF CALIFORNIA



By: _____

Jamie Wright, J.D.
Chair, Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

KEITH ROBERT DEORIO, M.D.,
Physician's and Surgeon's Certificate Number
G 74544,

Respondent.

Case No. 17-2013-234390

OAH No. 2016080769

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 13 and 14, 2017, in Los Angeles.

Christine R. Friar, Deputy Attorney General, represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California (Board), Department of Consumer Affairs (Department), State of California.

Ernest J. Franceschi, Jr., Attorney at Law, represented respondent Keith Robert DeOrio, M.D., who was present.

Complainant moved at hearing to amend the Accusation as follows: at page 5, paragraph 20, line 13, change "December 23" to "December 21." The motion, unopposed, was granted.

Oral and documentary evidence was received. The record was held open to allow briefing. Complainant submitted a closing brief, which was marked as Exhibit 35. Respondent submitted an opposing closing brief, which was marked as Exhibit K. Complainant submitted a reply brief, which was marked as Exhibit 36.

The record was closed and the matter was submitted on April 25, 2017.

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Protective Order

Complainant moved for a protective order sealing exhibits to protect confidential information concerning third parties; respondent made no objection. The ALJ issued a protective order dated March 22, 2017. Redaction of those documents subject to the protective order, to obscure confidential information, was not practicable and would not have provided adequate privacy protection. Those exhibits shall remain under seal and shall not be opened, except by order of the Board, by OAH, or by a reviewing court. The ALJ ordered that every court reporter refer in the hearing transcript to respondent's patients by initials only.

FACTUAL FINDINGS

Jurisdiction

1. Complainant filed the Accusation in her official capacity. Respondent timely filed a notice of defense.

2. The Board issued Physician and Surgeon's Certificate No. G 74544 to respondent on July 7, 1992. On September 3, 2013, the Board issued a suspension notice to respondent, notifying him that his certificate was suspended, effective August 30, 2013, for unpaid tax delinquencies, and that the suspension would not be lifted until the Board received a release from the Franchise Tax Board. The Board issued another suspension notice to respondent, dated March 4, 2014, reminding him that his license suspension of August 30, 2013, was still in effect and that "[e]ngaging in activities which require a physician's license while you have a suspended license is a criminal offense." (Ex. 13.) Respondent's certificate expired on April 30, 2014, and is in delinquent status.

The Board's Investigation of Third-Party Complaints Against Respondent

3. The Board received two complaints, one on August 12, 2013, concerning patient M.B., allegedly treated by respondent in July 2013, and one on September 27, 2013, concerning patient M.M., allegedly treated by respondent from May 2011 to February 2013. The complaints alleged that respondent engaged in unprofessional conduct in his care and treatment of the patients and might be mentally impaired. All the treatments complained of took place while respondent's physician's and surgeon's certificate was valid and current, before the Board first suspended respondent's certificate on August 30, 2013.

4. Errol Fuller, an investigator with the Department's Health Quality Investigation Unit (HQIU), was assigned to investigate the consumer complaints on September 4, 2013. As part of the investigation, Mr. Fuller and senior investigator Charlaire McKenzie interviewed M.B. and M.M. Mr. Fuller, Ms. McKenzie, and others conducted an undercover operation at the DeOrio Wellness Center in Santa Monica on December 4, 2013, in which Ms. McKenzie sought care and treatment from respondent using the alias "Catherine Adams" (Patient CA).

5. On March 4, 2014, the Board sent its second suspension notice to respondent. (See Factual Finding 2.)

6. Mr. Fuller and others conducted a second undercover operation at the DeOrio Wellness Center on March 20, 2014, with Ms. McKenzie, as patient CA, again seeking treatment from respondent.

7. After further investigation by the HQIA, a criminal case was filed against respondent in the United States District Court, Central District of California. The case against respondent was dismissed without prejudice on May 21, 2015.

8. By letter dated July 7, 2015, sent by certified and regular mail to respondent's address of record, Mr. Fuller informed respondent that the Board had scheduled an interview with him for September 22, 2015, concerning his care and treatment of patients M.B., M.M., and C.A. Both the certified letter and the letter sent by regular mail were returned to the Board's investigator as undeliverable.

9. On August 3, 2015, Mr. Fuller tried to reach respondent through an attorney, by telephone and by letter, about the September 22 interview. The attorney informed Mr. Fuller that he would not be representing respondent.

