

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

In the Matter of the Accusation Against:

Jeffrey David Gross, M.D.

Physician's and Surgeon's
Certificate No. G 79394

Respondent.

Case No. 800-2018-045045

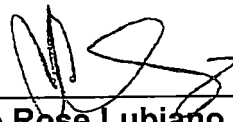
DECISION

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 September 8, 2023.

IT IS SO ORDERED August 10, 2023.

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:

JEFFREY DAVID GROSS, M.D.

Physician's and Surgeon's Certificate No. G 79394,

Respondent.

Agency Case No. 800-2018-045045

OAH No. 2022080683

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 8, 2023.

Peggy Bradford Tarwater, Deputy Attorney General, represented complainant Regi Varghese, Interim Executive Director, Medical Board of California (Board), Department of Consumer Affairs.

Craig B. Garner, Esq., Garner Health Law Corporation, represented respondent Jeffrey David Gross, M.D.

Oral and documentary evidence was received, and the parties also stipulated to certain facts. On May 15, 2023, respondent requested official notice of a United States Supreme Court decision issued after the hearing, and complainant objected to the request. In an order dated June 6, 2023, the administrative law judge overruled the objection, reopened the record to take official notice of the decision, and took the matter under submission.

SUMMARY

Complainant requests that the Board revoke respondent's physician's and surgeon's certificate due to his federal criminal conviction in 2021 of conspiring to commit honest-services mail and wire fraud. The conviction arose from a scheme in which respondent accepted bribes and kickbacks that were paid to induce him to refer patients to a hospital for spinal surgeries and other medical procedures between 2008 and 2013. Complainant argues respondent's conduct and criminal conviction are grounds for revocation because they are substantially related to the qualifications, functions, or duties of a physician and surgeon, and revocation is necessary to protect the public due to the dishonest and corrupt nature of the crime and respondent's alleged lack of rehabilitation.

Respondent argues that any disciplinary action against his certificate should be limited to a stayed revocation with probation rather than an outright revocation. Respondent has complied with the terms of his criminal sentence, and he accepted responsibility for his crime by pleading guilty to it. Furthermore, respondent contends his criminal conduct did not arise from or occur during patient care, treatment, management, or billing, and it is therefore less serious for disciplinary purposes than a

crime that did. According to respondent, the crime never affected patient care or influenced respondent's medical decision making.

Complainant proved respondent's conduct and criminal conviction are grounds for disciplinary action against respondent's certificate. Respondent's years-long conspiracy to commit honest-services fraud was serious, dishonest, and substantially related to the qualifications, functions, and duties of a physician and surgeon. Furthermore, the conspiracy arose from patient care, treatment, management, or billing, despite respondent's contention to the contrary. Respondent conspired to defraud patients of their right to honest services by accepting bribes and kickbacks intended to influence their care and treatment.

In addition, respondent's evidence does not show he is rehabilitated. While respondent's criminal conduct ended in 2013, the criminal conviction itself is recent, and respondent was released from prison just last year, leaving only a limited time in which to assess his rehabilitation. Respondent is also still on supervised release, and his good behavior while under supervision is accorded little weight in analyzing his rehabilitation because he is required to behave in exemplary fashion while under supervision. In addition, respondent's testimony does not show he has had a substantial change in attitude from that which existed at the time of the conspiracy. Instead, respondent downplayed the gravity of his criminal conduct, at times appearing to challenge the factual basis for his criminal conviction.

Considering the entire record, revocation of respondent's certificate is warranted. Complainant also requests an order directing respondent to pay the Board's investigative and enforcement costs; that request will be granted in part.

///

FACTUAL FINDINGS

Background

1. On July 6, 1994, the Board issued respondent physician's and surgeon's certificate number G 79394. The certificate is renewed and current with an expiration date of November 30, 2023.

2. Respondent is a neurosurgeon who formerly operated Oasis Medical Providers, Inc. (Oasis), a medical practice based in Laguna Niguel, California. He is also a licensed physician in Nevada and Utah; he became licensed in those states in February 2011 and September 2021, respectively. Respondent earned his medical degree from George Washington University in Washington, D.C., and he started his private practice in Laguna Niguel in 1999. From 2005 through 2013, respondent performed surgeries and other medical procedures on some of his patients at Pacific Hospital of Long Beach, California (Pacific Hospital).

