

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

In the Matter of the Accusation)	
Against:)	
)	
)	
DAVID WAYNE BAILEY, M.D.)	Case No. 09-2012-227123
)	
Physician's and Surgeon's)	OAH No. 2014100851
Certificate No. G41053)	
)	
Respondent)	
_____)	

DECISION

The attached Proposed Decision is hereby amended, pursuant to Government Code section 11517(e)(2)(c) to correct technical or minor changes that do not affect the factual or legal basis of the proposed decision. The proposed decision is amended as follows:

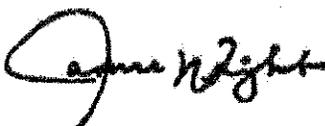
1. Page 1, paragraphs 1 and 4: the dates the matter was heard, January 14 and 15, 2014, and submitted, January 15, 2014, will be corrected to read "January 14 and 15, 2015" and "January 15, 2015."
2. Page 2, paragraphs 3 and 4: the dates that the disciplinary hearing was set to commence of January 15, 2014, sworn testimony was provided of January 15 and 16, 2014, and closing argument was given of January 16, 2014 will be corrected to read "January 15, 2015," "January 15 and 16, 2015," and "January 16, 2015."

The attached 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 April 3, 2015.

IT IS SO ORDERED: March 6, 2015.

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:

DAVID WAYNE BAILEY, M.D.,

Physician's and Surgeon's Certificate
No. G78854,

Respondent.

Case No. 09-2012-227123

OAH No. 2014100851

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 14 and 15, 2014, in San Diego, California.

Karolyn M. Westfall, Deputy Attorney General, Department of Justice, State of California, represented complainant, the Executive Director of the Medical Board of California, Department of Consumer Affairs, State of California.

No appearance was made by or on behalf of respondent, David Wayne Bailey, M.D.

The matter was submitted on January 15, 2014.

SUMMARY

Clear and convincing evidence established that respondent is alcohol and benzodiazepine dependent, that he used alcohol and controlled substances in a manner dangerous to himself and others, that he prescribed a controlled substance to another with the intention of using that substance himself, that he self-administered a controlled substance that he had prescribed in the name of another, that he violated the Medical Practice Act, and that he engaged in unprofessional conduct. Clear and convincing evidence established that respondent suffers from a physical or mental illness that affects his competency to safely practice medicine.

No evidence was presented in explanation, mitigation, or rehabilitation.

The outright revocation of respondent's certificate is the only disciplinary remedy that will protect the public.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 11, 2014, Accusation Case No. 09-2012-227123 was signed on complainant's behalf. The accusation alleged that respondent, David Wayne Bailey, M.D., used alcoholic beverages to the extent that he was a danger to himself or others (first cause for discipline), used alcoholic beverages to the extent that his ability to safely practice medicine was impaired (second cause for discipline), self-administered controlled substances prescribed for others (third cause for discipline), used dangerous drugs in a manner that was dangerous to himself or others (fourth cause for discipline), violated state laws related to dangerous drugs and controlled substances (fifth cause for discipline), engaged in dishonesty (sixth cause for discipline), knowingly made false representations of fact (seventh cause for discipline), created false medical records with a fraudulent intent (eighth cause for discipline), violated the Medical Practice Act (ninth cause for discipline), and engaged in general unprofessional conduct (tenth cause for discipline). The accusation also alleged respondent suffered from a mental or physical condition that affected his competency to practice medicine safely (a cause for action under Business and Professions Code section 822). The accusation and other jurisdictional documents were served on respondent, who timely filed a notice of defense.

Complainant served respondent with notice of the time and place of the hearing at the address listed in respondent's notice of defense and address of record on file with the Medical Board. The disciplinary hearing was set to commence on January 15, 2014, in San Diego, California 92101. Several days before the hearing, respondent telephoned complainant's counsel and advised her that he was not going to appear at the hearing. Respondent never contacted OAH.

On January 15, 2014, the administrative record was opened. No appearance was made by or on respondent's behalf. Jurisdictional documents were presented that established that respondent was properly served with all required documents and notices and that it was proper to proceed with the disciplinary action. On January 15 and 16, 2014, sworn testimony was provided and documentary evidence was received. On January 16, 2014, a closing argument was given; the record was closed; and the matter was submitted.

Respondent's License History

2. On May 18, 1994, the Medical Board issued Physician's and Surgeon's Certificate No. G78854 to respondent. On September 15, 2014, the Medical Board issued an Interim Order of Suspension – No Practice that was in effect at the time of the disciplinary hearing in this matter. There is no history of other disciplinary action having been imposed against respondent's certificate.

Evidence of Respondent's Substance Abuse

3. On Saturday, February 25, 2012, around 10:12 p.m., the San Bernardino County Sheriff's Department responded to a call concerning an incident taking place at the intersection of Mayberry and Main streets in Loma Linda, California. The investigating officer observed respondent approaching an adult female, E.D., who was crying hysterically and vomiting. Several adults were in E.D.'s immediate presence. These individuals said they were taking E.D., who was their mother, to the hospital. They were arguing with respondent, who was outside his vehicle and approaching E.D. on foot. Respondent told the officer, "I'm a physician and I know what I am doing." An officer told respondent to return to his vehicle. Respondent refused and continued arguing. The officer smelled a strong odor of alcohol about respondent, noted his slurred speech, and observed him swaying back and forth. Respondent was extremely intoxicated and could not care for himself. The officer arrested respondent for public intoxication, in violation of Penal Code section 647, subdivision (f), and took respondent to the central detention center where he was booked.

Criminal charges arising out of this incident were dismissed on August 29, 2012.

4. In 2012, respondent participated in a preventative medicine residency program at Loma Linda University School of Medicine. On October 5, 2012, the Loma Linda University Medical Center filed an 805 report¹ with the Medical Board in which the Center notified the Medical Board of the following: the Center had learned of respondent's arrest for public intoxication; on July 13, 2012, respondent was instructed by Linda Ferry, M.D., Associate Program Director of the Loma Linda Preventative Medicine Residency program, that he was not to return to work at the VA Preventative Medicine Clinic; the Center referred respondent to the hospital's Well-Being Committee for assessment and treatment; and respondent resigned from the residency program.

5. The Medical Board initiated an investigation. Respondent provided the Medical Board with authorizations for the release of psychiatric information and other medical information. Medical Board investigators obtained CURES reports, hospital records, medical records, and other documents. In November 2012 and March 2014, respondent agreed to undergo physical and mental examinations to determine his capacity to safely practice medicine.

Dr. Heh's Opinions

6. On January 16, 2014, C. W. Christopher Heh, M.D., evaluated respondent at the Medical Board's request. Dr. Heh is licensed to practice medicine in California. Dr. Heh is a board-certified psychiatrist.

Dr. Heh performed an independent psychiatric evaluation of respondent to determine whether respondent suffered from a mental disorder that might interfere with his ability to

¹ The 805 report was filed in accordance with Business and Professions Code section 805.

safely practice medicine. Dr. Heh's evaluation included a comprehensive review of medical and employment records and a face-to-face interview.

Dr. Heh determined that respondent had been treating with professionals for mental health issues since 2002; that respondent had been diagnosed with a major depressive disorder; that there were possible substance abuse issues; that respondent was arrested in 2012 for public intoxication; that respondent experienced grave difficulties at the Loma Linda Residency Preventative Medicine program; that respondent was diagnosed by his treating psychiatrist with alcohol dependency, benzodiazepine dependency, and a major depressive disorder; that respondent was placed on administrative leave as a result of "serious deficiencies in the competency of professionalism"; and that respondent resigned from the residency program. Dr. Heh's review of CURES reports suggested that respondent frequently prescribed benzodiazepines to E.D., his girlfriend.

Respondent presented to Dr. Heh for a psychiatric evaluation on time. According to Dr. Heh's report, respondent "gave the impression that he did not fully appreciate the importance of this psychiatric evaluation/interview giving me a 'blank/puzzled' look." Dr. Heh told respondent that the purpose of the interview was to determine whether respondent suffered from a mental disorder that might interfere with his ability to safely practice medicine.

During the interview, respondent said he suffered from "low grade depression." He was not apologetic or remorseful for his poor performance in the residency program, stating he did not appreciate being treated as a resident and that preventative medicine was a poor fit. He told Dr. Heh that he did not disclose all the psychotropic medications he had taken in response to questions Dr. Heh posed in a written questionnaire. Respondent said that after resigning from the residency program, he moved to the East Coast to live with his parents, after which he returned to California to practice medicine. He provided a history of psychiatric treatment that was unclear to Dr. Heh, who believed it possible that respondent was self-prescribing controlled substances.

Dr. Heh diagnosed the following mental disorders: Major Depressive Disorder, mild severity currently; Alcohol Use Disorder, moderate severity; Sedative Hypnotic Anxiolytic Use Disorder, mild severity; and rule/out neurocognitive disorder, unspecified.

In his report, Dr. Heh wrote, "His addiction to alcohol and sedative hypnotic anxiolytics still remains in force due to the fact he continues to drink alcohol and he continues to consume Klonopin² daily. In general the treatment for addictions is

² Notice is taken that Klonopin, the trade name for Clonazepam, is a benzodiazepine medication that has anxiolytic, anticonvulsant, muscle relaxant, amnesic, sedative, and hypnotic properties. Klonopin has been approved by the FDA for the treatment of epilepsy and panic disorders. It is a controlled substance. Long-term effects from Klonopin use include tolerance, dependence, and withdrawal syndrome. The use of Klonopin may impair the ability to drive or operate machinery in a safe manner. The central nervous system

COMPLETE abstinence.” Dr. Heh observed that respondent’s failure to accurately report certain matters, including the psychotropic medications he had taken and a three-day admission to an Oregon health care facility for mental health issues, could have been due to willful omission or an underlying neurocognitive disorder such as Alzheimer’s Dementia.

Dr. Heh’s report concluded:

In conclusion, Dr. Bailey does not appear to be a totally reliable historian. He appears to have suffered severe mental disorder(s) in the past that have required hospitalizations. Currently, he still appears to suffer from these mental disorders, which include addictions to alcohol and controlled substances. He continues to drink alcohol and consume a controlled substance, namely Klonopin. However, at this time I do not see a severe active indication that his mental illness poses an immediate threat to himself or to others. It appears at this time his mental illness does not jeopardize patients and/or public safety. However, due to the nature of his mental illness, for which relapses can occur – it is essential that he have ongoing monitored psychiatric/psychological visits, active treatment of his addictions, and further work up to rule out possible underlying Neurocognitive Disorder. If his Neurocognitive work up proves to be negative then one must assume a willful omission of facts leading to his inconsistencies in his interview and history.

Dr. Nair’s Opinions

7. On May 6, 2014, Mohan Nair, M.D., evaluated respondent at the Medical Board’s request. Dr. Nair is licensed to practice medicine in California. He is a board-certified psychiatrist. He also holds certification from the American Society of Clinical Psychopharmacology, the American Board of Addiction Medicine, and the American Board of Pain Medicine.

Dr. Nair conducted a three and one-half hour interview with respondent, administered the MMPI-2 and MCMI III, conducted neuropsychological testing, and reviewed records.

Respondent described himself as a 50-year-old male who was currently employed as a pediatrician by La Salle Medical Associates in Hesperia. At the time, an interim suspension order was not in place. Respondent reported that he worked 32 hours per week and had done so since mid-2014, earning \$132,000 per year. He said he had been married for the last year to E.D., who was 41 years old.

depressing effects of Klonopin are intensified by the consumption of alcohol beverages, and the consumption of alcohol should be avoided when taking Klonopin.

Respondent reported that after his arrest for public intoxication, he went "through a midlife crisis. I had moved to Maryland. I was living in the basement of my mother's house. I can recall getting the letters [from the Medical Board], but I did not do anything about it." He said he was drinking a lot. He said he returned to California, where he met with Dr. Heh and obtained employment with La Salle Medical Associates.

Respondent described his current life situation and day-to-day functioning. He said he was seeing about 25-30 patients per day, spending time with his wife, and reading books related to Alcoholics Anonymous. He said he did not have an AA sponsor. He said he began attending AA meetings because that had been required of him by the Loma Linda Well Being Committee.

Dr. Nair performed an independent psychiatric evaluation to determine whether respondent suffered from a mental disorder that might interfere with respondent's ability to safely practice medicine. The evaluation included a review of medical and employment records, psychological testing, and a face-to-face interview. Respondent's educational history included graduation from high school and college, graduation from medical school in 1992, participation in a pediatric residency from 1992 through 1995, becoming board-certified in pediatrics, and then working at Kaiser early in his career. He said he began a residency program in preventative medicine in March 2012 and resigned from that program four months later "because I could not afford to stay." Respondent provided a medical history that included a head injury arising out of a 1990 traffic collision, the repair of a hernia in 2007, treatment for hypertension, and treatment for a gastroesophageal reflux disease.

Respondent provided a psychiatric history that included having seen a psychiatrist, possibly for depression, when he was 23 years old, when he was considering dropping out of medical school. According to respondent, "I got a job. I felt better." Respondent said he saw a psychologist and a psychiatrist in 1992, during his pediatric residency. He reported that he had been seeing Dr. Kohut, a psychiatrist, for the past 15 years. He said he began taking Trazadone³ 10 years before his visit with Dr. Nair. Respondent told Dr. Nair that he was currently taking ¼ mg of Klonopin four times a day, and occasionally six times a day. He said he took Klonopin for panic and anxiety attacks. He mentioned that he had been hospitalized in Portland during a fellowship in 2002 "when he was most depressed."

Respondent reported consuming alcoholic beverages since he was 19 years old. He said he last consumed an alcoholic beverage four days before his interview with Dr. Nair. He said he drank four to six beers once or twice a week; if he did not drink beer, he drank four to six glasses of wine once or twice a week. He liked hard liquor less than beer or wine. When he drank alcoholic beverages, he often listened to music. He said he would not take Trazodone if he was drinking heavily, but admitted he passed out when he drank heavily. He estimated he had passed out at least 50 times, most recently about two months before his interview with Dr. Nair. With regard to those blackouts, respondent said, "I would drink

³ Trazadone is an antidepressant of the serotonin antagonist and reuptake inhibitor (SARI) class. It also has anti-anxiety (anxiolytic) and sleep-inducing (hypnotic) effects. It is a controlled substance.

maybe about even as much as six beers. I would fall asleep on the couch, and I wouldn't know when I actually went to my bed."

Respondent said that in 2012, when he was arrested for public intoxication, he was told his blood alcohol level was 0.11 percent. With regard to the incident giving rise to his arrest, he reported that he had gone to get his now-wife, who had stormed out of the house after drinking. He was told that she was in a parking lot in Loma Linda, so he went there to find her. He said he had consumed four or five drinks before he left home. He said he was arrested and was in custody for about eight hours. He hired an attorney, and charges were dismissed.

Respondent stated that, while he was in the preventative medicine residency program, he was drinking heavily. He said that whenever he drank heavily the day before he was scheduled to go to work (he said he consumed six to ten beers from 6:00 p.m. to 1:00 or 2:00 a.m. on those occasions), he had difficulty waking up the next morning. He said he called in sick and did not report to work. He said his supervisor was upset about his frequent absences.

Respondent said that between 2009 and 2013, he drank six to ten beers three to four nights a week. On at least one of those nights, he consumed 12 to 20 beers or a bottle of wine together with one or two six-packs of beer. He said his excessive consumption of alcohol affected his relationship with E.D.

Respondent said he called in prescriptions for Klonopin in E.D.'s name for his own use because he did not have insurance and E.D. had insurance that covered the cost of the medication. He used this technique as a method of self-prescribing. He also had colleagues call in prescriptions of Klonopin for his use.

Respondent participated in a 30-day chemical dependency program for just five days. He said he left the program before its scheduled completion date "because I felt that I was not getting anything out of being there with junkies and alcoholics. We had nothing in common. They also wanted me off the Klonopin and it didn't feel good."