10. By letter dated August 3, 2015, Ernest J. Franceschi, Jr., attorney for respondent in this matter, informed Mr. Fuller that respondent would not participate in the scheduled interview, and that respondent was invoking his right under the Fifth Amendment of the United States Constitution not to speak with any Board investigator. Mr. Franceschi also challenged the Department's jurisdiction to regulate alternative health care practitioners, citing Business and Professions Code sections 2053.5 and 2053.6.¹ "All of the services provided by Dr. DeOrio to the individuals identified in your letter were rendered pursuant to the foregoing provisions and do not as a matter of law constitute the practice of medicine in California." (Ex. 23.)

11. Respondent did not appear for the September 22, 2015, interview.

12. In October 2015, the investigation of the consumer complaints against respondent was reassigned to Ellen Coleman, another HQIU investigator. By letter dated December 22, 2015, which was mailed to respondent's address of record, Ms. Coleman requested that respondent produce the certified medical records of patients M.B. and MM. Ms. Coleman enclosed a written Authorization for Release of Medical Information signed by each patient. She also enclosed a Certification of Records form for each patient. The form allows the licensee to certify the medical records being produced to HQIU. Among other things, certified medical records produced by a licensee assist the Board to assess whether documents provided by a complaining consumer are true and accurate. The form alternatively gives the licensee the option of certifying that there are no medical records to produce, with a check box next to

¹ All further statutory references are to the Business and Professions Code.

language that reads, "A thorough search of our files carried out under my direction and control revealed that this facility or business does not have the records described in the attached request for documents or subpoena duces tecum." (Ex. 24, italics omitted.) On December 21, 2015, the Board investigator received a letter from Mr. Franceschi requesting that all correspondence from the Board to respondent be directed to Mr. Franceschi.

13. Having received no response to her December 22 request for medical records, Ms. Coleman sent another letter, dated January 7, 2016, to respondent by certified mail, this time with a copy to Mr. Franceschi, requesting the certified medical records of patients M.M. and M.B., and again enclosing an authorized release signed by each patient. The letter sent to respondent's address of record was returned as undeliverable. Mr. Franceschi received his copy of the letter, however.

14. By letter dated January 12, 2016, Mr. Franceschi wrote to Ms. Coleman that respondent had directed him to inform her that respondent would not comply with her request for patient MM's and patient MB's medical records, asserting his rights under the Fifth Amendment to the United States Constitution. Respondent did not return to Ms. Coleman, either directly or through Mr. Franceschi, the Certification of Records forms with the boxed checked to indicate that he did not have any of the requested medical records.

15. By letter dated April 7, 2016, sent by overnight delivery to respondent at his address of record and to Mr. Franceschi, Ms. Coleman requested certified medical records of patient CA, and enclosed a written authorization for the release of the records. Mr. Franceschi responded, by letter dated April 8, 2016, that respondent would not comply with the request, asserting his rights under the Fifth Amendment to the United States Constitution. Respondent did not return to Ms. Coleman, either directly or through Mr. Franceschi, the Certification of Records forms with the boxed checked to indicate that he did not have any of the requested medical records.

16. As of the date of hearing, respondent has not produced any certified medical records of patients M.M., M.B., or CA. Nor has respondent completed and returned any of the Certification of Records forms with the box checked to indicate that no such records exist.

Additional Evidence

17. Respondent acknowledged that he was, at all relevant times, a licensed physician. He has practiced complementary alternative medicine (CAM) since 1994. Though he continued to practice medicine under his license after that date, he testified that he has not practiced medicine since some time before August 30, 2013, and did not practice medicine with respect to patients M.M., M.B., and C.A. Respondent testified that, because of his arrest and prosecution, his business failed and the DeOrio Wellness Center closed. He did not notify the Board of a change of his address of record because, he testified, he was traumatized by the events in his life.

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18. Respondent asserted, incorrectly, that because he practiced CAM exclusively, the Board had no jurisdiction to investigate consumer complaints against him concerning what the consumers alleged to be medical care, or to interview respondent and obtain from him certified medical records or a certification that he had no medical records for those patients.²

19. Respondent testified that his reliance on his Fifth Amendment rights was based entirely on his belief that he might be criminally prosecuted for practicing medicine without a license when he saw patients M.M. and MB. He feared that, although the federal case had been dismissed, the dismissal was without prejudice and prosecutors might file another case against him, or that he might be charged with a misdemeanor by the Santa Monica City Attorney's office. He contended, without evidentiary support, that although the felony count against him was, on its face, for practicing medicine without a license between December 4, 2013, and March 20, 2014, the case in fact pertained to the care and treatment he provided to patients M.M. and M.B.