Criminal Conviction

3. Pacific Hospital closed in the fall of 2013 following a raid by federal authorities in a criminal investigation of alleged healthcare fraud. On January 23, 2018, an Indictment was filed against respondent in the United States District Court, Central District of California, Case No. SA CR 18-00014-CJC. Count One of the Indictment charged respondent with conspiring with Pacific Hospital's owner, Michael D. Drobot, and others to defraud patients of their right to honest services by accepting bribes and kickbacks that were paid to induce respondent to refer patients to Pacific Hospital for spinal surgeries and other medical services.

4. On July 16, 2020, respondent agreed to plead guilty to Count One of the Indictment. In his plea agreement, respondent admitted he conspired to commit honest-services mail and wire fraud in violation of 18 U.S.C. section 371, a felony, by receiving bribes and kickbacks disguised as legitimate payments under three agreements with Pacific Hospital and Pacific Specialty Physician Management, Inc. (PSPM), an affiliated company that Drobot also controlled. First, in February 2008, respondent agreed to sublease Oasis's medical office space to PSPM in return for monthly payments of \$15,000. Second, in November 2008, respondent agreed to an option contract under which PSPM promised to pay \$15,000 per month to Oasis for the option to purchase the accounts receivable and all other tangible assets of Oasis. Respondent knew that one unstated purpose of both agreements was to induce him to bring certain spinal surgery patients to Pacific Hospital, but respondent did not disclose that information to patients. PSPM paid Oasis \$145,000 under the sublease agreement and \$105,000 under the option agreement.

5. Third, in April 2009, respondent entered into an outsourced collections agreement with Pacific Hospital in which he agreed to assist with collections on some of the spinal surgery cases he performed at the hospital in exchange for 15 percent of any amounts the hospital collected for those surgeries. The agreement, later amended, also called for respondent to be paid 10 percent of the collected amount on other outpatient surgeries. During surgeries, if respondent used hardware from International Implants, a Drobot-formed hardware distribution company, he was advanced \$5,000 regardless of subsequent collections. Once again, respondent knew that one purpose of the agreement was to induce him to bring certain spinal surgery patients to Pacific Hospital, and he did not disclose this information to his patients. Pacific Hospital paid Oasis \$372,936 under this agreement.

6. As part of his guilty plea, respondent admitted Drobot paid him a total of \$622,936 under the agreements between April 2008 and May 2013. During that time, respondent referred dozens of patients to Pacific Hospital for spinal surgeries based in part on payments made to him under those agreements. Respondent admitted he understood the amounts paid to him by Drobot constituted bribes and kickbacks to induce him to refer his patients to Pacific Hospital. Respondent also admitted that in furtherance of the scheme, he and his co-conspirators transmitted items by mail and interstate wire communications.

7. On May 21, 2021, the court accepted the plea agreement as to Count One, dismissed the other charges in the Indictment, and sentenced respondent to 15 months in federal prison to be followed by three years of supervised release. The court also ordered respondent to forfeit \$622,936 to the government, to pay a fine of \$100, and to report the conviction to the Board. On July 21, 2021, the court ordered respondent to pay a total of \$45,000 in victim restitution to three patients who received implant hardware for which respondent received kickbacks from Drobot, with payments to be credited against the amount of the forfeiture order.

8. In August 2021, respondent surrendered to federal correctional authorities to begin his prison sentence. He was released in January 2022 to a halfway house in Las Vegas, Nevada, which was followed by a period of home confinement. On July 5, 2022, respondent was released from home confinement and placed on supervised release.

Procedural History

9. In late April 2022, the Board notified respondent that his physician's and surgeon's certificate was automatically suspended due to his incarceration on the

criminal conviction. On May 2, 2022, respondent objected to the suspension because he had already been released from prison to the halfway house in Las Vegas. On the same day, William Prasifka, complainant's predecessor as the Board's executive director, filed the accusation in his official capacity charging respondent with four causes for disciplinary action: (1) conviction of a crime; (2) dishonest or corrupt acts/healthcare fraud; (3) unprofessional conduct; and (4) fraudulent/false claims and statements. Respondent timely filed a notice of defense. On July 13, 2022, the Board notified respondent that the automatic suspension was dissolved, allowing respondent to resume practice within the state. Complainant served a notice of hearing on respondent in late August 2022.

Hearing

COMPLAINANT'S CASE

10. At the hearing, complainant amended the accusation to delete the fourth cause for discipline for fraudulent/false claims and statements. As to the three remaining causes for discipline, complainant presented court records of respondent's plea, his criminal conviction, and his sentencing hearing to support the disciplinary charges. At the sentencing hearing, respondent expressed regret for making a "grand mistake," while stating the bribes and kickbacks did not affect the quality of patient care. (Exhibit 9, p. A196.) But when stating the reasons for the sentence, the court noted that "[p]atients who are undergoing serious and potentially life-threatening procedures are entitled to the peace of mind that comes from knowing that their doctor is considering only their best interest in deciding that surgery is called for and in selecting a facility and in selecting the hardware to be used in that surgery." (*Id.* at pp. A223-224.) Respondent nonetheless "picked the facility [i.e., Pacific Hospital] and the physical hardware that earned him upfront payments. He participated in trading

patient referrals for regular substantial kickbacks and that robbed his patients . . . of the peace of mind that they need when going through a procedure like this. And it was for money. There's no other reason to have engaged in this conduct." (*Id.* at p. A224.) "Quite simply, this scheme introduced greed into the physician-patient relationship." (*Id.* at p. A223.)

11. Complainant also presented a cost certification stating that the Department of Justice billed the Board for \$23,327.50 in case-related costs through April 18, 2023, and the Department of Justice expected to bill the Board another \$1,730 in costs up to the start of the hearing. The costs are attributable to 107 hours of attorney and paralegal work, plus eight hours of anticipated additional work. Based on the cost certification, complainant requests an order directing respondent to pay costs totaling \$25,057.50 to the Board.

RESPONDENT'S CASE

12. Respondent testified that when he first read the Indictment, he did not believe he had done anything wrong. An attorney for the hospital, Michael Tichon, drafted and negotiated the agreements between respondent and Pacific Hospital and PSPM. Respondent trusted Tichon to provide good advice, and respondent had no reason to believe the agreements were unlawful. Tichon died before respondent was indicted.

13. In addition, respondent testified he never let the agreements affect his medical decision making for any patients. According to respondent, he always considered surgery to be a last resort for his patients, and the agreements with Pacific Hospital and PSPM did not change that conservative approach. Respondent's plea agreement includes a statement that it is "not meant to indicate that [respondent]

provided any patients with substandard medical or surgical care or that any treatment he recommended, prescribed, and/or delivered was not medically necessary." (Exhibit 3, pp. A144-145.) Respondent testified he never did. Respondent also noted he had a sign posted in his office between approximately 2007 until 2016 disclosing to patients that Oasis provided "contract/billing/collections/negotiations services for a number of professionals and entities, including . . . health care facilities where you may have had or are recommended to have treatment." (Exhibit Q.) According to respondent, the disclosure pertained to Oasis' agreements with PSPM and Pacific Hospital, among others.

14. Respondent fought the criminal charges for about two years before agreeing to plead guilty. Respondent testified that during plea negotiations, he became aware of "certain challenges" in the case and of a jury instruction for honest-services fraud that led him to believe he faced a "very uphill battle" for an acquittal at trial. Therefore, he admitted to conspiring with Drobot and others to commit honest-services mail and wire fraud. Drobot and other physicians have also been convicted of crimes related to the conspiracy, but respondent testified he did not know other physicians were involved in the conspiracy at the time.

