IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

QUINN LI,
Petitioner,
v.
THE SUPERIOR COURT
OF SACRAMENTO COUNTY,
Respondent;
MEDICAL BOARD OF CALIFORNIA,
Real Party in Interest.

C092584
Sacramento County
No. 34202080003396

REMITTITUR ON ORIGINAL PROCEEDING

I, ANDREA K. WALLIN-ROHMANN, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached opinion, previously provided to the parties, is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 6th day of December 2021.

ANDREA K. WALLIN-ROHMANN
Clerk

Liz Outman
By: Liz Outman
Assistant Deputy Clerk III

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

Trial Court Clerk

By:
Deputy Clerk

cc: See Mailing List

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 9/30/2021 by L. Outman, Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

QUINN LI, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; MEDICAL BOARD OF CALIFORNIA, Real Party in Interest.	C092584 (Super. Ct. No. 34202080003396)

ORIGINAL PROCEEDING in mandate. Petition denied. James P. Arguelles, Judge.

La Follette, Johnson, DeHaas, Fesler & Ames, Nicole D. Hendrickson; Rothschild Wishek & Sands, Michael Rothschild; John D. Harwell; Max H. Hare, for Petitioner.

No appearance for Respondent.

Xavier Becerra, Attorney General, Gloria L. Castro, Senior Assistant Attorney General, Mary Cain-Simon, Supervising Deputy Attorney General, Rebecca D. Wagner, Deputy Attorney General, for Real Party in Interest.

For almost 45 years, California trial courts have followed the rule laid down by *Chamberlain* that a trial court exercising its independent judgment under Code of Civil

Procedure[1] section 1094.5 must determine whether the administrative agency's findings are supported by the preponderance of the evidence, notwithstanding the clear and convincing evidence standard of proof applied in the underlying administrative proceeding. (*Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 368-369 (*Chamberlain*); accord, *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 858 (*Ettinger*).) That rule was born out of the appellate court's interpretation that the weight of the evidence phrase in subdivision (c) of section 1094.5 is synonymous with the preponderance of the evidence standard of proof. (*Chamberlain*, at p. 368; see § 1094.5, subd. (c) ["Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by *the weight of the evidence*"], italics added.) No appellate court has disagreed with *Chamberlain* or its progeny and our Supreme Court has not, to our knowledge, reviewed or rendered a decision on the merits of the statutory interpretation.

In this writ proceeding, petitioner Quinn Li challenges the continued vitality of the *Chamberlain* rule, asserting our Supreme Court's recent *Conservatorship of O.B.* decision impliedly abrogated *Chamberlain*'s long-standing interpretation of section 1094.5, subdivision (c). (Citing *Conservatorship of O.B.* (2020) 9 Cal.5th 989.) In *Conservatorship of O.B.*, our Supreme Court held an appellate court applying the substantial evidence standard of review must account for the standard of proof required in the underlying proceeding when determining whether a finding is supported by the evidence. (*Id.* at pp. 995-996.) Thus, "[w]hen reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is

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1 All further section references are to the Code of Civil Procedure unless otherwise specified.

whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true." (*Id.* at p. 1011.) Petitioner asserts the trial court acted in contravention of *Conservatorship of O.B.* when it denied petitioner's request to stay, during the pendency of his mandamus proceeding, the adverse disciplinary decision by real party in interest the Medical Board of California (the board) regarding petitioner's medical license, because the trial court used the preponderance of the evidence standard of proof rather than the clear and convincing standard of proof in evaluating the merits of the stay request.

We disagree with petitioner's implied abrogation argument but conclude, in sum, that a trial court reviewing an administrative agency's findings under the independent judgment standard of review in section 1094.5 must, like under the substantial evidence standard of review, account for the standard of proof required and applied in the underlying proceeding. We recognize this conclusion breaks with over four decades of established law. As we explain, however, after closely reexamining the statutory construction employed by the *Chamberlain* and *Ettinger* courts, it is clear there is no basis for the interpretation that the weight of the evidence phrase in section 1094.5 is synonymous with preponderance of the evidence.

Despite the significance of our conclusion on this important question of law, we deny petitioner's petition for writ of mandate because he fails to raise any argument demonstrating the correct application of the standard of review would have resulted in a different outcome in the trial court. Prejudicial error must be proven; it is not presumed.

FACTUAL AND PROCEDURAL BACKGROUND

The board revoked petitioner's medical license but stayed the revocation and placed petitioner on probation for three years pursuant to terms and conditions (the decision). Petitioner filed a petition for writ of mandate or, in the alternative, administrative mandate and also filed an ex parte application for an order staying the decision pursuant to section 1094.5, subdivision (h). In the stay application, petitioner

argued, among other things, that the board is unlikely to prevail in the matter because the decision "was taken in violation of the law, the wrong standard of proof was applied, the correct standard was not met, the findings are not supported by the evidence, the penalty exceeded the Board's authority under the law as it is punishment, not protective of the public, and the Board's Decision was just plain wrong."[2] The trial court denied the stay application.[3]

A few days after our Supreme Court filed *Conservatorship of O.B.*, petitioner asked the trial court to reconsider its denial of the stay application. Specifically, petitioner asked the trial court to "apply the clear and convincing evidentiary standard to the issue whether the [b]oard was unlikely to prevail on the merits, consistent with the holding in [*Conservatorship of*] *O.B.*" The trial court denied the application for reconsideration without explanation, citing only section 1008, subdivisions (a) and (e), section 1094.5, subdivisions (c) and (h), and *Chamberlain* for " 'the standard of proof in the original administrative proceedings is wholly irrelevant to the standard of proof applicable to a review of such proceedings.' "[4] (Citing *Chamberlain*, *supra*, 69 Cal.App.3d at p. 370.)

Petitioner filed a petition for writ of mandate in this court, requesting a stay of the board's decision and an order commanding the trial court to comply with "the standard of review and burden of proof rules articulated in" *Conservatorship of O.B.* We stayed the

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2 Section 1094.5, subdivision (h)(1), provides the trial court shall not stay the operation of an administrative order or decision "unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits."

3 We subsequently denied petitioner's petition for writ of mandate as to this ruling.

4 Based on the arguments presented in the parties' briefs, the parties interpret the order to mean the trial court found *Conservatorship of O.B.* resulted in no change in the law pertinent to its consideration of petitioner's stay request. We shall do the same.

board's decision and all further proceedings in the trial court and issued an order to show cause why relief should not be granted. The parties filed their respective briefs in response to the order to show cause. We now consider the merits.

DISCUSSION

Section 1094.5 "provides the basic framework by which an aggrieved party to an administrative proceeding may seek judicial review of any final order or decision rendered by a state or local agency." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 137, fn. omitted.) Subdivision (c) of the statute "provides for both an independent judgment and a substantial evidence review of administrative decisions." (*Bixby*, at p. 137, italics omitted.) The trial court determines the applicable standard of review on a case-by-case basis by considering whether the administrative decision substantially affects a fundamental vested right. (*Id.* at p. 144.) "If the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining under section 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in the light of the whole record." (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32.)

I

The Independent Judgment Standard Of Review Applies

We first address petitioner's confusing argument that *Conservatorship of O.B.* mandates the trial court shall apply the substantial evidence standard of review rather than the independent judgment standard of review in evaluating the merits of his

petition.[5] The independent judgment standard of review applies to agency decisions revoking or suspending a medical license. (*Moran v. Board of Medical Examiners* (1948) 32 Cal.2d 301, 302, 308; *Bixby v. Pierno*, *supra*, 4 Cal.3d at pp. 139, 146.) Our Supreme Court did not, in *Conservatorship of O.B.*, discuss or change the standard of review applicable to this proceeding.

II

The Application Of Conservatorship Of O.B.

To The Standards Of Review In Section 1094.5

In *Conservatorship of O.B.*, our Supreme Court granted review "to clarify how an appellate court is to review the sufficiency of the evidence associated with a finding made by the trier of fact pursuant to the clear and convincing standard." (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 995.) The court explained "[t]here [wa]s a split of opinion over how an appellate court should address a claim of insufficient evidence" when the standard of proof in the underlying proceeding was clear and convincing evidence. (*Ibid.*) In the view of some appellate courts, such a review required the court to analyze "the record for substantial evidence in a manner mindful of the fact that the clear and convincing standard of proof applied before the trial court." (*Id.* at p. 1004.) Other

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[5] Petitioner also confusingly asserts *Conservatorship of O.B.* compels reviewing courts in section 1094.5 cases "to determine whether the agency is unlikely to prevail ultimately on the merits by determining whether [the agency's] decision meets the 'clear and convincing' test, rather than the substantial evidence test." Petitioner confuses standard of proof and standard of review, the differences of which are discussed *post*. Petitioner further misapprehends the rule espoused in *Conservatorship of O.B.* Our Supreme Court did *not* state that the standard of proof in the underlying proceeding should be applied by a reviewing court "rather than the substantial evidence test." Rather, our Supreme Court concluded that a reviewing court applying the substantial evidence *standard of review* to "evaluat[e] the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing *standard of proof* applied before the trial court." (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1005, italics added.)

appellate courts concluded "th[e] standard of proof has no bearing whatsoever on appellate review for sufficiency of the evidence," meaning the standard of review applies without regard to the standard of proof at trial. (*Id.* at p. 1003.) Our Supreme Court rejected the latter view, definitively ruling that, "[i]n general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof." (*Id.* at p. 1005.)

The substantial evidence standard of review addressed and discussed in *Conservatorship of O.B.* pertained to an appellate court's review of trial court decisions. The *Conservatorship of O.B.* rule nonetheless unquestionably also applies to a trial court's substantial evidence review under section 1094.5. That is because "the superior court, in an administrative mandamus proceeding, must apply the 'substantial evidence' rule in the same manner that that rule is applied by appellate courts in California in reviewing decisions of trial courts." (*Beverly Hills Fed. S. & L. Assn. v. Superior Court* (1968) 259 Cal.App.2d 306, 317; accord, *American Federation of Teachers v. San Lorenzo etc. Sch. Dist.* (1969) 276 Cal.App.2d 132, 135.) And, section 1094.5's substantial evidence review sometimes applies to underlying administrative proceedings in which the standard of proof is clear and convincing evidence. (See, e.g., *SASCO Electric v. Fair Employment & Housing Com.* (2009) 176 Cal.App.4th 532, 535, 546 [upholding the trial court's conclusion "there [wa]s substantial evidence to support the [administrative] finding that there was clear and convincing evidence of oppression and malice on [employer's] part"].)