20. Respondent testified that he made and kept no medical records for patients M.M., M.B., and C.A., and that any records would reflect only his CAM services. Respondent explained that he did not return the Certification of Records form because he had no medical records for those individuals, only CAM records, and the contract his clinic entered into with its members prohibited him from providing records to state agencies, including the Board. He explained that he did not check the box on the certification form, to indicate that he had no medical records for those individuals, because he was not treating the patients in a medical capacity. This explanation is nonsensical and cannot justify respondent's failure to return the certifications. The Board requested certified medical records for its investigation of the consumer complaints, not CAM records. If respondent had medical records, he was obligated to certify them and produce them to the Board. If he did not have medical records, he was obligated to so certify to the Board. Because respondent did not certify that he had no medical records, the Board had no basis to conclude that none existed.

21. Respondent has lived in Arizona since 1999; he used to visit California to operate the wellness center, when it was operating, for a few days per week. He does not practice medicine in Arizona or any other state, and is not currently working. Respondent has no intention of ever again practicing traditional medicine in California. He would like his certificate to be reinstated and "retired."

² Some evidence was introduced to support a claim that, at least with respect to patient M.M., respondent practiced medicine and held himself out as practicing medicine. But whether the Board would be justified, after a full investigation, in concluding that respondent was, in fact, practicing medicine with respect to patient M.M., and with respect to patient M.B., is beyond the scope of this hearing. This matter concerns respondent's refusal to submit to a Board interview and to certify medical records.

LEGAL CONCLUSIONS

Burden of Proof

1. The rigorous educational, training, and testing requirements for obtaining a physician's license justify imposing on complainant a burden of proof of clear and convincing evidence. (Evid. Code, § 115; see *Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; *Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911.)

Applicable Authority

2. The Board's highest priority is to protect the public. (§ 2229.) The Board is responsible for enforcing the disciplinary provisions of the Medical Practice Act (§ 2004, subd. (a)), and may take action against a licensee for unprofessional conduct, which includes, among other things, any violation of the Medical Practice Act, and "the repeated failure by a certificate holder, in the absence of good cause, to attend and participate in an interview by the board. (§ 2234, subds. (a), (h).) It is a violation of the Medical Practice Act for a licensee to refuse a Board request for certified medical records of a patient, if the request is accompanied by the patient's written authorization for release of records to the Board. (§ 2225.5, subd. (a)(1).)

3. A certificated practitioner who violates the Medical Practice Act may have his or her certificate revoked or suspended or placed on probation, or have "other action taken in relation to discipline" as the Board deems proper. (§ 2227.) The Board retains jurisdiction to discipline a certificate that is retired, inactive, or disabled. (§ 2220.)

4. It is unlawful to practice medicine "without having at the time of so doing a valid, unrevoked, or unsuspended certificate . . ." (§ 2052, subd. (a).) A person who provides services to a client, and does not hold himself or herself out as a physician or perform certain specified procedures, is not in violation of section 2052 as long as he or she makes certain disclosures to the client and obtains a written acknowledgement in return. (§§ 2053.5, 2053.6.) A physician who practices CAM, however, remains subject to discipline by the Board for violations of the Medical Practice Act or other acts of unprofessional conduct, such as those alleged here under section 2234, subdivisions (a) and (h). The physician is not subject to discipline for gross negligence, repeated negligent acts, or incompetence under section 2234, subdivisions (b), (c), or (d), none of which is alleged in this case, but only "solely on the basis that the treatment or advice he or she rendered to a patient is alternative or complementary medicine . . . if that treatment or advice meets" certain requirements, including obtaining informed consent and providing information about conventional treatment. (§ 2234.1, subd. (a).)³

³ "For purposes of this section, 'alternative or complementary medicine,' means those health care methods of diagnosis, treatment, or healing that are not generally used but that

5. The constitutional guarantee against compelled self-incrimination protects an individual from being forced to testify against himself or herself in a pending proceeding, where he or she reasonably believes the answers might incriminate him or her in a criminal case. (See, e.g., *Hoffman v. United States* (1951) 341 U.S. 479, 486; *United States v. Apfelbaum* (1980) 445 U.S. 115, 128.) Respondent believed charges could be filed against him by the Santa Monica City Attorney, or again in federal court, the first case having been dismissed without prejudice. He testified that he asserted his constitutional rights out of concern that he would be prosecuted for treating patients M.B. and M.M. while his license was suspended. Respondent's belief was not reasonable. Board records show, and respondent agrees, that his license was not suspended, and was valid and in good standing, when he saw those two patients. No competent evidence was offered to show that the previous prosecution involved patients M.B. and M.M.

6. Moreover, respondent's blanket assertion of his rights under the Fifth Amendment to the United States Constitution in refusing to be interviewed by the Board's investigator and to produce requested certified medical records, did not afford him the protection he sought. By refusing to appear at the interview to assert his Fifth Amendment rights when questioned, and by refusing to certify to the Board, on the forms the investigator sent him, that he had no medical records, as he claims, respondent did not establish his right with sufficient particularity. (See *North River Ins. Co., Inc. v. Stefanou* (4th Cir. 2012) 831 F.2d 484, 486 [civil action; blanket refusal to answer or respond was not sufficient].)

Cause for Discipline

7. Cause exists to suspend or revoke respondent's license under section 2234, subdivisions (a) and (h), in that clear and convincing evidence established that respondent engaged in unprofessional conduct and violated the Medical Practice Act by refusing to attend and participate in an interview with the Board, without good cause, as set forth in Factual Findings 3 through 21.

8. Cause exists to suspend or revoke respondent's license under sections 2234, subdivision (a), and 2225.5, subdivision (a)(1), in that clear and convincing evidence established that respondent refused to comply with the Board's requests for certified medical records, as set forth in Factual Findings 3 through 21.

9. Complainant has clearly and convincingly established that respondent has repeatedly acted in violation of the Medical Practice Act and of statutory provisions governing the professional practice of medicine. The purpose of a disciplinary action such as this is to protect the public, and not to punish the licensee. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) In this case revocation is warranted to protect the public.

provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method." (§ 2234.1; subd. (b).)

ORDER

Physician's and Surgeon's Certificate No. G 74544, issued to respondent Keith Robert DeOrio, M.D., is hereby revoked.

DATED: May 24, 2017

DocuSigned by:

Howard W. Cohen

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearing

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7 Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO July 8 20 16
BY W. S. J. ANALYST

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9 BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
10 STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 17-2013-234390

12 KEITH ROBERT DEORIO, M.D.
1821 Wilshire Blvd., Suite 100
13 Santa Monica, CA 90403

ACCUSATION

14 Physician's and Surgeon's Certificate
No. G 74544,

15 Respondent.
16

17
18 Complainant alleges:

19 PARTIES

20 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
21 capacity as the Executive Director of the Medical Board of California, Department of Consumer
22 Affairs (Board).

23 2. On or about July 7, 1992, the Board issued Physician's and Surgeon's Certificate
24 Number G 74544 to Keith Robert DeOrío, M.D. (Respondent). Respondent's certificate expired
25 on April 30, 2014, and is in delinquent status, however pursuant to Business and Professions
26 Code section 494.5 the certificate is also in suspended status. Specifically, on September 3, 2013
27 the Board issued a suspension notice to Respondent pursuant to Business and Professions Code
28 section 494.5 based on Respondent's delinquent unpaid taxes. On March 4, 2014 another

1 suspension notice was issued to Respondent pursuant to Business and Professions Code section
2 494.5.

3 JURISDICTION

4 3. This Accusation is brought before the Board, under the authority of the following
5 laws. All section references are to the Business and Professions Code unless otherwise indicated.

6 4. Section 2234 of the Code, states:

7 "The board shall take action against any licensee who is charged with unprofessional
8 conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not
9 limited to, the following:

10 "(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the
11 violation of, or conspiring to violate any provision of this chapter.

12 "...

13 "(h) The repeated failure by a certificate holder, in the absence of good cause, to attend and
14 participate in an interview by the board. This subdivision shall only apply to a certificate holder
15 who is the subject of an investigation by the board."

16 5. Section 2225.5 of the Code states:

17 "(a) (1) A licensee who fails or refuses to comply with a request for the certified medical
18 records of a patient, that is accompanied by that patient's written authorization for release of
19 records to the board, within 15 days of receiving the request and authorization, shall pay to the
20 board a civil penalty of one thousand dollars (\$1,000) per day for each day that the documents
21 have not been produced after the 15th day, up to ten thousand dollars (\$10,000), unless the
22 licensee is unable to provide the documents within this time period for good cause.

23 "...

24 "(e) Imposition of the civil penalties authorized by this section shall be in accordance with
25 the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Division 3 of
26 Title 2 of the Government Code).

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1 treatment. Patient M.M. also alleged, like patient M.B.'s husband, that Respondent may be
2 mentally impaired. Patient M.M. likewise included with her complaint a signed Authorization for
3 Release of Medical Information for her medical records as maintained Respondent.

4 11. The investigation into the allegations asserted by M.M. was consolidated with the
5 already open investigation into Respondent's case and treatment of M.B.

6 12. As part of its investigation into the allegations against the Respondent, the Board
7 conducted an undercover operation. C.A., an undercover investigator with the Board, sought care
8 and treatment from Respondent and was treated by him twice as a patient.

9 13. On or about July 7, 2015, an investigator for the Board sent a letter to Respondent via
10 certified and regular mail at his address of record informing Respondent that he was scheduled to
11 be interviewed by the Board on September 22, 2015 at the Division of Investigation, Health
12 Quality Investigation Unit, Glendale Field Office, located in Glendale, California. The letter
13 further informed Respondent that the purpose of the interview was to discuss his care and
14 treatment of patients M.B., M.M. and C.A.

15 14. Both the certified letter and that mailed via regular mail were returned to the Board's
16 investigator from the U.S. Postal Office as unable to be forwarded.

17 15. On or about August 3, 2015, the Board's investigator spoke to an attorney for
18 Respondent. The investigator then emailed the attorney a copy of the letter he had sent
19 Respondent regarding the interview. The attorney later contacted the investigator to inform him
20 that he would not be representing Respondent.

21 16. On August 6, 2015, the investigator received a letter from another attorney for
22 Respondent. The letter stated that Respondent declined to participate in the interview with the
23 Board scheduled for September 22, 2015. The letter further stated that Respondent was invoking
24 his right under the Fifth Amendment of the United States Constitution not to speak with any
25 investigator from the Board.

26 17. Respondent's conduct, as set forth in paragraphs 7 through 16, inclusive above,
27 constitutes unprofessional conduct pursuant to Code section 2234, subdivisions (a) and (h), in that
28 Respondent failed, in the absence of good cause, and, in fact, refuses to attend and participate in

1 an interview with the Board, despite being the subject of an investigation by the Board. As such,
2 cause for discipline exists.

3 **SECOND CAUSE FOR DISCIPLINE**

4 **(Unprofessional Conduct - Refusal to Comply with Request for Patient Records)**

5 18. Respondent is subject to disciplinary action under Code sections 2234, subdivision
6 (a), and 2225.5, subdivision (a)(1), in that Respondent failed and refuses to comply with the
7 Board's requests for the certified medical records of patients M.B., M.M. and C.A. The
8 circumstances are as follows:

9 19. On or about December 22, 2015, the investigator assigned to Respondent's case
10 mailed a letter requesting the certified medical records of patients M.M. and M.B. to Respondent
11 at his address of record. Enclosed with the investigator's request was a written Authorization for
12 Release of Medical Information signed by each patient.

13 20. On or about December 23, 2015, the investigator received a letter from Respondent's
14 attorney requesting that all correspondence from the Board to Respondent be directed to
15 Respondent's counsel.

16 21. Having received no response to her December 22, 2015 request for M.M.'s and
17 M.B.'s medical records from Respondent or his attorney, on or about January 7, 2016, the
18 investigator sent another letter to Respondent via certified mail, on which his attorney was
19 copied, requesting the certified medical records of patients M.M. and M.B. Enclosed with the
20 investigator's request was a written Authorization for Release of Medical Information signed by
21 each patient.

22 22. On or about January 11, 2016, the investigator's December 22, 2015 letter requesting
23 the certified medical records of patients M.M. and M.B., which was mailed to Respondent's
24 address of record with the Board, was returned to sender as undeliverable.

25 23. On or about January 13, 2016, the investigator received the return receipt postcard
26 from Respondent's attorney indicating that he was in receipt of the January 7, 2016 letter to
27 Respondent requesting the certified medical records of patients M.M. and M.B.

28 ///

- 1 3. Ordering Keith Robert DeOrio, M.D. to pay the Board civil penalties in the amount of
2 \$30,000 for his failure and refusal to comply with the Board's requests for the certified medical
3 records of patients M.M., M.B. and C.A.;
- 4 4. Ordering Keith Robert DeOrio, M.D., if placed on probation, to pay the Board the
5 costs of probation monitoring; and
- 6 5. Taking such other and further action as deemed necessary and proper.

7
8 DATED: July 8, 2016


KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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