15. Respondent explained that the surgeries he performed at Pacific Hospital were on personal injury lien patients, i.e., patients with injury claims against third parties. For such patients, respondent would operate on the patient in return for a lien on any recovery in the patient's personal injury case. Pacific Hospital also received a lien for its costs on the patient's personal injury recovery. If the patient lost the personal injury case, respondent had the right to pursue payment from the patient, but respondent testified he never did.

///

16. Respondent treated personal injury lien patients at Pacific Hospital because his primary hospital, Hoag Hospital in Newport Beach, California, would not admit those patients, who were often uninsured and unable to pay out of pocket for their care. According to respondent, his staff privileges at Pacific Hospital allowed him to provide surgical care to persons who otherwise may not have received it. Furthermore, respondent testified he generally was not paid his entire bill for a surgery on a personal injury lien patient. Respondent estimates he discounted over two million dollars from his usual and customary charges for surgeries on such patients at Pacific Hospital.

17. Respondent is current on payments on the criminal court's restitution and forfeiture orders, although "some amount" is still owing. Respondent currently resides and practices in Nevada. He is in solo practice and primarily treats patients with private insurance, although he still treats some personal injury lien patients. He also treats Medicare and Medicaid patients without charge, something he testified he has done since 2005 as a way of giving back to the community. Before the criminal conviction, he could have billed the government but never did; after the criminal conviction, he has been excluded from billing federal entities for 10 years.

18. In September 2022, the Nevada State Board of Medical Examiners suspended respondent's medical license in that state, stayed the suspension, and placed respondent on probation for four years. Similarly, in early November 2022, the Division of Licensing of the Department of Commerce of the State of Utah revoked respondent's license in that state, stayed the revocation, and placed respondent on probation for three years. Both orders were stipulated resolutions of disciplinary charges based on the same criminal conviction and underlying conduct at issue in this

case. There have been no allegations of other misconduct against respondent since the criminal conviction.

19. Respondent testified he is in compliance with the terms of conditions of the probation orders in Nevada and Utah. Among other requirements, the Nevada order required him to pass an Ethics and Boundary Assessment examination. The Utah order also required respondent to take up to six additional hours of continuing education over and above the minimum continuing education requirements. In mid-November 2022, respondent completed a two-day continuing education course in medical ethics and professionalism.

20. Supplementing his testimony, respondent presented letters from patients, two attorneys for personal injury lien patients, the landlord for Oasis, and a treating psychotherapist attesting to respondent's exemplary medical care and good character. The letters are from 2021 and pertain to his sentencing in the criminal case. The patients and attorneys describe respondent as a highly skilled and professional surgeon who went above and beyond what was expected in providing medical care. The landlord for Oasis describes respondent as a dedicated and caring physician and human being. Respondent's psychotherapist wrote that through their work together, respondent has "realized a long history of over-compliance with requests and demands of others" and now knows that "escaping discomfort and trying to meet the demands of financial pressure" caused a major lapse in judgment. (Exhibit J.)

21. Regarding the Board's costs, two Deputy Attorneys General worked on the case, and respondent argues the work of the first Deputy Attorney General was unnecessary and duplicative of the work of the second Deputy Attorney General who represented complainant at the hearing. The costs attributable to the first Deputy Attorney General total \$14,225 for 64.75 hours billed between April and August 2022.

Analysis of Evidence

22. Respondent contends his criminal conduct did not arise from or occur during patient care, treatment, management, or billing, making it less serious for disciplinary purposes than a crime that did. But respondent conspired to defraud patients of their right to honest services in their medical care and treatment by accepting bribes and kickbacks intended to influence their care. In the words of the judge in his criminal case, respondent "participated in trading patient referrals for regular substantial kickbacks," which "introduced greed into the physician/patient relationship" and "robbed his patients . . . of the peace of mind that they need when going through a [surgical] procedure." (Exhibit 9, pp. A223-224.) Therefore, respondent's crime arose from patient care, management, treatment, or billing for purposes of assessing the appropriate disciplinary action.

