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

In the Matter of the Accusation Against: Gerald Junior Gracia, M.D. Physician's and Surgeon's Certificate No. A 108980 Respondent.	Case No. 800-2018-042506

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 3, 2021.

IT IS SO ORDERED August 4, 2021.

MEDICAL BOARD OF CALIFORNIA

Richard E. Thorp MD

Richard E. Thorp, M.D., Chair
Panel B

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

In the Matter of the Accusation against:

GERALD JUNIOR GRACIA, M.D.,

Physician's and Surgeon's Certificate No. A 108980,

Respondent.

Agency Case No. 800-2018-042506

OAH No. 2020090148

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter remotely by video and teleconference on May 24, 2021.

Jonathan Nguyen, Deputy Attorney General, appeared on behalf of complainant William Prasifka, Executive Director of the Medical Board of California (Board), Department of Consumer Affairs, State of California.

Seth Weinstein, Attorney at Law, appeared on behalf of respondent Gerald Junior Gracia, M.D., who was present.

Oral and documentary evidence was received. At the beginning of the hearing, the parties stipulated to certain facts set forth in a Fact Stipulation filed with OAH on May 19, 2021. The record was held open to allow the parties to submit redacted exhibits by May 26, 2021. Complainant timely submitted a redacted version of exhibit 11; respondent timely submitted a redacted version of exhibit O. The redacted versions of exhibits 11 and O were admitted and replaced the unredacted versions in the record.

The record was closed and the matter was submitted for decision on May 26, 2021.

SUMMARY

Complainant alleged respondent was criminally convicted for misdemeanor reckless driving, with an alcohol advisement, in June 2019. Complainant brought three causes for discipline against respondent: conviction of a substantially related crime, use of alcoholic beverages in a dangerous manner, and unprofessional conduct. Respondent admitted the conviction and introduced evidence of mitigation and rehabilitation. Based on the evidentiary record, a public reprimand shall issue against respondent.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Board issued Physician's and Surgeon's Certificate No. A 108980 to respondent on July 24, 2009. The certificate has never been disciplined and is scheduled to expire on February 28, 2023.

2. Complainant brought the Accusation against respondent in his official capacity as Executive Director of the Board. Respondent filed a Notice of Defense. This hearing ensued.

Respondent's Criminal Conviction

3. On June 7, 2019, in the case of *People v. Gracia* (Super. Ct. San Bernardino County, 2018, No. MWV18012623), in accordance with a plea agreement, respondent pled no contest to and was convicted of violating Vehicle Code section 23103, subdivision (a) (reckless driving, with an alcohol consumption advisement, or "wet reckless"), a misdemeanor. The court placed respondent on 36 months' summary probation on terms and conditions including that he enroll in and complete an AB 541 alcohol education program by April 1, 2020, not violate any law, not drive without a valid license and insurance, not drive with a measurable amount of alcohol in his system, and pay a fine of $1,888.

4. The facts and circumstances underlying the conviction are that, in the early morning hours of March 17, 2018, shortly after 1:30 a.m., respondent was driving home from Ontario Airport when he felt poorly and realized he was intoxicated. He exited Interstate Highway 15 at Foothill Boulevard and, unable to continue driving, pulled onto the shoulder of the offramp, turned off the engine, got into the back seat

of the car, and fell asleep. At 3:16 a.m., California Highway Patrol (CHP) officer Jack Lane was dispatched to the site, where a local police department officer was also present. Officer Lane observed respondent exit the vehicle; respondent smelled of alcohol, appeared disoriented and confused, and had slurred speech and an unsteady gait. Officer Lane also observed some damage to the car's front right fender and to the offramp guardrail, and believed the car jutted somewhat into the offramp traffic lane. Respondent refused to submit to field sobriety tests. Officer Lane arrested respondent and took him to the CHP Rancho Cucamonga area office, where a blood sample collected from respondent under authority of a search warrant showed a blood alcohol concentration (BAC) of 0.283 percent.

5. Respondent completed the court-mandated AB 541 alcohol program at Valley Improvement Program, Inc., on February 5, 2020. He has paid all fines, fees, and costs, and has otherwise complied with all terms of his criminal probation, which is scheduled to terminate on June 6, 2022.

Mitigation and Rehabilitation

6. Respondent readily admitted he was wrong to try to drive home from Ontario International Airport (Ontario Airport) the day of his arrest. "That day is one of the worst days of my life," he testified.

7. Respondent and his wife intended to visit friends in Boston, taking a flight there from Ontario Airport through Chicago on Friday, March 16, 2018. The visit would be brief, because respondent was scheduled to work Monday, March 19, 2018, as the attending surgeon on call and doing rounds with residents.

8. The flight from Ontario Airport was cancelled, however, and transferred to Los Angeles International Airport (LAX). Respondent's wife and respondent were

transported by rideshare to LAX, but flights to Chicago were repeatedly delayed by a bad storm. Respondent sat in a bar in the LAX terminal with a group of passengers who had been delayed. "One drink turned to another to another," respondent testified; he did not realize how much he was drinking.

9. After three or four flight delays, respondent's wife left to visit her family, who lived close to airport. Respondent and numerous other passengers waited at LAX to see whether there would still be a flight. In all, respondent drank over the course of eight to 10 hours until the flight was finally cancelled late in the evening.

10. Respondent testified he made a mistake when he decided to drink while waiting at LAX. After the first couple of drinks, "I just made a bad decision. I'm not making excuses. It was a mistake I made in the festive atmosphere." Respondent, who was born in Haiti, was looking forward to visiting Haitian friends in Boston. Other passengers were going to Boston to continue celebrating St. Patrick's Day, and everyone was complaining about the delayed flights.

11. After the flight was cancelled, the waiting passengers agreed to rideshare back to Ontario Airport. Respondent arrived outside the parking lot at Ontario Airport on March 17, 2018, just after 1:30 a.m. When he got to his car, respondent took a photograph of the front fender, which he had found damaged two or three days earlier. Respondent rented the car weeks earlier from an Enterprise Rent-a-Car near Arrowhead Regional Medical Center (ARMC), where he worked. Sometimes respondent had to cover shifts when the hospital was short of surgeons, and he received an allowance to rent a car to avoid putting miles on his own car. Respondent took the photograph to submit to Enterprise Rent-a-Car because his wife had told him it was required in order to process his claim.

12. Respondent then began to drive the rental car home from the Ontario Airport. He did not realize he was intoxicated until, at some point, he "felt something was really wrong, I was really off." The sensation of inebriation was overwhelming and his vision was blurry; respondent knew it was not safe to drive anymore. So, he immediately exited the freeway and pulled onto the shoulder of the offramp, thinking that he should get in the back seat and sleep rather than continue driving to look for a place to park.

13. Respondent was awakened when the CHP or local police department officer knocked on the car window and asked whether he was alright. Respondent's recollection of his conversation with the CHP officer is vague and differs somewhat from what the CHP officer reported. Respondent does not remember saying, as the officer maintained, that he stopped to help with an accident. He does not remember telling the officer he was driving from ARMC; he remembers telling the officers he worked at ARMC and was driving home from the airport. Respondent does not remember saying he had only one drink while at the airport, or being asked about a collision with the offramp guardrail. He did not believe his car was obstructing a lane on the offramp. He was very confused about why the officer wanted to administer sobriety tests since he had stopped driving and was sleeping in the back seat.

14. Respondent's recollection of his encounter with the CHP officer at the site of his arrest and, subsequently, at the CHP office in Rancho Cucamonga is deemed to have been affected by his high BAC; it is also disputed by Officer Lane. Respondent testified the officers at the site of his arrest belittled him and did not answer his questions. At the CHP office in Rancho Cucamonga, respondent continued to ask why it was necessary to do a blood alcohol test, but the officers laughed at him and made inappropriate jokes. Respondent testified he told them he was a professional and

complained about his treatment. When he said his handcuffs were too tight and his pinky was going numb, officers tightened the handcuffs further and said, "well, you're not a doctor right now, are you?" Respondent believed the officers treated him unprofessionally because he is Black.[1]

15. Rashya Henderson, a Supervising Special Investigator in the Board's enforcement program, testified for complainant. She interviewed respondent on March 5, 2020, to discuss his arrest and criminal conviction. Respondent told her that, after he began to drive home from Ontario Airport, he realized he had too much to drink earlier at LAX, so he pulled over and slept in his car. He apologized at the interview for making a "really bad decision" in consuming alcohol and then driving. He said he could have hurt someone or himself, and he knew he put his professional status in jeopardy. Respondent disputed the CHP officer's conclusion that he had collided with the freeway offramp guardrail, noted he was not convicted of damaging the guardrail, and produced a time-stamped photograph showing that the damage to his front fender pre-existed the incident leading to respondent's arrest. Respondent told Ms. Henderson that he reported his arrest to his employer, Dr. GnanaDev, at ARMC.

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[1] At the hearing, references to respondent by Officer Lane and the Deputy Attorney General did not acknowledge respondent's status as a licensed medical professional. The ALJ instructed the officer and the Deputy Attorney General to refer to respondent by his professional title. The officer's failure is consistent with respondent's recollection of his treatment on the night of his arrest, creates an appearance of bias and impropriety, and has some corroborative value in determining the relative credibility of respondent and Officer Lane. (See Evid. Code, § 780.)

16. At hearing, respondent repeatedly apologized for his actions, testifying he should never have allowed himself to drink so much alcohol at LAX and should never have tried to drive home from Ontario Airport. It was not customary for respondent to consume much alcohol. Ordinarily, he would drink, very moderately, at holiday and birthday celebrations, or when on vacation. He would never drink to the point of inebriation and has never been an alcohol or substance abuser. The incident was one isolated day in a 20-year career. Respondent expressed how upset he is with himself for putting his career, something he loves, in so much jeopardy, and having put his and others' safety in jeopardy. Respondent's testimony was consistent with information he provided to the Board's investigator.

17. Respondent has not drunk any alcoholic beverage since the night of his arrest over three years ago. There was no evidence of any prior or subsequent criminal convictions suffered by respondent. He has worked on trying to understand what triggered his decision to continue drinking that night.

18. To that end, respondent enrolled in a two-day PBI Medical Ethics and Professionalism course in September 2020. He learned about the course from a physician in his AB 541 program. In the PBI course, doctors shared their experiences, discussed what they did wrong, and tried to identify triggers or underlying causes. Respondent is still in the PBI Continuation Program, where he discusses with a moderator how to identify triggers and how to create a plan to ensure that what led to his criminal conviction never happens again. In the course, respondent has learned legal and ethical aspects of medicine and that he must strive not to repeat his mistake. Respondent avidly shares what he has learned with his colleagues; he testified, "Did you know this?" has become his nickname.

19. Respondent disclosed his arrest to Dr. Dev GnanaDev, the head of his department at ARMC, and to Dr. Glenn Koh at Surgical Affiliates Management Group, Inc. (SAMG) at Long Beach Medical Center. Respondent also met with the Wellbeing Committee at Long Beach Medical Center in October 2019 to inform them of his arrest and conviction. He continues to work with the committee.

20. Charles Carstroem, M.D., Chair of the ARMC Wellbeing Committee, wrote in a letter dated February 11, 2021, that, as a member of the Trauma Team, respondent's "contributions to the care of our patients have been noted by the Service Medical Director and our ICU Medical Director. [¶] [Respondent] has continued to consistently provide appropriate care for our patients. In addition, he has maintained contact with our Wellbeing Committee. [¶] I commend [respondent] for his self-improvement efforts and goals for the future as he continues to be a contributing member of our healthcare team." (Ex. P.) The hospital has asked respondent to help other doctors who have had experiences similar to his, such as being accused of substance abuse or of an ethical violation.

21. Respondent is licensed as a physician in California and New York, and has a Drug Enforcement Agency registration. He is board-certified in Surgical Critical Care by the American Board of Surgery. At the time of his arrest, respondent was an attending surgeon in general surgery and in trauma/critical care/burn at ARMC, where he served on the Peer Review Committee and was the Interim Burn Director. Respondent now practices with SAMG at Long Beach Memorial Hospital, and as a surgical affiliate at St. Elizabeth Hospital in Red Bluff, California, and at Canton Potsdam Hospital in New York. At Long Beach Medical Center, respondent is the Deputy Trauma Medical Director, Trauma/Critical Care/Burn, is on the Adult Critical Care Committee, and is an attending surgeon in general surgery.

22. Respondent plans to continue his practice with SAMG at Long Beach Medical Center. He also plans to pursue a master's degree in business and public healthcare administration. Eventually, when he retires, he may relocate to Haiti or the Dominican Republic to help train physicians.

23. Respondent testified he understands why the Board takes his mistake seriously and that public protection is the Board's highest priority. He asked that the Board consider his record before and since the incident in determining license discipline. He is concerned that certain probationary restrictions, such as a prohibition against supervising residents, interns, physician assistants, and nurse practitioners, could lead to the termination of his position, because 70 percent of SAMG's practice involves nurse practitioners or physician assistants.

24. Glenn Koh, M.D., testified and submitted an affidavit on respondent's behalf. Dr. Koh has been a surgeon in the fields of general surgery and trauma surgery for 11 years. As the Chief Medical Officer of SAMG, Dr. Koh oversees a national practice of 300 doctors in 40 different programs, including Long Beach Medical Center. Dr. Koh has known respondent as a surgeon with SAMG at Long Beach Memorial Center since October 2019. Respondent was the deputy trauma medical director there for a short period of time at the beginning of the pandemic. Dr. Koh testified that doctors faced many challenges at Long Beach Medical Center during the pandemic; the workload and toll taken on physicians were extraordinary. A very real physical danger was ever present as doctors tried to save patients for whom there was no cure. And emergency department patients were already victims of trauma, adding enormous complexity to their cases. Doctors had to work harder to ensure patient survival; they had fewer hours of rest and longer work hours.

25. Dr. Koh speaks with respondent every week or two. Respondent disclosed his criminal conviction to Dr. Koh when SAMG was considering hiring respondent. It did not overly concern Dr. Koh and it has not affected respondent's ability to practice to SAMG's highest expectations with respect to patient care. Respondent's conviction has had no discernable bearing on his performance. Respondent has never been disciplined at work, and Dr. Koh has never seen or heard that respondent has ever been intoxicated at work.

26. Respondent, Dr. Koh believes, is not a risk to the public, "he is absolutely a benefit to the public." Respondent has told Dr. Koh that he is very regretful about his behavior and will never repeat it. If the Board puts respondent on probation, Dr. Koh testified, Dr. Koh and his team will evaluate the Board's findings. If respondent is not allowed to supervise physician assistants and nurse practitioners, an intrinsic duty of SAMG members, it would be difficult to keep him employed at SAMG.

27. Joseph Vivian Davis, III, D.O., J.D., testified and submitted an affidavit on respondent's behalf. Dr. Davis works at ARMC, the trauma center for San Bernardino county. A little over three years ago, respondent was employed at ARMC, doing surgical intensive care. Respondent is also an instructor at Western University where Dr. Davis is chair of respondent's department. Dr. Davis has never had any issues with respondent, either in their medical practice at ARMC or at Western University. Respondent worked well with other attending physicians and with patients. There were no complaints about respondent. Dr. Davis is aware of respondent's criminal conviction. Respondent was "up front with me, honest and sincere." Dr. Davis has never heard of respondent being intoxicated in the workplace.

28. Also testifying on behalf of respondent was Matthew A. Torrington, M.D., a licensed physician who is board-certified in family medicine and addiction medicine.

Dr. Torrington has been in private practice in Culver City for 15 years. He has served as a medical director, primary addiction medicine physician, and consulting addiction medicine physician for drug and alcohol treatment centers, and has evaluated or treated over 1,000 addiction-related patients presenting with substance abuse issues. Dr. Torrington met and evaluated respondent on April 22, 2020, and on March 29, 2021.[2] Respondent was sober both times and displayed no signs or symptoms of substance or alcohol abuse. Respondent told Dr. Torrington he had suffered a wet reckless conviction after consuming alcohol while waiting 10 hours for a delayed flight. Respondent said he had consumed a variety of alcoholic beverages; though he said he could not remember how many drinks he had, it was more alcohol than he had ever consumed in a day. Respondent said he was someone who did not drink alcohol regularly; he said that, before his arrest, he rarely drank, but would sometimes drink on holidays. Respondent told Dr. Torrington that he had completely abstained from drinking alcohol since his arrest, and said it was not difficult to do so. Respondent tested negative for alcohol on both evaluation dates on a 12-panel urine drug screen for ETG, an alcohol metabolite. Though respondent's workload was greatly increased this past year, he continued to abstain from alcohol consumption since the incident, despite the stresses at work created by the pandemic.

29. In addition to affidavits of Drs. Koh and Davis and the report of Dr. Torrington, about which those physicians testified at hearing, respondent offered in

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[2] Dr. Torrington's percipient testimony was admitted under Government Code section 11513, subdivision (d). His expert opinion testimony was excluded due to untimely disclosure under Business and Professions Code section 2334.

evidence affidavits of Abner Ward, M.D., Michael Murphy, M.D., and Makkalon Em, M.D.

a. Dr. Ward obtained his medical degree at UNC Chapel Hill. He practices orthopedic surgery and has known respondent for 26 years. Dr. Ward wrote that respondent is extremely knowledgeable and caring; he is what patients need and "is a boon to the public and not a danger to himself at all." If respondent does not someday return to academia, "he will remain the highest caliber of community surgeon." "From my time as an Air Force Colonel and working with hundreds of Surgeons, I would put [respondent] in the top 1% of them that [I] have ever met or worked with." Respondent discussed his arrest with Dr. Ward, who wrote, "I do not believe this will ever happen again and was an extremely unfortunate mistake." (Ex. H.)

b. Dr. Murphy obtained his medical degree from The University of Florida College of Medicine. He is board-certified in child and adolescent psychiatry and in general psychiatry. He has known respondent since medical school, and they remain friends and colleagues. Dr. Murphy wrote respondent is conscientious, dedicated, and well-respected, and has an excellent work ethic. Dr. Murphy is aware of respondent's criminal conviction but does not believe respondent is a danger to himself or the public. Respondent "works tirelessly to provide excellent care for his patients as well as mentorship and guidance to younger providers. In addition, he has always been generous with his time and resources to help those less fortunate through medical missions over the past 20 years. I truly believe his is remorseful for the actions that led to this situation, has learned from this experience, and that this will serve to make him a more compassionate and understanding Physician." (Ex. I.)

c. Dr. Em obtained his medical degree from St. George University. He is a general surgeon and now practices at the University of Tennessee Health Science,

Methodist University Hospital, training in multi-organ abdominal transplant surgery as a fellow. Respondent trained Dr. Em at SUNY Stony Brook eight years ago. Respondent "is one of the finest physicians I have ever known. He is [a] fund of knowledge, detail oriented, clinically and technically sound, punctual, compassionate and caring," and advocates on his patients' behalf. Dr. Em is aware of respondent's conviction, but wrote that respondent is not a danger to himself or others; "[o]n the contrary, we need more physicians like him. . . . [Respondent] is one of the finest persons I have ever known, both as a human being and physician. I have no reservation having [respondent] taking care and/or operating on me or any of my family members." (Ex. J.)

30. The character reference letters are sufficient corroboration of respondent's testimony at hearing regarding his minimal alcohol use before his arrest, and his total abstention in the years since. Complainant offered no evidence of problems at work one associates with substance abuse or substance use disorders. The physicians who took the time to testify, and others who submitted affidavits, are uniform in their praise of respondent as a responsible surgeon. Without a basis for concluding respondent abuses substances or has a substance use disorder, and in light of respondent's record as a surgeon, his continued sobriety, and character reference and job performance evidence, there is no basis for predicting he will again engage in similar behavior, that he represents a danger to the public, or that he is unfit to practice medicine. Respondent complied with the terms of his criminal probation, and participates voluntarily in a continuing professional ethics program, further indicating the lack of a continuing problem as well as respondent's rehabilitation. Respondent's criminal conviction appears to have been a one-time, though terrible, error of judgment that put people at risk, but for which he is appropriately remorseful.

31. Complainant argues that respondent's unwillingness to cooperate with the arresting officer demonstrates that he is evasive and not trustworthy. Appropriate license discipline in this matter cannot be determined by statements respondent made while inebriated. Respondent has not been evasive in this proceeding; he has admitted to drinking and driving and expressed appropriate regret not only at hearing but to his friends and colleagues and to the Board investigator.

LEGAL CONCLUSIONS

Applicable Authority

1. The Board's highest priority is to protect the public. (Bus. & Prof. Code, § 2229.) The Board may act against a licensee for unprofessional conduct. (Bus. & Prof. Code, § 2234.) Unprofessional conduct includes a criminal conviction for an offense substantially related to the qualifications, functions, or duties of a physician and surgeon (Bus. & Prof. Code, §§ 490, subd. (a), 2236, subd. (a).) Unprofessional conduct also includes the use of alcohol to an extent or in such a manner as to be dangerous or injurious to the licensee or to any other person or to the public. (Bus. & Prof. Code, § 2239, subd. (a).)

2. A licensee who violates the Medical Practice Act may have his or her license revoked, suspended for up to one year, placed on probation and required to pay the costs of probation monitoring, or "other action taken in relation to discipline" as the Board deems proper. (Bus. & Prof. Code, § 2227.) Among other actions specified is public reprimand of the licensee. (Bus. & Prof. Code, § 2227, subd. (a)(4).)

3. The rigorous educational, training, and testing requirements for obtaining a physician's license justify imposing on complainant a burden of proof of

clear and convincing evidence. (Evid. Code, § 115; see *Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; *Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911.)

4. A crime or act 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 certificate to perform licensed activities in a manner consistent with public health, safety, and welfare. (Cal. Code Regs., tit. 16, § 1360.) Respondent's misdemeanor alcohol-related crime was substantially related to his profession under Business and Professions Code section 2236. The dangers of driving under the influence of alcohol are well known, perhaps no more so than by practitioners of the healing arts such as physicians. Little could be more substantially related to the qualifications, functions, and duties of a physician and surgeon than for respondent to have driven his car while so severely intoxicated that his vision blurred and he felt the absolute necessity of exiting the freeway, turning off his engine, and going to sleep. It was only fortuitous that respondent did not injure or kill anyone before he stopped driving.

Causes for Discipline

5. Cause exists to suspend or revoke respondent's license under Business and Professions Code sections 2236, subdivision (a), and 490, and California Code of Regulations, title 16, section 1360, in that clear and convincing evidence established respondent was convicted of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon, as set forth in Factual Findings 3 through 5.

6. Cause exists to suspend or revoke respondent's license under Business and Professions Code section 2239 in that clear and convincing evidence established respondent used alcoholic beverages to an extent, or in such a manner as to be dangerous and injurious to himself or other persons, as set forth in Factual Findings 3 through 5.

7. Cause exists to suspend or revoke respondent's license under Business and Professions Code section 2234 for unprofessional conduct, in that clear and convincing evidence established respondent was convicted of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon, and used alcoholic beverages to an extent, or in such a manner as to be dangerous and injurious to himself or other persons, as set forth in Factual Findings 3 through 5.

Appropriate Discipline

8. Though causes for discipline are established, placing respondent on probation would be unnecessarily punitive and would not serve the ends of protecting the public. As a means of protecting the public, a reprimand informing the public that respondent was criminally convicted of reckless driving, with an alcohol advisement, will suffice.

9. A public reprimand is sufficient to protect the public in light of complainant's failure to show that respondent's misconduct in 2018 was part of a pattern or would be likely to be repeated. Since the incident three years ago, respondent has abstained from alcohol and has taken other significant steps to remediate his instance of poor judgment. The probation conditions set forth in the Board's disciplinary guidelines are unnecessary under the circumstances presented. Imposing probation, including such terms as psychotherapy and random biological

sample testing, would be inappropriate when there is no evidence respondent suffers from a substance use disorder; probation would merely be punitive. (See Factual Findings 23-31.) The purpose of a disciplinary action such as this one is to protect the public, and not to punish the licensee. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

10. In view of all the evidence, including evidence of respondent's reputation in the medical community and his testimony about and other evidence of rehabilitation, the safety of the public will be protected if respondent is issued a public reprimand under Business and Professions Code section 2227, subdivision (a)(4).

11. In his otherwise disciplined and law-abiding life, respondent made one mistake, albeit a very serious one. He accepted responsibility for his error and pled no contest to a wet reckless misdemeanor. He has complied with the terms and conditions of probation. Most importantly, respondent took his mistake to heart. He recognized the tremendous damage he could have caused and he took immediate steps to prevent a recurrence by choosing to abstain entirely from alcohol consumption. He also voluntarily entered and continues to participate in a program to discuss his conviction with and learn from other medical professionals with similar issues. His rehabilitation is consistent with the character witnesses' descriptions of respondent as a caring and compassionate practitioner. Respondent's embarrassment and remorse were both convincing and compelling.

12. Respondent's efforts, and his commitment to abstinence, are consistent with the Board's criteria for rehabilitation found at California Code of Regulations, title 16, section 1360.1. The regulation states:

When considering the suspension or revocation of a license, certificate or permit on the ground that a person holding a license, certificate or permit under the Medical Practice Act has been convicted of a crime, the division, in evaluating the rehabilitation of such person and his or her eligibility for a license, certificate or permit shall consider the following criteria:

(a) The nature and severity of the act(s) or offense(s).

(b) The total criminal record.

(c) The time that has elapsed since commission of the act(s) or offense(s).

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

(e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.

(f) Evidence, if any, of rehabilitation submitted by the licensee, certificate or permit holder.

13. Although respondent's crime, a wet reckless, was certainly a serious one, it was also his only one. His conviction is too recent for him to be eligible to petition for expungement. He has, however, complied with the terms and conditions of probation, and he has established convincing rehabilitation in a relatively short period of time. It is true that, since people have a strong incentive to obey the law while

under the supervision of the criminal justice system, little weight is generally placed on the fact that an applicant has engaged in good behavior while on probation or parole. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) In this case, however, there appears to be very little risk of recidivism upon the termination of probation since respondent was a respectful, law-abiding citizen before his anomalous conduct on one evening, and he has taken impressive steps to ensure that he is even more so today and will remain so in the future.

14. What occurred on the early morning of March 17, 2018, was an isolated, anomalous event that had never occurred before and is extremely unlikely to ever occur again. Given the unique circumstances under which respondent committed the crime, the impact the event had on him, the robust steps he took to ensure against a recurrence, and the improbable chance of recurrence, actual discipline (i.e., license revocation, suspension, or probation) is not justified. Members of the public, however, are entitled to know a physician's practice-related deficiencies when choosing to entrust or to maintain their health care with that physician. Simply ignoring the events of March 17, 2018, would disserve the public interest and violate the Board's mandate of public protection. (Bus. & Prof. Code, § 2229.) A public reprimand, under Business and Professions Code section 2227, subdivision (a)(4), will provide a measured response to respondent's conduct and criminal conviction while informing and protecting the public.

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ORDER

Respondent Gerald Junior Gracia, M.D., Physician's and Surgeon's Certificate number A 108980, is hereby publicly reprimanded for the conduct identified in the Factual Findings 3 and 4.

DATE: 06/18/2021

Howard W. Cohen (Jun 18, 2021 09:14 PDT)

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings

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

In the Matter of the Accusation Against:	Case No. 800-2018-042506
Gerald Junior Gracia, M.D. **400 North Pepper Avenue, Suite 308** **Colton, CA 92324-1819** **Physician's and Surgeon's Certificate No. A 108980,** Respondent.	**A C C U S A T I O N**

PARTIES

1. Christine J. Lally (Complainant) brings this Accusation solely in her official capacity as the Interim Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On or about July 24, 2009, the Medical Board issued Physician's and Surgeon's Certificate Number A 108980 to Gerald Junior Gracia, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on February 28, 2021, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following

laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 2001.1 of the Code states:

> Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

5. 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.

6. Section 2234 of the Code, states:

> The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:
>
> (a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.
>
> (b) Gross negligence.
>
> (c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.
>
> (1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.
>
> (2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.
>
> (d) Incompetence.
>
> (e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon.
>
> (f) Any action or conduct that would have warranted the denial of a certificate.
>
> (g) The failure by a certificate holder, in the absence of good cause, to attend

and participate in an interview by the board. This subdivision shall only apply to a certificate holder who is the subject of an investigation by the board.

7. Section 2236 of the Code states:

(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

(b) The district attorney, city attorney, or other prosecuting agency shall notify the Division of Medical Quality of the pendency of an action against a licensee charging a felony or misdemeanor immediately upon obtaining information that the defendant is a licensee. The notice shall identify the licensee and describe the crimes charged and the facts alleged. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds a license as a physician and surgeon.

(c) The clerk of the court in which a licensee is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the board. The division may inquire into the circumstances surrounding the commission of a crime in order to fix the degree of discipline or to determine if the conviction is of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon.

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

8. Section 2239 of the Code states:

(a) The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

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

complaint, information, or indictment.[1]

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

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

10. Section 490 of the Code states:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

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

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

(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in *Petropoulos* v. *Department of Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Chapter 33 of the Statutes of 2008 do not constitute a change to, but rather are declaratory of, existing law.

11. Section 493 of the Code states:

(a) Notwithstanding any other provision of law, in a proceeding conducted by a

[1] There is a nexus between a physician's use of alcoholic beverages and his or her fitness to practice medicine, established by the Legislature in Section 2239, in "all cases where a licensed physician used alcoholic beverages to the extent or in such a manner as to pose a danger to himself or others." (*Watson v. Superior Court* (*Medical Board*) (2009) 176 Cal.App.4th 1407, 1411.)

board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

(b) As used in this section, "license" includes "certificate," "permit," "authority" and "registration."

(c) This section shall become inoperative on July 1, 2020, and, as of January 1, 2021, is repealed.

12. California Code of Regulations, title 16, Section 1360 states:

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

FACTUAL SUMMARY

13. On June, 7, 2019, in a case entitled, the *People of the State of California v. Gerald Junior Gracia*, Case Number MWV18012623, in the Superior Court of California, County of San Bernardino, Respondent, upon his plea of no contest, was convicted of reckless driving with a wet advisement, in violation of Vehicle Code Section 23103, subdivision (a), a misdemeanor. The remaining criminal charges of violating (1) Vehicle Code Section 23152, subdivision (a), driving under the influence; (2) Vehicle Code Section 23152, subdivision (b), driving under the influence with a blood alcohol content of 0.08% or more; and (3) Vehicle Code Section 12500, subdivision (a), driving without a license were dismissed as part of Respondent's plea agreement with the San Bernardino County District Attorney's Office. Respondent was placed on three-years probation with the following terms and conditions:

A. Complete an Alcohol Education Program.

B. Pay court fines and fees.

C. Obey all laws.

D. Do not drive without a valid license and insurance.

E. Do not drive a motor vehicle with a measurable amount of alcohol in your system.

F. Submit to a blood and breath alcohol test upon request of a law enforcement officer.

14. The circumstances leading to Respondent's conviction are as follows:

A. On March 17, 2018, at approximately 3:16 a.m., California Highway Patrol (CHP) Officer Jack Lane was dispatched to the off-ramp to Foothill Blvd. from Interstate highway 15. Upon his arrival, he observed Respondent's vehicle on the right shoulder of the off-ramp with the rear of the car partially blocking the number 3 lane of the off-ramp.

B. Officer Lane contacted Rancho Cucamonga Police Department Deputy Ly who stated he was dispatched to the scene because of a report of a vehicle blocking the roadway. Deputy Ly located Respondent asleep in the back seat of the car and attempted to wake him up.

C. After multiple failed attempts to wake Respondent, Deputy Ly requested medical personnel check on Respondent and requested the CHP. Deputy Ly stated he could smell the strong odor of alcohol emitting from inside Respondent's vehicle. Medical personnel were unable to wake up Respondent.

D. CHP Officer Lane observed Respondent get out of the back seat of his vehicle. Officer Lane approached Respondent and could immediately smell the strong odor of alcohol emitting from Respondent's breath and person. Officer Lane attempted to speak with Respondent, but Respondent appeared extremely disoriented and was unaware of what had happened.

E. Respondent kept telling Officer Lane that he was a trauma surgeon at Arrowhead Regional Medical Center. Officer Lane asked Respondent why he was on the side of the off-ramp. Respondent looked around with a confused look on his face and seemed confused as to where he was. Officer Lane looked at the driver seat in Respondent's car and observed that

it was adjusted for Respondent's stature.

F. Officer Lane asked Respondent for his driver's license. Officer Lane observed Respondent fumble through his wallet and passed over his driver's license multiple times. Respondent presented his California Medical Board card to Officer Lane. Officer Lane asked Respondent for his driver's license again. Respondent again fumbled through his wallet and was able to present his driver's license after passing over his license multiple times. Respondent handed Officer Lane his Florida driver's license.

G. As Officer Lane spoke with Respondent, he observed Respondent mumble and slur his speech and had an unsteady gait. While speaking with Officer Lane, Respondent attempted to put a sandal on his foot, but kept missing it with his foot. Officer Lane asked Respondent where he was going and Respondent said he was "going to put his foot in the shoe."

H. After further questioning, Respondent stated he was coming from the airport, going home, came across a collision on the side of the road, and stopped to help. Officer Lane confirmed with Respondent that Respondent was stopped on the side of the road because he saw a collision and Respondent stated yes. Officer Lane asked Respondent why he was asleep in his car; Respondent had a confused look on his face and did not answer.

I. Officer Lane asked Respondent how much alcohol he had to drink and Respondent said he had one glass of wine at 8 p.m. at the airport. Officer Lane asked Respondent to perform Field Sobriety Tests and Respondent refused to do any tests.

J. Officer Lane observed fresh damage to front right fender of Respondent's car and to the guardrail of the off-ramp. Another officer located the key to Respondent's car in the back seat where Respondent was sleeping.

K. Based on Officer Lane's observations of the scene, Respondent's car, and his conversation with Respondent, Officer Lane arrested Respondent for violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol; Vehicle Code section 40300.5, subdivision (a), being involved in a traffic collision; and Vehicle Code section 40300.5, subdivision (b), being in a vehicle that was blocking the roadway. Officer Lane placed Respondent in handcuffs and walked him to his patrol vehicle.

L. During the arrest, Respondent kept turning away from Officer Lane asking if he was serious. Officer Lane told Respondent he was serious and to not turn away. While Officer Lane was walking Respondent to his patrol vehicle, Respondent kept stopping to ask other officers on the scene if they were being serious. Inside the patrol vehicle, Respondent complained that the handcuffs were too tight. Officer Lane adjusted the handcuffs, but Respondent attempted to twist his arm in the cuffs which caused them to tighten.

M. Officer Lane transported Respondent to the Rancho Cucamonga CHP area office. Officer Lane asked Respondent if he would submit an alcohol breath test, to which Respondent refused. Officer Lane asked Respondent if he would submit an alcohol blood test, to which Respondent refused. Officer Lane walked Respondent into the office and had him sit down while Officer Lane completed a search warrant to draw Respondent's blood for an alcohol test.

N. Respondent complained multiple times that Officer Lane never explained to him why he was being arrested. Officer Lane explained to Respondent multiple times that he was being arrested for driving under the influence of alcohol. Respondent repeated again, approximately five times, that Officer Lane had not explained why he was being arrested.

O. Officer Lane obtained the search warrant for the blood draw and contacted Law Enforcement Medical Services (LEMS) to the office to complete the blood draw. Respondent became verbally aggressive and called the officers in the room racists and began arguing with everyone. Another officer sat Respondent down in a chair in another room in an attempt to calm him down.

P. While in the other room, Respondent became verbally aggressive again and stood up. Officers ordered Respondent to sit down and Respondent refused. Multiple officers responded to the room to restrain Respondent. CHP Sergeant Corney was able to talk to Respondent and calm him down.

Q. An employee from LEMS arrived at the office to complete the blood draw. While LEMS employee performed the blood draw, Respondent started to pull his arm away and told the LEMS employee she had enough blood. Officers restrained Respondent to allow the

LEMS employee to complete the blood draw.

R. Respondent's blood sample was analyzed by the San Bernardino County Sheriff's Department, Scientific Investigations Division, for ethyl alcohol content. The results showed that Respondent had a blood alcohol concentration level of 0.28%, three and a half times the legal limit of 0.08%.

S. On May 22, 2018, Respondent was charged by the San Bernardino County District Attorney's Office with violating (1) Vehicle Code section 23152, subdivision (a), driving under the influence; (2) Vehicle Code section 23152, subdivision (b), driving under the influence of alcohol with a blood alcohol concentration of 0.08 % or more; and (3) Vehicle Code section 12500, subdivision (a), driving without a license.

T. On June 7, 2018, Respondent plead no contest to a violation of Vehicle Code section 23103, subdivision (a), reckless driving with a wet advisement. The other charges were dismissed pursuant to a plea agreement with the San Bernardino County District Attorney's Office.

U. On March 5, 2020, Respondent voluntarily participated in an interview conducted by Supervising Investigator Rashya Henderson with the Medical Board of California's Complaint Investigation Office at the Glendale, California field office. During the interview, Respondent stated that on March 17, 2018, he was preparing for a flight to Boston, Massachusetts from Ontario International Airport (ONT). Respondent's flight was delayed multiple times throughout the day. Sometime later, Respondent was told he could take a flight to Boston from Los Angeles International Airport (LAX). Respondent took a ride share service to LAX from ONT. While at LAX, Respondent and other people on the flight went to a bar in the terminal and drank some beers. Respondent did not remember how many beers he consumed. The flight from LAX to Boston was cancelled. Respondent and other people on that flight were driven back to ONT. Respondent attempted to drive home from ONT. Respondent stated during the interview that he was unable to drive home, pulled off the freeway, and got into the backseat of his car to sleep. Sometime after, Respondent was awakened by police officers and subsequently arrested for driving under the influence of alcohol.

FIRST CAUSE FOR DISCIPLINE

(Conviction of a Substantially Related Crime)

15. By reason of the facts set forth in paragraphs 13 and 14 above, Respondent is subject to disciplinary action under section 2236, subdivision (a), and section 490 of the Code, as well as California Code of Regulations, title 16, section 1360, in that Respondent has been convicted of a crime substantially related to the qualifications, function or duties of a physician and surgeon.

16. Respondent's acts and/or omissions as set forth in paragraphs 13 and 14 above, whether proven individually, jointly, or in any combination thereof, constitute the conviction of a crime substantially related to the qualifications, function or duties of a physician and surgeon, pursuant to section 2236, subdivision (a), and section 490 of the Code, as well as California Code of Regulations, title 16, section 1360

SECOND CAUSE FOR DISCIPLINE

(Use of Alcoholic Beverages in a Dangerous Manner)

17. By reason of the facts set forth in paragraphs 13 and 14 above, Respondent is subject to disciplinary action under section 2239 of the Code in that Respondent used alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to himself or to any other person or to the public.

18. Respondent's acts and/or omissions as set forth in paragraphs 13 and 14 above, whether proven individually, jointly, or in any combination thereof, constitutes the use of alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to himself, or to any other person or to the public, pursuant to section 2239 of the Code.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

19. By reason of the facts and allegations set forth in paragraphs 13 through 18 above, Respondent is subject to disciplinary action under section 2234, subdivision (a), of the Code in that Respondent has been convicted of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon, and Respondent has used alcoholic beverages to

the extent, or in such a manner, as to be dangerous and injurious to himself, or to any other person or to the public.

20. Respondent's acts and/or omissions as set forth in paragraphs 13 through 18 above, whether proven individually, jointly, or in any combination thereof, constitutes unprofessional conduct, pursuant to section 2234, subdivision (a), of the Code.

PRAYER

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

1. Revoking or suspending Physician's and Surgeon's Certificate Number A 108980, issued to Gerald Junior Gracia, M.D.;

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

3. Ordering Gerald Junior Gracia, M.D., if placed on probation, to pay the Board the costs of probation monitoring; and

4. Taking such other and further action as deemed necessary and proper.

DATED: June 4, 2020

CHRISTINE J. LALLY
Interim Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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