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

In the Matter of the Accusation Against:	)	
RIM MARCINKUS, M.D.	)	Case No. 09-2013-230441
Physician's and Surgeon's Certificate No. A66358	)	
Respondent	)	

DECISION

The attached Stipulated Settlement and Disciplinary Order 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 August 18, 2017.

IT IS SO ORDERED: July 20, 2017.

MEDICAL BOARD OF CALIFORNIA

Michelle Anne Bholat, M.D., Chair
Panel B

XAVIER BECERRA
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Attorneys for Complainant

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

In the Matter of the Accusation Against: **RIM MARCINKUS, M.D.** **72-301 Country Club Drive, #107** **Rancho Mirage, CA 92270** **Physician's and Surgeon's Certificate No. A66358** Respondent.	Case No. 09-2013-230441 OAH No. 2016110839 **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceedings that the following matters are true:

PARTIES

1. Kimberly Kirchmeyer (Complainant) is the Executive Director of the Medical Board of California (Board). She brought this action solely in her official capacity and is represented in this matter by Xavier Becerra, Attorney General of the State of California, by Martin W. Hagan, Deputy Attorney General.

2. Respondent Rim Marcinkus, M.D. (Respondent) is represented in this proceeding by attorney Albert J. Garcia, Esq., whose address is: 2000 Powell Street, Suite 1290, Emeryville, California 94608.

3. On or about August 21, 1998, the Board issued Physician's and Surgeon's Certificate No. A66358 to Respondent. The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought in Accusation No. 09-2013-230441, and will expire on November 30, 2017, unless renewed.

JURISDICTION

4. Accusation No. 09-2013-230441 was filed before the Board, and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on February 23, 2016. Respondent timely filed his Notice of Defense contesting the Accusation. A true and correct copy of Accusation No. 09-2013-230441 is attached hereto as Exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

5. Respondent has carefully read, fully discussed with counsel, and understands the charges and allegations in Accusation No. 09-2013-230441. Respondent has also carefully read, fully discussed with counsel, and fully understands the effects of this Stipulated Settlement and Disciplinary Order.

6. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

7. Having the benefit of counsel, Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

CULPABILITY

8. Respondent agrees that, at an administrative hearing, complainant could establish a *prima facie* case with respect to the charges and allegations contained in the First cause of discipline (with the exception of paragraph 17) and the charges and allegations contained in the Second, Third, Fourth, Fifth, and Seventh causes of discipline in Accusation No. 09-2013-

230441, and that he has thereby subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action. Respondent further agrees to be bound by the Board's imposition of discipline as set forth in the Disciplinary Order below.

9. Respondent further agrees that if he ever petitions for early termination or modification of probation, or if an accusation and/or petition for revocation of probation is filed against him before the Medical Board of California, all of the charges and allegations contained in the First cause of discipline (with the exception of paragraph 17) and all the charges and allegations contained in the Second, Third, Fourth, Fifth, and Seventh causes of discipline in Accusation No. 09-2013-230441 shall be deemed true, correct and fully admitted by Respondent for purposes of that proceeding or any other licensing proceeding involving respondent in the State of California or elsewhere.

10. Respondent agrees that his Physician's and Surgeon's Certificate No. A66358 is subject to discipline and he agrees to be bound by the Board's imposition of discipline as set forth in the Disciplinary Order below.

CONTINGENCY

11. This stipulation shall be subject to approval by the Medical Board of California. Respondent understands and agrees that counsel for Complainant and the staff of the Medical Board of California may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent or her counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw her agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

12. The parties agree that this Stipulated Settlement and Disciplinary Order shall be null and void and not binding upon the parties unless approved and adopted by the Board, except for this paragraph, which shall remain in full force and effect. Respondent fully understands and

agrees that in deciding whether or not to approve and adopt this Stipulated Settlement and Disciplinary Order, the Board may receive oral and written communications from its staff and/or the Attorney General's Office. Communications pursuant to this paragraph shall not disqualify the Board, any member thereof, and/or any other person from future participation in this or any other matter affecting or involving respondent. In the event that the Board does not, in its discretion, approve and adopt this Stipulated Settlement and Disciplinary Order, with the exception of this paragraph, it shall not become effective, shall be of no evidentiary value whatsoever, and shall not be relied upon or introduced in any disciplinary action by either party hereto. Respondent further agrees that should this Stipulated Settlement and Disciplinary Order be rejected for any reason by the Board, respondent will assert no claim that the Board, or any member thereof, was prejudiced by its/his/her review, discussion and/or consideration of this Stipulated Settlement and Disciplinary Order or of any matter or matters related hereto.

ADDITIONAL PROVISIONS

13. This Stipulated Settlement and Disciplinary Order is intended by the parties herein to be an integrated writing representing the complete, final and exclusive embodiment of the agreements of the parties in the above-entitled matter.

14. The parties agree that copies of this Stipulated Settlement and Disciplinary Order, including copies of the signatures of the parties, may be used in lieu of original documents and signatures and, further, that such copies shall have the same force and effect as originals.

15. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. A66358 issued to Respondent Rim Marcinkus, M.D. is revoked. However, the revocation is stayed and Respondent is placed on probation for three (3) years on the following terms and conditions.

1. **EDUCATION COURSE**. Within 60 calendar days of the effective date of this Decision, and on an annual basis thereafter, Respondent shall submit to the Board or its designee

for its prior approval educational program(s) or course(s) which shall not be less than 40 hours per year, for each year of probation. The educational program(s) or course(s) shall be aimed at correcting any areas of deficient practice or knowledge and shall be Category I certified. The educational program(s) or course(s) shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure. Following the completion of each course, the Board or its designee may administer an examination to test Respondent's knowledge of the course. Respondent shall provide proof of attendance for 65 hours of CME of which 40 hours were in satisfaction of this condition.

2. **MEDICAL RECORD KEEPING COURSE**. Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a course in medical record keeping approved in advance by the Board or its designee. Respondent shall provide the approved course provider with any information and documents that the approved course provider may deem pertinent. Respondent shall participate in and successfully complete the classroom component of the course not later than six (6) months after Respondent's initial enrollment. Respondent shall successfully complete any other component of the course within one (1) year of enrollment. The medical record keeping course shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A medical record keeping course taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Board or its designee had the course been taken after the effective date of this Decision. Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later

3. **PROFESSIONALISM PROGRAM (ETHICS COURSE)**. Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a professionalism program, that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358.1. Respondent shall participate in and successfully complete that program. Respondent shall

provide any information and documents that the program may deem pertinent. Respondent shall successfully complete the classroom component of the program not later than six (6) months after Respondent's initial enrollment, and the longitudinal component of the program not later than the time specified by the program, but no later than one (1) year after attending the classroom component. The professionalism program shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A professionalism program taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the program would have been approved by the Board or its designee had the program been taken after the effective date of this Decision. Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the program or not later than 15 calendar days after the effective date of the Decision, whichever is later.

4. **CLINICAL COMPETENCE ASSESSMENT PROGRAM**. Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a clinical competence assessment program approved in advance by the Board or its designee. Respondent shall successfully complete the program not later than six (6) months after Respondent's initial enrollment unless the Board or its designee agrees in writing to an extension of that time.

The program shall consist of a comprehensive assessment of Respondent's physical and mental health and the six general domains of clinical competence as defined by the Accreditation Council on Graduate Medical Education and American Board of Medical Specialties pertaining to Respondent's current or intended area of practice. The program shall take into account data obtained from the pre-assessment, self-report forms and interview, and the Decision(s), Accusation(s), and any other information that the Board or its designee deems relevant. The program shall require Respondent's on-site participation for a minimum of three (3) and no more than five (5) days as determined by the program for the assessment and clinical education evaluation. Respondent shall pay all expenses associated with the clinical competence assessment program.

At the end of the evaluation, the program will submit a report to the Board or its designee which unequivocally states whether the Respondent has demonstrated the ability to practice safely and independently. Based on Respondent's performance on the clinical competence assessment, the program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, evaluation or treatment for any medical condition or psychological condition, or anything else affecting Respondent's practice of medicine. Respondent shall comply with the program's recommendations. Determination as to whether Respondent successfully completed the clinical competence assessment program is solely within the program's jurisdiction.

If Respondent fails to enroll, participate in, or successfully complete the clinical competence assessment program within the designated time period, Respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The Respondent shall not resume the practice of medicine until enrollment or participation in the outstanding portions of the clinical competence assessment program have been completed. If the Respondent did not successfully complete the clinical competence assessment program, the Respondent shall not resume the practice of medicine until a final decision has been rendered on the accusation and/or a petition to revoke probation. The cessation of practice shall not apply to the reduction of the probationary time period.

5. **MONITORING - PRACTICE**. Within 30 calendar days of the effective date of this Decision, Respondent shall submit to the Board or its designee for prior approval as a practice monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with Respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in Respondent's field of practice, and must agree to serve as Respondent's monitor. Respondent shall pay all monitoring costs.

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The Board or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement for approval by the Board or its designee.

Within 60 calendar days of the effective date of this Decision, and continuing throughout probation, Respondent's practice shall be monitored by the approved monitor. Respondent shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation.

If Respondent fails to obtain approval of a monitor within 60 calendar days of the effective date of this Decision, Respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a monitor is approved to provide monitoring responsibility.

The monitor(s) shall submit a quarterly written report to the Board or its designee which includes an evaluation of Respondent's performance, indicating whether Respondent's practices are within the standards of practice of medicine and whether Respondent is practicing medicine safely, billing appropriately or both. It shall be the sole responsibility of Respondent to ensure that the monitor submits the quarterly written reports to the Board or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, Respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If Respondent fails to obtain approval of a replacement monitor within 60 calendar days of the resignation or unavailability of the monitor, Respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3)

calendar days after being so notified. Respondent shall cease the practice of medicine until a replacement monitor is approved and assumes monitoring responsibility.

In lieu of a monitor, Respondent may participate in a professional enhancement program approved in advance by the Board or its designee that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at Respondent's expense during the term of probation.

6. **NOTIFICATION**. Within seven (7) days of the effective date of this Decision, the Respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to Respondent, at any other facility where Respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to Respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days. This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

7. **SUPERVISION OF PHYSICIAN ASSISTANTS AND ADVANCED PRACTICE NURSES**. During probation, Respondent is prohibited from supervising physician assistants and advanced practice nurses.

8. **OBEY ALL LAWS**. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

9. **QUARTERLY DECLARATIONS**. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

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10. **GENERAL PROBATION REQUIREMENTS.**

Compliance with Probation Unit: Respondent shall comply with the Board's probation unit and all terms and conditions of this Decision.

Address Changes: Respondent shall, at all times, keep the Board informed of Respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Place of Practice: Respondent shall not engage in the practice of medicine in Respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

License Renewal: Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California: Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days. In the event Respondent should leave the State of California to reside or to practice ,Respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

11. **INTERVIEW WITH THE BOARD OR ITS DESIGNEE.** Respondent shall be available in person upon request for interviews either at Respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

12. **NON-PRACTICE WHILE ON PROBATION.** Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of Respondent's return to practice. Non-practice is defined as any period of time Respondent is not practicing medicine as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If Respondent resides in California and is considered to be in non-practice, Respondent shall

comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve Respondent from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event Respondent's period of non-practice while on probation exceeds 18 calendar months, Respondent shall successfully complete the Federation of State Medical Boards's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine. Respondent's period of non-practice while on probation shall not exceed two (2) years. Periods of non-practice will not apply to the reduction of the probationary term. Periods of non-practice for a Respondent residing outside of California will relieve Respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

13. **COMPLETION OF PROBATION**. Respondent shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, Respondent's certificate shall be fully restored.

14. **VIOLATION OF PROBATION**. Failure to fully comply with any term or condition of probation is a violation of probation. If Respondent violates probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against Respondent during probation,

the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

15. **LICENSE SURRENDER**. Following the effective date of this Decision, if Respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may request to surrender his or her license. The Board reserves the right to evaluate Respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, Respondent shall within 15 calendar days deliver Respondent's wallet and wall certificate to the Board or its designee and Respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

16. **PROBATION MONITORING COSTS**. Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

ACCEPTANCE

I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Albert J. Garcia, Esq. I understand the stipulation and the effect it will have on my Physician's and Surgeon's Certificate. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Medical Board of California.

DATED: 4/14/17

RIM MARCINKUS, M.D.
Respondent

I have read and fully discussed with Respondent Rim Marcinkus, M.D., the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its form and content.

DATED: 4-14-17

ALBERT J. GARCIA, ESQ.
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Medical Board of California.

Dated: 4/14/2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MATTHEW M. DAVIS
Supervising Deputy Attorney General

MARTIN W. HAGAN
Deputy Attorney General
Attorneys for Complainant

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Exhibit A

Accusation No. 09-2013-230441

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Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO FEBRUARY 23, 2016
BY ANALYST

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

In the Matter of the Accusation Against: **Rim Marcinkus, M.D.** **72-301 Country Club Drive, #107** **Rancho Mirage, CA 92270** **Physicians's and Surgeon's Certificate No. A66358,** Respondent.	Case No. 09-2013-230441 **ACCUSATION**

Complainant alleges:

PARTIES

1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official capacity as the Executive Director of the Medical Board of California.

2. On or about August 21, 1998, the Medical Board of California issued Physician's and Surgeon's Certificate No. A66358 to Rim Marcinkus, M.D. (respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on November 30, 2017, unless renewed.

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JURISDICTION

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

4. Section 2227 of the Code states:

"(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, 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 for a period not to exceed one year upon order of the board.

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

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

"(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.

"(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the board and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1."

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5. Section 2234 of the Code, states:

"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:

". . .

"(b) Gross negligence.

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

"(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

"(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

"(d) Incompetence.

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

". . ."

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

7. Section 2266 of the Code states: "The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct."

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8. Section 2216 of the Code states, in pertinent part: "On or after July 1, 1996, no physician and surgeon shall perform procedures in an outpatient setting using anesthesia, except local anesthesia or peripheral nerve blocks, or both . . . unless the setting is specified in H & S C §1248.1 . . ."

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence)

9. Respondent has subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (b), of the Code, in that he committed gross negligence in his care and treatment of patients T.U. and J.M., as more particularly alleged herein:

Patient T.U.

10. On or about June 22, 2011, patient T.U. was initially seen by respondent for a consultation regarding breast augmentation surgery. Patient T.U. complained of loss of volume, atrophy, and droopy breasts. Respondent's impressions were, "Bilateral breast atrophy with ptosis grade 2-3, asymmetry of breasts and nipple areolar complexes. Very thin skin envelope present." There is no consultation note indicating that options for treatment were discussed, such as mastopexy (surgical procedure for sagging or droopy breasts).

11. On or about August 24, 2011, patient T.U. underwent breast implant replacement in respondent's clinic under general anesthesia provided by Dr. E.S. High profile Natrelle-brand 350 cc saline implants were placed.

12. On or about December 5, 2011, patient T.U. returned to respondent for a follow-up visit. Respondent's notes are mostly illegible and state "pt. wants to go bigger." There is no documentation indicating possibility of mastopexy or acknowledgment of patient T.U.'s asymmetry.

13. On or about January 23, 2012, respondent prescribed to patient T.U. 500 mg of Keflex, four times daily, and provided an eleven day supply. The office note on this day does not mention the antibiotics and no reason is given for antibiotics. There is no documentation that patient T.U. was suffering from an infection on January 23, 2012.

14. On or about February 6, 2012, patient T.U. returned to respondent's office for a second surgery. After waiting several hours for an anesthesiologist, patient T.U.'s surgery was canceled. There is no documentation of patient T.U.'s visit for this day.

15. On or about February 7, 2012, patient T.U. returned to respondent's office. Respondent's pre-operative note states patient T.U.'s implants are "deflated and leaking." According to the operative notes, respondent "replaced bilaterally deflated implants with Natrelle 550 saline" and surgery was performed under general anesthesia provided by Dr. E.S. There is no documentation of any alternative treatment suggestions, such as mastopexy.

16. Following her second surgery on or about February 7, 2012, with respondent, patient T.U. consulted another plastic surgeon, Dr. M.S., who recommended further surgery with implant revision and mastopexy, at a cost of approximately $17,000, in order to correct her deformity caused by respondent.

17. On or about February 12, 2012, respondent and/or a member of his staff, submitted a warranty claim to Allergan USA, Inc., alleging that the breast implants respondent used on patient T.U. during her first breast implant augmentation surgery on or about August 24, 2011, were defective ("deflated.") In truth and fact, the breast implants were not defective, but instead were replaced because respondent elected to perform a second breast augmentation surgery on patient T.U. at her request on or about February 7, 2012. On or about May 17, 2012, as a result of respondent and/or his staff's submission of a warranty claim, he received from Allergan USA, Inc., a check in the amount of $1,200.00, covering operating expenses.

Patient J.M.

18. On or about July 14, 2012, patient J.M. consulted with respondent regarding facial cosmetic surgery.

19. On or about August 8, 2012, patient J.M. saw respondent for a pre-operative visit. There is no pre-operative note by respondent. Respondent prescribed to patient J.M., Keflex 500 mg, three times daily, #30, to begin on August 13, 2012. There is no documentation discussing the reason(s) for the 10-day course of Keflex for patient J.M. Respondent also prescribed Ativan 2 mg #2 to patient J.M., to bring to the surgery center and to take orally before the procedure.

20. On or about August 14, 2012, patient J.M. returned to respondent's office for surgery. Patient J.M.'s original consent form was for "Eurolift" (face and neck lift), but the consent form was changed, on the day of surgery, with respondent's note which stated, "Pt wants to add Restylane, Temporal, chin liposuction," and the initials of patient J.M. At approximately 4:30 p.m., surgery proceeded and according to the operative note, submental liposuction removed 30 ml of fat from beneath the chin, and 2 ml of Restylane was injected into the nasolabial folds. The lab work in patient J.M.'s chart, dated May 2, 2012, demonstrated a urinary tract infection (UTI). There is no documentation as to whether respondent acknowledged, treated, and/ or re-checked this UTI before beginning surgery. The Operating Room nursing notes for patient J.M.'s surgery state that the procedure was performed under "local with sedation," but there is no documentation of the method of sedation that was used. The nurse does not document the Ativan 4 mg oral sedative respondent prescribed pre-operatively. Moreover, in the nursing notes, there is no documentation of the standard "time out" prior to initiation of surgery; drains; locations of the electrosurgical grounding; pre-and post-surgical count of blades, needles, laparotomy sponges; and any wound dressing.

21. Patient J.M. returned to respondent for follow-up visits on August 15, 19, 23, and 28, 2012, and was presented with a bill of $1,550.00 for the additional procedures provided.

22. On or about August 30, 2012, there was no documentation of any office visit, but there is a note stating that "Called RX to Costco for Cipro 500 mg #20." There is no documentation regarding the reason for this prescription. Patient J.M.'s "Health Questionnaire" dated August 8, 2012, states that she is allergic to Cipro and respondent's documentation entitled, "Initial Evaluation" of patient J.M., dated July 14, 2012, notes, "Cipro" under the section "Allergies."

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23. Respondent committed gross negligence in the care and treatment of patients T.U. and J.M., which included, but was not limited to, the following:

(a) Respondent failed to consider and/or suggest mastopexy when patient T.U. initially presented with breast ptosis in or about June 2011;

(b) Respondent failed to consider and/or suggest mastopexy during patient T.U.'s first breast augmentation surgery on or about August 24, 2011;

(c) Respondent failed to consider and/or suggest mastopexy during patient T.U.'s follow-up visit on or about December 5, 2011;

(d) Respondent failed to consider and/or suggest mastopexy during patient T.U.'s second breast augmentation surgery on or about February 7, 2012;

(e) Respondent prescribed an 11-day course of Keflex (antibiotics) to patient T.U. on or about January 23, 2012, two weeks before the second surgery on or about February 7, 2012, without any documentation showing patient T.U. was suffering from an infection on or about January 23, 2012;

(f) Respondent prescribed a 10-day course of Keflex (antibiotics) to patient J.M. on or about August 8, 2012, without any documentation discussing the reason(s) for such prescription;

(g) Respondent failed to ensure completeness of nursing notes and this resulted in no documentation of the standard "time out" prior to initiation of surgery; drains; locations of the electrosurgical grounding; pre-and post-surgical count of blades, needles, laparotomy sponges; and any wound dressing for patient J.M.; and

(h) Respondent prescribed Cipro to patient J.M. on or about August 30, 2012, even though patient J.M. informed respondent on or about July 14, 2012, and again on or about August 8, 2012, that she was allergic to Cipro.

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SECOND CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

24. Respondent has further subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (c), of the Code, in that he committed repeated negligent acts in the care and treatment of patients T.U. and J.M., as more particularly alleged herein:

(a) Paragraphs 9 through 23, above, are hereby incorporated by reference and re-alleged as if fully set forth herein;

25. Respondent committed repeated negligent acts in the care and treatment of patients T.U. and J.M., which included, but was not limited to, the following:

(b) Respondent failed to consider and/or suggest mastopexy when patient T.U. initially presented with breast ptosis in or about June 2011;

(c) Respondent failed to consider and/or suggest mastopexy during patient T.U.'s first breast augmentation surgery on or about August 24, 2011;

(d) Respondent failed to consider and suggest mastopexy during patient T.U.'s follow-up visit on or about December 5, 2011;

(e) Respondent failed to consider and/or suggest mastopexy during patient T.U.'s second breast augmentation surgery on or about February 7, 2012;

(f) Respondent prescribed an 11-day course of Keflex (antibiotics) to patient T.U. on or about January 23, 2012, two weeks before the second surgery on or about February 7, 2012, without any documentation showing patient T.U. was suffering from an infection on or about January 23, 2012;

(g) Respondent prescribed a 10-day course of Keflex (antibiotics) to patient J.M. on or about August 8, 2012, without any documentation discussing the reason(s);

(h) Respondent failed to ensure completeness of nursing notes and this resulted in no documentation of the standard "time out" prior to initiation of surgery; drains; locations of the electrosurgical grounding; pre-and post-surgical count of blades, needles, laparotomy sponges; and any wound dressing for patient J.M.; and

(i) Respondent prescribed Cipro to patient J.M. on or about August 30, 2012, even though patient J.M. informed respondent on or about July 14, 2012, and again on or about August 8, 2012, that she was allergic to Cipro.

THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate and Accurate Records)

26. Respondent has further subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action under sections 2227 and 2234, as defined by section 2266, of the Code, in that he failed to maintain adequate and/or accurate medical records for patients T.U. and J.M., as more particularly alleged in paragraphs 9 through 25, above, which are hereby incorporated by reference and realleged as if fully set forth herein.

FOURTH CAUSE FOR DISCIPLINE

(Lack of Outpatient Setting Accreditation)

27. Respondent has further subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action under sections 2227 and 2234, as defined by section 2216 of the Code, in that in an unaccredited, outpatient setting, he performed procedures using general anesthesia, as more particularly alleged herein:

28. Paragraphs 9 through 25, above, are hereby incorporated by reference and realleged as if fully set forth herein.

29. On or about August 24, 2011, during treatment of patient T.U., respondent performed breast augmentation surgery using general anesthesia provided by Dr. E.S. at respondent's office, D.P. Surgery Center, a facility that was not accredited by The Institute for Medical Quality (IMQ) from 2009 until 2013.

30. On or about February 7, 2012, during treatment of patient T.U., respondent performed a second breast augmentation surgery using general anesthesia provided by Dr. E.S. at respondent's office, D.P. Surgery Center, a facility that was not accredited by IMQ from 2009 until 2013.

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FIFTH CAUSE FOR DISCIPLINE

(Incompetence)

31. Respondent has further subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (d), of the Code, in that he has demonstrated incompetence in the care and treatment of patient T.U. The circumstances are as follows:

(a) Paragraphs 9 through 25, above, are hereby incorporated by reference and re-alleged as if fully set forth herein;

(b) Respondent exhibited a lack of knowledge when he failed to consider and suggest mastopexy as an alternative to, or in conjunction with, breast augmentation surgery, when patient T.U. presented with breast ptosis in or about June 2011.

(c) Respondent exhibited a lack of knowledge when he failed to consider and suggest mastopexy as an alternative to, or in conjunction with, breast augmentation surgery, when patient T.U. returned for a follow-up visit in or about December 2011.

(c) Respondent exhibited a lack of knowledge when he stated during his November 13, 2014, interview with DOI Investigator that blowing up breast implants results in lifting of the breasts.

(d) Respondent exhibited a lack of knowledge when he prescribed a 10-day course of Keflex to patient J.M. on or about August 8, 2012.

SIXTH CAUSE FOR DISCIPLINE

(Dishonesty or Corruption)

32. Respondent has further subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (e), of the Code, in that he has engaged in an act or acts of dishonesty or corruption substantially related to the qualifications, functions, or duties of a physician, in his care or treatment of patient T.U., as more particularly alleged in paragraphs 9 through 17, above, which are hereby incorporated by reference and realleged as if fully set forth herein.

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SEVENTH CAUSE FOR DISCIPLINE

(General Unprofessional Conduct)

33. Respondent has further subjected his Physician's and Surgeon's Certificate No. A66358 to disciplinary action under sections 2227 and 2234, as defined by section 2234, of the Code, in that he has engaged in conduct which breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine, as more particularly alleged, in paragraphs 9 through 32, above, which are hereby incorporated by reference and realleged as if fully set forth herein.

PRAYER

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

1. Revoking or suspending Physician's and Surgeon's Certificate No. A66358, issued to respondent Rim Marcinkus, M.D.;

2. Revoking, suspending or denying approval of respondent Rim Marcinkus, M.D.'s authority to supervise physician assistants, pursuant to section 3527 of the Code;

3. Ordering respondent Rim Marcinkus, M.D., if placed on probation, to pay the Board the costs of probation monitoring; and

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

DATED: February 23, 2016

KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
State of California
Complainant