23. In his testimony, respondent also downplayed the gravity of his crime, at times appearing to challenge the facts underlying his guilty plea and conviction. Respondent portrayed his plea agreement as borne of necessity due to an unfavorable jury instruction about honest-services fraud, rather than due to a realization of wrongdoing. Respondent also emphasized the role of the attorney for Pacific Hospital in drafting and negotiating the sham agreements, seeming to imply the attorney was at fault for respondent's unwitting participation in a crime. But in his plea agreement, respondent admitted he understood the amounts paid to him by Drobot constituted bribes and kickbacks to induce him to refer his patients to Pacific Hospital. Similarly, respondent's emphasis on the sign in his office stating that Oasis provided "contract/billing/collections/negotiations services for a number of professionals and entities" appeared to imply that respondent believes he adequately notified patients about the agreements with Pacific Hospital and PSPM. But in his plea agreement,

respondent admitted he did not disclose to patients that an unstated purpose of the agreements was to induce respondent to refer patients to Pacific Hospital.

24. Furthermore, respondent did not acknowledge that the bribery and kickback scheme “robbed his patients . . . of the peace of mind that they need when going through a [surgical] procedure.” (Exhibit 9, p. A223.) Instead, respondent claimed there was no harm to patients because the agreements with Pacific Hospital and PSPM never affected respondent’s medical decision making. The court’s award of \$45,000 in victim restitution to three patients who received implant hardware for which respondent received kickbacks is inconsistent with respondent’s claim. Furthermore, respondent’s belief that his crime was technical and victimless is not much different than his original belief when he first learned of the Indictment that he had done nothing wrong. This weighs against a finding that he has had a substantial change in attitude from that which existed at the time of the conspiracy.

25. As to costs, complainant’s certification lacks sufficient detail to support a finding that the full amount of the original Deputy Attorney General’s costs is reasonable. The hours (64.75) and costs (\$14,225) of the work of the original Deputy Attorney General are more than half of the costs and hours described in the certification. This seems disproportionate to what occurred in the case during the time period of the work (April through August 2022), which was complainant’s filing of the accusation, a request to OAH to schedule a hearing, and a notice of hearing. Complainant’s cost certification does not explain why the hours and costs for the period are higher than expected for what occurred during that time.

///

///

LEGAL CONCLUSIONS

Legal Standards

1. "The board shall take action against any licensee who is charged with unprofessional conduct." (Bus. & Prof. Code, § 2234; undesignated statutory references are to this code.) For criminal offenses of a licensee, "[t]he conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct. . . ." (§ 2236, subd. (a); see also § 490, subd. (a).) Unprofessional conduct also "includes, but is not limited to," "[t]he commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon." (§ 2234, subd. (e).)

2. A plea of guilty is deemed to be a conviction within the meaning of section 2236. (§ 2236, subd. (d); see also § 490.) A crime, professional misconduct, or act is considered substantially related to the qualifications, functions, or duties of a licensee "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." (Cal. Code Regs., tit. 16, § 1360, subd (a).) "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." (*Ibid.*) "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." (Cal. Code Regs., tit. 16, § 1360, subd. (b); see also § 493, subd. (b)(1).)

3. "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 . . . and who is found guilty, . . . may, in accordance with the provisions of this chapter: [¶] (1) Have his or her license revoked [¶] (2) Have his or her right to practice suspended for a period not to exceed one year [¶] (3) Be placed on probation and be required to pay the costs of probation monitoring [¶] (4) Be publicly reprimanded [¶] (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." (§ 2227, subd. (a).)

4. Complainant bears the burden of proving the alleged grounds for disciplinary action by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence "requires a finding of high probability," and has been described as "requiring that the evidence be "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.)

///

///

///

Analysis

CAUSES FOR DISCIPLINE

First Cause for Discipline – Criminal Conviction

5. In the first cause for discipline, complainant alleges respondent is subject to disciplinary action because he was convicted of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon. (§ 2236, subd. (a).)

