

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

**In the Matter of the First Amended
Accusation and Notice of Order of
Automatic Suspension Against:**

KEVIN TIEN DO, M.D.

**Physician's and Surgeon's
Certificate No. G 76640**

Respondent.

File No. 06-2002-136106

DECISION

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

This Decision shall become effective at 5:00 p.m. on December 16, 2005.

IT IS SO ORDERED November 16, 2005.

MEDICAL BOARD OF CALIFORNIA

By:


**Steven Alexander, Chair
Panel A
Division of Medical Quality**

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

**In the Matter of the First Amended
Accusation and Notice of Order of
Automatic Suspension Against:**

**KEVIN TIEN DO, M.D.
309 S. Robertson Blvd.
Beverly Hills, CA 90211**

**Physician's and Surgeon's
Certificate No. G 76640**

Respondent.

Case No. 06-2002-136106

OAH No. L2004010620

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on June 8, 2005, in Los Angeles, California. Complainant was represented by Richard D. Marino, Deputy Attorney General. Kevin Tien Do, M.D. (Respondent) was present and was represented by Richard A. Moss, Attorney at Law.

Oral and documentary evidence was received and argument was heard. The record was held open until August 11, 2005, to allow Complainant to file and serve a cost certification. Complainant failed to submit any cost certification. The record was closed, and the matter was submitted for decision on August 11, 2005.

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FACTUAL FINDINGS

Jurisdiction

1. On November 18, 2003, Complainant, Ron Joseph, filed the Accusation while acting in his official capacity as the Executive Director of the Medical Board of California (Board), Department of Consumer Affairs. On September 16, 2004, Complainant, David T. Thornton, filed the First Amended Accusation while acting in his official capacity as the Executive Director of the Board.

2. On December 4, 2003, Respondent filed a Notice of Defense requesting a hearing on the Accusation.

3. On June 1, 1993, the Board issued Physician's and Surgeon's Certificate Number B76640 (certificate) to Respondent. The evidence at hearing indicated that Respondent's certificate was scheduled to expire on October 31, 2004, unless renewed. Whether the license has been renewed was not disclosed by the evidence. However, if it was not renewed, the Board retains jurisdiction over this matter pursuant to Business and Professions Code section 118, subdivision (b).

Respondent's Conviction and Subsequent Certificate Suspension

4. On August 15, 2003, in the United States District Court for the Eastern District of California, Case Number 2:02CR00338-01, entitled *The United States of America v. Kevin Tien Do, M.D.*, Respondent was convicted, on his plea of guilty, of violating Title 18, United States Code, sections 2 and 1347 (aiding and abetting health care fraud), a crime which is substantially related to the qualifications, functions and duties of a licensed physician and surgeon.

5. Respondent was sentenced to 12 months in federal prison, commencing October 15, 2003, and ordered to pay an assessment of \$100 and restitution of \$366,031.24.

6. The facts and circumstances surrounding Respondent's conviction are as follows: From April of 1997 through December 31, 1998, Respondent aided and abetted a billing company named "Medi-Syn" in a scheme to defraud Medi-Cal. Respondent permitted Medi-Syn to use his Medi-Cal provider number to submit claims requesting payment for services purportedly rendered by Respondent which Respondent did not provide and which were never provided by anyone else. Respondent and Medi-Syn opened a joint account under the name "Premier Health Providers Network" into which the Medi-Cal checks were deposited. Respondent provided 80 percent of these funds to Medi-Syn and kept 20 percent for himself. As a result of the scheme, Medi-Cal was defrauded out of \$366,031.24.

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7. On September 16, 2004, Respondent was notified by the Board that, pursuant to Business and Professions Code section 2236.1, his physician's and surgeon's certificate was automatically suspended, effective October 15, 2003, and would remain suspended while Respondent was incarcerated or until further order of the Division of Medical Quality.

Respondent's Employment History and F.B.I. Assistance

8. Respondent is 39 years old. He was born in Saigon, Vietnam and came to the United States in 1982, when he was 16 years old. He graduated from USC Medical School in 1991 and completed his residency in Physical Medicine and Rehabilitation at UCLA on June 30, 1995. Respondent entered private practice upon completion of his residency.

9. Prior to his conviction, Respondent owned and operated a rehabilitation practice in Hawthorne, which was later moved to Beverly Hills. In that practice, Respondent was employed as a rehabilitation consultant, called in by primary care doctors. He worked primarily with psychiatric facilities, addressing the medical problems of psychiatric patients, and also worked on personal injury cases. The facilities for which he provided consulting services included hospitals in Tustin and Buena Park and clinics in San Diego and Palmdale.

10. In August of 1995, Respondent was hired by Edgemont Hospital (Edgemont), a psychiatric hospital in Los Angeles. Located at the same address was Physician's Medical Specialties Medical Group (PMSMG) of which Respondent was a physician member. PMSMG supplied medical doctors to various hospitals, including Edgemont. PMSMB doctors provided treatment and therapy to Edgemont patients, for which Medi-Care was billed. Respondent had been referred to Edgemont by PMSMG to perform rehabilitation therapy consulting services.

11. About one year into his employment with Edgemont, Respondent came to believe that the hospital was engaged in fraud. He suspected that many Edgemont patients did not have psychiatric problems and were only admitted to the hospital to collect from Medi-Care. Finally, in 1998, Respondent contacted the Medi-Care Fraud Division to report his suspicions.

12. In 1998, he was interviewed several times by Federal Bureau of Investigation (FBI) agents regarding his report of suspected fraud at Edgemont. A few months into the investigation of Edgemont, Respondent was informed that that he was a suspect in a second investigation for his billing arrangements with Medi-Syn.

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13. In order to obtain leniency in the case against him, Respondent agreed to act as an undercover operative and to cooperate with the FBI in its investigation of Edgemont and in a third investigation regarding podiatrist Gary Feldman and the West Pico Medical Clinic (West Pico) where Respondent worked.¹ Respondent participated in 43 undercover operations from December of 1998 through May of 1999. He also provided additional assistance in 2000. Respondent's cooperation led to the conviction of Dr. Feldman.

14a. A few years later, FBI investigators requested Respondent's assistance with an investigation into the distribution of Serostim by several pharmacies.² Respondent explained to investigators that he was aware of practices in which doctors prescribed Serostim for patients, did not provide the Serostim to the patients, traded the Serostim back to the pharmacy and obtained immunoglobulin as a "kickback" in exchange. Respondent's explanation indicated that the redistribution of Serostim to another patient, after being prescribed to a prior patient, resulted in greater profits to the pharmacies. Describing himself as an "HIV specialist," Respondent told investigators that he averaged 50 Serostim prescriptions a month, obtained through five separate pharmacies.³ However, he denied receiving kickbacks from the five pharmacies. The investigators did not believe Respondent's denial of wrongdoing.

14b. At the administrative hearing, the evidence did not indicate whether the FBI's doubt of Respondent's candor was based on his history of criminal conduct and suspicious contacts or on more concrete evidence of his involvement in fraud relating to Serostim distribution. Respondent testified that he told FBI agents the truth regarding his Serostim prescriptions, and there was no evidence to contradict Respondent's assertions of innocence.

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¹ The West Pico owners and operators were suspected of recruiting patients with cash kickbacks and providing them unnecessary medical testing.

² Serostim is a brand name for generic somatotropin, a man-made version of human growth hormone used to treat, among other things, weight loss caused by acquired immunodeficiency syndrome (AIDS).

³ Respondent testified at the administrative hearing that he did not have a formal HIV practice, but that he was "exposed to HIV practice" during the early years of his medical career when he was in contact with many drug-abuse patients.

15. The FBI investigators' disbelief of Respondent was apparently transmitted to the Assistant United States Attorney (AUSA) prosecuting Respondent's criminal case. As part of the plea agreement in Respondent's criminal case, the AUSA made a motion for downward departure in sentencing, pursuant to Section 5K1.1 of the Federal Sentencing Guidelines (5K1.1 motion). However, the AUSA recommended only a three-month downward departure from the 15-months of incarceration recommended by the Probation Office. The 5K1.1 motion, filed May 20, 2002, contained the government's skepticism of Respondent's honesty, as follows:

The government is making this 5K1.1 motion to the full extent contemplated in the plea agreement despite some serious misgivings.

The defendant has been truthful with respect to matters in the more distant past and his truthfulness in these matters has benefited the government. However, the government does not believe the defendant has been truthful regarding certain current matters, particularly with respect to the distribution of Serostim. The defendant's testimony regarding earlier matter, as stated above, was very useful, and for this the government is willing to recommend some downward departure. However, in the event the defendant is called to testify the government would have to acknowledge to future defense counsel [in whose clients' cases defendant may be called to testify as a prosecution witness] that it does not believe the defendant to be totally truthful. This obviously makes the defendant's cooperation much less useful than it would have been were the government able to call him as a witness without having to state that his truthfulness is suspect.

Respondent's Post-Conviction History and Rehabilitation

16. Respondent began serving his federal prison sentence on October 15, 2003, and was officially released from custody on October 13, 2004. He remains on federal probation until October of 2007.

17. By 2004, Respondent had paid in full the \$100 assessment and the \$366,031.24 restitution ordered by the criminal court.

18. Respondent has not practiced medicine since October 15, 2003.⁴

19. In the past two years, Respondent has taken some unspecified continuing medical education courses.

⁴ Between 1995 and 2002, Respondent had obtained medical licenses in Hawaii, New York and Arizona. However, he did not practice in any of these jurisdictions and he surrendered all three licenses after his 2003 conviction.

