

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

In the Matter of the Accusation Against:

Nicky Shah, M.D.

Physician's & Surgeon's
Certificate No A 66655

Respondent.

Case No.: 800-2015-012369

**DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION**

No action having been taken on the petition for reconsideration, filed by July 6, 2020, and the time for action having expired at 5:00 p.m. on July 20, 2020, the petition is deemed denied by operation of law.

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
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STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Nicky Shah, M.D.

Physician's & Surgeon's
Certificate No. A 66655

Respondent.

Case No. 800-2015-012369

ORDER GRANTING STAY

(Government Code Section 11521)

The Medical Board of California (Board) has filed a Request for Stay of execution of the Decision in this matter with an effective date of July 10, 2020, at 5:00 p.m.

Execution is stayed until July 20, 2020, at 5:00 p.m.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: July 9, 2020



William Prasifka
Executive Director
Medical Board of California

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
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STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

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ORDER GRANTING STAY

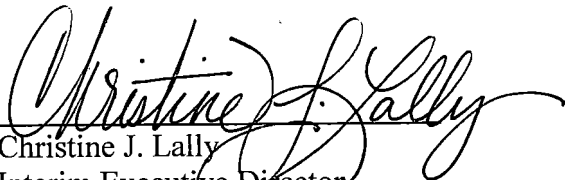
(Government Code Section 11521)

Nicky Shah, M.D. has filed a Request for Stay of execution of the Decision in this matter with an effective date of June 12, 2020, at 5:00 p.m.

Execution is stayed until July 10, 2020, at 5:00 p.m.

This stay is granted solely for the purpose of allowing the Respondent to file a Petition for Reconsideration.

DATED: June 11, 2020


Christine J. Lally
Interim Executive Director
Medical Board of California

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

**In the Matter of the Accusation
Against:**

Nicky Shah, M.D.

**Physician's and Surgeon's
Certificate No. A 66655**

Case No. 800-2015-012369

Respondent.

DECISION

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

Page 1, paragraph 2: "Kimberly Kirchmeyer, Executive Director" is changed to "Christine J. Lally, Interim Executive Director."

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 JUN 12 2020.

IT IS SO ORDERED MAY 13 2020.

MEDICAL BOARD OF CALIFORNIA

By:



**Kristina D. Lawson, J.D., Chair
Panel B**

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

In the Matter of the Accusation Against:

NICKY SHAH, M.D.

Physician's and Surgeon's Certificate No. A 66655

Respondent.

Case No. 800-2015-012369

OAH No. 2019120835

PROPOSED DECISION

Administrative Law Judge Regina Brown, Office of Administrative Hearings, State of California, heard this matter on February 11, 2020, in Oakland, California.

Jane Zack Simon, Supervising Deputy Attorney General, and Hamsa Murthy, Deputy Attorney General, represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California.

Francisco Rodriguez, Esq., represented respondent Nicky Shah, M.D., who was present at the hearing.

The record remained open for complainant to submit additional documents. On February 20, 2020, a Statement of Charges before the Iowa Board of Medicine was received and marked for identification as Exhibit 9; and a license certification was received and marked for identification as Exhibit 10.¹ On March 3, 2020, respondent submitted a written objection (marked for identification only as Exhibit C) to the documents. On March 6, 2020, complainant submitted a written reply (marked for identification only as Exhibit 11) to respondent's objection. Over respondent's objection, Exhibits 9 and 10 were admitted into evidence.

The record closed and the matter was submitted for decision on March 6, 2020.

FACTUAL FINDINGS

1. Complainant Kimberly Kirchmeyer issued the Accusation in her official capacity as Executive Director of the Medical Board of California, Department of Consumer Affairs (Medical Board).
2. On October 2, 1998, the Medical Board issued Physician's and Surgeon's Certificate (Certificate) No. A 66655 to respondent Nicky Shah, M.D. Respondent's Certificate was in full force and effect at the times of the acts set forth below and will expire on January 31, 2022, unless renewed.
3. The accusation alleges that respondent's Certificate is subject to discipline as a result of his felony convictions and unprofessional conduct.

¹ In complainant's cover letter, the license certification was misidentified as Exhibit 4.

Respondent's Convictions and Unprofessional Conduct

4. On May 9, 2017, respondent was convicted by jury of felony violations of Penal Code sections 132 and 134 (preparing and offering false evidence at a trial), offenses that are substantially related to the qualifications, functions or duties of a physician and surgeon. On September 28, 2017, imposition of sentence was suspended and respondent was placed on formal probation for three years pursuant to conditions including that he serve 30 days in county jail and 60 days on electronic monitoring; complete 380 hours of community service; participate in psychological counseling that addresses his honesty; and pay fines and fees. On July 22, 2019, the Court of Appeal of the State of California, Third Appellate District, affirmed the trial court's judgment.

5. In its opinion, the Court of Appeal set forth the underlying facts for the felony convictions as follows: The incident occurred on April 3, 2013, when respondent was driving to work on a temporary assignment at a small health clinic in Butte County. A California Highway Patrol officer stopped him for speeding. Respondent told the officer that he was on his way to a medical emergency to perform a surgery. The officer telephoned the clinic and determined that there was no medical emergency. Respondent was cited for speeding. At the trial on the speeding citation, respondent offered a letter from the clinic's office manager that stated: "This letter is to confirm that [respondent] was on his way to an emergency in order to attend to a patient at this facility on April 3, 2013, at 10:00 a.m., with severe abdominal pain and concern for a gall bladder infection." Respondent was found guilty of speeding. In January 2014, the Butte County District Attorney filed a felony complaint charging respondent with preparing and offering false evidence. At the jury trial, the District Attorney established that the letter presented at the trial for the speeding citation was false, as there was no

emergency at the clinic that morning. Furthermore, respondent had misled and induced the clinic's office manager to sign the letter under false pretenses.

In a footnote in the opinion, the Court of Appeal noted that, on a previous occasion in San Francisco in 2010, respondent was stopped for speeding and falsely told the officer that he was on an emergency call heading to the hospital.

Respondent's Evidence

6. At the hearing, respondent disagreed with the appellate court's characterization of the facts and provided additional information regarding the circumstances underlying his felony convictions.

7. According to respondent, fifty percent of the patients at the clinic were treated through workers' compensation and a high percentage of those were on pain management. Respondent stated that he was required to use prescriptions that were previously signed by the owner of the clinic because of a delay in obtaining a triplicate prescription pad for himself. He felt forced to continue with their current prescriptions even though he disagreed and he began to taper patients off their pain medications. According to respondent, he was concerned about the patients who were in pain and he started being "in a panic mode" about the approximately 25 patients he saw daily.

Respondent offered the following explanation as to his state of mind at the time he was stopped by the officer, and why, in his opinion, the officer misunderstood what respondent told him during their interaction. On the previous day, he had reviewed patients charts and was particularly concerned about the type and quantity of their prescribed medications. Respondent stated that he tried to relay as much information to the officer in a short amount of time, to assist the officer's understanding of the stress that respondent was under. For example, respondent told the officer that he was

"extremely nervous about the patients in the clinic and especially concerned about patients he was seeing that day." Respondent testified that he told the officer he had, "a patient who was complaining of abdominal pain and [respondent was] concerned about gall bladder. The patient may need surgery." Respondent stated that the officer misunderstood him, because he never said that he would be performing the surgery.

8. As an explanation as to why respondent provided the letter from the office manager to the court, respondent stated that he hired an attorney who told him that in an emergency situation a doctor is allowed to speed. Respondent stated that he asked the office manager to write a letter and verify that the situation was an emergency. He gave the letter to his attorney and respondent did not attend the trial on the speeding citation. At hearing, respondent did not admit to misleading the office manager into signing the letter.

9. Ultimately, respondent stated that he regretted that he had the inability to clearly explain to the officer and to the courts his situation because "there was no other reason for him to speed other than to treat his patients." Furthermore, respondent insists that he has never placed a patient at risk or provided care below the required medical standard.

10. It is apparent that respondent has a problem with honesty and candor, as evidenced by the facts and circumstances surrounding his convictions and by his lack of honesty in his testimony at this hearing. Additionally, he lied to law enforcement officers on two occasions and misled the office manager at the clinic.

11. Respondent has been licensed as a physician in California for over 24 years. He graduated from Johns Hopkins School of Medicine. He completed his fellowship at the University of California, at San Francisco, in general internal medicine

and physiology. He has practiced in California, Maryland, Massachusetts, and Iowa, but he is only licensed in California and Iowa. His focus of practice is internal medicine. Currently, he has a private practice in San Francisco, in general internal medicine, but he does not have privileges at any hospital.

12. Respondent testified that he received a Ph.D. in genetics from Johns Hopkins University. He explained that he discovered a new gene, is published and has given talks around the world on the subject. Also, he stated that he helped open clinics inside local pharmacies in San Francisco for uninsured patients, who paid a flat rate of \$49, and this concept eventually expanded to Walmart. Additionally, he stated that he is performing community service in the pharmaceutical sector on new drug development based on genetics. However, on cross-examination, respondent admitted that he did not have a Ph.D., as he had only completed three years towards his doctoral degree. Also, he admitted that his work in the pharmaceutical sector was for financial gain and not community service.

13. Respondent is in compliance with his criminal court probation. He has completed his community service hours through volunteering at his son's school. However, he did not present evidence that he has paid the fines and fees or that he has participated in psychological counseling that addresses his honesty.

14. Respondent is also currently licensed in Iowa. He was working in Iowa in 2013, but was released from the hospital where he was working, after the felony charges were filed. He is in settlement discussions with the Iowa Board regarding the status of his license.

15. Respondent provided four character letters, dated in 2017, that were addressed to the criminal court judge regarding his sentencing. The letters from Usha

Sunkara, M.D., Rajan Hundal, M.D., Andrew Rudin, M.D., and Robert Schuster, Esq., written three years ago, cannot be afforded significant weight in evaluating respondent's rehabilitation.

16. Counsel for complainant contends that in a case such as this, complainant would typically recommend that the licensee be placed on probation. However, respondent's failure to accept responsibility or address the magnitude of his misconduct, and his dishonest testimony, render him untrustworthy and lacking in integrity, which are characteristics that are integral to a physician and surgeon. Therefore, complainant seeks revocation of respondent's Certificate.

LEGAL CONCLUSIONS

1. The purpose of an administrative proceeding concerning licensure is not to punish the respondent, but rather is "to protect the public from dishonest, immoral, disreputable or incompetent practitioners [citations omitted]." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The goal is the prevention of future harm and the improvement and rehabilitation of the licensee. It is far more desirable to impose discipline before a licensee harms any patient than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.) While the objective, wherever possible, is to take action that is calculated to aid in the rehabilitation of the licensee, protection of the public shall be paramount. (Bus. & Prof. Code, § 2001.1.)

2. The standard of proof applied is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance, supra*, 135 Cal.App.3d at 856.)

Unprofessional Conduct/Criminal Convictions

3. Business and Professions Code section 2236, subdivision (a), authorizes the Board to impose discipline against any licensee who has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a physician and surgeon. California Code of Regulations, title 16, section 1360, provides that a conviction is substantially related to the qualifications, functions, or duties of a physician and surgeon "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." Creating and filing false documents is conduct substantially related to the duties of a physician and surgeon. Intentional dishonesty demonstrates a lack of moral character and can indicate unfitness to practice medicine. (*Matanky v. Board of Med. Examiners* (1978) 79 Cal.App.3d 293, 305.)

4. Complainant established by clear and convincing evidence that respondent's felony convictions are substantially related to the qualifications, functions, or duties of a physician and surgeon. (Factual Findings 4 and 5.) Cause for discipline exists pursuant to Business and Professions Code section 2236, subdivision (a).

5. Business and Professions Code section 2234, subdivision (e), defines unprofessional conduct by a physician and surgeon to include the commission of a dishonest act. Respondent was convicted of two counts of creating and filing false documents to the criminal court. Both crimes involve dishonesty. (Factual Findings 4 and 5.)

6. Complainant established by clear and convincing evidence that respondent engaged in unprofessional conduct by reason of his dishonest conduct. Cause for discipline exists pursuant to Business and Professions Code section 2234, subdivision (e).

Disciplinary Considerations

7. Cause for discipline having been established, the remaining issue is the appropriate level of discipline. The Medical Board's Manual of Model Disciplinary Orders and Disciplinary Guidelines (Guidelines) (12th ed., 2016) recommend, at a minimum, stayed revocation and five years' probation, subject to appropriate terms and conditions, for respondent's unprofessional conduct. The maximum discipline is revocation. Complainant argues that revocation of respondent's Certificate is necessary to protect the public.

8. In determining the appropriate disciplinary penalty, the seriousness of the misconduct is balanced against the physician's showing of rehabilitation. The burden of establishing rehabilitation is on respondent and the standard of proof is a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164; Evid. Code, §§ 115, 500.)

9. In determining whether or not a licensee is sufficiently rehabilitated to justify continued licensure, it must be kept in mind that, in exercising its licensing functions, protection of the public is the highest priority of the Medical Board. The Medical Board seeks to ensure that licensees will, among other things, be completely candid and worthy of the responsibilities they bear by reason of their licensure. The outcome of this case, therefore, turns on whether respondent has taken responsibility

for his misconduct and taken steps to rehabilitate himself to the extent that he can be trusted to practice medicine in a manner consistent with public safety.

10. It is noted that respondent has practiced for over 24 years. Respondent's misconduct in the instant case, however, is egregious, and is exacerbated by the presence of aggravating factors. Under these circumstances, in order to remain licensed, respondent must make a particularly strong showing of rehabilitation.

11. The expression of remorse and the taking of responsibility for past misconduct are relevant in assessing rehabilitation, just as the absence of remorse and the failure to take responsibility are aggravating factors. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940 [fully acknowledging the wrongfulness of one's actions is an essential step towards rehabilitation].) Respondent did not express remorse or accept any responsibility for his misconduct, and lacks insight into, his misconduct. He continued to maintain that he never told the officer that he was on his way to an emergency surgery; but the evidence failed to support his claims. Moreover, he compounded his dishonesty by presenting a false document at the trial on the speeding citation and was not candid at the jury trial on the felony charges. Respondent's misconduct is further aggravated by his dishonesty at hearing.

In the instant case, respondent's wholesale denial of his misconduct does not reflect well on his suitability for probation. Because respondent failed to present any meaningful evidence of rehabilitation, and in light of respondent's lack of candor at hearing, the Medical Board lacks assurances that, if placed on probation, respondent can be trusted to perform licensed activities in a manner consistent with public safety. Against this background, protection of the public requires revocation of respondent's Certificate.

ORDER

Physician's and Surgeon's Certificate No. A 66655 issued to respondent Nicky Shah, M.D., is revoked.

DATE: April 2, 2020

DocuSigned by:
Regina Brown
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REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings

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FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO *Oct. 11* 20 *19*
BY *[Signature]* ANALYST

7
8 **BEFORE THE**
9 **MEDICAL BOARD OF CALIFORNIA**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 800-2015-012369

13 **Nicky Shah, M.D.**
293 Corbett Ave
San Francisco CA 94114

A C C U S A T I O N

14
15 Physician's and Surgeon's Certificate No. A 66655,
16 Respondent.

17
18 **PARTIES**

19 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
20 capacity as the Executive Director of the Medical Board of California, Department of Consumer
21 Affairs (Board).

22 2. On October 2, 1998, the Medical Board issued Physician's and Surgeon's Certificate
23 Number A 66655 to Nicky Shah, M.D. (Respondent). The Physician's and Surgeon's Certificate
24 was in full force and effect at all times relevant to the charges brought herein and will expire on
25 January 31, 2020, unless renewed.

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JURISDICTION

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

4. Section 2227 of the Code 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.

6. Section 2236 of the Code provides that the conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct.

FIRST CAUSE FOR DISCIPLINE

(Unprofessional Conduct/Conviction of Crime)

7. Respondent Nicky Shah, M.D. is subject to disciplinary action for unprofessional conduct under sections 2234 and 2236 of the Code.

8. On May 9, 2017, Respondent was convicted of felony violation of Penal Code sections 132 and 134, relating to his presentation of false or fraudulent evidence at a trial. He appealed the conviction. In a Decision issued by the Court of Appeal on July 22, 2019, the conviction was affirmed.

9. The facts surrounding the conviction demonstrate that it is substantially related to the qualifications, functions or duties of a physician and surgeon and constitutes unprofessional conduct.

10. On April 3, 2013, Respondent was driving to work at a small health clinic in Butte County, where he had accepted a temporary position. He was stopped for speeding after a CHP officer clocked him driving at 95 miles per hour. Respondent informed the CHP officer that he was on his way to a medical emergency, and needed to be at work within the next ten minutes to

1 perform a surgery. The officer telephoned the clinic, was informed there was no emergency, and
2 that Respondent was simply late to see his regularly scheduled patients. Respondent continued to
3 maintain that there was an emergency requiring his immediate presence. He was cited for
4 speeding.

5 11. Shortly after the citation was issued, Respondent presented the clinic office manager
6 with a letter stating, "This letter is to confirm that [Respondent] was on his way to an emergency
7 in order to attend to a patient at this facility on April 3rd, 2013, at 10:00 a.m. with severe
8 abdominal pain and concern for a gall bladder infection." Respondent requested that the office
9 manager sign the letter, which was dated April 16, 2013. At the trial on the speeding citation,
10 Respondent, through his attorney, offered the letter in evidence. Respondent was nevertheless
11 found guilty of speeding.

12 12. After the speeding conviction, in January 2014 the Butte County District Attorney
13 filed a felony complaint charging Respondent with offering false and fraudulent evidence at the
14 speeding trial, in violation of Penal Code sections 132 and 134. Respondent requested and
15 received a trial by jury. The evidence presented at trial established that the April 16, 2013 letter
16 was false¹. There was no emergency at the clinic on the morning of April 3, 2013. Respondent
17 misled and induced the clinic's office manager to sign the letter under false pretenses and
18 presented that false evidence at his trial on the speeding citation. Moreover, evidence was
19 presented that Respondent was stopped for speeding in San Francisco in 2010, and falsely told the
20 officer he was on an emergency call heading to the hospital.

21 PRAYER

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

24 1. Revoking or suspending Physician's and Surgeon's Certificate Number A 66655,
25 issued to Nicky Shah, M.D.;

26
27 ¹ The Court of Appeal in its July 22, 2019 Decision noted, "There was overwhelming
28 evidence that the content of the letter – that [Respondent] was on his way to an emergency- was false."

- 1 2. Revoking, suspending or denying approval of Nicky Shah, M.D.'s authority to
2 supervise physician assistants and advanced practice nurses;
3 3. Ordering Nicky Shah, M.D., if placed on probation, to pay the Board the costs of
4 probation monitoring; and
5 4. Taking such other and further action as deemed necessary and proper.

6
7 DATED: October 11, 2019


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

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