6. Complainant proved this cause for discipline by clear and convincing evidence. Respondent's criminal conviction for conspiracy to commit honest-services mail and wire fraud is substantially related to the qualifications, functions, or duties of a physician and surgeon considering the nature and gravity of the crime, the time elapsed since the crime, and the nature and duties of the profession. (Cal. Code Regs., tit. 16, § 1360, subd. (b).) With respect to the nature of the crime, respondent accepted bribes and kickbacks that were paid to induce him to refer patients to Pacific Hospital for spinal surgeries and other medical procedures. While accepting the bribes and kickbacks, respondent referred dozens of patients to Pacific Hospital for spinal surgeries based in part on the payments. Given these facts, the crime bore a direct and substantial relationship to respondent's medical practice.

7. With respect to the gravity of respondent's crime, it was a felony that resulted in a 15-month federal prison sentence and three years of supervised release. Respondent committed the crime between April 2008 and May 2013, and respondent admitted he received a total of \$622,936 in bribes and kickbacks during that time. While considerable time has elapsed since then, respondent was not convicted of the crime until 2021, and complainant could not proceed with disciplinary charges based on the criminal conviction until it became final. (§§ 490, subd. (c), 2236.1, subd. (d).)

Under these circumstances, the time elapsed since respondent committed the crime does not preclude disciplinary action for the criminal conviction.

8. The nature and duties of the profession also support the conclusion that respondent's criminal conviction is substantially related to the qualifications, functions, or duties of a physician and surgeon. The doctor-patient relationship "is based on utmost trust and confidence in the doctor's honesty and integrity." (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 470.) "Although referring to a real estate license, the following quotation applies with even greater force to a medical license: '[T]here is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice.' [Citation.]" (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.) Respondent demonstrated a lack of honesty and integrity by "participat[ing] in trading patient referrals for regular substantial kickbacks and that robbed his patients . . . of the peace of mind that they need when going through a [surgical] procedure And it was for money. There's no other reason to have engaged in this conduct." (Exhibit 9, p. A224.)

9. After the hearing, the United States Supreme Court decided *Percoco v. United States* (May 11, 2023) 598 U.S. ---, 143 S.Ct. 1130 (*Percoco*), which concerns the correct legal standard for finding that a private citizen owes the government a duty of honest services. Before the hearing, respondent argued the decision in *Percoco* could "potentially eliminate[] the only basis by which Complainant brought the Accusation." (Respondent's Trial Brief, p. 9, fn. 6.) After the hearing, respondent requested official notice of the decision, and the administrative law judge granted the request. But the decision does not eliminate the criminal conviction that is the basis for the accusation, and respondent may not challenge that conviction in this administrative case.

(*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 302 (*Matanky*); see also *Arneson v. Fox* (1980) 28 Cal.3d 440, 452.) The specific legal issue decided in *Percoco* is also irrelevant to this case.

Second Cause for Discipline – Dishonest and Corrupt Acts

10. In the second cause for discipline, complainant charges respondent with committing acts involving dishonesty and corruption that are substantially related to the qualifications, functions or duties of a physician and surgeon. (§ 2234, subd. (e).) The alleged acts involving dishonesty and corruption are respondent's acts in furtherance of the conspiracy to commit honest-service mail and wire fraud. Complainant also charges respondent with committing healthcare fraud under Welfare and Institutions Code section 14107, but complainant did not present any legal argument about that additional charge at the hearing.

11. Complainant proved the charge of dishonest and corrupt acts under section 2234, subdivision (e) by clear and convincing evidence. Respondent's participation in the conspiracy was a dishonest and corrupt course of conduct that related directly and substantially to respondent's qualifications, functions, and duties as a physician and surgeon, for the reasons stated in the analysis of the first cause for discipline above.

Third Cause for Discipline – Unprofessional Conduct

12. In the third cause for discipline, complainant charges respondent with general unprofessional conduct based on the same allegations as in the first and second causes for discipline. (§ 2234, subd. (a).)

///

13. Complainant proved by clear and convincing evidence that respondent committed specific forms of unprofessional conduct as charged in the first and second causes for discipline. That proof also proves the charge of general unprofessional conduct in the third cause for discipline to the same extent.

DISCIPLINARY ACTION

14. With causes for disciplinary action established, the Board has discretion to determine the suitable discipline, "subject to the Legislative mandate that the Board's highest priority be protection of the public; and, secondarily, discipline should 'aid in the rehabilitation of the licensee.' (§ 2229, subds. (a) & (b).)" (*Pirouzian v. Superior Court* (2016) 1 Cal.App.5th 438, 448.) In exercising its discretion, the Board considers the Manual of Model Disciplinary Orders and Disciplinary Guidelines (12th Edition 2016) (Guidelines) that it has adopted. (Cal. Code Regs., tit. 16, § 1361, subd. (a).) "Deviation from these orders and guidelines, including the standard terms of probation, is appropriate where the Board in its sole discretion determines by adoption of a proposed decision or stipulation that the facts of the particular case warrant such a deviation – for example: the presence of mitigating factors; the age of the case; evidentiary problems." (*Ibid.*)

15. If a physician's criminal conviction or dishonest act is substantially related to the qualifications, functions, or duties of a physician and surgeon and "arises from or occurs during patient care, treatment, management, or billing," the Guidelines recommend a minimum disciplinary action of stayed revocation, a one-year suspension, and at least seven years' probation. For a felony criminal conviction not arising from or occurring during patient care, treatment, management, or billing, the Guidelines recommend a minimum disciplinary action of stayed revocation and at least seven years' probation without a suspension. If the dishonest act does not arise from

or occur during patient care, treatment, management, or billing, the Guidelines recommend a minimum disciplinary action of stayed revocation and five years' probation. The maximum disciplinary action for all of these forms of unprofessional conduct is license revocation. (Guidelines, pp. 24-25.)

16. In assessing the disciplinary action to take, the Board must also consider whether respondent made a showing of rehabilitation. "When considering the suspension or revocation of a license under Section 490 of the code on the ground that a person holding a license has been convicted of a crime, the board shall consider whether the licensee made a showing of rehabilitation," by applying criteria that differ depending on whether "the licensee completed the criminal sentence at issue without a violation of parole or probation." (Cal. Code Regs., tit. 16, § 1360.1.) The Accusation does not reference section 490, but the charge of unprofessional conduct under section 2236 based on a criminal conviction is analogous to a disciplinary charge under section 490. Therefore, the Board applies these criteria to respondent's showing of rehabilitation.

17. Respondent's crime arose from patient care, management, treatment, or billing for purposes of assessing the appropriate disciplinary action, despite respondent's argument to the contrary. Respondent dishonestly "participated in trading patient referrals for regular substantial kickbacks," which "introduced greed into the physician/patient relationship" and "robbed his patients . . . of the peace of mind that they need when going through a [surgical] procedure." (Exhibit 9, pp. A223-224.) In addition, respondent remains on supervised release, meaning he has not completed the criminal sentence at issue. Therefore, the Board must apply the rehabilitation criteria in California Code of Regulations, title 16, section 1360.1, subdivision (b). The evidence about those criteria is as follows:

(1) The nature and gravity of the act(s), professional misconduct, or crime(s). Respondent's crime was a serious felony involving dishonest and corrupt acts in respondent's medical practice. It resulted in a 15-month federal prison sentence and three years of supervised release.

(2) The total criminal record, or record of professional misconduct. Respondent has no other criminal record or prior record of professional misconduct.

(3) The time that has elapsed since commission of the act(s), professional misconduct, or crime(s). Respondent committed the crime between April 2008 and May 2013. Over 10 years have elapsed since then.

(4) Whether the licensee has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against such person.

Respondent is on supervised release. Complainant did not contend or prove respondent has violated any terms of that release. He is current on payments on the forfeiture and restitution orders against him, but an unspecified amount is still owing.

(5) The criteria in subdivisions (a)(1)-(5), as applicable. Subdivision (a)(1) of the regulation concerns the nature and gravity of the crime, which is addressed above. Subdivisions (a)(2)-(5) concern parole or probation and any modification of terms of parole or probation. There was no showing of any modification of the terms of respondent's supervised release.

(6) If applicable, evidence of dismissal proceedings pursuant to section 1203.4 of the Penal Code. This criterion is inapplicable since respondent's federal criminal conviction is not subject to dismissal under Penal Code section 1203.4.

(7) Evidence, if any, of rehabilitation submitted by the licensee. Respondent agreed to plead guilty and completed his prison sentence on the conviction. He has

not committed any similar misconduct since his criminal conviction, and he is gainfully employed in private medical practice in Nevada. Respondent has also completed ethics and continuing education training in relation to the probation orders for his medical licenses in Nevada and Utah.

18. Considering these criteria, respondent has not made a showing of rehabilitation. Respondent abused his position of trust as a physician and surgeon to profit illegally in a sophisticated and years-long conspiracy to commit honest-services mail and wire fraud. His criminal conviction and misconduct are serious and evidence bad character, and "the more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be. [Citations.]" (*In re Gossage* (2000) 23 Cal.4th 1080, 1096.) While respondent's criminal conduct ended in 2013, the criminal conviction itself is much more recent, and respondent was released from prison just last year, leaving only a limited time in which to assess his rehabilitation. Respondent is also still on supervised release, and his good behavior while under supervision is accorded "little weight" in proving rehabilitation because a person under supervised release is "required to behave in exemplary fashion." (*Id.* at p. 1099.) In addition, respondent's testimony does not demonstrate he has had a substantial change in attitude from that which existed at the time of the conspiracy. Instead, respondent downplayed the gravity of his criminal conduct, at times appearing to challenge the factual basis for his criminal conviction.

19. License revocation is a "drastic penalty." (*Cooper v. State Board of Medical Examiners* (1950) 35 Cal.2d 242, 252.) But with serious misconduct and limited evidence of rehabilitation, allowing respondent to continue practicing would not be protective of the public, which is the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. Under these circumstances, revocation

is the appropriate disciplinary action and is within the Board's discretion. (See *Matanky, supra*, 79 Cal.App.3d at pp. 297-298 [revoking license of a physician convicted of submitting fraudulent Medicare claims for convalescent hospital patient services].)

COSTS

20. Complainant also requests an award of \$25,057.50 for the Board's costs of investigation and enforcement of the case. Unless otherwise provided by law, "in any order issued in resolution of a disciplinary proceeding before any board within the [Department of Consumer Affairs] . . . upon request of the entity bringing the proceeding, the administrative law judge may direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case." (§ 125.3, subd. (a).)

21. In evaluating a request for costs, the administrative law judge must consider whether complainant's investigation was "disproportionately large" compared to the violation, and whether the licensee: (1) committed some misconduct but "used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed;" (2) had a "'subjective good faith belief in the merits of his or her position;" (3) raised a "'colorable challenge'" to the proposed discipline; and (4) "will be financially able to make later payments." (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45 [quoting *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 342, 345].)

22. Complainant's counsel offered certifications of the Board's investigation and enforcement costs, which are prima facie evidence that those costs are reasonable. (§ 125.3, subd. (c).) Complainant's investigation was not disproportionately

large compared to the violations, and respondent did not obtain a reduction in the severity of the discipline imposed. Respondents' subjective belief in the merits of his position does not justify a reduction, and respondent did not argue he will be financially unable to pay the Board's costs.

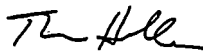
23. However, complainant's certification of costs lacks sufficient detail to support a finding that the full amount of the original Deputy Attorney General's costs is reasonable. The hours and costs of the work of the original Deputy Attorney General seem disproportionate to what occurred in the case during the time period of the work (April through August 2022). (Factual Finding 25.) Considering what occurred during that time, \$5,000 will be awarded for the work of the original Deputy Attorney General. The remaining \$9,225 in costs claimed for that work are disallowed. With this reduction, the costs claimed are reasonable. Therefore, the total costs awarded to the Board are \$15,832.50.

ORDER

Physician's and Surgeon's Certificate No. G 79394 issued to respondent Jeffrey David Gross, M.D., is revoked.

Respondent shall pay the Board \$15,832.50 in costs within 30 days of the effective date of this order.

DATE: 07/05/2023


Thomas Heller (Jul 5, 2023 11:57 PDT)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings