

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

In the Matter of the Petition for)
Termination of Probation By:)
)
)
Stuart J. Fischbein, M.D.)
)
Physician's and Surgeon's)
Certificate No. G 52027)
)
Respondent)
_____)

Case No. 26-2009-202439

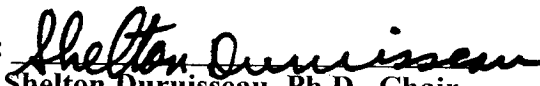
DECISION

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

This Decision shall become effective at 5:00 p.m. on April 29, 2011.

IT IS SO ORDERED April 1, 2011.

MEDICAL BOARD OF CALIFORNIA

By: 
Shelton Duruisseau, Ph.D., Chair
Panel A

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

In the Matter of the Petition for Termination of
Probation by:

STUART J. FISCHBEIN, M.D.,

Petitioner.

Case No. 26-2009-202439

OAH No. 2010101013

PROPOSED DECISION

This matter, by assignment of the Medical Board of California (Board) pursuant to Business and Professions Code section 2307, was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 10-11, 2011, in Los Angeles. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Peter Osinoff, Esq., represented Stuart J. Fischbein, M.D. (Petitioner), who was also present.

John Rittmayer, Deputy Attorney General, appeared pursuant to Government Code section 11522 on behalf of the California Attorney General.

FACTUAL FINDINGS

1. On March 12, 1984, the Board issued Petitioner Physician's and Surgeon's Certificate No. G 52027. The certificate is renewed and current, with an expiration date of July 31, 2011.

2A. Effective October 10, 2007, the Board revoked Petitioner's certificate, by its Decision After Non-Adoption in Board Case No. 06-2006-172374. The revocation was stayed, and Petitioner was placed on seven years probation, under various terms, including that he take an education course, an ethics course, continue with psychotherapy, and that he have a third party chaperone present while interacting with female patients.

2B. The basis for discipline of Petitioner's certificate was that he had a sexual relationship with a female patient, in violation of Business and Professions Code section 726 (unprofessional conduct); and that he had been convicted of an offense substantially related to the qualifications, functions and duties of a physician (sexual exploitation of a patient) in violation of Business and Professions Code section 2236, subdivision (a).

2C. The Administrative Law Judge who heard the matter issued a Proposed Decision in which Petitioner was placed on probation with the same terms but only five years in duration. In its Decision After Non-Adoption, the Board pointed out that the minimum discipline suggested in its Disciplinary Guidelines for violations of Business and Professions Code sections 726 and 2236 includes a seven year probation. The Board concluded that although the evidence of mitigation and rehabilitation presented by Petitioner was significant, it was not enough to warrant a departure from the minimum discipline suggested by the Disciplinary Guidelines. For that reason, the Board concluded that Petitioner should be placed on seven years probation.

3. The Petition for Termination of Probation (petition) was filed two years after the effective date of Petitioner's probation, which was the earliest possible time he could have done so. As of the hearing, Petitioner had less than four years of probation remaining.

4. Petitioner has complied with all the terms of his Board probation, including his continued psychotherapy with Jenny Gruska, MFT; completion of three separate boundaries and ethics programs; using a third party chaperone while interacting with female patients; providing a copy of the Board's Decision After Non-Adoption to those required to receive it; abstention from supervising physician assistants; and remaining current in his probation monitoring costs.

5. Attached to the petition are verified letters from the following physicians who have worked with Petitioner since his probation went into effect: Irwin Frankel, M.D.; David Kline, M.D.; Bruce Bekkar, M.D.; and Howard Mandel, M.D. Drs. Frankel and Kline also testified during the hearing. These physicians uniformly describe Petitioner as a competent and caring practitioner, who is brutally honest and has expressed remorse about his inappropriate relationship with the female patient in question. These physicians also believe that Petitioner is not apt to improperly cross over patient boundaries.

6. Also part of the petition is a verified letter from Petitioner's psychotherapist Jenny Gruska, who has seen Petitioner for the past several years. She subsequently issued a few supplemental letters. Ms. Gruska believes Petitioner has gained valuable insight into his prior misconduct and that she has no reason to believe he will enter into another dual relationship with a patient in the future.

7. Petitioner also presented character reference letters from a medical assistant with whom he has worked in an office setting, as well as a nurse-midwife whom he employs. Both depict Petitioner as a competent, caring professional, who has expressed regret for his past misconduct.

8. In addition, Petitioner presented an evaluation report from Elizabeth R. Becker, L.C.S.W., as well as her testimony. Ms. Becker helped to establish the Professional Boundaries program for the Board's PACE program. She first came into contact with Petitioner in 2006 when he attended the PACE program. Ms. Becker was impressed with Petitioner's candor and personal insight while he participated in PACE. Ms. Becker also

conducted an evaluation of Petitioner in December 2010 in connection with the petition. Ms. Becker opined that Petitioner is capable of maintaining safe and professional boundaries with patients. She believes he presents an extremely low risk to the public.

9. Being on probation has had an adverse effect on Petitioner's practice. However, Petitioner tends to overstate the adverse effect. For example, Petitioner was politely asked to leave as the Medical Director of a community medical clinic where he had volunteered for many years. He did not explain why he has not sought out other such positions, or other volunteer community activity which does not require a medical license. He resigned from his primary hospital in Los Angeles, Cedars-Sinai Medical Center, because physicians on probation face long, multi-level review. It was not established why he did not go through that process, as he had when he contested the Board's accusation in the matter that led to his being placed on probation. Another hospital where he worked went out of business. He contends he cannot obtain privileges at other hospitals due to his probation, but his explanation was unconvincing and he did not present sufficient details indicating he has made diligent efforts to do so. He still has privileges at other hospitals, but he complains that having the chaperone requirement makes his practice in those places difficult. Healthcare plans have terminated him from their networks due to his being on probation, and this has undoubtedly resulted in a significant decline of patients. However, Petitioner also complains that he cannot obtain a teaching position or serve as an expert reviewer. It is not clear whether those problems are related to his being on probation, his being convicted of a substantially related crime, his having sex with a patient, or some combination.

10. Petitioner's biggest concern is that he will not be able to recertify in his specialty with the American Board of Obstetrics and Gynecology (ABOG). It is clear that ABOG is not going to allow this to happen until his probationary period has ended, without the matter resorting to litigation or some sort of administrative review. Nonetheless, Petitioner did not clearly establish that the lack of certification will prohibit him from practicing medicine or substantially deteriorate the practice in which he now engages.

11. Petitioner has chafed somewhat at the requirement for him to have a third party chaperone during his female patient interactions. Petitioner acknowledges that the requirement poses a problem for him, practically and financially. He also acknowledges that the requirement was behind some of the friction between him and management at another hospital, which ultimately led him to withdraw his request for reappointment of staff privileges. Petitioner had a pointed discussion with his Board probation monitor about this issue in February of 2009, which is documented in the probation monitor's report but which Petitioner tends to discount. More telling, in a boundary protection plan Petitioner drafted on his own initiative in October of 2010, he lists having a trained chaperone with him at "all examinations at all times," without reference to having a chaperone present during consultation or treatment as required by the terms of his probation.

12. In the Fall of 2007, after Petitioner was placed on probation by the Board, he began working with a screenwriter friend on a project that later became a script entitled "Bedside Man." By this time, Petitioner had already completed the PACE Professional Boundaries program. The cover of the script states it is "based on a true story," and credits "Story by Stuart Fischbein." A promotional trailer was later made, in which Petitioner was also involved and credited. The storyline of the script and trailer are so similar to Petitioner's explanations of the events with the female patient in question that it is clear his friend heavily relied on Petitioner's input. Although fictional names are used in the story, the script and trailer are obviously based on Petitioner's version of events. When reviewed in their totality, the script and trailer tend to minimize Petitioner's culpability, make him look more like a victim and his victim less of one, and depict Petitioner as being persecuted for his views on some aspects of medicine.

13. In an effort to promote "Bedside Man" for financial investment to make a full-length movie, the trailer was made accessible over the internet. One hospital where Petitioner was affiliated found out about it and contacted Petitioner's psychotherapist. Ms. Gruska felt the trailer was "inappropriate," and she discussed the matter with Petitioner. From her letter detailing the events, it appears that Ms. Gruska was readily able to see the impropriety of the project while Petitioner had not. She told him that the project "did not represent him as a man who had made a terrible error in judgment." Ms. Gruska persuaded Petitioner that the project was an error and for the trailer to be removed from the internet. Petitioner has done so.

LEGAL CONCLUSIONS

1. The burden in a petition for reduction of an administrative penalty rests, at all times, with the petitioner. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084.)

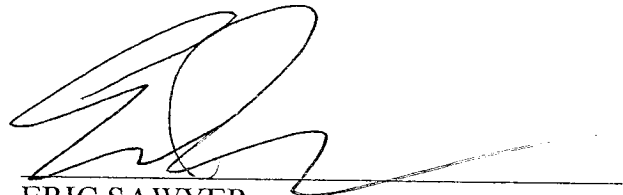
2. Cause was not established, pursuant to Business and Professions Code section 2307, subdivision (c), and California Code of Regulations, title 16, section 1360.2, for the termination of Petitioner's probation. First, although Petitioner has complied with the terms of his probation, it cannot be concluded that he has done anything in this regard so extraordinary or compelling as to clearly and convincingly evidence his complete and total rehabilitation. Simply complying with the terms of his probation is not enough. Although Petitioner is clearly on the right track toward rehabilitation, it was not clearly and convincingly established that he is satisfactorily rehabilitated. In fact, there are a few instances which evidence Petitioner is still on his journey, and that, to some degree, he still views probation as punishment and an inconvenience. For example, Petitioner filed the petition at the earliest possible opportunity. Although he no doubt has encountered difficulties practicing while on probation, he still tends to overstate those difficulties. He has openly chafed at the requirement that he have a third party chaperone during interactions with female patients. It is clear that once off probation, the chaperone requirement would quickly disappear from his practice as the lessons learned from these events fade and the inconvenience grows. More alarming was Petitioner's participation in the movie script and

trailer. This activity shows that Petitioner still harbors bad feelings about what happened to him, suggesting that he does not fully believe he engaged in misconduct. It also shows a lack of good judgment given the timing. Petitioner's psychotherapist was readily able to see that fact and had to persuade Petitioner. He had already been placed on probation and completed the PACE boundaries program when he started the project. He should have known better. Such a state of mind does not bode well for the proposition of removing Petitioner completely from the Board's probationary oversight. In all, these events demonstrate sufficient concern over the course of Petitioner's rehabilitation as to indicate that continuing probation with all terms should continue in order to protect the public. (Factual Findings 1-13.)

ORDER

The petition for termination of probation by Stuart J. Fischbein, M.D. is denied.

Dated: February 28, 2011

A handwritten signature in black ink, appearing to read 'Eric Sawyer', written over a horizontal line.

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings