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

In the Matter of the Accusation Against: Abhay Gupta, M.D. Physician's and Surgeon's Certificate No. A 88550 Respondent.	Case No.: 800-2019-057074

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 March 2, 2022.

IT IS SO ORDERED: January 31, 2022.

MEDICAL BOARD OF CALIFORNIA

Laurie Rose Lubiano, 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:

ABHAY GUPTA, M.D., Respondent

Agency Case No. 800-2019-057074

OAH No. 2021030458

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 17, and 18, 2021, at the Office of Administrative Hearings in San Diego, California.

Keith C. Shaw, Deputy Attorney General, represented complainant, William Prasifka, Executive Director of the Medical Board of California (board), Department of Consumer Affairs, State of California.

Kevin C. Murphy, Attorney at Law, Murphy and Jones, A.P.C., represented respondent who was present throughout the hearing.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on November 18, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. On August 13, 2004, the board issued Physician's and Surgeon's Certificate Number A 88550 to respondent. The Certificate is set to expire on December 31, 2023, unless renewed.

2. On January 21, 2021, the board filed accusation number 800-2019-057074 seeking revocation or suspension of respondent's certificate based upon three causes for discipline, namely: (1) conviction of a substantially related crime for respondent's October 21, 2019, conviction for violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of 0.08 percent or more; (2) dangerous use of alcohol based upon the underlying circumstances of his conviction; and (3) general unprofessional conduct based upon the underlying circumstances of his conviction.

3. Respondent timely filed a notice of defense, and this hearing followed.

Respondent's Conviction

4. On October 21, 2019, respondent was convicted on his plea of guilty in the Superior Court of California, County of San Diego, in Case No. M260047 of violation of Vehicle Code section 23152, subdivision (b), driving while having a measurable blood alcohol level of 0.08 percent or more, by weight, of alcohol in his blood, a misdemeanor. As a result of this conviction respondent was sentenced to five years of summary probation with terms and conditions that require him, among other conditions, to: successfully complete a driving under the influence (DUI) first offender's program, install an Ignition Interlock Device on respondent's vehicle for a period of six

months, attend a Mother's Against Drunk Driving (MADD) program, serve 40 hours of community service, and not operate a motor vehicle with any amount of measurable alcohol in his system. The events underlying respondent's conviction occurred on May 29, 2019.

Testimony of Officer Pascal Huoth

5. Officer Pascal Huoth is currently employed as a California Highway Patrol (CHP) officer, a position he has held for the past 13 years. Officer Huoth is assigned as a patrol officer working the "graveyard shift" with his partner enforcing traffic laws, including finding DUI drivers. Officer Huoth was responsible for investigating and arresting respondent for the May 29, 2019, incident that resulted in respondent's conviction. Officer Huoth summarized his findings from the arrest and investigation of respondent in a police report, which was received in evidence. Officer Huoth testified at the hearing consistent with the information in that police report. The following factual findings are based on officer Huoth's testimony and information in the police report.

6. Officer Huoth has undergone training related to DUI and has extensive experience with DUI arrests having made over 400 DUI arrests during his career. Officer Huoth underwent 52 hours of training relating to DUI prior to becoming an officer with the CHP, including topics related to the administration of field sobriety tests, and classroom training regarding roadside impairment. Officer Huoth was also trained on the topic of what constitutes a standard alcoholic beverage, which he stated was 12 ounces of beer, or 4 ounces of wine, or about 1.25 ounces of liquor. He explained that consumption of one standard alcoholic beverage increases the blood alcohol concentration (BAC) by about 0.02 percent. Officer Huoth further explained that the legal intoxication limit to drive in California is a BAC of 0.08 percent, which

would take about four standard alcoholic beverages to accomplish. Additionally, the average person burns off about 0.02 percent of BAC per hour through normal metabolism. He also stated that these numbers are a general in nature and do not account for body mass of the individual or the actual percent of alcohol in the drinks consumed by the individual.

7. Officer Huoth testified about the events leading to respondent's arrest on May 29, 2019. At 10:25 p.m. on May 29, 2019, officer Huoth and his partner were dispatched to a vehicle collision at Carmel Valley Road at the ramp to enter westbound highway 56. Upon arrival, officer Huoth observed respondent standing on the corner of the onramp. Officer Huoth "smelled alcohol emitting from [respondent's] breath." Officer Huoth asked respondent if he had consumed alcohol that night, and respondent replied that he had one IPA beer at 5:00 p.m. that he finished by 5:20 p.m. while at a golf course, and that he did not have any more alcohol other than that one beer. Respondent told the officer that he did not feel the effects of that one beer. Officer Huoth also observed respondent drinking from a 16-ounce water bottle during the time the officer was questioning respondent. Officer Huoth asked respondent to stop drinking from the bottle and respondent complied after having consumed almost the entire bottle.

Officer Huoth administered a series of field sobriety tests (FSTs) to respondent. Officer Huoth explained that if respondent fails four out of six FSTs, there is a high likelihood that respondent has a BAC above 0.10 percent. He administered the horizontal gaze nystagmus test, wherein the officer looks to see if respondent's eyes can follow the officer's finger smoothly without "bouncing", which is an indicator of intoxication. Officer Huoth observed a lack of smooth pursuit in each of respondent's eyes and extreme nystagmus in both eyes with an onset of 45 degrees in both eyes.

Officer Huoth stated that respondent's performance on the horizontal gaze nystagmus test indicated that respondent was intoxicated.

Officer Huoth next administered the one leg stand test, wherein respondent was instructed to initially stand with his feet together and then to raise one of his feet about six inches off the ground with his arms down by his sides and to count out loud with "1000-1, 1000-2, . . . " until the officer tells him to stop. Respondent put his foot down on two occasions and moved his arms out to use for balance as well, indicating intoxication.

Officer Huoth next administered the walk and turn test, wherein the officer instructs respondent to stand with his arms by his side "in a heel to toe" manner and has respondent take nine steps in a heel to toe manner in a straight line while looking at his feet, and then turn by pivoting on his left foot and take nine steps back in a straight line. Officer Huoth observed that respondent was not able to maintain his balance during the test, was complaining that he was uncomfortable while the officer was giving instructions, and respondent attempted to stretch his back. As a result, officer Huoth was unable to administer the walk and turn test completely to respondent.

Officer Huoth then administered the Romberg test to respondent. Officer Huoth instructed respondent to stand straight with his feet together and his arms by his side, then to tilt his head back with his eyes closed and to estimate 30 seconds, then to tilt his head forward and say "stop." Officer Huoth observed that respondent was swaying about two inches from center during the test, and respondent failed to say "stop" at the end of the test as instructed and instead said "30." Officer Huoth stated that respondent's performance on the Romberg test indicated impairment.

Officer Huoth also administered the finger to nose test to respondent wherein the officer instructed respondent to stand straight with his feet together with his index fingers pointed to the ground. Officer Huoth then instructed respondent to tilt his head back, close his eyes, and to touch the tip of his finger of his right hand to his nose, and then the tip of the finger of the left hand to his nose. Officer Huoth observed that respondent swayed about two inches from center during the test, and on two occasions respondent touched the bridge of his nose rather than the tip of his nose, and respondent failed to keep his feet together and instead moved his feet about six inches apart. Officer Huoth indicated that respondent's performance on this test indicated that he was impaired.

Finally, officer Huoth stated that another FST that can be administered is the preliminary alcohol screening test (PAS), which involves the use of a portable breathalyzer machine that respondent would blow into and the machine would provide a preliminary BAC measurement. However, respondent declined to give a sample for the PAS test.

8. Officer Huoth arrested respondent for driving under the influence of alcohol at approximately 11:00 p.m. Following the arrest, officer Huoth witnessed the taking of a blood sample from respondent for toxicology testing. The toxicology results from the testing of respondent's blood sample were received in evidence and demonstrate that respondent's BAC was 0.17 percent by weight, well over the 0.08 percent legal limit.

9. Officer Huoth also testified that respondent was not the cause of the vehicle collision on May 29, 2019, but the other driver was the cause of the collision. Additionally, the other driver was also arrested and charged with driving under the influence of alcohol.

Respondent's Testimony

10. Respondent is 51 years of age and currently licensed to practice medicine in California, Texas, Florida, Michigan, and Ontario, Canada. He has never had any discipline to his licenses or his staff privileges at hospitals. Respondent grew up in Canada and went to undergraduate and medical school in Canada. He graduated from medical school in 1994 and thereafter completed two years of general surgery internship and thereafter three years of a plastic surgery residency. Respondent then completed a microsurgery residency in June 2000 at the University of Texas MD Anderson Cancer Center, and an aesthetic surgery and breast reconstruction residency in July 2001 at Cleveland Clinic Florida. From August 2001 to October 2004 respondent worked as the Chief of Reconstructive Microsurgery and Assistant Professor of Surgery at University of Texas Health Science Center at San Antonio. Since October 2004 respondent has worked as the Medical Director of Gupta Plastic Surgery in San Diego, his own private practice consisting of two offices. His practice consists of 70 percent reconstructive surgery for cancer or trauma and 30 percent aesthetic or cosmetic surgery. Respondent has staff privileges at multiple hospitals and surgical centers. Respondent is married and has three children ages 14, 12, and 9. Respondent's wife works as a dentist.

11. Respondent testified about the events of May 29, 2019. He stated that he worked that day and had performed two surgeries. After work he went to the Farms Golf Club for a golf tournament starting at 5:00 p.m. Respondent played golf from 5:00 p.m. to 7:30 p.m. and then had dinner in the clubhouse from 7:30 p.m. to 8:30 p.m. After dinner he played cards at the clubhouse until about 10:00 p.m. According to respondent, during the golf tournament he had only one beer. He stated that he also had one beer at dinner with his meal, and while playing cards he drank one mixed

drink of bourbon and diet coke. Respondent stated that the bartenders at the golf club make "stiff drinks" and this was a "stiff drink." Respondent stated he felt no effects of the alcohol he had consumed. Respondent stated that on May 29, 2019, he weighed about 185 pounds, and he last drank alcohol before the accident at around 10:00 p.m. right before he started to drive home. After he finished playing cards at 10:00 p.m. he drove his car toward home when he was in a collision on Carmel Valley Road while trying to merge onto highway 56. After the collision respondent got out of his vehicle to check on the other driver and he noticed that he was visibly intoxicated. Respondent then called 911 to report the collision.

12. When the CHP officers arrived on the scene of the collision the officer administered FSTs to respondent. Respondent told the officer that he was experiencing back pain because he hurt his back at the golf tournament, and he told the officer he had an inner ear abnormality with symptoms of dizziness and imbalance. Respondent stated that he did not recall the officer instructing him to use the word "stop" after counting to 30 on the Romberg test.

13. As a result of his conviction, respondent was required to undergo a substance abuse assessment. He testified that the result of the assessment was that he showed no signs of alcoholism and was at very low risk for alcoholism in the future. He also attended the first offender DUI program, which included the requirement that he attend Alcoholic Anonymous (AA) meetings with individual counseling and therapy. Respondent successfully completed the requirements of the first offender DUI program and provided a Notice of Completion document evidencing his completion of that program.

Respondent was also required to install an ignition interlock device on his vehicle, which requires him to blow into a detector to prove he has no alcohol in his

system before the vehicle ignition will work to start the vehicle. He was required to have this device on his vehicle for six months. Respondent successfully completed this requirement and provided documentation showing that the ignition interlock device was installed on his vehicle.

Respondent was additionally required to attend a MADD victim impact panel, which he completed. He was further required to complete 32 hours of community service, and he completed a total of 33 hours of community service. Respondent provided documentation showing his completion of the community service hours. Respondent paid all of the required fines and fees associated with his conviction. Respondent met all of the requirements of his criminal probation, but he remains on summary probation until October 21, 2024.

14. Respondent testified that he fully accepts responsibility for his mistake of drinking alcohol and driving a vehicle. His recognizes that his actions demonstrated a lack of judgment. Respondent stated that he learned from his experience and the first offender DUI program and MADD impact panel how widespread and damaging drinking and driving is. He learned that it is not safe to drive a vehicle with any amount of alcohol in your system. He has learned from his mistake and will never repeat it again. He stated that after he completed the first offender DUI program in April 2020, the only time he drank alcohol was if he and his wife were having dinner and he would have wine "for the flavor," but if he and his wife were drinking they would never drive and would take Uber. Respondent made the decision to abstain from alcohol completely in October 2020 in order to "prove to the board that [he] takes this seriously."

15. Additionally, respondent began voluntarily testing his biological fluid beginning in June 2021 to show he has not been using alcohol. Respondent began

seeing Anoop Karippot, M.D., a board-certified psychiatrist and board-certified sleep machine specialist, on October 13, 2020, for a sleep medicine/CPAP machine evaluation/sleep assessment. Dr. Karippot works at the AKANE Institute of Behavioral Medicine/AKANE Institute of Allergy, Asthma and Sleep Medicine. During that visit on October 13, 2020, respondent requested a formal comprehensive clinical psychiatric evaluation because of his DUI conviction, which Dr. Karippot provided along with a follow-up treatment plan including random biological fluid screens for alcohol on a weekly basis beginning in June 2021. Dr. Karippot wrote a letter dated June 22, 2021, which was received in evidence. In the letter Dr. Karippot wrote that after the initial psychiatric evaluation and assessment of respondent on October 13, 2020, there were five follow-up psychiatric evaluations and management on the following dates: December 9, 2020, February 11, 2021, February 17, 2021, March 30, 2021, and June 22, 2021. Dr. Karippot further wrote that "Laboratory work-up with a random alcohol test was also ordered on a weekly basis," and that "so far I have received 4 different laboratory test results which were all negative." Dr. Karippot wrote the following at the conclusion of his letter under the title "Recommendations/Treatment Plan":

> I am satisfied with the clinical evaluation and treatment plan arranged for this patient. Patient is compliant with the recommendations and treatment plan arranged. His toxicology screen including the random alcohol screen has been negative or on [*sic*] at least 4 different occasions. He has been compliant with the recommended treatment plan arranged including his CPAP machine use and sleep hygiene. Patient is noted to be stable with his day-to-day functioning. No particular psychiatric stressors of [*sic*] psychopathology noted. No concerns in terms of his

functioning or his substance use noted during my evaluation and assessment.

Respondent testified that the biological fluid testing for alcohol performed as a result of Dr. Karippot's orders were initially taken randomly. However, "for the last six months" he was providing urine for the alcohol screening on a scheduled basis every Wednesday because the random testing was interfering with his surgical schedule. If he had to provide a random biological fluid sample, respondent was required to cancel an entire day of surgery or office visits, which was a hardship. Thereafter, respondent found a laboratory located in the same building as his office in Encinitas, where he normally works every Wednesday, where he can provide a biological sample for alcohol screening. As a result, he schedules the screening for Wednesdays. Respondent provided copies of the lab results from his biological fluid screening from the dates of June 9, 2021, to October 27, 2021. All of these results were negative for alcohol and only tested for alcohol and no other substances.

16. Respondent stated that he also underwent a psychiatric evaluation by Dr. Clark Smith to assess him for potential alcoholism. Respondent stated that Dr. Smith had no diagnoses for respondent other than sleep apnea.

17. Respondent testified that he has never put a patient's safety in jeopardy and believes he is safe to practice medicine. He admits he made a terrible mistake as a result of a lapse in judgment, but stated "it has never happened before, since, and will never happen again." Respondent believes he has paid for his mistake and does not believe that his ability to practice medicine should be affected by his mistake. Respondent is worried because any license restrictions will affect his medical practice because most of his practice is insurance based and if his license is placed on probation the insurance companies will drop him and he will lose most of his patients.

Respondent hopes to find some level of discipline that does not include placing his license on probation in order to avoid those consequences.

18. Respondent also provided an interview with an investigator for the board on September 29, 2020, regarding the events of respondent's arrest and resulting conviction. A transcript of that interview was received into evidence. The transcript of that interview shows that respondent told the investigator that he drank one beer during his golf round that started at 5:00 p.m. and ended at about 7:00 p.m. or 7:15 p.m., he had one beer at dinner that started after the golf round and ended at about 8:30 p.m., and he had one mixed drink of bourbon mixed with coke during the time he played cards at about 9:00 p.m. or 9:30 p.m. but told the investigator that he did not finish that mixed drink. Respondent told the investigator that he stopped playing cards just before 10:00 p.m. and drove home.

19. After respondent's conviction, respondent's attorney wrote a letter to the board on his behalf dated November 18, 2019, which was signed by respondent, disclosing respondent's criminal conviction. The letter was received in evidence and provides that on May 29, 2019, respondent had been playing golf at The Farms prior to the vehicle collision. The letter further provides, "Dr. Gupta had dinner at The Farms and consumed alcohol with his meal." No further disclosures were made in the letter regarding the amount or the number of drinks of alcohol respondent consumed that night.

20. On cross examination, respondent stated that the vehicle collision happened at about 10:15 p.m. and the CHP officers arrived at about 10:30 p.m. Respondent stated that he was arrested at about 11:00 p.m. or 11:30 p.m. and his blood was drawn for the alcohol and drug screen at about midnight or shortly after midnight.

21. During cross examination, respondent also stated that he did not recall telling officer Huoth that he only consumed one beer prior to the vehicle collision, and he stated that he did not recall telling officer Huoth that he had consumed more than one drink that night. Instead, respondent stated that he did not recall that officer Huoth ever asked him how much alcohol respondent drank that night, but he stated that he "would not have lied to him."

Testimony of Clark E. Smith, M.D.

22. Dr. Clark Smith is board certified in addiction psychiatry, forensic psychiatry, pain medicine, and general psychiatry. He has been licensed to practice medicine in California since 1982. Dr. Smith graduated medical school from the University of Arizona in 1981 and completed his residency in psychiatry at the University of California San Diego Medical Center in 1985. From 1985 to 2019 Dr. Smith worked in private practice in general, forensic and addiction psychiatry, as well as pain medicine. During his career he has also worked as the Medical Director of multiple addiction recovery treatment centers and outpatient clinics. Dr. Smith has also provided expert testimony and opinions in professional disciplinary proceedings on behalf of respondents in relation to multiple agencies including the board of registered nursing, board of pharmacy, board of optometry, and others. In 2019, Dr. Smith closed his private practice and since that time works as the Chief Medical Officer for the Institutes of Health, a multidisciplinary clinic focusing on pain, addiction, and post traumatic stress disorder (PTSD). Dr. Smith now only works for the Institutes of Health and provides expert opinion work in legal matters such as this case.

23. Dr. Smith conducted an independent forensic psychiatric evaluation of respondent on July 1, 2021, and summarized his findings in a report dated July 31, 2021, which was received in evidence. As part of his evaluation Dr. Smith reviewed the

police report for respondent's arrest, the accusation in this matter, the toxicology reports, patient testimonial letters, letters of professional recommendation, and documents related to respondent's compliance with criminal probation. Dr. Smith evaluated respondent through "telemedicine video" during the span of two hours on July 1, 2021. Dr. Smith testified that he corroborated the information provided to him by respondent through a telephone call with respondent's wife, but he did not contact any other friends or family of respondent to corroborate the information respondent provided to him. Dr. Smith testified that he typically will interview third parties, like family members and friends, because there can be a "lack of forthcoming-ness about alcohol use" by individuals and doing so provides corroboration for the information the individual provides to him. Dr. Smith stated that it is important to get accurate and honest information from an individual in order to assess them for alcohol abuse disorder. According to Dr. Smith, respondent's wife told him that respondent stopped consuming alcohol completely, and since his arrest respondent has not consumed alcohol and driven a vehicle.

Dr. Smith testified and wrote in his report that after his evaluation of respondent he concluded that respondent had a one-time incident of driving under the influence of alcohol, but this was not a recurring pattern for him. Dr. Smith stated that respondent does not meet the diagnostic criteria for a substance abuse disorder and there is no reason for additional treatment, and no clinical reason for ongoing supervision of respondent in his practice of medicine. Dr. Smith opined that he believes that respondent is safe to practice because respondent provided a lot of letters of recommendation from colleagues and those letters were "high quality," because respondent stopped drinking alcohol completely, and because it has been two years since the incident that resulted in his conviction and he has had no other instances or problems with alcohol. Dr. Smith has no treatment plan for respondent

because respondent has no diagnosis. According to Dr. Smith, respondent has been rehabilitated from his DUI completely.

Dr. Smith stated that he is aware that at the time of his arrest respondent's BAC was 0.17 percent. He opined that a person's body mass is an important factor in calculating a BAC. Specifically, if a 185-pound person drank the same amount of alcohol as a 370-pound person, the BAC of the 370-pound person would be half of that of the 185-pound person. Furthermore, the amount of alcohol a person drinks matters for calculation of BAC. However, if a person has a high tolerance for alcohol as a result of daily repetitive drinking, they may have a high BAC, but not show any signs of intoxication. Dr. Smith admitted that respondent did not tell him how many alcohol drinks he consumed on the night of his arrest. Dr. Smith stated that his understanding of a standard drink is 1.5 ounces of 80 proof distilled spirits, or about four ounces of wine, and 12 ounces of beer. He explained that one standard drink would affect a 185-pound person by increasing their BAC by about 0.02 percent and later testified that it would increase their BAC by 0.03 percent. So accordingly, Dr. Smith admitted that in order for a 185-pound person to attain a BAC of 0.17 percent that person would have to consume about eight standard drinks. Also eating a standard meal may slow absorption of the alcohol and affect the BAC.

24. On cross examination, Dr. Smith admitted that he did not include in his report how many drinks respondent consumed on the night of his arrest. Dr. Smith also stated that he had an understanding that respondent consumed three drinks on the night of his arrest, but he could not recall where he got that information. He admitted that the police report provides that respondent had only one drink that night. Dr. Smith stated that as of the date of his testimony, he did not know how many drinks respondent had on the night of his arrest, but he stated that the important

number was the BAC of 0.17 percent. Dr. Smith also testified that he believed that respondent had consumed three IPA beers on the night of his arrest, but again Dr. Smith did not know where he got that information and admitted he did not include that in his report. Also, Dr. Smith testified that he believed that respondent consumed his last alcoholic drink during dinner on the night of his arrest, but Dr. Smith did not know where he got that information. Dr. Smith stated that while it is important to assess the number of drinks respondent consumed in order to assess whether he had an alcohol abuse issue, Dr. Smith was not concerned because respondent "seemed to be honest and completely open throughout the interview" and that he admitted that he "drank more than he intended." Dr. Smith also admitted that he has not spoken to respondent since the July 1, 2021, assessment of him, but he has spoken to respondent's attorney.

25. Dr. Smith also admitted on cross examination that if respondent had consumed an IPA beer at 5:15 p.m., and consumed another IPA beer at 8:00 p.m. at dinner, and a mixed drink at between 9:00 and 9:30 p.m. that all of this alcohol would have been dissipated in respondent's system by midnight when his blood was drawn. Dr. Smith stated that the "burn off" rate of alcohol would be about 0.02 percent per hour, meaning that the BAC would decrease by 0.02 percent per hour after consumption.

Testimony of Respondent's Character Witnesses

26. Two character witnesses testified at the hearing on behalf of respondent. The first character witness was James Bried, M.D., an orthopedic surgeon with Orthopedic Surgeon Associates affiliated with Palomar Health Medical Group. Dr. Bried has been board certified in orthopedic surgery since 1990 and has been on staff at Palomar Health Medical Group for 34 years. Dr. Bried is also the Medical Director of

Orthopedics at Palomar Health and has a full-time clinical practice performing about 600 surgeries per year. Dr. Bried treats about 30 to 40 patients per day for three days per week and performs surgery two days per week.

Dr. Bried has known respondent for 16 years and knows him both personally and professionally. Dr. Bried first met respondent in the physician lounge of the operating room of the hospital while waiting for surgeries to start. Dr. Bried and respondent both have surgeries on Fridays at the same surgical center. Dr. Bried and respondent are both very busy surgeons and also socialize with each other outside of work. Dr. Bried testified that respondent is an outstanding surgeon with a great reputation and that the quality of respondent's practice is the highest. He and respondent share similar interests in sports and children. Dr. Bried noted that respondent coaches baseball. Dr. Bried and respondent have played golf together. Dr. Bried has referred many patients to respondent, including his own family members. Dr. Bried has seen respondent drink alcohol once or twice, but he has never seen respondent drunk. Dr. Bried has never seen respondent drink alcohol while he was coaching and has never seen respondent take recreational or prescription drugs. Dr. Bried testified that he knows that respondent had a DUI conviction, but he has no knowledge of the amount of alcohol respondent drank on the night of his arrest.

27. The second character witness was Gilbert Lee, M.D. Dr. Lee is a board-certified plastic surgeon and owner and Medical Director of Changes Plastic Surgery and Spa since 1994. Changes Plastic Surgery focuses mainly on aesthetic and cosmetic surgery, but also some reconstructive surgery. Dr. Lee's responsibilities at Changes Plastic Surgery and Spa consist of 90 percent direct patient care and 10 percent administrative work.

Dr. Lee first met respondent 16 years ago at a plastic surgery section meeting at Scripps Memorial Hospital where respondent was presenting a lecture on microsurgical breast reconstruction. Dr. Lee has never performed surgery on the same patient as respondent at the same time, but Dr. Lee has performed surgery on the same patient as respondent but at different times. Dr. Lee has "shared" patients with respondent where respondent may perform the second stage of a surgical procedure. Dr. Lee and respondent have worked together closely as colleagues. Dr. Lee considers respondent to be an excellent surgeon and physician and has a good reputation with patients and other doctors. Additionally, Dr. Lee also socializes with respondent outside of work, primarily playing golf together and at plastic surgery meetings. Dr. Lee has observed respondent drink alcohol on social occasions, but never more than one or two drinks and Dr. Lee has never seen respondent drunk. Dr. Lee has also never seen respondent use recreational or prescription drugs. Dr. Lee is aware that respondent has a DUI conviction, but he does not know how many drinks respondent had on the night of his arrest.

Respondent's Documentary Evidence

28. Respondent provided documentary evidence including: his curriculum vitae; extensive patient testimonials and reviews; documentation of his completion of community service hours; Dr. Karippot's letter evaluation; Lab results showing negative results for alcohol screens from dates of June 9, 2021, to October 27, 2021; Dr. Smith's report from his evaluation of respondent; and numerous letters of recommendation and character references letters. Both Dr. Bried and Dr. Lee provided letters of recommendation that mirrored their testimony. Additionally, respondent provided nine letters of recommendation from other physicians, and three letters from neighbors and friends of respondent. All of the letters from the friends and neighbors

praised respondent's character and noted his devotion to his family, coaching children in sports, decision-making abilities, integrity, and honesty. All of the letters from other physicians praised respondent's professional abilities and conduct, compassion, patient care, and skill. All of the letters from the friends, neighbors and other physicians mentioned respondent's DUI conviction and opined that it was an isolated incident.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant bears the burden of proof of establishing that the charges in the accusation and petition to revoke probation are true. (Evid. Code, § 115; 500.)

2. The standard of proof required is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The obligation to establish charges by clear and convincing evidence is a heavy burden. It requires a finding of high probability; it is evidence so clear as to leave no substantial doubt, or sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Applicable Statutes and Regulations

3. Business and Professions Code section 490 provides:

> (a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the

qualifications, functions, or duties of the business or profession for which the license was issued.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

(c) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. An action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code.

(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in Petropoulos v. Department of Real Estate (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of

crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Chapter 33 of the Statutes of 2008 do not constitute a change to, but rather are declaratory of, existing law.

4. Business and Professions Code section 2227 provides:

(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.

5. Business and Professions Code section 2234 provides in relevant 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 or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter. . . .

6. Business and Professions Code section 2236 provides:

(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and

surgeon constitutes unprofessional conduct within the meaning of this chapter. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

[¶] . . . [¶]

(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section and Section 2236.1. The record of conviction shall be conclusive evidence of the fact that the conviction occurred.

7. Business and Professions Code section 2239 provides:

(a) The use . . . 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 or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section. The Division of Medical

Quality may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing may order the denial of the license when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment.

8. The primary purpose of disciplinary action is to protect the public. (Bus. & Prof. Code, § 2229, subd. (a).) "Where rehabilitation and protection are inconsistent, protection shall be paramount." (Bus. & Prof. Code, § 2229, subd. (c).)

9. California Code of Regulations, title 16, section 1360, provides:

(a) For the purposes of denial, suspension or revocation of a license pursuant to Section 141 or Division 1.5 (commencing with Section 475) of the code, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license if to a substantial degree it evidences present or potential unfitness of a person holding a license to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare. Such crimes, professional

misconduct, or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of state or federal law governing the applicant's or licensee's professional practice.

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:

(1) The nature and gravity of the crime;

(2) The number of years elapsed since the date of the crime; and

(3) The nature and duties of the profession.

Applicable Case Law

10. There is a nexus between a physician's use of alcoholic beverages and his or her fitness to practice medicine, established by the Legislature in section 2239, "in all cases where a licensed physician used alcoholic beverages to the extent or in such a manner as to pose a danger to himself or others." (*Watson v. Superior Court* (2009) 176 Cal.App.4th1407, 1411.)

Disciplinary Guidelines

11. California Code of Regulations, title 16, section 1361, provides that when reaching a decision on a disciplinary action, the board must consider and apply the "Manual of Model Disciplinary Orders and Disciplinary Guidelines" (12th Edition/2016).

Under the Guidelines the board expects that, absent mitigating or other appropriate circumstances such as early acceptance of responsibility, demonstrated willingness to undertake board-ordered rehabilitation, the age of the case, and evidentiary problems, 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. California Code of Regulations, title 16, section 1361, further provides that the board shall use the Uniform Standards for Substance-Abusing Licensees as provided in section 1361.5, without deviation, for each individual determined to be a substance-abusing licensee.

12. California Code of Regulations, title 16, section 1361.5, provides that if the licensee is to be disciplined for unprofessional conduct involving the use of alcohol, the licensee shall be presumed to be a substance-abusing licensee for purposes of section 315 of the Business and Professions Code. In 2015, the board adopted the Uniform Standards for Substance Abusing Licensees under California Code of Regulations, title 16, sections 1361 and 1361.5. California Code of Regulations, title 16, section 1361.5, further provides specific probationary terms and conditions that must be used without deviation in the case of a substance-abusing licensee.

13. Under the Disciplinary Guidelines, the minimum discipline for a misdemeanor conviction substantially related to the functions of a physician and surgeon but not arising from or occurring during patient care, treatment, management or billing is a stayed revocation for five years. The maximum discipline is revocation. Among the conditions of probation, the guidelines recommend community service,

professionalism program, psychiatric evaluation, medical evaluation and treatment, and victim restitution.

14. Under the Disciplinary Guidelines, the minimum discipline for the excessive use of alcohol in violation of Business and Professions Code section 2239 is stayed revocation for five years with terms and conditions including: suspension of 60 days or more, abstain from alcohol and controlled substances, biological fluid testing, ethics course, psychiatric evaluation, psychotherapy, medical evaluation and treatment, and a monitor of practice/billing. The maximum discipline is revocation.

Evaluation

15. Clear and convincing evidence established that respondent was convicted of a DUI and had a BAC of 0.17 percent at midnight after being involved in a vehicle collision at about 10:15 p.m. on May 29, 2019. Respondent testified that he did not feel the effects of alcohol when he drove a vehicle that night, which is very concerning considering he had a BAC of 0.17 percent. Even respondent's expert Dr. Smith stated that a person with a high tolerance for alcohol as a result of repetitive and daily use can have a high BAC without feeling the effects of alcohol. Respondent downplayed his performance on the field sobriety tests given by officer Huoth during his testimony and attempted to minimize his level of intoxication. However, the BAC of 0.17 percent taken at midnight, many hours after respondent claimed to have his first of three drinks, tells a different story. Respondent provided inconsistent information regarding the quantity of alcohol he consumed that night to various individuals. First, he told officer Huoth he only consumed one beer that night. Second, he told the board investigator he had two beers and only part of a mixed drink he did not finish. Finally, at the hearing respondent stated he consumed two beers and one very strong mixed drink. While respondent claims to take responsibility for his actions on the night

of his arrest, he continues to minimize those actions and has provided inconsistent information regarding the amount of alcohol he consumed, which is very concerning.

Respondent's expert Dr. Smith provided inconsistent testimony regarding the importance of the number, type and amount of alcohol respondent consumed that night for a determination of whether respondent abuses alcohol. Specifically, Dr. Smith admitted during his testimony that he did not know how much alcohol, or the type of alcohol respondent consumed that night, but claimed that information was less important than respondent's BAC and admission that he had too much to drink. Previously, Dr. Smith had testified that knowing the number, type and amount of drinks consumed by an individual he is evaluating for alcohol abuse is very important information. Dr. Smith stated that he based his conclusion that respondent did not suffer from a substance abuse disorder because he trusted that respondent was honest and provided him with truthful information. However, the evidence as a whole established that respondent failed to provide honest information regarding the amount of alcohol he consumed that night to various individuals, thereby calling into question the accuracy of Dr. Smith's conclusion.

16. With regard to mitigation and rehabilitation, respondent provided substantial evidence to establish that his is an excellent surgeon with the high level of knowledge and skills to provide plastic surgery to his clients. There is no question that respondent is a highly competent plastic surgeon, and his patients are very satisfied with his work. Furthermore, respondent has taken steps to ensure the board that he is not an alcoholic. Specifically, he has undergone a psychiatric evaluation by Dr. Karippot and Dr. Smith, and he has voluntarily undergone biological fluid testing for alcohol since June 2021. However, for the past six months, which is the majority of that time he has been testing, respondent has not provided random biological fluid testing

but rather has done his testing on a scheduled basis on Wednesdays for his convenience. Respondent claims he has abstained from alcohol since October 2020 in an effort to show the board he is taking this disciplinary proceeding seriously. Respondent has provided numerous letters from individuals praising his character and expressing the opinion that respondent's DUI conviction was an isolated incident. Respondent has only had one arrest and conviction, which was approximately two-and-a-half years ago, with no other incidents. However, respondent has been on summary probation since his conviction in October 2019 and he remains on criminal probation until October 2024. Since persons under the direct supervision of judicial or correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue inappropriate behavior while under supervision. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) On balance, based on respondent's behavior since his conviction and the negative lab tests showing he has abstained from alcohol, respondent has sufficiently rebutted the presumption that he is a substance-abusing licensee such that strict adherence to the Uniform Standards for Substance-Abusing Licensees set forth in the Disciplinary Guidelines is not necessary for public protection.

Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) While a candid admission of misconduct and full acknowledgment of wrongdoing is a necessary step in the rehabilitation process, it is only a first step; a truer indication of rehabilitation is presented if an individual demonstrates by sustained conduct over an extended period of time that he or she is rehabilitated. (*In re Trebilcock* (1981) 30 Cal.3d 312, 315-316.)

The evidence as a whole shows that respondent has undergone some rehabilitation from his DUI conviction and has had some self-reflection regarding his actions on May 29, 2019, but insufficient time has passed since his actions and the evidence provided is insufficient to show that he is completely rehabilitated.

Cause Exists for Discipline

17. Cause exists under Business and Professions Code section 2227, 2234, and 2236 to impose discipline. Complainant established by clear and convincing evidence that respondent was convicted on October 21, 2019, of violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of 0.08 percent or more, a misdemeanor. Respondent's conviction is substantially related to the qualifications, functions or duties of a physician and surgeon.

18. Cause exists under Business and Professions Code section 2227, 2234, and 2239 to impose discipline. Complainant established by clear and convincing evidence that respondent used alcohol to the extent or in such a manner as to be dangerous to himself and others.

19. Cause exists under Business and Professions Code section 2227, and 2234 to impose discipline. Complainant established by clear and convincing evidence that respondent engaged in unprofessional conduct as a result of his use of alcohol on May 29, 2019, resulting in his arrest and conviction.

Degree of Discipline

20. California Code of Regulations, title 16, section 1361.5, and the Disciplinary Guidelines dictate that the minimum discipline for a substance abusing licensee, such as respondent, is revocation stayed for five years with specific terms and

conditions related to substance abuse. Respondent's lack of honesty regarding the amount of alcohol he consumed on the night of his arrest undercuts his rehabilitation evidence substantially, and calls into question the legitimacy of Dr. Smith's, as well as Dr. Karippot's conclusions that respondent is not an alcohol abuser. Under these circumstances, respondent has provided insufficient evidence to justify deviation from the board's Disciplinary Guidelines with regard to the length of probation. However, given that respondent has been practicing for two-and-a-half years since his conviction with no issues and has provided evidence that he has abstained from alcohol since October 2020, an actual suspension of his license is not necessary for public protection. Furthermore, because respondent has successfully practiced as a physician with no issues since his conviction and no evidence has been presented showing any issues regarding respondent's practice, the term requiring a practice monitor for respondent is not necessary to provide public protection in light of the other terms of probation that ensure respondent will not abuse alcohol or any controlled substance. Instead, the monitoring by the board provided by the remaining terms of probation is sufficient to provide public protection under these circumstances.

ORDER

Physician's and Surgeon's Certificate number A 88550 issued to Abhay Gupta, M.D. is revoked. However, revocation is stayed, and respondent is placed on probation for five years upon the following terms and conditions.

1. **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.

2. **Supervision of Physician Assistants and Advanced Practice Nurses** - During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses.

3. **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.

4. **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.

5. **General Probation Requirements –**

Compliance with Probation Unit

Respondent shall comply with the board's probation unit.

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.

6. **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.

7. **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 Board'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.

8. **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.

9. **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.

10. **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.

11. **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.

12. **Controlled Substances - Abstain From Use** - Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to respondent by another practitioner for a bona fide illness or condition.

Within 15 calendar days of receiving any lawfully prescribed medications, respondent shall notify the board or its designee of the: issuing practitioner's name, address, and telephone number; medication name, strength, and quantity; and issuing pharmacy name, address, and telephone number.

If respondent has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported the use to the board or its

designee, respondent shall receive a notification from the board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the board within 15 days of submission of the matter. Within 15 days of receipt by the board of the Administrative Law Judge's proposed decision, the board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the board, the board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

13. **Alcohol - Abstain From Use** - Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the board or its designee to immediately

cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the board within 15 days of submission of the matter. Within 15 days of receipt by the board of the Administrative Law Judge's proposed decision, the board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the board, the board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

14. **Biological Fluid Testing** - Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory

or service approved in advance by the board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the board and respondent.

If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the board within 15 days of submission of the matter. Within 15 days of receipt by the board of the Administrative Law Judge's proposed decision, the board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the board, the board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

15. **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.

16. **Psychiatric Evaluation** - Within 30 calendar days of the effective date of this Decision, and on whatever periodic basis thereafter may be required by the board or its designee, respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a board-appointed board certified psychiatrist, who shall consider any information provided by the board or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the board or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Respondent shall pay the cost of all psychiatric evaluations and psychological testing.

Respondent shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the board or its designee.

17. **Psychotherapy** - Within 60 calendar days of the effective date of this Decision, respondent shall submit to the board or its designee for prior approval the name and qualifications of a California-licensed board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. Upon approval, respondent shall undergo and continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Board or its designee deems that no further psychotherapy is necessary.

The psychotherapist shall consider any information provided by the board or its designee and any other information the psychotherapist deems relevant and shall furnish a written evaluation report to the board or its designee. Respondent shall

cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent.

Respondent shall have the treating psychotherapist submit quarterly status reports to the board or its designee. The board or its designee may require respondent to undergo psychiatric evaluations by a board-appointed board-certified psychiatrist. If, prior to the completion of probation, respondent is found to be mentally unfit to resume the practice of medicine without restrictions, the board shall retain continuing jurisdiction over respondent's license and the period of probation shall be extended until the board determines that respondent is mentally fit to resume the practice of medicine without restrictions.

Respondent shall pay the cost of all psychotherapy and psychiatric evaluations.

18. **Medical Evaluation and Treatment** - Within 30 calendar days of the effective date of this Decision, and on a periodic basis thereafter as may be required by the board or its designee, respondent shall undergo a medical evaluation by a board-appointed physician who shall consider any information provided by the board or designee and any other information the evaluating physician deems relevant and shall furnish a medical report to the board or its designee. Respondent shall provide the evaluating physician any information and documentation that the evaluating physician may deem pertinent.

Following the evaluation, respondent shall comply with all restrictions or conditions recommended by the evaluating physician within 15 calendar days after being notified by the board or its designee. If respondent is required by the board or its designee to undergo medical treatment, respondent shall within 30 calendar days of the requirement notice, submit to the board or its designee for prior approval the

name and qualifications of a California licensed treating physician of respondent's choice. Upon approval of the treating physician, respondent shall within 15 calendar days undertake medical treatment and shall continue such treatment until further notice from the board or its designee.

The treating physician shall consider any information provided by the board or its designee or any other information the treating physician may deem pertinent prior to commencement of treatment. Respondent shall have the treating physician submit quarterly reports to the board or its designee indicating whether or not the respondent is capable of practicing medicine safely. Respondent shall provide the board or its designee with any and all medical records pertaining to treatment, the board or its designee deems necessary.

If, prior to the completion of probation, respondent is found to be physically incapable of resuming the practice of medicine without restrictions, the board shall retain continuing jurisdiction over respondent's license and the period of probation shall be extended until the board determines that respondent is physically capable of resuming the practice of medicine without restrictions. Respondent shall pay the cost of the medical evaluation(s) and treatment.

DATE: December 21, 2021

Debra Nye-Perkins
Debra Nye-Perkins (Dec 21, 2021 09:37 PST)

DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings

Attachment-Accusation 800-2019-057074

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

In the Matter of the Accusation Against: **ABHAY GUPTA, M.D.** 10672 Wexford St., Ste. 275 San Diego, CA 92131 **Physician's and Surgeon's Certificate No. A 88550** Respondent.	Case No. 800-2019-057074 **ACCUSATION**

PARTIES

1. William Prasifka (Complainant) brings this Accusation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On or about August 13, 2004, the Medical Board issued Physician's and Surgeon's Certificate No. A 88550 to Abhay Gupta, 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 December 31, 2021, unless renewed.

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 provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Board deems proper.

5. Section 2234 of the Code requires the Board to take action against any licensee who is charged with unprofessional conduct, defined to include "[v]iolating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter."

6. Section 2236 of the Code states:

"(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

"(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section and Section 2236.1. The record of conviction shall be conclusive evidence of the fact that the conviction occurred."

7. Section 2239 of the Code states:

"(a) The use .....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 or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

"(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section. The Division of Medical Quality[1] may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing may order the denial of the license when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment."[2]

FIRST CAUSE FOR DISCIPLINE

(Conviction of a Crime Substantially Related to the Qualifications, Functions, or Duties of a Physician and Surgeon)

8. Respondent is subject to disciplinary action under Code sections 2234, as defined by section 2236, in that Respondent has been convicted of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon, as more particularly alleged herein.

9. On or about May 29, 2019, at approximately 10:25 p.m., California Highway Patrol (CHP) was dispatched to a collision involving two vehicles at the entrance of the westbound Highway 56 ramp. A CHP officer contacted Respondent, who was determined to be driving one of the vehicles. The officer observed that Respondent displayed objective signs of alcohol intoxication, including emitting an odor of alcohol. Respondent continually drank from a water bottle and the officer had to ask him to stop drinking. Respondent admitted to consuming one (1) IPA beer at "The Farms" golf course earlier in the evening. Respondent performed a series of Field Sobriety Tests, which indicated that he was under the influence. It was determined that the driver of the other vehicle was also intoxicated and responsible for the collision. Respondent

[1] The "Division of Medical Quality" refers to the Board pursuant to Business and Profession Code section 2002.

[2] There is a nexus between a physician's use of alcoholic beverages and his or her fitness to practice medicine, established by the Legislature in section 2239, "in all cases where a licensed physician 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.)

submitted to a blood alcohol test, which resulted in a 0.171% blood alcohol content, over twice the legal limit.

10. Respondent was arrested and charged in the San Diego County Superior Court with two misdemeanor charges: 1) Vehicle Code (VC) section 23152(a) – Driving Under the Influence of Alcohol and; 2) VC section 23152(b) – Driving with a Blood Alcohol Level of 0.08% or More. On or about October 21, 2019, Respondent pled guilty to VC section 23152(b). He was sentenced to the following: five (5) years of court probation, attend the DUI first offender's driving program, install an Ignition Interlock Device for a period of six (6) months, attend the MADD program, serve 40 hours of community service, not operate a motor vehicle with any measurable amount of alcohol, and obey all laws.

SECOND CAUSE FOR DISCIPLINE

(Dangerous Use of Alcohol)

11. Respondent is subject to disciplinary action under sections 2227 and 2234, as defined by section 2239, subdivision (a), of the Code, in that he has used alcoholic beverages to the extent, or in such a manner, as to be dangerous or injurious to himself, another person, or the public, as more particularly alleged in paragraphs 8 through 10, above, which are hereby incorporated by reference as if fully set forth herein.

THIRD CAUSE FOR DISCIPLINE

(General Unprofessional Conduct)

12. Respondent is subject to disciplinary action under sections 2227 and 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 8 through 11, above, which is hereby incorporated by reference as if fully set forth herein.

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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. A 88550, issued to Abhay Gupta, M.D.;

2. Revoking, suspending or denying approval of Abhay Gupta, M.D.'s authority to supervise physician assistants and advanced practice nurses;

3. Ordering Abhay Gupta, 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: JAN 21 2021

For: WILLIAM PRASIFKA REJI VARGHESE
Executive Director DEPUTY DIRECTOR
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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