Dr. Nair performed a mental status examination. Respondent was neatly groomed. He had slight eye tics. Eye contact was good. Respondent's speech and thought processes were coherent and goal directed. Attention and concentration were excellent. Respondent responded to multiple complex questions asked in tandem. The questions did not have to be repeated or rephrased. His memory was intact. He denied feelings of depression for the last seven years. He denied feeling anxious about anything other than financial issues. He denied psychotic symptoms. He denied thoughts of suicide or hopelessness. When he was confronted with unfavorable information that he had not disclosed voluntarily, respondent acknowledged its truth and said he had not volunteered it because he was ashamed.

Neuropsychological testing was conducted. Respondent was pleasant and cooperative, alert and attentive, and oriented in all spheres. His speech was fluent and normal. His comprehension was grossly intact. His thought processes were logical and

linear. His mood was euthymic, and his affect was appropriate. Dr. Bailey put forth adequate effort on memory tests. WAIS-IV testing estimated a full scale IQ of 109. Respondent's auditory attention was average. His auditory working memory was average. His visual working memory was low average. His visuospatial skills were average. His speech was fluent and normal for rate, rhythm, and volume. His vocabulary was within the average range. Respondent was able to encode, consolidate, and recall material. The results of learning and memory testing demonstrated difficulty with organization and a failure to utilize effective learning strategies. However, executive functioning was intact. In summary, respondent possessed average intellectual abilities. He appeared to have some difficulty with abstract concepts (e.g., proverbs) and demonstrated a somewhat concrete manner of thinking.

Respondent's approach to the MMPI-2 "was open and cooperative." The MMPI-2 profile was valid. The testing indicated that, in his interpersonal relations, respondent was outgoing and sociable, with a strong need to be around others. No clinical mental health diagnosis was indicated, although, "The possibility that he has a substance abuse or use problem should be evaluated further to determine if this is a possible source of his problem situation."

Respondent completed the Millon Clinical Multiaxial Inventory-III. He reported that he recently had experienced marital and family problems and problems relating to his use of alcohol. There was a "distinct tendency toward avoiding self-disclosure . . . in this patient's response style." Possible Axis II conclusions included narcissistic personality traits and obsessive compulsive personality features. The MCMI-III report stated, "Once he accepts the therapist's competence and goodwill, he will probably carry out treatment recommendations, especially if they are specific and time-limited."

Dr. Nair's report included a summary of employment records, CURES reports, and medical records.

Based on his interview with respondent, the results of neurocognitive and psychological testing, and a review of records, Dr. Nair reached the following DSM-IV diagnosis:

Axis I:	311.00	Depression, Not Otherwise Specified
	303.90	Alcohol Dependence
	304.10	Benzodiazepine Dependence
	291.80	Alcohol Induced Mood Disorder.
Axis II:	None.	
Axis III:	History of head trauma.	
Axis IV:	Psychosocial stressors related to occupational & legal system.	
Axis V:	GAF: 55.	

In his narrative report, Dr. Nair concluded in part:

In mid-2012, subsequent to having dropped out of the preventative medicine program at Loma Linda University Medical Center, Dr. Bailey dropped out of the 30-day chemical dependency program after five days. Dr. Bailey left "because I was not getting anything out of being there with junkies and alcoholics. We had nothing in common. They also wanted me off the Klonopin and it didn't feel good." Dr. Bailey's inability to recognize the destructive impact of Alcohol Dependence on his life is alarming.

Dr. Bailey remains in dangerous denial about his Alcohol Dependence even though it has led to actions of a life-threatening nature and has repeatedly caused disruptions in his employment, education and relationships. The reasonable medical probability is that his heavy drinking has resulted in poor responses to psychiatric medication treatment and psychotherapy that he has had on an ongoing basis for two decades.

The essential feature of Alcohol Dependence is a cluster of cognitive, behavioral and physiological symptoms indicating that the individual continues to use the substance despite significant substance-related problems. Alcohol Use Disorder is defined by a cluster of behavioral and physical symptoms which can include withdrawal, tolerance and craving. Once a pattern of repetitive and intense use develops, individuals with Alcohol Use Disorder may devote substantial periods of time to obtaining and consuming alcoholic beverages. Craving for alcohol is indicated by a strong desire to drink that makes it difficult to think of anything else and that often results in the onset of drinking. School and job performance may also suffer either from the aftereffects of drinking or from actual intoxication The individual may use alcohol in physically hazardous circumstances (e.g., driving an automobile, swimming, operating machinery while intoxicated). Finally, individuals with an Alcohol Use Disorder may continue to consume alcohol despite the knowledge that continued consumption poses significant physical (e.g., blackouts, liver disease), psychological (e.g., depression), social or interpersonal problems (e.g., violent arguments with spouse while intoxicated, child abuse).

Dr. Nair also provided a diagnosis of Benzodiazepine Dependence. Following his review of CURES data, Dr. Nair concluded that respondent had been taking Klonopin in

amounts well beyond that prescribed by Dr. Kohut (respondent's treating psychiatrist) and that respondent had obtained Klonopin by unlawfully prescribing it for his wife. Dr. Nair observed that the combined use and dependence on alcohol and benzodiazepine was dangerous.

According to Dr. Nair, respondent's chronic problems with mood and poor judgment raised concerns about persistent Postconcussional Disorder due to the head injury respondent suffered in the 1990 traffic collision. However, given the nature of respondent's alcohol abuse, Dr. Nair could not assess whether other factors might be involved in diagnosing a neurocognitive disorder. Any conclusion in that regard could be reached only if respondent remained abstinent from the use of alcohol for a period of six months or longer.

With regard to respondent's substance abuse problems, Dr. Nair wrote:

Dr. Bailey is not in recovery. The amount of time that he has worked is too short to make any conclusions on his continued ability to work. Given that he is not in recovery, he continues to drink in spite of having been in a treatment program, after having left treatment and continuing to be in denial. His prognosis is guarded. It is questionable how long he can actually sustain his current employment given that he is not in treatment, is not really working a 12-Step Program, and is not able to maintain abstinence.

All the mental health treatment that Dr. Bailey has been getting has not been helpful and it is not likely to help since he continues drinking. Since he has not been forthcoming to his doctors about the extent of his drinking, the primary focus should be treatment of his alcohol dependence. Given his long history, it is imperative that he is on anticraving drugs and possibly Antabuse. It is unlikely that he will be able to abstain on his own. Dr. Bailey is suffering from Alcohol Dependence. Other conditions include alcohol-related mood disorder and possibly alcohol-related cognitive impairment. Dr. Bailey had a motor vehicle accident when he was in his 20s with a loss of consciousness. There may be distant effects related to the traumatic brain injury.

In his narrative report, Dr. Nair concluded, "Dr. Bailey is an active alcoholic who should not be practicing at present. Dr. Bailey is a danger to himself, patients and the public if he does not completely abstain from drinking Dr. Bailey's ability to practice medicine safely is impaired by his Alcohol Abuse"

8. Dr. Nair testified in this hearing in a manner entirely consistent with the findings, opinions, and conclusions set forth in his narrative report. In addition to those matters contained in his report, Dr. Nair testified that respondent's prolonged use of

Klonopin to treat his anxiety was contraindicated and had resulted in tolerance and dependence. He testified that taking Klonopin and consuming alcoholic beverages in tandem "was a medically dangerous combination" that had a synergistic effect. Respondent's use of Klonopin and alcohol had numerous negative impacts on his ability to practice medicine, ranging from simply not showing up at the worksite to more sophisticated effects such as having cognitive difficulty when analyzing data and exercising medical judgment.

Dr. Nair testified that respondent's prescribing a controlled substance to E.D. involved unprofessional and unethical conduct in the absence of emergent circumstances. Prescribing a controlled substance to a family member with the intent of self-administering that medication involved dishonesty and unprofessional conduct. Respondent's failure to maintain medical records to support the prescription of a controlled substance to E.D. involved conduct falling below the standard of care.

9. Dr. Nair's expert testimony was based on his education, training and experience, as well as his review of voluminous medical records, his interview with respondent, and the results of psychological and neuropsychological testing. Dr. Nair's testimony was credible.

The CURES Reports

10. California maintains a database relating to the prescription of controlled substances to patients in California. Physicians, pharmacies, certain law enforcement agencies, and others have access to this controlled substance database, which is known as the Controlled Substance Utilization Review and Evaluation System (CURES).

11. Natalie Zellmer, an experienced Medical Board investigator, was assigned to investigate the 805 report involving respondent. During her investigation, Ms. Zellmer obtained CURES reports that included prescriptions written for E.D. and prescriptions written for respondent by health care providers.

Ms. Zellmer's review of CURES data established that respondent was prescribed Klonopin by a treating physician and that respondent had prescribed Klonopin to E.D. on two dozen occasions. Ms. Zellmer provided her findings to Dr. Heh and to Dr. Nair.

12. Dr. Heh believed that respondent's prescription of Klonopin to his wife/girlfriend, E.D., raised ethical considerations. In his report, Dr. Heh raised the possibility that respondent "may be self-prescribing or prescribing for his wife/partner for this has been alluded to by his past psychiatrist . . . and is noted in his CURES report."

13. Dr. Nair's report stated, "He [respondent] has called in Klonopin on his wife's name because he did not have insurance and she had insurance as a way of self-prescribing . . . Dr. Bailey called in Klonopin for his wife with the purpose of wanting to use it for himself between 2011 and 2012."

Respondent's Testimony on August 29, 2014

14. A hearing was conducted before Administrative Law Judge Roy W. Hewitt on August 29, 2014, that related to a Petition for an Interim Suspension Order. Respondent appeared on his own behalf and testified under oath at that hearing.

Respondent testified that he was working as a pediatrician at the time of the hearing. He said was seeing Dr. John Kohut, a psychiatrist, once every six months. He said that he was seeing Dr. Kurt Bickford, a psychologist, once a month. He admitted that he had consumed alcoholic beverages about six days before the hearing. Respondent provided a written statement to ALJ Hewitt that stated, "I have stopped drinking this month and have determined that I will never take another alcoholic drink." Respondent prepared that statement after he consumed alcoholic beverages about six days before.

Respondent testified that in the past he had told himself that he was not going to drink on a given day but had then consumed alcoholic beverages anyway. He said he had blacked out on many occasions from consuming too much alcohol, but not since he began working as a pediatrician in February 2014. Respondent said that he had been arrested for public intoxication in 2012, that he had failed to show up to work during his residency on several occasions in 2012 after drinking too much the night before, and that he had spent five days in a 30-day substance abuse program before leaving that program.

Respondent admitted that he prescribed Klonopin to his wife on 18 occasions and that he did so for his own use. He said,

I was going through a period of financial hardship. I didn't have medical insurance, so the only way I could get not only Klonopin, but my other medications, including the antidepressant, [and] medication for reflux, I – I prescribed it under her name so that I wouldn't have to pay out-of-pocket.

Evidence in Extenuation, Mitigation and Rehabilitation

15. No evidence was presented in extenuation, mitigation, or rehabilitation.

Disciplinary Guidelines

16. The Medical Board's preface to the 11th edition of the Manual of Disciplinary Orders and Disciplinary Guidelines states in part:

Business and Professions Code section 2229 mandates protection of the public shall be the highest priority for the Medical Board and for the Administrative Law Judges of the Medical Quality Hearing Panel. Section 2229 further specifies that, to the extent not inconsistent with public protection, disciplinary actions shall be

calculated to aid in the rehabilitation of licensees. To implement the mandates of section 2229, the Board has adopted the Manual of Model Disciplinary Orders and Disciplinary Guidelines (guidelines), 11th Edition. Consistent with the mandates of section 2229, these guidelines set forth the discipline the Board finds appropriate and necessary for the identified violations. In addition to protecting the public and, where not inconsistent, rehabilitating the licensee, the Board finds that imposition of the discipline set forth in the guidelines will promote uniformity, certainty and fairness, and deterrence, and, in turn, further public protection.

The Board expects that, absent mitigating or other appropriate circumstances such as early acceptance of responsibility and demonstrated willingness to undertake Board-ordered rehabilitation, Administrative Law Judges hearing cases on behalf of the Board and proposed settlements submitted to the Board will follow the guidelines, including those imposing suspensions. Any proposed decision or settlement that departs from the disciplinary guidelines shall identify the departures and the facts supporting the departure.

17. An outright revocation is the maximum recommended disciplinary sanction for the misconduct established by the clear and convincing evidence. Absent other evidence that explains or mitigates such misconduct, establishes rehabilitation, or demonstrates respondent's fitness and capacity to safely practice medicine, an outright revocation must be imposed to protect the public.

18. The guidelines recommend an outright revocation when a licensee may be unable to safely practice his profession as a result of a mental or physical illness affecting competency. A license that has been revoked or suspended on this basis may not be reinstated until the licensing agency has received competent evidence of the absence or control of the condition that resulted in the suspension or revocation, and the license may be reinstated only when the agency is satisfied that, with due regard for the public health and safety, the person's right to practice may be safely restored. (Bus. & Prof. Code, § 822.) There was no competent evidence that established respondent's control over his alcohol dependence or benzodiazepine dependence.

Factual Conclusions

19. The purpose of the Medical Practice Act is to assure the high quality of medical practice in California. The disciplinary process operates by eliminating immoral and incompetent practitioners from the roster of state-licensed professionals.

Respondent's long-term misuse of alcohol and his excessive use of benzodiazepines reflect a lack of sound professional and personal judgment that is relevant to his fitness and competence to safely practice medicine. His prescribing of Klonopin to E.D. for his own use involved dishonesty and unprofessional conduct. Respondent's substance abuse, alcohol dependence, and benzodiazepine dependence pose a significant risk of harm to patients. His misuse of alcohol and benzodiazepine dependence has already negatively impacted his own private life; there is no need to wait until respondent's substance abuse problems adversely impact the lives of his patients. Protection of the public, the primary purpose of the Medical Practice Act, does not require a showing of actual patient harm.

Given respondent's unwillingness or inability to attain total abstinence from the use of alcohol and to manage his dependence on Klonopin, the only disciplinary remedy available to protect the public is the outright revocation of respondent's certificate.

LEGAL CONCLUSIONS

Purpose of Physician Discipline

1. The purpose of the Medical Practice Act is to assure the high quality of medical practice. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574.) Conduct supporting the revocation or suspension of a medical license must demonstrate an unfitness to practice. The purpose of a disciplinary action is not to punish, but to protect the public. In an administrative disciplinary proceeding, the inquiry must be limited to the effect of the doctor's actions upon the quality of his service to his patients. (*Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1416.)

The Standard of Proof

2. The standard of proof in an administrative action seeking to suspend or revoke a physician's certificate is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

3. The clear and convincing standard of proof applies in a disciplinary action involving the claim that a physician's ability to practice medicine competently was impaired due to mental or physical illness. (*Medical Board of California v. Superior Court (Liskey)* (2003) 111 Cal.App.4th 163, 170-171.) In order to take disciplinary action against a medical license, the Board is obligated to base its decision on "clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence." (*Ibid.*, at pp. 177-178.)

Imposing Physician Discipline

4. Business and Professions Code section 2227 provides in part:
 - (a) A licensee whose matter has been heard by an administrative law judge . . . and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:
 - (1) Have his or her license revoked upon order of the board.
 - (2) Have his or her right to practice suspended . . .
 - (3) Be placed on probation . . .
 - (4) Be publicly reprimanded . . .
 - (5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.
5. Business and Professions Code section 2229 provides in part:
 - (a) Protection of the public shall be the highest priority for the Division of Medical Quality . . . and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.
 - (b) In exercising his or her disciplinary authority an administrative law judge . . . shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.
 - (c) Where rehabilitation and protection are inconsistent, protection shall be paramount.

Applicable Disciplinary Statutes

6. Business and Professions Code section 822 provides in part:

If a licensing agency determines that its licentiate's ability to practice his . . . profession safely is impaired because the

licentiate is mentally ill . . . affecting competency, the licensing agency may take action by any one of the following methods:

- (a) Revoking the licentiate's certificate or license.
- (b) Suspending the licentiate's right to practice.
- (c) Placing the licentiate on probation.
- (d) Taking such other action in relation to the licentiate as the licensing agency in its discretion deems proper.

The licensing agency shall not reinstate a revoked or suspended certificate or license until it has received competent evidence of the absence or control of the condition which caused its action and until it is satisfied that with due regard for the public health and safety the person's right to practice his or her profession may be safely reinstated.

7. Business and Professions Code section 2234 provides in part:

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

- (a) Violating . . . directly or indirectly . . . any provision of this chapter.

[¶] . . . [¶]

- (e) The commission of any act involving dishonesty . . . that is substantially related to the qualifications, functions, or duties of a physician and surgeon

8. Business and Professions Code section 2238 provides:

A violation of any federal statute or federal regulation or any of the statutes or regulations of this state regulating dangerous drugs or controlled substances constitutes unprofessional conduct.

9. Business and Professions Code section 2239 provides in part:

- (a) The use or prescribing for or administering to himself . . . of any controlled substance; or the use of any of the dangerous

drugs . . . or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely . . . constitutes unprofessional conduct

10. Business and Professions Code section 2261 provides in part:

Knowingly making or signing any . . . document directly or indirectly related to the practice of medicine . . . which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct.

11. Business and Professions Code section 2262 provides in part that "creating any false medical record, with fraudulent intent, constitutes unprofessional conduct"

12. Health and Safety Code section 11153, subdivision (a), provides in part, "A prescription for a controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his . . . professional practice"

13. Health and Safety Code section 11157 prohibits any person from issuing a prescription that is false or fictitious in any respect.

14. Health and Safety Code section 11170 prohibits any person from prescribing, administering, or furnishing a controlled substance for himself.

15. Health and Safety Code section 11173 prohibits any person from obtaining or attempting to obtain a controlled substance by fraud, misrepresentation or subterfuge.

Unprofessional Conduct

16. Unprofessional conduct must, among other things, indicate an unfitness to practice medicine. Unprofessional conduct involves conduct that breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575.)

Substantial Relationship

17. There must be a logical connection between the misconduct that forms the basis for physician discipline and the physician's ability to practice medicine. That nexus is established where the physician's use of alcohol is dangerous or injurious to the physician or to any other person or to the public. Physician discipline is authorized where the use of alcoholic beverages is to the extent or in such a manner as to pose a danger to the physician or others. (*Id.*, at p. 1424.)

Rehabilitation

18. Rehabilitation requires a consideration of those offenses from which one has allegedly been rehabilitated. Rehabilitation is a state of mind, and the law looks with favor on rewarding one who has achieved reformation and regeneration with the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented when an applicant demonstrates fitness by sustained good conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) To establish rehabilitation from alcoholism or other substance abuse, a licensee must establish that the abuse was addictive in nature, that the abuse causally contributed to the misconduct, and that he has undergone a meaningful and sustained period of rehabilitation. (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101.)

Cause Exists to Revoke Respondent's Certificate

19. First Cause for Discipline: Cause exists under Business and Professions Code section 2239, subdivision (a), to revoke respondent's certificate. Clear and convincing evidence established that respondent has engaged in unprofessional conduct by using alcoholic beverages to an extent, or in a manner, dangerous to himself and others. Respondent is an alcoholic who is not in recovery. He was publically intoxicated on February 12, 2012. His alcoholism resulted in unauthorized absences from work, his significant difficulties in the preventative medicine residency program, and the termination of his clinical privileges at the VA Center. Two board-certified psychiatrists have diagnosed respondent as suffering from alcohol-related problems that are not in remission that put him at personal risk, and one psychiatrist believes that respondent's alcohol dependence poses a substantial risk of harm to patients.

20. Second Cause for Discipline: Cause exists under Business and Professions Code section 2239, subdivision (a), to revoke respondent's certificate. Clear and convincing evidence established that respondent engaged in unprofessional conduct in that he has used alcoholic beverages to the extent and in a manner that impairs his ability to safely practice medicine. Dr. Nair's credible expert opinion was, "Dr. Bailey is an active alcoholic who should not be practicing at present. Dr. Bailey is a danger to himself, patients and the public if he does not completely abstain from drinking Dr. Bailey's ability to practice medicine safely is impaired by his Alcohol Abuse" This opinion and the reasons for it were sufficient to sustain the second cause for discipline.

21. Third Cause for Discipline: Cause exists under Business and Professions Code section 2239, subdivision (a), to revoke respondent's certificate. Clear and convincing evidence established that respondent has engaged in unprofessional conduct by self-administering Klonopin that he had prescribed for E.D. with the intention of using the Klonopin himself.

22. Fourth Cause for Discipline: Cause exists under Business and Professions Code section 2239, subdivision (a), to revoke respondent's certificate. Clear and convincing evidence established that respondent has engaged in unprofessional conduct by self-

administering Klonopin in dangerous amounts and that his use of Klonopin, in combination with his use of alcoholic beverages, was medically dangerous.

23. Fifth Cause for Discipline: Cause exists under Business and Professions Code section 2238 to revoke respondent's certificate. Clear and convincing evidence established that respondent has engaged in unprofessional conduct by violating state laws related to the prescription and use of Klonopin as follows: respondent repeatedly issued prescriptions for Klonopin in E.D.'s name with the intent of self-administering the Klonopin obtained from the prescriptions; he engaged in fraud and deceit in order to obtain Klonopin; he provided a false name to obtain Klonopin; he repeatedly used Klonopin in violation of law; and he repeatedly used and possessed Klonopin that was not obtained with a legitimate prescription.

24. Sixth Cause for Discipline: Cause exists under Business and Professions Code section 2234, subdivision (e), to revoke respondent's certificate. Clear and convincing evidence established that respondent has engaged in unprofessional conduct by committing acts of dishonesty by issuing prescriptions for Klonopin in E.D.'s name that he intended to use himself.

25. Seventh Cause for Discipline: Cause exists under Business and Professions Code section 2261 to revoke respondent's certificate. Clear and convincing evidence established that respondent falsely represented that he was prescribing Klonopin for E.D. when, in fact, the prescription he wrote for Klonopin in E.D.'s name was for his own use.

26. Eighth Cause for Discipline: Cause exists under Business and Professions Code section 2262 to revoke respondent's certificate. Clear and convincing evidence established that respondent intentionally created medical records – prescriptions to E.D. for Klonopin – that were false because respondent intended to use the Klonopin obtained from the prescription for himself.

27. Ninth Cause for Discipline: Cause exists under Business and Professions Code section 2234, subdivision (a), to revoke respondent's certificate. Clear and convincing evidence established that respondent used alcoholic beverages to the extent that he was a danger to himself or others (first cause for discipline), used alcoholic beverages to the extent that his ability to safely practice medicine was impaired (second cause for discipline), self-administered controlled substances prescribed to E.D. (third cause for discipline), used dangerous drugs in a manner that was dangerous to himself (fourth cause for discipline), violated state laws related to dangerous drugs and controlled substances (fifth cause for discipline), engaged in dishonesty (sixth cause for discipline), knowingly made false representations of fact (seventh cause for discipline), and created false medical records with a fraudulent intent (eighth cause for discipline), all in violation of the Medical Practice Act.

28. Tenth Cause for Discipline: Cause exists under Business and Professions Code section 2234 to revoke respondent's certificate. Clear and convincing evidence established that respondent engaged in general unprofessional conduct as described herein and as specified in the first through ninth causes for discipline.

29. Business and Professions Code Section 822 Cause for Action: Cause exists under Business and Professions Code section 822 to revoke respondent's certificate. Clear and convincing evidence established that respondent's ability to safely practice medicine is impaired because respondent suffers from alcohol dependence and benzodiazepine dependence and that his uses of those substances affects his professional competency.

The Measure of Discipline

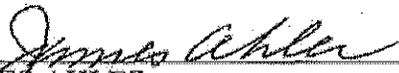
30. Cause exists under Business and Professions Code sections 2227 and 2229 to revoke respondent's certificate. Respondent engaged in unprofessional conduct. He suffers from alcohol dependence and benzodiazepine dependence, and his substance abuse presents a substantial risk of harm to himself, patients, and the public. Respondent does not appear to be able or willing to become abstinent of alcohol despite his treatment with psychiatrists and psychologists and despite his brief participation in substance abuse programs. At this point, respondent's prognosis is guarded.

Protection of the public is the highest priority for the Medical Board. The law specifically provides that, where rehabilitation and protection of the public are inconsistent, protection of the public is paramount. Under all the circumstances, the outright revocation of respondent's certificate is the only disciplinary option available at this time that will protect the public.

ORDER

Physician's and Surgeon's Certificate No. G78854 issued to David Wayne Bailey, M.D., is revoked.

DATED: February 19, 2015



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 THOMAS S. LAZAR
Supervising Deputy Attorney General
3 KAROLYN M. WESTFALL
Deputy Attorney General
4 State Bar No. 234540
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-3121
7 Facsimile: (619) 645-2061

8 *Attorneys for Complainant*

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO September 11 2014
BY D. Firdaus ANALYST

10 BEFORE THE
11 MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
12 STATE OF CALIFORNIA

13 In the Matter of the Accusation Against:
14 DAVID WAYNE BAILEY, M.D.
26230 Lawton Avenue
15 Loma Linda, CA 92354
16 Physician's and Surgeon's Certificate
No. G78854,
17
18 Respondent.

Case No. 09-2012-227123

ACCUSATION

19 Complainant alleges:

20 PARTIES

- 21 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
22 capacity as the Executive Director of the Medical Board of California, Department of Consumer
23 Affairs.
- 24 2. On or about May 18, 1994, the Medical Board of California issued Physician's and
25 Surgeon's Certificate No. G78854 to David Wayne Bailey, M.D. (respondent). The Physician's
26 and Surgeon's Certificate No. G78854 was in full force and effect at all times relevant to the
27 charges brought herein and will expire on April 30, 2016, unless renewed. On or about
28 September 5, 2014, an Interim Order of Suspension was issued immediately suspending

1 Physician's and Surgeon's Certificate No. G78854 and prohibiting respondent from practicing
2 medicine in the State of California. As a result, respondent remains suspended from the practice
3 of medicine as of the date of the filing of this Accusation.

4 **JURISDICTION**

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

8 4. Section 2227 of the Code states:

9 "(a) A licensee whose matter has been heard by an administrative law judge of
10 the Medical Quality Hearing Panel as designated in Section 11371 of the
11 Government Code, or whose default has been entered, and who is found guilty, or
12 who has entered into a stipulation for disciplinary action with the board, may, in
13 accordance with the provisions of this chapter:

14 "(1) Have his or her license revoked upon order of the board.

15 "(2) Have his or her right to practice suspended for a period not to exceed
16 one year upon order of the board.

17 "(3) Be placed on probation and be required to pay the costs of probation
18 monitoring upon order of the board.

19 "(4) Be publicly reprimanded by the board. The public reprimand may
20 include a requirement that the licensee complete relevant educational courses
21 approved by the board.

22 "(5) Have any other action taken in relation to discipline as part of an order
23 of probation, as the board or an administrative law judge may deem proper.

24 "(b) Any matter heard pursuant to subdivision (a), except for warning letters,
25 medical review or advisory conferences, professional competency examinations,
26 continuing education activities, and cost reimbursement associated therewith that are
27 agreed to with the board and successfully completed by the licensee, or other matters

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1 made confidential or privileged by existing law, is deemed public, and shall be made
2 available to the public by the board pursuant to Section 803.1.”

3 5. Section 2234 of the Code, states, in pertinent part:

4 “The board shall take action against any licensee who is charged with
5 unprofessional conduct. In addition to other provisions of this article, unprofessional
6 conduct includes, but is not limited to, the following:

7 “(a) Violating or attempting to violate, directly or indirectly, assisting in or
8 abetting the violation of, or conspiring to violate any provision of this chapter.

9 “... ”

10 “(e) The commission of any act involving dishonesty or corruption which is
11 substantially related to the qualifications, functions, or duties of a physician and
12 surgeon.

13 “... ”

14 6. Unprofessional conduct under Business and Professions Code section 2234 is conduct
15 which breaches the rules or ethical code of the medical profession, or conduct which is
16 unbecoming a member in good standing of the medical profession, and which demonstrates an
17 unfitness to practice medicine. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,
18 575.)

19 7. Section 2238 of the Code states:

20 “A violation of any federal statute or federal regulation or any of the statutes
21 or regulations of this state regulating dangerous drugs or controlled substances
22 constitutes unprofessional conduct.”

23 8. Section 2239 of the Code states, in pertinent part:

24 “(a) The use or prescribing for or administering to himself or herself, of any
25 controlled substance; or the use of any of the dangerous drugs specified in Section
26 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous
27 or injurious to the licensee, or to any other person or to the public, or to the extent
28 that such use impairs the ability of the licensee to practice medicine safely or more

1 than one misdemeanor or any felony involving the use, consumption, or
2 self-administration of any of the substances referred to in this section, or any
3 combination thereof, constitutes unprofessional conduct.^[1] The record of the
4 conviction is conclusive evidence of such unprofessional conduct.

5 "... (Footnote added.)

6 9. Section 2261 of the Code provides that:

7 "Knowingly making or signing any certificate or other document directly or indirectly
8 related to the practice of medicine or podiatry which falsely represents the existence or
9 nonexistence of a state of facts, constitutes unprofessional conduct."

10 10. Section 2262 of the Code provides that:

11 "Altering or modifying the medical record of any person, with fraudulent intent, or
12 creating any false medical record, with fraudulent intent, constitutes unprofessional
13 conduct.

14 "In addition to any other disciplinary action, the Division of Medical Quality or the
15 California Board of Podiatric Medicine may impose a civil penalty of five hundred dollars
16 (\$500) for a violation of this section."

17 11. Section 11153 of the Health and Safety Code states, in pertinent part,

18 "(a) A prescription for a controlled substance shall only be issued for a
19 legitimate medical purpose by an individual practitioner acting in the usual course of
20 his or her professional practice. The responsibility for the proper prescribing and
21 dispensing of controlled substances is upon the prescribing practitioner, but a
22 corresponding responsibility rests with the pharmacist who fills the prescription.

23 Except as authorized by this division, the following are not legal prescriptions: (1) an
24 order purporting to be a prescription which is issued not in the usual course of
25 professional treatment or in legitimate and authorized research; . . .

26 ¹ There is a nexus between a physician's use of alcoholic beverages and his or her fitness to
27 practice medicine, established by the Legislature in section 2239, "in all cases where a licensed physician
28 used alcoholic beverages to the extent or in such a manner as to pose a danger to himself or others."
(*Watson v. Superior Court (Medical Board)* (2009) 176 Cal.App.4th 1407, 1411.)

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“...”

12. Section 11157 of the Health and Safety Code states, “No person shall issue a prescription that is false or fictitious in any respect.”

13. Section 11170 of the Health and Safety Code states, “No person shall prescribe, administer, or furnish a controlled substance for himself.”

14. Section 11173 of the Health and Safety Code states, in pertinent part:

“(a) No person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact.

“(b) No person shall make a false statement in any prescription, order, report, or record, required by this division.

“...”

15. Section 11174 of the Health and Safety Code states,

“No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a controlled substance, give a false name or false address.”

16. Section 11180 of the Health and Safety Code states,

“No person shall obtain or possess a controlled substance obtained by a prescription that does not comply with this division.”

17. Section 822 of the Code states:

“If a licensing agency determines that its licentiate’s ability to practice his or her profession safely is impaired because the licentiate is mentally ill, or physically ill affecting competency, the licensing agency may take action by any one of the following methods:

“(a) Revoking the licentiate’s certificate or license.

“(b) Suspending the licentiate’s right to practice.

“(c) Placing the licentiate on probation.

1 irresponsible behavior, unexplained late days to clinic and rotation obligations.” In the
2 addendum, Dr. L.F. reported that respondent did not show up for work on June 25, 2012,
3 and July 3, 2012, without advanced notice that he would not be coming to work. Dr. L.F.
4 further reported that on July 5, 2012, respondent showed up one hour late to work without
5 notification or explanation. Dr. L.F. further reported that respondent called on July 10,
6 2012, and reported to a volunteer at the clinic that he would not be coming to work due to
7 errands he needed to complete. Dr. L.F. further reported that on July 12, 2012, respondent
8 did not show up to work and that respondent did not respond to a page, but rather, called
9 the general clinic phone number at 10:00 a.m. to say he would not be coming to work. Dr.
10 L.F. reported that when respondent was questioned about his failure to show up to work,
11 respondent had a “blank, amused/puzzled look on his face without any explanation of his
12 behavior.”

13 (e) On or about July 13, 2012, Dr. L.F. reported in an email that she had instructed
14 respondent not to return to the VA Medical Center. Dr. L.F. stated,

15 “I want us all to consider what may account for my growing concern that
16 he is not open about a serious disorder or about impending pathology/need for
17 evaluation for understanding an underlying disorder such as premature
18 dementia, anxiety/depression, addictions, minimal brain dysfunction,
19 traumatic brain injury, or chronic health problem that is undisclosed and he
20 seems aware of ... but unwilling to reveal, etc. *He seems to have no remorse*
21 *or concern* for all the hassle he is putting everyone through (fellow residents,
22 patients, staff) when he is not present at his rotations. I cannot figure this out
23 and am very concerned about some serious pathology. This may relate to why
24 he does not worked [sic] long in any field and has stopped his other areas of
25 specialty medicine and migrated to PM.” (Italics original.)

26 (d) On or about July 23, 2012, the Loma Linda University Preventative Medicine
27 Residency Advisory Committee met and noted that “[respondent] has had problems with
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1 professionalism at his VA rotations,” that “[a] medical issue was identified, and
2 [respondent] is currently on administrative leave.”

3 (e) On or about October 5, 2012, pursuant to Section 805 of the Code, the Board
4 received a Health Facility/Peer Review Reporting form from the Loma Linda University
5 Medical Center. This form reported that Loma Linda University Medical Center learned
6 in June, 2012, that respondent had been charged with an alcohol-related traffic violation,
7 and as a result, respondent was placed on administrative leave from any clinical duties and
8 was referred to the Resident Well-Being Committee for assessment and treatment. The
9 Section 805 report further noted that respondent was not fully engaged in the activities of
10 the Well-Being Committee, which recommended that respondent not resume clinical
11 duties. The Section 805 report further stated that respondent resigned from the residency
12 program while still on administrative leave.

13 (f) On or about August 14, 2012, respondent signed authorizations for the release
14 of psychiatric information and for alcohol and drug abuse information.

15 (g) On or about November 1, 2013, while residing out of state, respondent signed
16 a voluntary agreement for a physical and mental examination with the Board. On or about
17 March 26, 2014, after having returned to California, respondent again signed a voluntary
18 agreement for mental examination with the Board.

19 (h) On or about January 16, 2014, C.W. Christopher Heh, M.D., performed a
20 psychiatric evaluation of respondent at the Board’s request. Dr. Heh’s evaluation
21 consisted of a face-to-face evaluation and records review.

22 (i) During the examination by Dr. Heh, respondent gave the impression that he
23 did not fully appreciate the importance of the evaluation, giving a “blank/puzzled” look.
24 Respondent denied any psychiatric hospitalizations but admitted to having “low grade
25 depression” and admitted to his current use of Cymbalta,² Klonopin,³ and Trazadone.⁴

26 ² Cymbalta is a brand name for Duloxetine, a selective serotonin and norepinephrine reuptake
27 inhibitor (SNRI) used for treating depression, anxiety disorder, and pain associated with diabetic
28 peripheral neuropathy, or fibromyalgia.

1 Respondent further admitted to being arrested for "disorderly conduct" in the past but
2 claimed to only drink two to three alcoholic beverages per week.

3 (j) Dr. Heh determined, amongst other things, that respondent's "addiction to
4 alcohol and sedative hypnotic anxiolytics remains in force due to the fact that he continues
5 to drink and he continues to consume Klonopin daily." Dr. Heh further concluded that
6 respondent was not a totally reliable historian, which may or may not be based upon a
7 willful omission, and appears to suffer from several mental disorders. Dr. Heh concluded
8 that respondent did not pose an immediate threat to himself or others, but recommended
9 further work up to rule out a possible underlying neurocognitive disorder.

10 (k) On or about May 6, 2014, Mohan Nair, M.D., performed a psychiatric
11 examination with neuropsychiatric testing of respondent at the Board's request. Dr.
12 Nair's evaluation consisted of a 3.5 hour face-to-face examination of respondent, MMPI-2
13 testing, 8 hours of neuropsychological testing, and 2 hours of records review.

14 (l) During the examination by Dr. Nair, respondent reported that he was drinking
15 heavily during his Loma Linda residency in 2012. He admitted that during that residency,
16 he drank during the day before he was supposed to be working, and that he drank 6-10
17 beers in the evening, occasionally drinking up to 18 beers at a time, necessitating that he
18 call in sick the next day. Respondent reported he would drink 4-6 glasses of wine when
19 not drinking beer, and sometimes drink 1-2 drinks of hard liquor when also drinking beer
20 or wine. Respondent reported experiencing blackouts on at least 50 occasions, most
21 recently in or about March, 2014. Respondent reported that after he dropped out of the
22 residency program at Loma Linda University Medical Center, he entered a 30-day
23

24 (...continued)

25 ³ Klonopin is a brand name for Clonazepam, a Schedule IV controlled substance pursuant to
26 Health and Safety Code section 11057, subdivision (d)(7), and Title 21 of the Code of Federal
27 Regulations, section 1308.14, subdivision (c)(11), and a dangerous drug pursuant to Business and
28 Professions Code section 4022.

⁴ Trazodone, an oral antidepressant drug that affects the chemical messengers (neurotransmitters)
within the brain that nerves use to communicate with (stimulate) each other, is a dangerous drug pursuant
to Business and Professions Code section 4022.

1 chemical dependency program, but dropped out of the chemical dependency program after
2 5 days "because I felt that I was not getting anything out of being there with junkies and
3 alcoholics. We had nothing in common. They also wanted me off the Klonopin and it
4 didn't feel good."

5 (m) Between April 27, 2011, and November 5, 2012, respondent prescribed
6 Klonopin in his wife's name on at least eighteen (18) occasions, and prescribed Zolpidem⁵
7 in his wife's name on at least four (4) occasions. During the psychiatric examination with
8 Dr. Nair, respondent additionally admitted to having called in prescriptions for Klonopin
9 in his wife's name for his own use. Respondent further acknowledged that his
10 consumption of alcohol had affected his relationship with his wife, and admitted that he
11 was still consuming alcohol.

12 (n) Dr. Nair determined that "Dr. Bailey has an alcohol dependence problem along
13 with benzodiazepine dependence... Thus, he has a Polysubstance Dependence including
14 two central nervous system depressants which reinforce the negative effects of each
15 other."

16 (o) Dr. Nair concluded that "Dr. Bailey is an active alcoholic who should not be
17 practicing at present. Dr. Bailey is a danger to himself, patients and the public if he does
18 not completely abstain from drinking... Dr. Bailey's ability to practice medicine safely is
19 impaired by his Alcohol Abuse."

20 (p) On or about August 29, 2014, respondent testified under oath during a hearing
21 on a Petition for Interim Suspension Order filed with the Office of Administrative
22 Hearings in San Diego, with Administrative Law Judge Roy W. Hewitt, presiding.

23 (q) During his testimony, respondent admitted to being an alcoholic and being
24 powerless to stop drinking on his own. Respondent further admitted to attending AA
25 meetings since 2011, and attending approximately fifty (50) meetings since February.

26
27 ⁵ Zolpidem (brand name, Ambien) is a Schedule IV controlled substance pursuant to Health and
28 Safety Code section 11057, subdivision (d)(32), and Title 21 of the Code of Federal Regulations section
1308.14, and is a dangerous drug pursuant to Business and Professions Code section 4022.

1 Respondent admitted having had his last alcoholic drink six (6) days prior to the hearing.
2 Respondent further admitted having had many blackouts in his life as a result of his
3 alcohol consumption and admitted to being arrested for disorderly conduct in 2012,
4 wherein he drove himself to the location where he was arrested and that his blood alcohol
5 content at the time of arrest was 0.11 percent. Respondent further admitted that he has
6 prescribed Klonopin to his wife on eighteen (18) occasions in the past that were intended
7 for his own use and that he subsequently ingested himself. Respondent further admitted
8 that he prescribed Zolpidem to his wife on four (4) occasions in the past that were
9 intended for his own use.

10 **SECOND CAUSE FOR DISCIPLINE**

11 **(Using Alcoholic Beverages to an Extent that Such Use Impairs Respondent's Ability to
12 Practice Medicine Safely)**

13 19. Respondent is further subject to disciplinary action under sections 2227 and 2234, as
14 defined by section 2239, subdivision (a), of the Code, in that he has used alcoholic beverages to
15 an extent that such use impairs his ability to practice medicine safely, as more particularly alleged
16 in paragraphs 18(a) through 18(q), above, which are hereby incorporated by reference and
17 realleged as if fully set forth herein.

18 **THIRD CAUSE FOR DISCIPLINE**

19 **(Using or Administrating Controlled Substances to Himself)**

20 20. Respondent is further subject to disciplinary action under sections 2227 and 2234, as
21 defined by section 2239, subdivision (a), of the Code, in that he has used or administered
22 controlled substances to himself, as more particularly alleged in paragraphs 18(a) through 18(q),
23 above, which are hereby incorporated by reference and realleged as if fully set forth herein.

24 **FOURTH CAUSE FOR DISCIPLINE**

25 **(Use of Dangerous Drugs to an Extent, or in a Manner, as to be Dangerous to Himself, to
26 Others, or to the Public)**

27 21. Respondent is further subject to disciplinary action under sections 2227 and 2234, as
28 defined by section 2239, subdivision (a), of the Code, in that he has used dangerous drugs to an

1 extent, or in a manner, as to be dangerous or injurious to himself, to another person, or to the
2 public, as more particularly alleged in paragraphs 18(a) through 18(q), above, which are hereby
3 incorporated by reference and realleged as if fully set forth herein.

4 **FIFTH CAUSE FOR DISCIPLINE**

5 **(Violation of State Laws Regulating Dangerous Drugs and/or Controlled Substances)**

6 22. Respondent is further subject to disciplinary action under sections 2227 and 2234, as
7 defined by section 2238, of the Code, in that he has violated a state law or laws regulating
8 dangerous drugs and/or controlled substances, as more particularly alleged hereinafter:

9 (a) Paragraphs 18(a) through 18(q), 20 and 21, above, are hereby incorporated by
10 reference and realleged as if fully set forth herein.

11 (b) Respondent repeatedly issued prescriptions for controlled substances using another
12 person's name, i.e., his wife's name, as the patient, for the purpose of obtaining the controlled
13 substance for his own use, in violation of Health and Safety Code sections 11153, 11157, 11170,
14 11173, and 11174.

15 (c) Respondent repeatedly obtained or attempted to obtain controlled substances, or
16 procured or attempted to procure the administration of or prescription for controlled substances,
17 by fraud, deceit, misrepresentation, or subterfuge, in violation Health and Safety Code section
18 11173.

19 (d) Respondent repeatedly gave a false name, i.e., his wife's name, in connection with
20 the prescribing, furnishing, administering controlled substances, in violation of Health and Safety
21 Code section 11174.

22 (e) Respondent repeatedly prescribed, used, and/or administered to himself controlled
23 substances, in violation of section 2239 of the Code, and Health and Safety Code section 11170.

24 (f) Respondent repeatedly used and/or possessed controlled substances which were not
25 obtained by prescriptions that complied with the California Controlled Substances Act, in
26 violation of Health and Safety Code section 11180.

27 (g) Respondent repeatedly issued prescriptions for controlled substances outside of the
28 usual course of his professional practice, in violation of Health and Safety Code section 11153.

1 **SIXTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty or Corruption)**

3 23. Respondent is further subject to disciplinary action pursuant to sections 2227 and
4 2234, as defined by section 2234, subdivision (e), of the Code, in that he has committed an act or
5 acts of dishonesty or corruption, as more particularly alleged in paragraphs 18(a) through 18(q)
6 and 22, above, which are hereby incorporated by reference and realleged as if fully set forth
7 herein.

8 **SEVENTH CAUSE FOR DISCIPLINE**

9 **(False Representations)**

10 24. Respondent is further subject to disciplinary action pursuant to sections 2227 and
11 2234, as defined by section 2261, of the Code, in that he has knowingly made or signed a
12 certificate or document directly or indirectly related to the practice of medicine which falsely
13 represented the existence or nonexistence of a state of facts, as more particularly alleged in
14 paragraphs 18(a) through 18(q), 22 and 23, above, which are hereby incorporated by reference
15 and realleged as if fully set forth herein.

16 **EIGHTH CAUSE FOR DISCIPLINE**

17 **(Creation of False Medical Records, with Fraudulent Intent)**

18 25. Respondent is further subject to disciplinary action pursuant to sections 2227 and
19 2234, as defined by section 2262, of the Code, in that he created false medical records with
20 fraudulent intent, as more particularly alleged in paragraphs 18(a) through 18(q), 22, 23 and 24,
21 above, which are hereby incorporated by reference and realleged as if fully set forth herein.

22 **NINTH CAUSE FOR DISCIPLINE**

23 **(Violating, or Attempting to Violate, Directly or Indirectly a Provision or Provisions
24 of the Medical Practice Act)**

25 26. Respondent is further subject to disciplinary action pursuant to sections 2227 and
26 2234, as defined by section 2234, subdivision (a), of the Code, in that he has violated or
27 attempted to violate, directly or indirectly, assisted in or abetted the violation of, or conspired to
28 violate, a provision or provisions of the Medical Practice Act, as more particularly alleged in

1 paragraphs 18, 19, 20, 21, 22, 23, 24 and 25, above, which are hereby incorporated by reference
2 and realleged as if fully set forth herein.

3 **TENTH CAUSE FOR DISCIPLINE**

4 **(General Unprofessional Conduct)**

5 27. Respondent is further subject to disciplinary action under sections 2227 and 2234 of
6 the Code, in that he has engaged in conduct which breaches the rules or ethical code of the
7 medical profession, or conduct which is unbecoming to a member in good standing of the medical
8 profession, and which demonstrates an unfitness to practice medicine, as more particularly
9 alleged in paragraphs 18, 19, 20, 21, 22, 23, 24, 25 and 26 above, which are hereby incorporated
10 by reference and realleged as if fully set forth herein.

11 **SECTION 822 CAUSE FOR ACTION**

12 **(Mental Illness and/or Physical Illness Affecting Competency)**

13 28. Respondent is subject to action under section 822 of the Code in that his ability to
14 practice medicine safely is impaired due to a mental illness and/or physical illness affecting
15 competency, as a result of his long standing addiction to alcohol and benzodiazepines, as more
16 particularly alleged in paragraphs 18(a) through 18(q), above, which are hereby incorporated by
17 reference and realleged as if fully set forth herein.

18 **PRAYER**

19 WHEREFORE, complainant requests that a hearing be held on the matters herein alleged,
20 and that following the hearing, the Medical Board of California issue a decision:

- 21 1. Revoking or suspending Physician's and Surgeon's Certificate No. G78854, issued to
22 respondent David Wayne Bailey, M.D.;
- 23 2. Revoking, suspending or denying approval of respondent David Wayne Bailey,
24 M.D.'s authority to supervise physician assistants, pursuant to section 3527 of the Code;
- 25 3. Ordering respondent David Wayne Bailey, M.D. to pay, if placed on probation, the
26 costs of probation monitoring;
- 27 4. Taking action as authorized by section 822 of the Code as the Board, in its discretion,
28 deems necessary and proper;

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5. Imposing a civil penalty of five hundred dollars (\$500.0) for each of respondent David Wayne Bailey, M.D.'s violation of section 2262 of the Code; and

6. Taking such other and further action as deemed necessary and proper.

DATED: September 11, 2014 Kimberly Kirchmeyer for

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

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