20. Respondent works as a technician at a diagnostic services company which provides nerve testing for patients. He also works as a medical assistant in an office specializing in plastic surgery. His duties include intake at the front desk, taking vital signs, drawing blood, collecting urine and preparing patients for surgery. He does not perform physicals or take patient histories. He obtained both of his current jobs through referrals from friends.

21. At the hearing, Respondent admitted responsibility for his crime. However, he pointed out that, prior to receiving information from the FBI in 1998, he was unaware that the Medi-Syn billed services were not provided. Instead, Respondent believed that services billed under his provider number were going to be provided by another physical therapist Respondent was to supervise. Nevertheless, Respondent admitted he did not supervise any physical therapist and he knew he was receiving money for services he did not personally provide.

22. Respondent's friend and one of his former patients both testified credibly on his behalf, characterizing him as compassionate and worthy of their trust.

Unproven Allegations

23. Complainant did not offer any evidence in support of the following allegations in the First Amended Accusation:

(a) In paragraph 13:

Respondent Kevin Tien Do, M.D., is subject to disciplinary action under Business and Professions Code section 2234, subdivision (b), in that he committed gross negligence during the care, treatment and management of the Patients E.P., Y.T., and R.I . . .

(b) In paragraph 14:

Respondent Kevin Tien Do, M.D., is subject to disciplinary action under Business and Professions Code section 2234, subdivision (c), in that he committed repeated negligent acts during his care, treatment and management of Patients E.P., Y.T., and R.I . .

(c) In paragraph 15:

Respondent Kevin Tien Do, M.D., is subject to disciplinary action under Business and Professions Code section 2234, subdivision (c), for incompetence in that he demonstrated that he lacks the knowledge and skill necessary to discharge the duties and responsibilities of his license during his care, treatment and management of Patients E.P., Y.T., and R.I

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(d) In paragraph 16:

Respondent Kevin Tien Do, M.D., is subject to disciplinary action under Business and Professions Code section 725 in that he committed repeated acts of clearly excessive treatment during his care, treatment and management of Patients E.P., Y.T., and R.I . .

(e) In paragraph 17:

Respondent Kevin Tien Do, M.D., is subject to disciplinary action under Business and Professions Code section 2266 in that he failed to maintain adequate and accurate records relating to the provision of his medical services . . .

24. The allegations set forth in paragraphs 13, 14, 15, 16 and 17 of the First Amended Accusation were not proven.

Costs

25. As evidence of the costs of prosecution of this matter, Complainant submitted the following:

(a) Deputy Attorney General (DAG) Richard D. Marino submitted a declaration, documenting the time billed by the Department of Justice, Office of the Attorney General (DOJ) for this case. The declaration stated that, for the fiscal year 2003, DAG Rajpal Dillon billed 18.5 hours at a rate of \$112 per hour (subtotal \$2,072); for the fiscal year 2004, DAG Rajpal Dillon billed 3.75 hours at \$132 per hour (subtotal \$495); and for the fiscal year 2005, DAG Richard Marino billed 14.5 hours at \$139 per hour (subtotal \$2,015). These costs included payment for the following tasks:

(1) conducting an initial case evaluation; (2) obtaining, reading and reviewing the investigative material and requesting further investigation, as needed; (3) drafting pleadings, including the First Amended Accusation and Automatic Suspension Order, subpoenas, correspondence, memoranda, and other case-related documents; (4) researching relevant points of law and fact; (5) locating and interviewing witnesses and potential witnesses; (6) consulting and/or meeting with colleague deputies, supervisory staff, experts, client staff, and investigators; (7) communicating and corresponding with Richard A. Moss, Respondent's counsel; (8) providing and requesting discovery; (9) preparing for and attending trial setting, status, prehearing and settlement conferences, as required; and (10) preparing for hearing.

(b) The total DOJ costs billed to the Board were \$4,582.00.

(c) The DOJ costs were not broken down per task or per issue/allegation.

26. Since five causes for discipline were not proven, the portion of costs attributable to the prosecution of those unproven allegations should be disallowed. There was no indication regarding the specific amount of DOJ costs attributable to the five unproven causes for discipline. However, the unproven allegations comprised about 75 percent of the factual allegations in the First Amended Accusation. Consequently, 75 percent of the DOJ costs (\$3436.50) will be disallowed. Pursuant to Government Code section 11425.50, subdivision (c), and California Code of Regulations, title 1, section 1042, subdivision (c), the Administrative Law Judge deems \$1,145.50 of DOJ costs to be reasonable. Thus, Complainant is awarded a total cost recovery of **\$1,145.50**.

LEGAL CONCLUSIONS

1. Cause exists to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2236, on the grounds that Respondent has been convicted of an offense substantially related to the qualifications, functions and duties of a licensed physician and surgeon, as set forth in Factual Findings 4, 5 and 6.

2. Cause exists to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (e), on the grounds that Respondent committed acts involving dishonesty and corruption which are substantially related to the qualifications, functions, and duties of a physician and surgeon, as set forth in Factual Findings 4, 5, 6 and 21.

3. Cause does not exist to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (b), for gross negligence, as set forth in Factual Findings 23 and 24.

4. Cause does not exist to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (c), for repeated negligent acts, as set forth in Factual Findings 23 and 24.

5. Cause does not exist to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (c), for incompetence, as set forth in Factual Findings 23 and 24.

6. Cause does not exist to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 725, for repeated acts of clearly excessive treatment, as set forth in Factual Findings 23 and 24.

7. Cause does not exist to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2266, for failure to maintain accurate and adequate medical records, as set forth in Factual Findings 23 and 24.

8. Cause exists to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, on the grounds that Respondent engaged in unprofessional conduct, as set forth in Factual Findings 4, 5, 6 and 21.

9. Pursuant to Business and Professions Code section 125.3, Complainant is entitled to recover reasonable costs of investigation and prosecution of this matter in the amount of **\$1,145.50**, as set forth in Factual Findings 25 and 26.

10a. Although Respondent has been convicted of only a single offense, it evidences a breach of public trust so severe that, barring significant rehabilitation evidence, revocation would seem the only option for maintaining the public health safety and welfare. However, Respondent has accepted responsibility for his crime and has made significant attempts to rectify his transgression, cooperating in 43 undercover operations which resulted in the conviction of one perpetrator, with minimal benefit to Respondent. Additionally, Respondent has paid in full the \$366,031.24 restitution. Furthermore, the commission of Respondent's crime ended seven years ago, and he has subsequently worked in the medical field in various capacities, with no further criminal activity. While Respondent made inappropriate choices of business associates at the beginning of his medical career, he apparently has not duplicated these choices in his subsequent employment.

10b. Under all of the circumstances of this case, a period of probation is warranted, provided that several probationary conditions are in place for protection of the public health, safety and welfare. Given Respondent's lengthy absence from the practice of medicine, his probation should include methods for assessing his current competence to practice and for re-establishing his level of competence should any deficiency be noted. Additionally, the severity of the violation and Respondent's extended absence from practice warrant a lengthy probationary period. Furthermore, despite Respondent's urging to receive a "time-served" credit toward any ordered suspension, Respondent should be separated from practice for an additional period of time. This separation should afford him the opportunity to further contemplate the impropriety and seriousness of his conduct and enable him to establish a plan for the future that will include strict compliance with the laws and rules governing the practice of medicine.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Physician's and Surgeon's Certificate No. G 76640 issued to respondent Kevin Tien Do is revoked. However, the revocation is stayed and respondent is placed on probation for ten years upon the following terms and conditions.

1. Actual Suspension

As part of probation, Respondent is suspended from the practice of medicine for one year, beginning the sixteenth (16th) day after the effective date of this decision.

2. Notification

Prior to engaging in the practice of medicine the Respondent shall provide a true copy of the Decision(s) and Accusation(s) 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 Division or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

3. Supervision of Physician Assistants

During probation, Respondent is prohibited from supervising physician assistants.

4. 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.

5. Quarterly Declarations

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

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6. Probation Unit Compliance

Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of Respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division 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, subdivision (b).

Respondent shall not engage in the practice of medicine in Respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Division or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than 30 calendar days.

7. Interview with the Division or Its Designee

Respondent shall be available in person for interviews either at Respondent's place of business or at the probation unit office, with the Division or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.

8. Residing or Practicing Out-of-State

In the event Respondent should leave the State of California to reside or to practice, Respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside 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; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if Respondent's periods of temporary or permanent residence or practice outside California totals two years. However, Respondent's license shall not be cancelled as long as Respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical

licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

9. Failure to Practice Medicine - California Resident

In the event Respondent resides in the State of California and for any reason Respondent stops practicing medicine in California, Respondent shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if Respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

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

11. Cost Recovery

Within 90 calendar days from the effective date of the Decision or other period agreed to by the Division or its designee, Respondent shall reimburse the Division the amount of **\$1,145.50** for its prosecution costs. The filing of bankruptcy or period of non-practice by respondent shall not relieve the respondent his obligation to reimburse the Division for its costs.

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12. License Surrender

Following the effective date of this Decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may request the voluntary surrender of Respondent's license. The Division reserves the right to evaluate Respondent's request and to exercise its discretion 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 Division or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of Respondent's license shall be deemed disciplinary action.

If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

13. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

14. Ethics Course

Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a course in ethics, at Respondent's expense, approved in advance by the Division or its designee. Failure to successfully complete the course during the first year of probation is a violation of probation.

Respondent shall submit a certification of successful completion to the Division or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

15. Oral and/or Written Examination

Within 60 calendar days of the effective date of this Decision, Respondent shall take and pass an oral and/or written examination, administered by the Probation Unit. The Division or its designee shall administer the oral and/or written examination in a subject to be designated by the Division or its designee and the oral examination shall be audio tape recorded.

If respondent fails the first examination, Respondent shall be allowed to take a second examination, which may consist of an oral and/or written examination. The waiting period between the first and second examinations shall be at least 90 calendar days.

Failure to pass the required oral and/or written examination within 180 calendar days after the effective date of this Decision is a violation of probation. Respondent shall pay the costs of all examinations. For purposes of this condition, if Respondent is required to take and pass a written exam, it shall be either the Special Purpose Examination (SPEX) or an equivalent examination as determined by the Division or its designee.

Respondent shall not practice medicine until Respondent has passed the required examination and has been so notified by the Division or its designee in writing. This prohibition shall not bar Respondent from practicing in a clinical training program approved by the Division or its designee. Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.

16. Monitoring - Practice/Billing

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

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

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

The monitor(s) shall submit quarterly written reports to the Division or its designee which includes an evaluation of respondent's performance, indicating whether Respondent's practices are within the standards of practice of medicine or billing, or both, and whether Respondent is practicing medicine safely, billing appropriately or both.

It shall be the sole responsibility of Respondent to ensure that the monitor submits the quarterly written reports to the Division or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, Respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Division or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If Respondent fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, Respondent shall be suspended from the practice of medicine until a replacement monitor is approved and prepared to assume immediate monitoring responsibility. Respondent shall cease the practice of medicine within three calendar days after being so notified by the Division or designee.

In lieu of a monitor, Respondent may participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at Respondent's expense during the term of probation.

Failure to maintain all records, or to make all appropriate records available for immediate inspection and copying on the premises, or to comply with this condition as outlined above is a violation of probation.

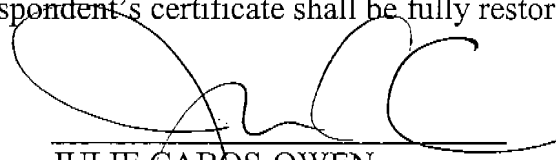
17. Solo Practice

Respondent is prohibited from engaging in the solo practice of medicine.

18. Completion of Probation

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

DATED: September 9, 2005


JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO September 16, 2004
BY Richard Marino ANALYST

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Attorneys for Complainant

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

In the Matter of the Automatic Suspension Of
First Amended Accusation Against:

KEVIN TIEN DO, M.D.

Physician's and Surgeon's Certificate No.
G76640,

Respondent.

Case No. 06-2002-136106

OAH No. L2004010620

FIRST AMENDED ACCUSATION

PARTIES

1. David T. Thornton (Complainant) brings this First Amended Accusation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs.

2. On or about June 1, 1993, the Medical Board of California issued Physician's and Surgeon's Certificate Number G76640 to Kevin Tien Do, M.D. (Respondent). On or about August 15, 2003, Respondent was sentenced to a one year term in federal prison to begin October 15, 2003, by reason of his criminal conviction for aiding and abetting health care fraud, in violation of Title 18, United States Code, sections 2 and 1347, in the matter entitled *United States of America v. Kevin T. Do, M.D.*, United States District Court for the Eastern

1 District of California Case No. 2:02CRS0038-01. Pursuant to Business and Professions Code
2 section 2236.1, Respondent's Physician's and Surgeon's Certificate was automatically
3 suspended, effective October 15, 2003. At all times relevant to the charges brought herein,
4 Respondent's Physician's and Surgeon's Certificate was in full force and effect. Unless renewed,
5 Respondent's Physician's and Surgeon's Certificate will expire on October 31, 2004.

6 **JURISDICTION**

7 3. This First Amended Accusation is brought before the Division of Medical
8 Quality, Medical Board of California (Division), under the authority of the following sections of
9 the Business and Professions Code (Code) and supersedes Accusation No. 06-2002-136106
10 which was brought before the Division on November 18, 2003.

11 4. Section 2227 of the Code provides that a licensee who is found guilty under
12 the Medical Practice Act may have his license revoked, suspended for a period not to exceed one
13 year, placed on probation and required to pay the costs of probation monitoring, or such other
14 action taken in relation to discipline as the Division deems proper.

15 5. Business and Professions Code section 2234 provides:

16 "The Division of Medical Quality shall take action against any
17 licensee who is charged with unprofessional conduct. In addition to other
18 provisions of this article, unprofessional conduct includes, but is not limited to,
19 the following:

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

23 "(b) Gross negligence.

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

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

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

10 “(d) Incompetence.

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

14 “(f) Any action or conduct which would have warranted the denial
15 of a certificate.

16 “(g) The practice of medicine from this state into another state or
17 country without meeting the legal requirements of that state or country for the
18 practice of medicine. Section 2314 shall not apply to this subdivision. This
19 subdivision shall become operative upon the implementation of the proposed
20 registration program described in Section 2052.5.”

21 6. Business and Professions Code section 2236 provides:

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

1 7. Business and Professions Code section 2266 provides:

2 “The failure of a physician and surgeon to maintain adequate and
3 accurate records relating to the provision of services to their patients constitutes
4 unprofessional conduct.”

5 8. Business and Professions Code section 725 provides:

6 “Repeated acts of clearly excessive prescribing or administering of
7 drugs or treatment, repeated acts of clearly excessive use of diagnostic procedures,
8 or repeated acts of clearly excessive use of diagnostic or treatment facilities as
9 determined by the standard of the community of licensees is unprofessional
10 conduct for a physician and surgeon, dentist, podiatrist, psychologist, physical
11 therapist, chiropractor, or optometrist. However, pursuant to Section 2241.5, no
12 physician and surgeon in compliance with the California Intractable Pain
13 Treatment Act shall be subject to disciplinary action for lawfully prescribing or
14 administering controlled substances in the course of treatment of a person for
15 intractable pain.

16 Any person who engages in repeated acts of clearly excessive
17 prescribing or administering of drugs or treatment is guilty of a misdemeanor and
18 shall be punished by a fine of not less than one hundred dollars (\$100) nor more
19 than six hundred dollars (\$600), or by imprisonment for a term of not less than 60
20 days nor more than 180 days, or by both the fine and imprisonment.

21 **COST RECOVERY**

22 9. Business and Professions Code section 125.3 provides that the Board may
23 request the administrative law judge to direct a licensee found to have committed a violation or
24 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
25 and enforcement of the case.

1 **MEDI-CAL CLAIM REIMBURSEMENT**

2 10. Welfare and Institutions Code Section 14124.12 provides:

3 “(a) Upon receipt of written notice from the Medical Board of California,
4 the Osteopathic Medical Board of California, or the Board of Dental Examiners of
5 California, that a licensee's license has been placed on probation as a result of a
6 disciplinary action, the department may not reimburse any Medi-Cal claim for the type of
7 surgical service or invasive procedure that gave rise to the probation, including any dental
8 surgery or invasive procedure, that was performed by the licensee on or after the effective
9 date of probation and until the termination of all probationary terms and conditions or
10 until the probationary period has ended, whichever occurs first. This section shall apply
11 except in any case in which the relevant licensing board determines that compelling
12 circumstances warrant the continued reimbursement during the probationary period of
13 any Medi-Cal claim, including any claim for dental services, as so described. In such a
14 case, the department shall continue to reimburse the licensee for all procedures, except for
15 those invasive or surgical procedures for which the licensee was placed on probation.

16 “(b) The Medical Board of California, the Osteopathic Medical
17 Board of California, and the Board of Dental Examiners of California, shall work
18 in conjunction with the State Department of Health Services to provide all
19 information that is necessary to implement this section. These boards and the
20 department shall annually report to the Legislature by no later than March 1 that
21 number of licensees of these boards, placed on probation during the immediately
22 preceding calendar year, who are:

23 “(1) Not receiving Medi-Cal reimbursement for certain surgical
24 services or invasive procedures, including dental surgeries or invasive procedures,
25 as a result of subdivision (a).

26 “(2) Continuing to receive Medi-Cal reimbursement for certain
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1 surgical or invasive procedures, including dental surgeries or invasive procedures,
2 as a result of a determination of compelling circumstances made in accordance
3 with subdivision (a).

4 “(c) This section shall become inoperative on July 1, 2005, and, as
5 of January 1, 2006, is repealed.”

6 **FIRST CAUSE FOR DISCIPLINE**

7 **(Criminal Conviction)**

8 11. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
9 Business and Professions Code section 2236 in that he has sustained a felony criminal conviction
10 for a crime which under the facts and circumstances of its commission is substantially related to
11 the duties, qualifications and functions of a physician and surgeon, as follows:

12 A. On or about August 8, 2000, in an information filed by the
13 United States District Attorney in the United States District Court for the Eastern
14 District of California, in the matter entitled *United States of America v. Kevin T.*
15 *Do, M.D.*, Case No. 2:02CRS0038-01, Kevin Tien Do, M.D. (Respondent), was
16 charged with Aiding and Abetting Health Care Fraud, in violation of Title 18,
17 United States Code, sections 2 and 1347, in that Respondent assisted others to
18 defraud Medi-Cal, the California medical treatment assistance program, of
19 \$337,000 by allowing a medical billing company to use Respondent’s Medi-Cal
20 provider number to submit claims, and receive payment, for medical care and
21 treatment—specifically, physical therapy—that was not provided and was not
22 intended to be provided.

23 B. On or about September 13, 2002, Respondent entered a
24 plea to the charge of Aiding and Abetting Health Care Fraud, in violation of Title
25 18, United States Code, sections 2 and 1347; on or about August 15, 2003,
26 Respondent was sentenced to a one year term in federal prison to begin October
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1 15, 2003.

2 C. The facts and circumstances underlying Respondent's
3 conviction for aiding and abetting health care fraud are as follows:

4 (1) On or about and between April 1997 and December
5 1998, Respondent allowed a billing service to use his Medi-Cal provider number
6 for medical services--specifically, physical therapy--which were not performed.

7 (2) Respondent and the billing service established a
8 joint bank account into which the checks for payment of the fraudulently billed
9 services would be deposited. Respondent and the billing service agreed to divide
10 the payment with the billing service receiving Eighty Percent (80%) and
11 Respondent receiving Twenty Percent (20%).

12 (3) By reason of the fraudulent billing scheme
13 perpetrated by Respondent, Medi-Cal, California's medical treatment assistance
14 program for disadvantaged and low income families and individuals, was
15 defrauded of approximately \$397,000.00.

16 **SECOND CAUSE FOR DISCIPLINE**

17 **(Dishonest or Corrupt Acts)**

18 12. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
19 Business and Professions Code section 2234, subdivision (e), in that he committed dishonest and
20 corrupt acts which engaged in the practice of medicine as shown by his conviction for aiding and
21 abetting health care fraud, in violation of Title 18, United States Code, sections 2 and 1347, as
22 follows:

23 A. Complainant refers to and, by this reference, incorporates
24 herein paragraph 11, above, as though fully set forth.
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1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Gross Negligence)**

3 13. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
4 Business and Professions Code section 2234, subdivision (b), in that he committed gross
5 negligence during the care, treatment and management of the Patients E.P., Y.T., and R.I.,¹ as
6 follows:

7 **Patient E.P.**

8 A. On or about October 20, 2000, E.P., then 62 years old,
9 presented to B.J.G., Respondent's nurse practitioner, with complaints of chest
10 pain, intermittent palpitations, shortness of breath, and neck pain. The nurse
11 practitioner ordered several tests, including an EKG, as well as respiratory
12 therapy. The EKG revealed "possible abnormality, repeat if myocardial injury is
13 suspected."

14 B. During E.P.'s ensuing eight visits to Respondent's office,
15 respiratory therapy was administered. E.P.'s heart and respiratory rate of 82 was
16 recorded for each visit.

17 **Patient Y.T.**

18 C. On or about October 13, 2000, 66 year-old Y.T. presented
19 to respondent's clinic with chest pain and a history of high blood pressure.
20 Respondent ordered several tests, including an EKG. The EKG was normal;
21 however, a pulmonary function test showed mild obstruction. Other tests
22 performed on Y.T. were a carotid ultrasound, peripheral vascular ultrasound,
23 arterial and a venous ultrasound. Laboratory tests included lipid panel, ESR,
24 urinalysis, thyroid panel, anemia panel, basic metabolic panel, hepatitis panel,

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26 1. All references to individuals other than Respondent in this First Amended Accusation
27 shall be by initials only. The true names are known to Respondent and will be disclosed to him
28 upon his timely written request for discovery pursuant to Government Code section 11507.6.

1 liver/hepatic function panel, arthritis panel, PSA, hematology panel and
2 hemoglobin A1C.

3 D. On eight visits through November 6, 2000, Y.T. had
4 respiratory therapy. On one occasion the patient's heart rate and respiratory rate
5 were both documented as 77, while on another visit the heart rate was recorded as
6 230 and the respiratory rate as 250.

7 **Patient R.I.**

8 E. Between September 22, 2000 and October 11, 2000, R.I.,
9 then 76 years old, received respiratory therapy at Respondent's office on nine
10 occasions. Patient R.I. had primary diagnoses of hypertension, arthritis,
11 depression, BPH, and asthma. No physical examination was performed and no
12 medical history was taken or documented at any of the visits. A respiratory rate
13 of either 77 or 78 was recorded for each respiratory therapy.

14 F. The following acts and omissions, considered individually
15 and collectively, constitute extreme departures from the standard of care:

16 (1) A comprehensive history of E.P.'s chest
17 symptoms was not taken and a detailed cardiac examination of
18 patient E.P. was not performed.

19 (2) E.P. was not referred for a cardiac consult
20 despite the abnormal EKG.

21 (3) Respondent did not refer E.P. to a pulmonologist.

22 (4) Respondent did not refer E.P. for a cardiac
23 consultation.

24 (5) E.P.'s records incorrectly reflect respiration
25 rates of 82.

26 (6) Unnecessary imaging procedures were
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1 performed on Y.T.

2 (7) Respondent failed to address the Y.T.'s
3 chest pain.

4 (8) Respondent failed to refer Y.T. to a
5 pulmonologist.

6 (9) Y.T.'s records incorrectly reflect a heart rate
7 of 230 and respiration rates of 77 and 250.

8 (10) The effectiveness of the medical treatment
9 provided R.I. was not documented.

10 (11) Respondent failed to refer R.I. to a
11 pulmonologist.

12 (12) R.I.'s records incorrectly reflect respiratory
13 rates of 77 to 78.

14 (13) Respondent failed supervise his nurse
15 practitioner's care, treatment and management of Patients E.P.,
16 Y.T. and R.I. by B.J.G.

17 **FOURTH CAUSE FOR DISCIPLINE**

18 **(Repeated Negligent Acts)**

19 14. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
20 Business and Professions Code section 2234, subdivision (c), in that he committed repeated
21 negligent acts during his care, treatment and management of Patients E.P., Y.T., and R.I., as
22 follows:

23 A. Complainant refers to and, by this reference, incorporates
24 herein paragraph 12, above, as though fully set forth.

25 B. The following acts and omissions constitute departures
26 from the standard of care:
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1 (1) A comprehensive history of E.P.'s chest
2 symptoms was not taken and a detailed cardiac examination of
3 patient E.P. was not performed.

4 (2) E.P. was not referred for a cardiac consult
5 despite the abnormal EKG.

6 (3) Respondent did not refer E.P. to a pulmonologist.

7 (4) Respondent did not refer E.P. for a cardiac
8 consultation.

9 (5) E.P.'s records incorrectly reflect respiration
10 rates of 82.

11 (6) Unnecessary imaging procedures were
12 performed on Y.T.

13 (7) Respondent failed to address the Y.T.'s
14 chest pain.

15 (8) Respondent failed to refer Y.T. to a
16 pulmonologist.

17 (9) Y.T.'s records incorrectly reflect a heart rate
18 of 230 and respiration rates of 77 and 250.

19 (10) The effectiveness of the medical treatment
20 provided R.I. was not documented.

21 (11) Respondent failed to refer R.I. to a
22 pulmonologist.

23 (12) R.I.'s records incorrectly reflect respiratory
24 rates of 77 to 78.

25 (13) Respondent failed supervise his nurse
26 practitioner's care, treatment and management of Patients E.P.,
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1 Y.T. and R.I. by B.J.G.

2 **FIFTH CAUSE FOR DISCIPLINE**

3 **(Incompetence)**

4 15. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
5 Business and Professions Code section 2234, subdivision (c), for incompetence in that he
6 demonstrated that he lacks the knowledge and skill necessary to discharge the duties and
7 responsibilities of his license during his care, treatment and management of Patients E.P., Y.T.,
8 and R.I., as follows:

9 A. Complainant refers to and, by this reference, incorporates
10 herein paragraph 13, above, as though fully set forth.

11 **SIXTH CAUSE FOR DISCIPLINE**

12 **(Repeated Acts of Clearly Excessive Treatment)**

13 16. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
14 Business and Professions Code section 725 in that he committed repeated acts of clearly
15 excessive treatment during his care, treatment and management of Patients E.P., Y.T., and R.I.,
16 as follows:

17 A. Complainant refers to and, by this reference, incorporates
18 herein paragraph 13, above, as though fully set forth.

19 **SEVENTH CAUSE FOR DISCIPLINE**

20 **(Failure To Maintain Accurate and Adequate Medical Records)**

21 17. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
22 Business and Professions Code section 2266 in that he failed to maintain adequate and accurate
23 records relating to the provision of his medical services, as follows:

24 A. Complainant refers to and, by this reference, incorporates
25 herein paragraphs 11 and 13, above, as though fully set forth.
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1 **EIGHTH CAUSE FOR DISCIPLINE**

2 **(Unprofessional Conduct)**

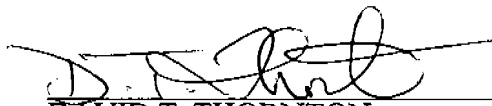
3 18. Respondent KEVIN TIEN DO, M.D., is subject to disciplinary action under
4 Business and Professions Code section 2234, generally, in that he committed unprofessional
5 conduct during his medical practice as further described in paragraphs 11 and 13.
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7 **PRAYER**

8 **WHEREFORE**, Complainant requests that a hearing be held on the matters
9 herein alleged, and that following the hearing, the Division of Medical Quality issue a decision:

- 10 1. Revoking or suspending Physician's and Surgeon's Certificate No.
11 G76640, issued to Kevin Tien Do, M.D.;
- 12 2. Revoking, suspending or denying approval of Kevin Tien Do's, M.D.,
13 authority to supervise physician's assistants, pursuant to section 3527 of the Code;
- 14 3. Ordering Kevin Tien Do, M.D., to pay the Division of Medical Quality the
15 reasonable costs of the investigation and enforcement of this case, and, if placed on probation,
16 the costs of probation monitoring; and,
- 17 4. Taking such other and further action as deemed necessary and proper.

18 DATED: September 16, 2004.
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22 **DAVID T. THORNTON**
23 Executive Director
24 Medical Board of California
25 Department of Consumer Affairs
26 State of California

27 Complainant
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