Our Supreme Court did not, however, in *Conservatorship of O.B.* consider or decide the scope of the independent judgment standard of review in section 1094.5 -- the standard of review at issue in this proceeding. We thus disagree with petitioner's assertion that our Supreme Court impliedly overruled *Chamberlain* and intended to

require a trial court to account for the standard of proof in the underlying proceeding when exercising its independent judgment under section 1094.5. (*Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [" '[i]t is axiomatic that cases are not authority for propositions not considered' "].) That said, we recognize the nonsensical conflict created by requiring a trial court to account for the clear and convincing evidence standard of proof in exercising substantial evidence review but not in exercising its independent judgment review.

First, independent judgment review, like substantial evidence review, applies to underlying proceedings governed by both the clear and convincing evidence and the preponderance of the evidence standards of proof. (See, e.g., *Ettinger*, *supra*, 135 Cal.App.3d at p. 856 [clear and convincing evidence standard of proof applied to a medical license revocation proceeding; independent judgment standard of review applied in trial court]; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1895, 1897 [preponderance of the evidence standard of proof applied to revocation of food processor's license; independent judgment standard of review applied in trial court].) As our Supreme Court said, " '[a]s a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed . . . the same as one that may be sustained on a mere preponderance.' " (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1005.) "[K]eeping the clear and convincing standard in mind when reviewing for sufficiency of the evidence helps ensure that an appropriate degree of [judicial] scrutiny attaches to findings to which this standard applies." (*Id.* at p. 1006.)

Second, substantial evidence review is *more deferential* to the fact finder than independent judgment review. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 818 & fn. 10 (*Fukuda*).) And, third, the purpose of independent judgment review is to protect individual liberty. (*Id.* at p. 816, fn. 8 [independent judgment review addresses concerns regarding the danger individuals face " 'from the dominance of government and other institutions wielding governmental power' "]; *Yakov v. Board of Medical Examiners*

(1968) 68 Cal.2d 67, 75 [the purpose of independent judgment review is to surround individual liberty rights "with a panoply of legal protection"].)

With the foregoing in mind, we took a closer look at the *Chamberlain* and *Ettinger* courts' statutory construction and interpretation of the weight of the evidence phrase with respect to independent judgment review in section 1094.5. We did so because we are convinced that, if the *Chamberlain* and *Ettinger* courts incorrectly concluded section 1094.5 expressly ties a preponderance of the evidence standard of proof to the independent judgment standard of review, logic and public policy support extending the "account for the standard of proof" rule to the independent judgment standard of review. Our research confirmed our suspicions; we find no basis for the *Chamberlain* and *Ettinger* courts' conclusion.

Before we delve into that analysis, however, we take a quick detour to address *Yazdi*, a case recently decided by the Second District Court of Appeal and relied upon by the board. (*Yazdi v. Dental Bd. of California* (2020) 57 Cal.App.5th 25.) In that case, the Second District Court of Appeal considered the application of *Conservatorship of O.B.* to the independent judgment standard of review under section 1094.5. The court concluded *Conservatorship of O.B.* did not "overturn[] the standard to be applied by the trial court in reviewing an administrative proceeding pursuant to a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5." (*Yazdi*, at p. 33.) Two reasons informed the court's decision.

First, the court relied on the nature of the proceeding before our Supreme Court, explaining "[t]he [*Conservatorship of*] *O.B.* case involved an appeal from a probate proceeding, not an administrative mandate proceeding" and did not address "the decades of case law . . . concerning the review to be made initially in the trial court and subsequently by this court in the administrative mandate setting." (*Yazdi v. Dental Bd. of California*, *supra*, 57 Cal.App.5th at p. 33.) Second, the court stated a trial court's reweighing of the evidence under the independent judgment standard "runs contrary to

the language in the [*Conservatorship of*] *O.B.* decision . . . , stating that the trial court should *not* reweigh the evidence." (*Yazdi*, at pp. 33-34.) In sum, the Second District Court of Appeal was "not persuaded that the [*Conservatorship of*] *O.B.* decision intended to abolish the independent judgment standard in administrative mandate proceedings." (*Yazdi*, at p. 34.)

We agree with *Yazdi* that *Conservatorship of O.B.* did not consider nor decide the scope of the independent judgment standard of review under section 1094.5. We disagree, however, with the *Yazdi* court's intimation that *Conservatorship of O.B.* does not apply to *any* administrative mandate proceedings. (*Yazdi v. Dental Bd. of California*, *supra*, 57 Cal.App.5th at p. 33.) The application of *Conservatorship of O.B.* is not limited to probate proceedings. Our Supreme Court disapproved of nonprobate cases insofar as they were inconsistent with the court's rule (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1010, fn. 7) and the rule has subsequently been applied to issues outside the probate context (see, e.g., *King v. U.S. Bank National Assn.* (2020) 53 Cal.App.5th 675, 711 [applied to review of punitive damages award]; *Morgan v. J-M Manufacturing Co., Inc.* (2021) 60 Cal.App.5th 1078, 1089-1090 [same]; *In re Nathan E.* (2021) 61 Cal.App.5th 114, 123 [applied to dispositional order removing a child]). As explained *ante*, "the superior court, in an administrative mandamus proceeding, must apply the 'substantial evidence' rule in the same manner that that rule is applied by appellate courts in California in reviewing decisions of trial courts." (*Beverly Hills Fed. S. & L. Assn. v. Superior Court*, *supra*, 259 Cal.App.2d at p. 317.) Thus, to the extent *Yazdi* stands for the proposition that *Conservatorship of O.B.* does not apply to the substantial evidence standard of review in administrative mandate proceedings, we disagree.

III

The Statutory Interpretation In Chamberlain And Ettinger Reexamined

A

The Statute's Legislative History

In 1943, "the Legislature enacted and the Governor signed legislation directing the Judicial Council to 'make a thorough study of the subject . . . of review of decisions of administrative boards, commissions and officers[,] . . . formulate a comprehensive and detailed plan,' and report its recommendations to the Legislature along with 'drafts of such legislative measures as may be calculated to carry out and effectuate the plan.' [Citation.] The Judicial Council of California did so in its Tenth Biennial Report (1944) (Report). [Citation.] The Report recommended, and the Legislature adopted with only minor changes, three major pieces of legislation: a statewide Department of Administrative Procedure [citations]; the Administrative Procedure Act [citations]; and the statute that we consider in the case now before us, section 1094.5 [citations]." (*Fukuda*, *supra*, 20 Cal.4th at pp. 814-815.)

The Report " 'is a most valuable aid in ascertaining the meaning of [section 1094.5]. . . . [T]he council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation [the Judicial Council] told the Legislature what it intended to provide by the language used. *In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report.*' " (*Fukuda*, *supra*, 20 Cal.4th at p. 816.)

Notably, the Judicial Council's recommendations focused on "a portion of the field of administrative adjudication which seemed most in need of improvement . . . [i.e.,] the one occupied by the agencies engaged in licensing and disciplining the members of the various professions and occupations." Thus, the Judicial Council stated "[t]he

proposed legislation [wa]s designed to provide a solution for many of the difficulties and injustices arising in the administrative licensing and disciplining of private citizens." In that vein, the Judicial Council noted its proposed language for section 1094.5 did "not depart from the procedural pattern laid down by recent court decisions" and was "modeled upon the statutory provisions suggested by other studies as well as upon the case law of this State". The Judicial Council explained the proposed statute provided "for the cases in which the court has the power to exercise an independent judgment on the evidence and also for the cases in which the court merely examines the record to ascertain whether the decision is supported by substantial evidence."

Section 1094.5 is a codification of the procedure devised for reviewing adjudicatory decisions of administrative agencies as discussed in *Drummey*, *Laisne*, *Walker*, *Dare*, and *Sipper*. (*Fukuda*, *supra*, 20 Cal.4th at pp. 811-814 [citing and discussing in part IIA: *Drummey v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75; *Laisne v. Cal. St. Bd. of Optometry* (1942) 19 Cal.2d 831; *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879; *Dare v. Bd. of Medical Examiners* (1943) 21 Cal.2d 790; *Sipper v. Urban* (1943) 22 Cal.2d 138], 816 [the scope of review under section 1094.5 is the same as that specified in the cases outlined "in part II.A"].) We briefly discuss *Drummey* given its importance in the analysis that follows.

In *Drummey*, our Supreme Court addressed the scope of judicial review pertaining to an administrative agency's decision to cancel or suspend an existing license. (*Drummey v. State Bd. of Funeral Directors*, *supra*, 13 Cal.2d at p. 84.) The court held "that in such a proceeding the court to which the application for mandate is made must weigh the evidence, and exercise its independent judgment on the facts, as well as on the

law, if the complaining party is to be accorded his constitutional rights under the state and federal Constitutions."[6] (*Ibid.*)

Our Supreme Court relied, in part, on the United States Supreme Court's statement that: " 'Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty.' " (*Drummey v. State Bd. of Funeral Directors*, *supra*, 13 Cal.2d at p. 85, quoting *St. Joseph Stock Yards Co. v. United States* (1936) 298 U.S. 38, 52 [80 L.Ed. 1033, 1041-1042]; *Drummey*, at p. 86 [finding the analysis in *St. Joseph Stock Yards Co.* to be sound].)

Our Supreme Court concluded that, in exercising its independent judgment, "[t]he findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence." (*Drummey v. State Bd. of Funeral Directors*, *supra*, 13 Cal.2d at p. 85.) It explained that "[t]his procedure where

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6 In *Fukuda*, our Supreme Court noted the reasoning of its plurality opinion in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335 "casts doubt on the suggestion in *Drummey* . . . that the independent judgment standard of judicial review is compelled by the due process clauses of the state and federal Constitutions." (*Fukuda*, 20 Cal.4th at p. 822, fn. 15.)

the courts in reviewing, in its broadest sense, the actions of administrative boards are given the power to weigh the evidence is not unknown to our present law," noting "State Bar disciplinary cases in which the court has power to weigh the evidence offer [an] illustration." (*Id.* at p. 86.)

B

Chamberlain And Ettinger

The meaning of the weight of the evidence phrase as to independent judgment review under section 1094.5 first came before the Second District Court of Appeal in 1977. (*Chamberlain, supra,* 69 Cal.App.3d at p. 367.) *Chamberlain* was the seminal case defining the phrase as synonymous with preponderance of the evidence. (*Id.* at p. 368.) The court explained the "apparent source of the [weight of the evidence] language of both section 1094.5 and of our Supreme Court in *Strumsky* [*v. San Diego County Employees Assn.*, *supra*, 11 Cal.3d at p. 32] which cites it, is the opinion in *Drummey v. State Bd. of Funeral Directors*[, *supra*,] 13 Cal.2d 75 . . . , in which the court established the constitutional requirement of independent judgment review and applied it to statewide agencies not vested with judicial powers." (*Chamberlain,* at p. 368.)

Quoting from *Drummey*, the *Chamberlain* court explained that, when a trial court considers a petition for writ of mandate to secure the restoration of a professional license, the exercise of the trial court's independent judgment on the facts " 'does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort. [Rather,] in weighing the evidence the courts can and should be assisted by the findings of the board. The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision *is contrary to the weight of the evidence*.' " (*Chamberlain, supra,* 69 Cal.App.3d at p. 368, quoting *Drummey v. State Bd. of Funeral Directors, supra,* 13 Cal.2d at pp. 84-85.)

The *Chamberlain* court then said: "The purpose for which a court normally weighs the evidence is to determine which way it preponderates on a given issue. Evidence Code section 115 provides in pertinent part: 'Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' Thus, an unexplained statement that a reviewing court shall weigh the evidence is a statement that it shall determine whether the evidence preponderates in favor of, or against, the administrative decision under review. Such interpretation is also required by the long standing practice of courts in this state to define 'preponderance of the evidence' in terms of the weight of the evidence." (*Chamberlain, supra*, 69 Cal.App.3d at pp. 368-369.) The court relied on two California Supreme Court opinions for the foregoing proposition.

As to the first case, the *Chamberlain* court noted our Supreme Court "defined 'preponderance of the evidence' as follows: 'The term simply means what it says, viz., that *the evidence on one side outweighs, preponderates over*, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.' " (*Chamberlain, supra*, 69 Cal.App.3d at p. 369, quoting *People v. Miller* (1916) 171 Cal. 649, 652-653.) As to the second case, the *Chamberlain* court explained, our Supreme Court "reject[ed] a claim that fraud was required to be proved by clear and convincing evidence," reasoning: " 'So in civil cases tried without a jury where fraud is an issue, *it is for the trial court to determine the weight of the evidence*, and while it cannot find fraud upon a mere suspicion, yet if there is any substantial evidence tending to prove fraud, it is for the trial court to determine whether such evidence *outweighs or preponderates over* that adduced in opposition thereto, and when the trial court has found that such evidence does so preponderate, its decision thereon is final, and an appellate court has no right or authority to disturb such a finding, even though the appellate court may be of a contrary opinion as to the weight of such evidence . . . .' " (*Chamberlain*, at p. 369, quoting *Noll v. Baida* (1927) 202 Cal. 98,

101.) In the *Chamberlain* court's view, "[t]he phrase 'determine the weight of the evidence' in *Noll* is virtually identical with that contained in Code of Civil Procedure section 1094.5" and thus the court concluded a trial court must "examine the evidence favoring the administrative determination . . . 'to determine whether such evidence outweighs or preponderates over that adduced in opposition thereto . . . .' " (*Chamberlain*, at pp. 369-370, quoting *Noll*, at p. 101.)

Next, the *Chamberlain* court considered the petitioner's argument that the trial court had to take into consideration the higher standard of proof required in the underlying proceeding, relying "upon the rule relating to charges of unprofessional conduct on the part of attorneys." (*Chamberlain*, *supra*, 69 Cal.App.3d at p. 370.) The court pointed to an apparent conflict between California Supreme Court cases in that regard[7] but concluded, "[i]n any event, the standard of proof in the original administrative proceedings is wholly irrelevant to the standard of proof applicable to a review of such proceedings." (*Chamberlain*, at p. 370.) The court said *Johnstone* supported its position because the court "based its reversal of the trial court judgment denying a writ of mandate upon the conclusion there was no 'substantial evidence to support the order of the city council,' thereby applying upon review a standard of proof even lower than that of 'preponderance of the evidence.' " (*Chamberlain*, at p. 370, citing *Johnstone v. City of Daly City* (1958) 156 Cal.App.2d 506.)

The *Chamberlain* court next analogized, in part, to review of factual determinations in criminal trials, explaining that, although "the standard of proof in the initial proceeding is proof beyond a reasonable doubt," "on review of such findings, the 'substantial evidence' test is applied." (*Chamberlain*, *supra*, 69 Cal.App.3d at p. 370.)

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[7] Although immaterial to this appeal, we note the apparent conflict identified in *Chamberlain* was resolved in *Ettinger*, in which the court contrasted the vested rights regarding the revocation and suspension of professional licenses with the "mere termination of state employment." (*Ettinger*, *supra*, 135 Cal.App.3d at pp. 857-858.)

This long-standing rule, as the *Chamberlain* court referred to it, was purportedly reaffirmed in *Kunkin*, which provided: " 'The substantial evidence rule has received extended discussion and express reaffirmation in several of our recent cases. In *People v. Mosher* (1969) 1 Cal.3d 379, 395 . . . , we observed that "this court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . . If the circumstances reasonably justify the trial court's findings, an appellate court cannot reverse merely because the circumstances might also be reasonably reconciled with a contrary finding. . . . The test on appeal becomes whether *substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.*" ' " (*Chamberlain*, at pp. 370-371, quoting *People v. Kunkin* (1973) 9 Cal.3d 245, 250.)

The *Chamberlain* court concluded "the standard of proof on review of factual determinations of a tribunal is not a function of the standard of proof in the original proceedings before such tribunal. The standard of proof on review is, instead, governed by the degree to which it is appropriate to presume correctness of such determinations. The holding in *Strumsky* that an 'independent judgment' review is appropriate in the case of local administrative agency findings affecting vested fundamental rights is a determination that, as stated in *Drummey*, such findings 'come before the court with a strong presumption of their correctness . . . .' [Citation.] Though this presumption does not invoke the substantial evidence test, it does require the party challenging such findings to 'convince the court that the board's decision is contrary to the weight of the evidence.' " (*Chamberlain*, *supra*, 69 Cal.App.3d at p. 371.)

Approximately five years later, the Second District Court of Appeal reaffirmed *Chamberlain's* interpretation of section 1094.5, subdivision (c). In *Ettinger*, the court addressed two issues. First, the court held the clear and convincing standard of proof applies to administrative proceedings to revoke or suspend a medical license. (*Ettinger*,

supra, 135 Cal.App.3d at p. 856.) The court explained, in important part as further discussed *post*, that the heightened standard of review applied in disciplinary proceedings involving other professional licenses, such as real estate brokers and attorneys. (*Id.* at pp. 855-856.) The court then specifically addressed attorney disciplinary proceedings, as follows: "It is true that State Bar proceedings, although administrative, have been held to be of a nature all their own, neither civil nor criminal. [Citations.] However, when one compares the underlying policy considerations for that distinction with the policy considerations present in the instant case, substantial similarities can be seen.

" ' "The State Bar Act is designed to provide a procedure whereby those attorneys at law who prove recreant to their trust may be removed from the ranks of the profession. The public, as well as the legal profession and the courts must be protected from those who do not measure up to their responsibilities. . . . The purpose of disbarment proceedings is not to punish the individual but to determine whether the attorney should continue in that capacity." ' [Citation.]

"The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. [Citations.]

"Since it is apparent that the underlying purpose of disciplining both attorneys and physicians is protection of the public, it would be anomalous to require a higher degree of proof in disciplinary hearings involving attorneys or real estate agents than in hearings involving physicians." (*Ettinger*, *supra*, 135 Cal.App.3d at p. 856.)

The second issue the *Ettinger* court addressed was whether the clear and convincing standard of proof affected the independent judgment standard of review under section 1094.5. (*Ettinger*, *supra*, 135 Cal.App.3d at p. 858.) It concluded it did not. The court said "[the weight of the evidence] standard is considered to be synonymous with the *preponderance of the evidence* standard." (*Ibid.*, citing *People v. Miller*, *supra*, 171 Cal. at p. 654 & *Lawyer v. Los Angeles Pacific Co.* (1913) 23 Cal.App. 543, 546.) The court

further agreed with *Chamberlain* that, "the standard of proof used in the original proceeding is completely irrelevant." (*Ettinger*, at p. 858.)

Our research revealed no subsequent appellate history for *Chamberlain* or *Ettinger*. In other words, our Supreme Court has not had the opportunity to consider the propriety of the conclusions espoused in those cases. Our Supreme Court has, however, cited favorably to both cases for reasons other than the section 1094.5, subdivision (c) interpretation. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 [citing *Ettinger* for its application of the clear and convincing standard of proof in professional license revocation proceedings]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 184, fn. 1 [same]; *Fukuda, supra*, 20 Cal.4th at p. 817 [citing *Chamberlain* for "quoting *Drummey's* 'strong presumption of . . . correctness' and burden of proof qualifications on independent judgment review"].)

C

Weight Of The Evidence Is Not Always Synonymous With Preponderance Of The Evidence

The pertinent question in *Chamberlain* and *Ettinger* was, and is before us today, what meaning the Legislature intended to attach to the weight of the evidence phrase in section 1094.5. "The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.) "In interpreting a statute where the language is clear, courts must follow its plain meaning. [Citation.] However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.] In the end, we ' "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an

interpretation that would lead to absurd consequences." ' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

The *Chamberlain* and *Ettinger* courts essentially relied on two principles for the conclusion that the weight of the evidence phrase in section 1094.5 is synonymous with preponderance of the evidence. The first was that the interpretation was consistent with Evidence Code section 115 and established common law; the second was that, because a trial court reviews findings made in an administrative proceeding, the standard of proof used in the original proceeding is irrelevant. Neither principle supports the conclusion reached.

First, the *Chamberlain* court's reliance on Evidence Code section 115 presents an obvious timing issue. The court invoked the portion of the statute providing that " '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence' " to reach the conclusion that "an unexplained statement that a reviewing court shall weigh the evidence is a statement that it shall determine whether the evidence preponderates in favor of, or against, the administrative decision under review." (*Chamberlain, supra*, 69 Cal.App.3d at pp. 368-369.) But Evidence Code section 115 was enacted 20 years *after* the Legislature enacted section 1094.5. The Legislature thus could not have contemplated *Chamberlain's* proposed fusion of the two statutes when it enacted section 1094.5.

It is further informative that, from around the turn of the prior century up to at least 1961, former section 2061, occasion 5, provided "[t]hat in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt." The statute was repealed when Evidence Code section 115 was enacted. (Stats. 1965, ch. 299, § 127.) Nothing in section 2061 provided "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence" -- the portion of Evidence Code section 115 relied upon

by the *Chamberlain* court. Moreover, section 2061 was frequently described as enumerated matters affecting the weight of evidence (*People v. Moran* (1904) 144 Cal. 48, 63) or weight of the evidence rules (see, e.g., *People v. Grill* (1907) 151 Cal. 592, 597, overruled on another ground in *People v. Henderson* (1963) 60 Cal.2d 482; *People v. King* (1951) 103 Cal.App.2d 122, 128). Thus, the weight of the evidence phrase was used in common law to reference *both* preponderance of the evidence and guilt beyond a reasonable doubt before and around the time section 1094.5 was enacted.

Second, the cases relied upon by the *Chamberlain* and *Ettinger* courts do not reveal a legislative intent to define weight of the evidence as preponderance of the evidence *in mandamus proceedings*. The *Chamberlain* court relied on *Miller* and *Noll*. (*Chamberlain*, *supra*, 69 Cal.App.3d at p. 369, citing *People v. Miller*, *supra*, 171 Cal. at pp. 652-653 & *Noll v. Baida*, *supra*, 202 Cal. at p. 101.) The *Ettinger* court relied on *Miller* and *Lawyer*. (*Ettinger*, *supra*, 135 Cal.App.3d at p. 858, citing *People v. Miller*, *supra*, 171 Cal. at p. 654 & *Lawyer v. Los Angeles Pacific Co.*, *supra*, 23 Cal.App. at p. 546.) Notably, *Miller* and *Lawyer*, in turn, relied on *Murphy*. (*People v. Miller*, *supra*, 171 Cal. at p. 654, quoting *Murphy v. Waterhouse* (1896) 113 Cal. 467, 473; *Lawyer v. Los Angeles Pacific Co.*, *supra*, 23 Cal.App. at p. 546, citing *Murphy*, at p. 473.)

Our Supreme Court, in *Miller*, considered whether the trial court's insanity instruction as to the meaning of preponderance of the evidence was erroneous. (*People v. Miller*, *supra*, 171 Cal. at pp. 650-651.) It concluded the trial court erred because the instruction given "was substantially the same as that of proof beyond a reasonable doubt." (*Id.* at p. 651.) On pages 652 and 653 of *Miller*, the pages upon which the *Chamberlain* court relied (*Chamberlain*, *supra*, 69 Cal.App.3d at p. 369), our Supreme Court explained the meaning of preponderance of the evidence, citing and quoting several cases. (*Miller*, at pp. 652-653.) The court said preponderance of the evidence "simply means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses

or quantity, but in its effect on those to whom it is addressed." (*Id.* at p. 652.) The cases cited and discussed by the court addressed preponderance of the evidence in terms of having greater weight than or preponderating over other evidence. (*Id.* at p. 653.) Nothing on pages 652 or 653 equates the weight of the evidence phrase with preponderance of the evidence, nor is there any discussion as to the meaning of that phrase.

A different page in *Miller* caught the eye of the *Ettinger* court. *Ettinger* cited page 654 in *Miller* (*Ettinger*, *supra*, 135 Cal.App.3d at p. 858), which in the absence of any analysis or discussion was presumably intended to direct the reader to the *Murphy* quote that " 'the weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case.' " (*People v. Miller*, *supra*, 171 Cal. at p. 654, quoting *Murphy v. Waterhouse*, *supra*, 113 Cal. at p. 473.) *Lawyer*, the second case relied upon by the *Ettinger* court (*Ettinger*, at p. 858), also relied on the *Murphy* quote for its conclusion that "the use of the term 'preponderance of probability,' as synonymous with the weight of evidence, has received the sanction of the supreme court of this state." (*Lawyer v. Los Angeles Pacific Co.*, *supra*, 23 Cal.App. at p. 546.) And, in *Noll*, relied upon in *Chamberlain* (*Chamberlain*, *supra*, 69 Cal.App.3d at pp. 369-370), the court rejected the assertion that civil fraud had to be proven by clear and convincing evidence and, "in doing so reaffirmed the standard of proof by a preponderance of the evidence" (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 289, discussing *Noll v. Baida*, *supra*, 202 Cal. at p. 101).

Two glaring issues arise from the conclusion that *Miller*, *Murphy*, *Noll*, and *Lawyer* unequivocally render the weight of the evidence phrase in section 1094.5 synonymous with the preponderance of the evidence standard of proof. First, the cases were all *civil actions* that considered the phrase within *that* context. Even if our Supreme Court sanctioned the use of weight of the evidence as a term of art in *civil actions*, it does not inform whether the *Legislature* intended the phrase to mean preponderance of the evidence in section 1094.5, a statute governing *special proceedings of a civil nature and*

not civil actions. (*Binyon v. State of California* (1993) 17 Cal.App.4th 952, 954-955 [" '[t]he judicial remedy of mandamus is not a civil action, but a special proceeding of a civil nature, which is available for specified purposes and for which the code provides a separate procedure' "]; *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1115 ["[a]n application for a writ of administrative mandamus is a 'special proceeding of a civil nature' "].) In fact, the Legislature referred to applications for a writ of mandate as special proceedings of a civil nature well before the enactment of section 1094.5. (See, e.g., *Jones v. Board of Police Commissioners* (1903) 141 Cal. 96, 98.)

Second, while a court may, in construing a term of art, consider the history of a term's legal interpretation as a guide to the Legislature's intended meaning rather than its dictionary definition (*Irvin v. Contra Costa County Employees' Retirement Assn.* (2017) 13 Cal.App.5th 162, 174), the *Chamberlain* and *Ettinger* courts failed to recognize that our Supreme Court did not uniformly employ the weight of the evidence phrase as a synonym for preponderance of the evidence. Indeed, prior to the enactment of section 1094.5, our Supreme Court and appellate courts sometimes used the phrase to generally refer to the standard of proof in the underlying proceeding or the degree to which the fact finder finds the evidence probative. (See, e.g., *People v. Travers* (1891) 88 Cal. 233, 237 [addressing "the difference in the weight of evidence required in civil and criminal cases"]; *People v. Bushton* (1889) 80 Cal. 160, 164 ["[t]he well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case . . . [¶] . . . [and] [a]ny other rule as to the weight of the evidence makes one measure applicable to one part of the case and a different one to another part, and leads to confusion]; *People v. Barker* (1938) 29 Cal.App.2d Supp. 766, 771 [" 'A judgment in a civil action is not admissible in a subsequent criminal prosecution, although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail' "]; *Wilcoxson v. Burton* (1865) 27 Cal. 228,

232 ["We have examined the testimony contained in the voluminous record filed in this action with patient attention; and have furthermore availed ourselves of the thorough and exhaustive discussion of counsel upon the weight of the evidence and the conclusions properly to be drawn from it, and we are satisfied not only that the case is one where the evidence is in conflict, but one in which the court below did not so far mistake the relative weight of the opposing proofs as to justify us in going behind the special findings"]; *Howland v. Oakland C.S.R. Co.* (1895) 110 Cal. 513, 521-522 [objection as to the sufficiency of a witness's knowledge "goes more to the weight of the evidence than its admissibility"]; *People v. Sanders* (1896) 114 Cal. 216, 235 ["the weight of the evidence . . . was exclusively for the jury" such that "how much or how little importance should be attached to it was for the jury alone to say"].)

Even more pertinent is the fact that our Supreme Court, prior to the enactment of section 1094.5, used the weight of the evidence phrase in attorney disciplinary proceedings when it applied its independent judgment to determine whether the findings were supported by clear and convincing evidence. Our Supreme Court explained it reviewed the entire record "to ascertain *the weight of the evidence* and whether . . . any charge has been proven against petitioner which merits his disbarment" (*Narlian v. State Bar of California* (1943) 21 Cal.2d 876, 880-881, italics added) by clear and convincing evidence (*Hildebrand v. State Bar of California* (1941) 18 Cal.2d 816, 828). (See also *Furman v. State Bar of California* (1938) 12 Cal.2d 212, 214, 229 [the court "can and always does pass upon the weight of the evidence" in attorney discipline cases to determine if guilt is established by " 'convincing proof to a reasonable certainty' "].)

That the weight of the evidence phrase was used by our Supreme Court in attorney disciplinary proceedings when taking into account the clear and convincing standard of proof is significant because *Drummey*, the source of the weight of the evidence language in section 1094.5 (as noted by *Chamberlain*, *supra*, 69 Cal.App.3d at p. 368), relied on our Supreme Court's standard of review in attorney disciplinary cases as an illustration of

how a reviewing court exercises its independent judgment when "given the power to weigh the evidence." (*Drummey*, *supra*, 13 Cal.2d at p. 86.) As the *Ettinger* court noted, the public policy considerations in attorney disciplinary proceedings are the same as in other licensing disciplinary proceedings. (*Ettinger*, *supra*, 135 Cal.App.3d at p. 856.)

Notably, our Supreme Court continues to use the weight of the evidence phrase in a manner that accounts for the clear and convincing evidence standard of proof in attorney disciplinary proceedings. In 1991, our Supreme Court adopted then California Rules of Court, rule 954(a)(4) (now California Rules of Court, rule 9.16) which provides the court will order review of a decision of the State Bar Court recommending disbarment or suspension from practice when, among other grounds, it appears the decision is not supported "by the weight of the evidence." In *In re Menna*, a case decided approximately four years later, the court reversed a determination that an applicant had the requisite good moral character to be certified for admission. (*In re Menna* (1995) 11 Cal.4th 975, 979.) The court explained "[b]oth the hearing department and the review panel of the State Bar Court evaluated the evidence of rehabilitation under a heightened 'clear and convincing' standard" and the question was "whether the evidence support[ed] the State Bar Court's determination he met that standard." (*Id.* at pp. 986-987.) After reviewing the evidence, the court concluded it was not persuaded the applicant had "demonstrated his overall rehabilitation by clear and convincing evidence." (*Id.* at p. 988.) Thus, the State Bar Court's "determination [wa]s not supported by the weight of the evidence; nor [wa]s it appropriate in light of the record as a whole." (*Id.* at p. 979.)

In an analogous proceeding involving judicial discipline, our Supreme Court held it would independently evaluate the record evidence in reviewing a recommendation by the Commission on Judicial Qualifications to remove a sitting judge from the bench. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276.) In that case, the court "independently f[ou]nd upon clear and convincing evidence in accord with the findings of the Commission" that, subject to some qualifications, the judge's conduct

constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (*Id.* at p. 281.)

The point is that, although the *Chamberlain* and *Ettinger* courts seemingly relied on the dictionary definition of the weight of the evidence phrase laid out in California Words, Phrases, and Maxims,[8] the dictionary formulated the definition without taking into account the inconsistencies in the common law noted *ante* with regard to the use of the phrase in other proceedings.[9] The phrase weight of the evidence simply has not been uniformly used as a synonym for preponderance of the evidence in California common law. Thus, as our Supreme Court noted in *Conservatorship of O.B.*, "even if we were to regard [California Supreme Court] case law as informing prevailing expectations among legislators, and these expectations as reflective of legislative intent" in interpreting section 1094.5, we could not reasonably conclude the Legislature intended the phrase to

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[8] California Words, Phrases, and Maxims states our Supreme Court in *Murphy* and *Miller* said " 'weight of evidence' or 'preponderance of probability' is sufficient to establish a fact in a civil case." (California Words, Phrases, and Maxims (1960) p. 555, citing *Murphy v. Waterhouse*, *supra*, 113 Cal. 467 & *People v. Miller*, *supra*, 171 Cal. at p. 654.) It further cites *Lawyer* for the proposition that "[t]he use of the term 'preponderance of probability,' as synonymous with 'weight of evidence,' has received the sanction of the supreme court of this state, and therefore, an instruction that the weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case, was not error." (California Words, Phrases, and Maxims, at p. 555, citing *Lawyer v. Los Angeles Pacific Co.*, *supra*, 23 Cal.App. at p. 546.)

[9] Notably, in 1930 and 1948, around the time section 1094.5 was enacted, the Law Dictionary with Pronunciations by James A. Ballentine defined "weight of evidence" as "not a question of mathematics, but depends on its effect in inducing belief. One witness may be contradicted by several and yet his testimony may outweigh all of theirs. The question is not on which side are the witnesses more numerous, but what is to be believed." (Ballentine, Law Dict. with Pronunciations (1930) p. 1360; Ballentine, Law Dict. with Pronunciations (2d ed. 1948) p. 1360.) The dictionary thus ascribed to "weight" as applied to evidence a meaning of degree of probative value -- a meaning sanctioned by our Supreme Court as recently as last year. (*People v. Turner* (2020) 10 Cal.5th 786, 805 ["[w]eight" in relation to evidence "describes the degree to which the jury [or fact finder] finds the evidence probative"].)

mean preponderance of the evidence by implicitly incorporating only the cases identified in *Chamberlain* and *Ettinger*. (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1011 [interpreting Probate Code section 1801, Legislature not "regarded as having implicitly incorporated th[e] judicially created rule [that the standard of proof disappears on appeal] within the statute" because the court's "precedent did *not* consistently articulate th[at] view"].)

The *Chamberlain* court's discussion of the *Johnstone* case also reveals a fundamental misapprehension of the concepts of burden of proof, standard of proof, and standard of review, which are distinct concepts. The substantial evidence standard of review is not "a standard of proof even lower than that of 'preponderance of the evidence,' " as the *Chamberlain* court proclaimed. (*Chamberlain*, *supra*, 69 Cal.App.3d at p. 370.)

The *burden of proof* is a party's duty or obligation " 'to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.' " (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 997, quoting Evid. Code, § 115.) The *standard of proof* refers to the requisite degree or level of proof demanded to prove a specific allegation in a given case -- i.e., preponderance of the evidence, clear and convincing proof, or proof beyond a reasonable doubt. (*Conservatorship of O.B.*, at pp. 997-998 ["The standard of proof that applies to a particular determination serves 'to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision' "].)

A *standard of review*, in contrast, defines a reviewing court's scope of review. (*Peplinski v. Fobe's Roofing* (1995) 193 Wis.2d 6, 13, fn. 1 [531 N.W.2d 597, 599].) It prescribes the degree of deference given by the reviewing court to the findings reached in a decision under review, providing " 'the power of the lens' through which the

[reviewing] court looks at the issue in a particular case." (*Commonwealth v. Ratsamy* (2007) 594 Pa. 176, 180 [934 A.2d 1233, 1235]; *Estate of Ekic v. Geico Indem. Co.* (2018) 163 Idaho 895, 897 [422 P.3d 1101, 1103].) " 'It is widely agreed that the primary function of a standard of review is to apportion power and, consequently, responsibility between trial and appellate courts for determining an issue or a class of issues. . . . In determining the appropriateness of a particular allocation of responsibility for deciding an issue or a class of issues, account should be taken of the relative capabilities of each level of the court system to take evidence and make findings of fact in the face of conflicting evidence, on the one hand, and to set binding jurisdiction-wide policy, on the other.' " (*Tetra Tech EC, Inc. v. Dept. of Revenue* (2018) 382 Wis.2d 496, 530, fn. 23 [914 N.W.2d 21, 38], quoting *Utah v. Thurman* (Utah 1993) 846 P.2d 1256, 1265-1266.) Substantial evidence and independent judgment are standards of review. (See *Fukuda*, *supra*, 20 Cal.4th at p. 824.)

In *Johnstone*, the appellate court considered whether substantial evidence supported a city council's adverse employment decision. (*Johnstone v. City of Daly City*, *supra*, 156 Cal.App.2d at pp. 507, 515.) The court said: " 'It may be conceded that in disciplinary administrative proceedings the burden of proof is upon the party asserting the affirmative [citation], and that guilt must be established to a reasonable certainty [citations] and cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay.' " (*Id.* at pp. 515-516.) The court concluded "the record show[ed] that appellant was discharged from his position on charges that were based on suspicion, conjecture and hearsay, and not on substantial evidence necessary to warrant his discharge. Suspicion, conjecture and hearsay, even though strong, are not sufficient under our law to constitute evidence and warrant a discharge from a civil service position." (*Id.* at p. 516.) Nothing in *Johnstone* supports the blanket assertion that "the standard of proof in the original administrative proceedings is wholly irrelevant to the standard of proof applicable to a review of such proceedings."

(*Chamberlain*, *supra*, 69 Cal.App.3d at p. 370.) Moreover, nothing in *Johnstone* indicates the court applied "a standard of proof even lower than that of 'preponderance of the evidence.' " (*Chamberlain*, at p. 370.) The *Johnstone* court merely concluded the city council failed to identify *probative evidence* supporting its determination.

The criminal case relied upon by the *Chamberlain* court also does not support the assertion that the standard of proof in the original proceeding is irrelevant in the review of such a proceeding. True, as noted in *Chamberlain*, *supra*, 69 Cal.App.3d at pages 370 through 371, our Supreme Court said " '[t]he test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' " (*People v. Kunkin*, *supra*, 9 Cal.3d at p. 250.) But what *Chamberlain* missed is the next paragraph, in which our Supreme Court further said: "In *People v. Reilly* (1970) 3 Cal.3d 421, 425 . . . , we emphasized that reasonableness was the ultimate standard under the substantial evidence rule. '*The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt*.' " (*Kunkin*, at p. 250, italics added.) Thus, in applying the substantial evidence standard of review in criminal proceedings, the standard of proof does not disappear upon review. Although the reviewing court does not under the substantial evidence standard of review weigh the evidence to determine whether the evidence proves guilt beyond a reasonable doubt, it determines whether a reasonable trier of fact could have come to that conclusion. As our Supreme Court reiterated in *Conservatorship of O.B.*, "the firmly established rule in criminal cases [is] that the prosecution's burden of proving a defendant's guilt beyond a reasonable doubt affects how an appellate court reviews the record for substantial evidence." (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1007.)

Nothing in the legislative history indicates that the Legislature intended to build a preponderance of the evidence standard of proof into the independent judgment standard of review requiring the trial court to disregard the standard of proof in the underlying

administrative proceeding. By prescribing that the trial court shall review "the weight of the evidence," the Legislature did not prescribe by *what weight* the evidence shall be reviewed. Logic and the public policy considerations discussed in *Conservatorship of O.B.* lead to the conclusion that the trial court *must* account for the standard of proof in the underlying proceeding when exercising its independent judgment under section 1094.5.

We find no merit in the board's argument that requiring the trial court to account for the clear and convincing standard of proof in the underlying administrative proceeding when applying independent judgment review to the findings would conflict with the principles of deference or presumptive correctness laid down in *Fukuda*. "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda*, *supra*, 20 Cal.4th at p. 817.) Further, " 'considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence.' " (*Id.* at p. 812.)

Under our analysis, all that would be required is for the trial court to apply the principles of deference and presumptive correctness *in the context of* whether the findings are supported by clear and convincing evidence, rather than a mere preponderance of the evidence. We can discern no conflict with *Fukuda*. It is also notable that the presumption of correctness is a starting point "but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings. This approach to the trial court's exercise of independent judgment long has been understood . . . ." (*Fukuda*, *supra*, 20 Cal.4th at pp. 818-819.)

In sum, we disagree with the conclusion reached in *Chamberlain* and *Ettinger* and believe a trial court must account for the standard of proof in the underlying administrative proceeding when exercising its independent judgment in reviewing the sufficiency of the evidence supporting the administrative agency's findings.

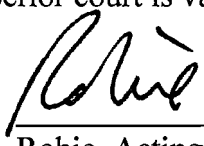
IV

Petitioner Fails To Show A Different Outcome Would Result

Although we agree with petitioner that a trial court should account for the clear and convincing evidence standard of proof when exercising its independent judgment under section 1094.5, we conclude no remedy is available to petitioner for failing to demonstrate, in his petition, that he would have received a different outcome had the trial court done so. (*Fisher v. State Personnel Bd.* (2018) 25 Cal.App.5th 1, 20 ["Reversible error requires demonstration of prejudice arising from the reasonable probability the party 'would have obtained a better outcome' in the absence of the error' "].) Petitioner's attempt to remedy the deficiency in his reply brief is to no avail. We do not consider arguments raised for the first time in a reply brief. (*Sourcecorp, Inc. v. Shill* (2012) 206 Cal.App.4th 1054, 1061, fn. 7; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

DISPOSITION

The petition for writ of mandate is denied. The September 18, 2020, stay of the board's decision and the proceedings in the superior court is vacated.



Robie, Acting P.J.

We concur:

Renner, J.

Krause, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

Court of Appeal - Third District
FILED
ELECTRONICALLY
Jun 26, 2020
Andrea K. Wallin-Rohmann, Clerk
By: AMaas, Senior Deputy Clerk

QUINN LI, M.D.,
Plaintiff and Appellant,
v.
MEDICAL BOARD OF CALIFORNIA,
Defendant and Respondent.

C092135
Sacramento County
No. 34202080003396

BY THE COURT:

Respondent Medical Board's May 28, 2020 decision placing petitioner on probation effective 5:00 p.m., June 26, 2020, is stayed pending opposition and further order of this court.

The petition for writ of supersedeas or other extraordinary relief is construed as a petition for writ of mandate. Respondent shall serve and file an opposition to the petition no later than Thursday, July 2, 2020.

ROBIE, Acting P.J.

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cc: See Mailing List

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 7/22/2020 by C. Doutherd, Deputy Clerk

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

QUINN LI,
Petitioner,
v.
THE SUPERIOR COURT OF
SACRAMENTO COUNTY,
Respondent;
MEDICAL BOARD OF CALIFORNIA,
Real Party in Interest.

C092135
Sacramento County
No. 34202080003396

BY THE COURT:

The petition for writ of mandate is denied. The June 26, 2020 stay of the Medical Board's May 28, 2020 decision placing petitioner on probation is vacated.

RAYE, P.J.

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cc: See Mailing List

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 9/18/2020 by A. Maas, Deputy Clerk

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

QUINN LI,
Petitioner,
v.
THE SUPERIOR COURT
OF SACRAMENTO COUNTY,
Respondent;
MEDICAL BOARD OF CALIFORNIA,
Real Party in Interest.

C092584
Sacramento County
No. 34202080003396

BY THE COURT:

Real Party in Interest Medical Board of California's May 28, 2020, decision placing petitioner on probation is stayed pending further order of this court. Additionally, all further proceedings in Sacramento Superior Court in case number 34202080003396 are stayed pending further order of this court. It appears Respondent Sacramento County Superior Court may have erred in denying petitioner's motion for reconsideration, considering its conclusion that the heightened standard of review set forth in our Supreme Court's recent decision in *Conservatorship of O.B.* (2020) 9 Cal.5th 989, does not apply to the trial court's review of disciplinary decisions of the Medical Board pursuant to section 1094.5 of the Code of Civil Procedure. Further, the superior court previously concluded petitioner poses no danger to the public. Consequently, a balancing of the equities favors a stay of further proceedings and the imposition of the Board's decision imposing discipline against petitioner

Let an order to show cause issue. Written return to the order to show cause by Real Party in Interest is to be served and filed by October 19, 2020. Petitioner's reply, if any, is to be served and filed with this court within 15 days after the filing of the written return.

ROBIE, Acting P.J.

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cc: See Mailing List

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Accusation against:

Quinn Li, M.D., Respondent

OAH No. 2018080648

Case No. 800-2016-028347

DECISION AFTER NON-ADOPTION

Erin R. Koch-Goodman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on July 15, 16, 17, 18, and 19, 2019, in Sacramento, CA.

Rebecca D. Wagner, Deputy Attorney General (DAG), appeared on behalf of Kimberly Kirchmeyer (Complainant), Executive Director of the Medical Board of California (Board), Department of Consumer Affairs.

Nicole Hendrickson, Attorney at Law, LaFollette, Johnson, DeHass, Fesler & Ames, appeared on behalf of Quinn Li, M.D. (Respondent), who was present at hearing.

Evidence was received at hearing. The record remained open for the submission of closing briefs. Complainant's Closing Brief was filed on September 16, 2019, and marked Exhibit 17. Respondent's Closing Brief was filed on September 30, 2019, and marked Exhibit MM. Complainant's Reply Brief was filed on October 7, 2019, and

marked Exhibit 18. The record was closed and the matter was submitted for decision on October 7, 2019. The ALJ issued a proposed decision on November 18, 2019.

On February 5, 2020, Panel A of the Board issued an Order of Non-Adoption of Proposed Decision. Oral argument on the matter was heard by Panel A on May 7, 2020, with ALJ Coren Wong presiding. DAG Rebecca Wagner represented Complainant. Respondent was present and was represented by Attorney Nicole D. Hendrickson. Panel A, having read and considered the entire record, including the transcript and the exhibits, and having considered the written and oral argument, hereby enters this Decision After Non-Adoption.

FACTUAL FINDINGS

1. On July 1, 2004, the Board issued Respondent Physician's and Surgeon's Certificate (license) No. A 87986. Respondent's license is in full force and effect until July 31, 2020, unless renewed or revoked.

Accusation

2. On April 10, 2018, complainant, in her official capacity, made and served an Accusation against Respondent, seeking to discipline his license for acts of gross negligence, repeated acts of negligence, and failure to maintain adequate and accurate medical records during his treatment of A.P. on August 10, 2016. More specifically, complainant alleges Respondent failed to: document an adequate medical history, abnormal vital signs and an accurate heart examination; diagnosis A.P. with dehydration and incorrectly diagnosed A.P. with non-infectious gastroenteritis; test A.P.'s orthostatic vital signs (OVS), test for a urinary tract infection (UTI), and conduct blood tests; treat A.J. with the proper medication; and document patient status and

vital signs prior to discharge, spend sufficient time with A.P. to assess and reassess before discharge, or provide sufficient discharge instructions.

3. On April 13, 2019, Respondent timely filed a Notice of Defense, requesting an administrative hearing before OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq. This hearing followed.

Background

4. Respondent was born and raised in China. He completed a Medical Degree in 1986 and a Master of Science in 1989 from Sun Yet-sen University of Medical Sciences. In 1990, Respondent moved to the United States, and began a Doctorate of Philosophy in pathology at the University of Medicine and Dentistry of New Jersey. He completed his Doctorate in 1995. From 1996 to 2000, he was a resident in internal medicine and pediatrics at Overlook Hospital at Columbia University, New Jersey. In 2000, Respondent was licensed to practice medicine in New Jersey. From 2000 to 2005, Respondent worked as an emergency department (ED) physician in Trenton, New Jersey. In 2004, he became licensed to practice medicine in California, and in 2005, Respondent began practicing in California as an ED physician in Sacramento at Sutter Medical Center. He is Board Certified in internal medicine (2000, recertified in 2012), and was Board Certified in Pediatrics from 2000 to 2014. Respondent has treated ED patients for 11 years, and has treated urgent care patients for an additional 11 years. Respondent has no prior discipline history.

5. Currently, Respondent is a primary care physician (PCP) at Lincoln Associates Inc., serving a population of 3,000 seniors. He is also the owner/operator of several urgent care facilities in the greater Sacramento area, including the Elk Grove

and Sacramento Urgent Care Clinics. The conduct at issue occurred at the Sacramento Urgent Care Clinic on August 10, 2016, when Respondent provided care and treatment to a 16-year-old adolescent complaining of low back pain, nausea, vomiting, and diarrhea.

Conduct at Issue

6. On August 10, 2016, A.R. drove her son, A.P., to the Sacramento Urgent Care Clinic. A.R. checked-in with the receptionist and was asked to complete a two-page information sheet, seeking, among other things: reason for the visit - "back hurt, throw up, weak, headach[e]" and PCP - Ravinder Khaira, M.D. A.R. then submitted the completed information sheet, her insurance card and driver's license to the receptionist. At 1:59 p.m., the receptionist printed patient stickers for A.P. (name, social security number, birthdate, age, visit date and time) and placed a sticker at the top of each page of a three-page pro-forma Evaluation/Management (E/M) form (medical record). A.P. was nauseous and asked to use the bathroom. A.P. and A.R. were directed to the bathroom located inside the treatment area; they walked passed Respondent, who was sitting at the Nurses Station. From outside the bathroom, Respondent could hear A.P. heaving and vomiting. A.P. and A.R. exited the bathroom and Medical Assistant (MA) Jordan Gill led them through the treatment area to Examination Area 2 (Exam 2). MA Gill confirmed A.P.'s date of birth (16 years and three months old), took A.P.'s vital signs, and questioned A.P. about his main problem and symptomology.

MA Gill recorded his findings in the medical record, as follows: blood pressure (BP) - 164/94, pulse (P) - 142, temperature (T) - 99.9 degrees Fahrenheit, oxygen

saturation - 96 percent, weight and height were left blank[1]; Main Problem - Pain; Date of onset - August 7, 2016; Where is it - Back; Makes worse/better - Not Applicable; Timing of Pain is - Constant; Related Symptoms - Nausea, vomiting, diarrhea; Severity of Pain - Pain/Discomfort 10 of 10; Quality of Pain - Sharp; What caused Pain - Not injury, Not motor vehicle accident, Not work-related; Chronic/Inactive Conditions - None; Current Medications - None; Family History - None; Tobacco and Alcohol - Never; Street Drugs - No; Allergies - Negative Acknowledgement. MA Gill left A.P. and A.R. and provided A.P.'s medical record to Respondent at the Nurses Station.

7. Respondent reviewed A.P.'s medical record, entered Exam 2, and met A.P. and A.R. Respondent questioned A.P. and A.R. about the main reason for the visit. Respondent did not repeat medical history questions; instead, relying on the MA and his documentation in the medical chart. Following the physical examination, Respondent documented "normal/negative" in the medical chart for all of the following categories:

> well-developed, well-nourished (WDWN); Eyes (icteric or injected conjunctivae); Musculoskeletal (gait and station); Ear, Nose, and Throat (mouth pallor of oral mucosa, ear pinnae and external nose, tympanic membrane and ear canal red and/or bulging, tenderness of sinuses on percussion); Lymph nodes (cervical or inguinal lymphadenopathy); skin (rashes, cyanosis, ecchymosis, or laceration, warm, cool or tender on palpation); Respiratory (respiratory distress - retraction, access, muscles, diaphragm

[1] The same day at the Sutter ED, A.P. weighed 379 pounds.

movement), Auscultation (breath sounds, crackles, rubs, wheezing); Cardiac (heart auscultation - murmurs, rubs, gallops, clicks, pretibial or pedal edema); Gastrointestinal/abdomen (tenderness or mass to palpation, liver and spleen enlarged or tender, punch tenderness for involvement of diaphragm, liver, spleen); and Neurological (cranial nerves II-XII ([i.e., oculomotor nerve (III), trochlear nerve (IV), abducens nerve (VI), vestibulocochlear nerve (VIII), glossopharyngeal nerve (IX), vagus nerve (X), and hypoglossal nerve (XII)]).

Respondent drew an arrow from GI/abdominal and handwrote: "tender to lower back." Respondent documented a diagnosis in the medical record by marking the following boxes: Nausea with emesis; Gastroenteritis/enteritis/colitis, not infectious; and back pain. Respondent ordered Toradol, 60 milligrams (mg.) injection, for the back pain, and prescribed Zofran 8mg. ODT (orally disintegrating tablets) for the nausea.

8. Respondent left A.P. and A.R. and directed MA Gill to administer the Toradol injection. Respondent went to the nurses' station and began A.P.'s discharge paperwork. At approximately 2:13 p.m., Respondent printed discharge instructions for A.P. for the topics of Gastroenteritis (two pages) and Food Poisoning (two pages). The discharge instructions included directions to "Get Prompt Medical Attention if any of the following symptoms occur," including "increasing abdominal pain or constant lower right abdominal pain, continued vomiting (unable to keep liquids down), frequent diarrhea (more than 5 times a day) . . . ." In addition, Respondent added, after "Special Advice: [go] back or go to the ER for worsening pain or fever."

9. At approximately 2:13 p.m., MA Gill reentered Exam 2 and administered A.P. a Toradol injection. MA Gill told A.P. to wait in Exam 2 and he would return in 10 minutes to check on him. MA Gill returned 10 minutes later, finding A.P. to be "good," noting the same in the medical chart. At approximately 2:23 p.m., A.P. was released and walked out of the Sacramento Urgent Care Clinic on his own accord.

Consumer Complaint

10. On December 2, 2016, A.R. filed a Consumer Complaint with the Board, alleging Respondent provided substandard care to her son, A.P., on August 10, 2016, at Sacramento Urgent Care, 7200 South Land Park Drive. She wrote:

> Took my son to urgent care. Doctor Li said he had food poisoning. He never asked his history or did any tests. My son drank a gallon of water. Dr. Li never asked if he was diabetic [illegible]. We were there only 20-25 minutes. Dr. Li gave him medicine for vomiting and a shot for pain. Got there at 1:59 p.m. Later that night, my son was worse so I took him to Sutter Medical Center. He was there for 2 days and died of cardiac arrest, respiratory arrest, diabetic ketoacidosis and acute pancreatitis, [and] diabetes. I feel Dr. Li misdiagnosed my son and didn't recognize how sick he was. He did <u>not</u> have food poisoning.

Board Investigation

11. The Board, in turn, provided the Complaint to Respondent and asked for a written response. On December 30, 2016, Respondent submitted a Statement of Care (Statement) to the Board, writing, in part:

I have reviewed the record of the visit. [A.P.] came to Sacramento Urgent Care on 8/10/16 with his mother. He complained of back pain, vomiting and diarrhea for 3 days. We . . . asked if he had any chronic/inactive medical conditions and was taking medications. Based on the record, it was denied for any chronic medical conditions or medications suggesting he was diabetic. On my physical exam, he was alert and walked with a normal gait. His skin was warm with normal color. He had no acute distress with normal breathing and oxygenation. He was not hypotensive. He was in pain/nausea and had a low grade Temp of 99.9F, which made it hard to assess his pulse rate. He had no tenderness in the abdomen. He had a muscular tenderness in the lower back, which could be caused by straining during vomiting. At that point, he had no clinical signs of severe dehydration or ketoacidosis. In an outpatient setting, the standard of care is symptomatic relief and oral rehydration. For an otherwise healthy 16 yr old patient, it was not warranted to do laboratory tests at that early stage of the disease, but to observe the progression. We gave him intramuscular injection of Toradol 60 mg to relieve his pain. After the injection, he was rechecked and his status was good. He was discharged with a prescription of Zofran 8 mg for nausea and continued oral hydration at home. He was given a detailed discharge instruction material for gastroenteritis and oral rehydration.

I specifically advised him to come back or go to ER for worsening pain and fever.

12. On April 30, 2017, the Board opened an investigation, and assigned the case to Special Investigator Belen Buntin. Ms. Buntin obtained A.P.'s medical records from Sutter Medical Center and Sacramento Urgent Care for August 10, through 12, 2016; interviewed A.R. on May 31, 2017, and Respondent on September 14, 2017; and obtained the expert medical opinion of Soni Nageswaran, M.D., on whether Respondent practiced within the standard of care for an urgent care doctor when he treated A.P. on August 10, 2016.

13. On January 3, 2018, Ms. Buntin issued an Investigative Report, summarizing her findings regarding the care and treatment of A.P. On September 9, 2018, after acquiring additional information, including the civil deposition transcripts of A.R. and Respondent, Respondent's curriculum vitae (CV), and all medical records for A.P. from Sacramento Urgent Care (August 10, 2016, and June 23, 2015 – ear infection), Ms. Buntin issued a Supplemental Investigation Report. Ms. Buntin testified at hearing consistent with her reports.

Medical Opinions

BOARD EXPERT – DR. SONI NAGESWARAN

14. Dr. Nageswaran completed a Bachelor of Art in biology in 1996, at Johns Hopkins University in Baltimore, Maryland. She earned a Medical Degree in 2001, from the University of Michigan Medical School, in Ann Arbor. Dr. Nageswaran then completed a three-year residency in family medicine at the University of California (UC), Davis Medical Center. In 2003, she became licensed to practice medicine in

California, and she has been Board Certified by the American Board of Family Medicine, since 2004.

15. Dr. Nageswaran has practiced medicine for 16 years, treating patients in outpatient clinics, a managed primary care office, an urgent care center, and a Veteran's Affairs emergency department. Currently, Dr. Nageswaran works for Sacramento County Correctional Health treating jailed men and women. She was a Board Medical Consultant from 2007 to 2008, and a Board Expert Reviewer from 2007 to 2009, and again from 2015 to the present. She has reviewed approximately nine cases for the Board, including this case, with all cases related to the standard of care. She has never testified before this hearing.

16. The Board retained Dr. Nageswaran to conduct a review of documents and provide an opinion as to whether Respondent acted within the medical standard of care when he treated A.P. On October 24, 2017, the Board provided Dr. Nageswaran with the following documents for her review: Consumer Complaint, Respondent's Statement of Care, medical records for A.P. from Sutter Medical Center and Sacramento Urgent Care from August 10, through 12, 2016; Respondent's Board interview transcript; and the Board Investigative Report.

17. On November 29, 2017, Dr. Nageswaran drafted an Expert Report, finding Respondent departed from the standard of care on 13 occasions when treating A.P.: five extreme departures and eight simple departures. On September 22, 2018, Dr. Nageswaran issued an addendum (Addendum 1), after reviewing new information, including the Board Supplemental Investigative Report, A.R.'s and Respondent's civil deposition transcripts, and all medical records for A.P. from Sacramento Urgent Care, adding an additional simple departure. On March 16, 2019, Dr. Nageswaran issued another addendum (Addendum 2), correcting the dates A.P. entered Sutter Medical

Center and died: the dates "are listed as 12/11/16 and 12/12/16, instead of 8/11/16 and 8/12/16, respectively." Dr. Nageswaran testified at hearing consistent with her Report and addendums.

18. To evaluate Respondent's care and treatment of A.P., Dr. Nageswaran compared it to the "community or professional expectation of practice in a particular clinical setting, based on medical training, textbooks, and hands-on training [or] how would [she] respond or act" if treating the same patient in the same environment. For Dr. Nageswaran, a simple departure "is not a huge error in judgement; not a completely uncommon practice; something seen before; not egregious." An extreme departure from the standard of care "may be more egregious; a commission or omission that may have consequences to the patient; something strange or surprising to see." Dr. Nageswaran opined in this case, an urgent care setting, a physician must identify the patient's chief complaint and symptoms; ask questions and conduct a relevant physical examination; and develop a diagnosis, treatment and follow-up plan. In addition, the physician must "document all pertinent positives and negatives, as well as the thought-process/decision-making for diagnosis."

19. Overall, Dr. Nageswaran was critical of Respondent's medical recordkeeping, noting repeated failures to: document pertinent positives and negatives; provide rationale for selecting diagnoses (e.g., non-infectious gastroenteritis), rejecting diagnoses (e.g., dehydration and urinary tract infection), not ordering tests (e.g., blood tests), and medication choices (e.g., Toradol and Zofran); and specify the nature and quality of each system examined (e.g., cardiovascular – tachycardic). More specifically, Dr. Nagaswaran found Respondent made 10 simple departures and five extreme departures. The simple departures include failing to: document sinus rhythm following a heart rate in the 140s; take OVS to access

dehydration; order blood tests; conduct an oral fluid tolerance test in a patient with gastrointestinal symptoms and an elevated heart rate; document patient's initial clinical status as "uncomfortable"; diagnose dehydration; spend an adequate amount of time assessing and reassessing A.P.; and provided incomplete discharge instructions to A.P. In addition, Respondent: used Toradol, 60 mg., a high dose NSAID, with side effects including gastric upset, in a patient with acute vomiting; and incorrectly documented non-infectious cause for acute gastroenteritis.

The extreme departures include failing to: document pertinent positives and negatives in the medical chart regarding the physical examination of A.P.; order a urinalysis in a patient presenting with an elevated temperature, low back pain, nausea, and vomiting; and document patient's improvement in clinical status before discharging patient. In addition, Respondent incorrectly noted a normal heart examination immediately following the taking of an elevated heart rate, and failed to repeat vitals prior to discharge; and a normal heart examination, without specifying heart rate or type of improvement in a patient who presented with significant tachycardia.

Examination

20. **Medical History**. In the urgent care setting, a "focused history" should be taken, tailored to the patient's presenting complaint. For a physical, it is important to note aspects of the exam that are noted to be present or absent which might directly relate to a possible diagnosis being ruled in or out. In this case, the medical record shows no past medical conditions, family history, past surgical history, social history, and medications. The entire Review of Systems was left blank, with no positives and negatives listed, suggesting that these items were not reviewed.

The physical examination section shows several systems evaluated, but all are checked off as normal with no qualifiers. The only pertinent finding written was "tender to low back," though this does not clarify which side, if it was palpation versus percussion, if there was spasm or mobility impairment, or other findings to suggest pure musculoskeletal cause to explain A.P.'s back pain of 10/10. In addition, more specific gastrointestinal and urological history or physical questions/examinations were not specifically noted, though these would be pertinent in helping characterize the nature of the patient's symptoms, narrow down possible etiologies, and support Respondent's medical decision-making. With the exception of one note "tender to lower back," Respondent simply checked boxes on the E/M form. Dr. Nageswaran testified that the standard of care also requires a more detailed description of A.P. and his pain (e.g., radiating/tingling; back only – middle or sides; leg pain too).

21. **Abnormal Vital Signs & Heart Examination**. A.P. had a high pulse rate - 142 (normal 60-100); high blood pressure - 164/94 (normal 100-120/60-70); a slightly elevated temperature - 99.9 degrees Fahrenheit (normal 98.6 degrees); and a slightly elevated respiratory rate - 22 (normal 20). Together, Dr. Nageswaran found A.P.'s vital signs to be "abnormal" and "very concerning" and without additional testing and/or improvement in vital signs, Dr. Nageswaran would not have sent A.P. home.

In addition, Dr. Nageswaran questions the accuracy and reliability of Respondent's physical examination of A.P. Respondent checked the box marking A.P.'s heart exam as normal, less than 10 minutes after his pulse rate was 142 or tachycardic. In his Board interview, Respondent said he marked normal because A.P.'s heart rate was between 110-120 during the physical examination. However, there is no heart rate or sinus rhythm listed in A.P.'s medical chart for Respondent's examination, no EKG was performed, and no follow-up vitals were taken to confirm. Failure to document a

sinus rhythm is a simple departure, and if Respondent had documented a heart rate of below 120, then there was no departure from the standard of care.

Diagnosis

22. **Dehydration**. A.P. presented with symptoms concerning for dehydration, and Respondent should have documented specifics associated with dehydration in the history and physical (e.g., skin turgor, mucous membrane, ability to make tears, and urinary values), showing dehydration was assessed. "Also, with the patient's elevated heart rate in the setting of this illness, it would make most sense to attribute this to dehydration," which should have been listed as a diagnosis and required specific treatment with medication and hydration. Failure to list dehydration as a diagnosis represents a simple departure.

23. **Non-infectious Diagnosis.** Dr. Nageswaran found nothing in the medical chart to suggest a non-infectious cause for A.P.'s condition. In fact, the most common forms of gastroenteritis are viral, then bacterial and parasitic. Non-infectious causes of gastroenteritis have recurrent symptoms, caused by a food intolerance, starting a new medication known to cause stomach upset, or food poisoning. Non-infectious gastroenteritis is diagnosed based on a specific history. Respondent failed to document a diet history, to rule food poisoning in or out.

> [Ultimately, w]ith a typical acute presentation and without red flag symptoms or other specific history . . . an otherwise healthy patient presenting with sudden onset nausea, vomiting, and/or diarrhea would be diagnosed with acute gastroenteritis, presumed viral (and self-limited), unless there were reasons to consider otherwise.

> Diagnosing A.P. with acute gastroenteritis non-infectious is a simple departure from the standard of care.

Testing

24. **Orthostatic Vital Signs (OVS)**. A diagnosis of dehydration can be confirmed with OVS, which requires heart rate and blood pressure readings in three different positions – lying, sitting, and standing. Not taking OVS represents a simple departure.

25. **Urinary Tract Infection (UTI)**. Low back pain, nausea, and vomiting are all symptoms commonly associated with pyelonephritis (kidney infection) as well as renal colic (pain from kidney stone). Pyelonephritis can also have a fever, weakness, fatigue, and other constitutional problems. Both of these diagnoses are ruled out or diagnosed using a routine urinary analysis.

> Despite UTIs being uncommon in young males without urinary symptoms, they can still happen. With this patient presenting with nausea, vomiting, and also elevated temperature in addition to severe low back pain, it would have been the standard of care to check his urine for signs of infection or kidney stones, even in the absence of urinary symptoms. That said, his gastrointestinal symptoms were much more classic for the more common diagnosis of acute gastroenteritis, so it is really the presence of the low back pain symptoms that would lead a one to consider these urological conditions as possible causes too. Not checking a [urinary analysis] with this particular clinical presentation

(with the significant low back pain) represents an extreme departure.

26. **Blood Tests.** Blood tests help narrow down possible conditions a patient may have, help determine electrolyte abnormalities, hepatic causes to symptoms, renal involvement as a result of hydration status, as well as the extent of any infection that might be present. Blood tests are routinely performed on adults in the ED, because it is faster and easier to rule out major conditions. Blood tests are not always available in urgent care environments, so a doctor must determine whether it is appropriate to send a patient to the ED for blood tests. In this case, the clinic could have run some blood tests, and with a low-grade fever and very high heart rate, suggesting dehydration or physiological distress, blood work should have been attempted and failure to do so was a simple departure from the standard of care.

Treatment

27. **Medication.** Toradol is a nonsteroidal anti-inflammatory drug (NSAID) well known to cause gastric upset. There are options other than Toradol for pain management in an urgent care setting. "[I]n the face of acute gastrointestinal disturbance (when resting and healing of the gastric lining is essential for the tolerance of oral intake and the overall recovery process), one would ordinarily try to avoid NSAIDs, especially in a strong dose (even in a large patient)." "Though there may be limited options for effectively treating this patient's significant back pain without the risk of other adverse events, in the setting of acute vomiting, the use of a high dose NSAID represents a simple departure.

28. Respondent also prescribed Zofran, with the expectation that A.P. would be able to rehydrate himself orally once he took the medicine. "However, besides the

time needed to fill the prescription and ingest it (during which time the patient would have presumably been losing more fluids from his significant vomiting symptoms), it was not known if the patient would have been able to tolerate ingesting the medication itself, nor that it would be digested or absorbed." As such, Respondent should have monitored A.P. for oral fluid tolerance before discharge, especially given A.P.'s elevated heart rate (even if it were <120). Failure to conduct and monitor the oral fluid tolerance of A.P. prior to discharge represents a simple departure from the standard of care.

Discharge

29. **Patient Status/Repeat Vital Signs.** During his Board interview, Respondent stated that A.P. was "pretty uncomfortable" when he arrived at the clinic and was immediately taken back to be seen, and following the Toradol injection, Respondent stated that A.P. was looking better, stable, and walking around. Neither was documented in the medical chart; failure to document the clinical status on admission is a simple departure and failure to document the improvement in clinical status prior to discharge is an extreme departure.

30. In addition, minutes after arrival, Respondent conducted a physical of A.P. and marked NAD (no acute distress) in the medical chart, suggesting a very different clinical status than "pretty uncomfortable." Also, Respondent did not document any improvement in A.P.'s clinical status before discharge. Doctors must watch patients, and document presentation and improvement in clinical status in the medical chart; the documentation corroborates the doctor's decision-making (e.g., discharge versus send to ED). Moreover, no repeat vitals where taken, leaving the medical chart absent of any final clinical status for A.P.

31. **Time with Patient.** Dr. Nageswaran found A.P.'s time in the clinic to be approximately 14 minutes, insufficient time to adequately assess and reassess A.P. The time stamp for patient check-in was 14 minutes before A.P. was given a Toradol injection, suggesting that the time between receptionist check-in, vital signs by MA Gill, physical examination and ordering treatment by Respondent, and injection by MA Gill was only 14 minutes total. Also, the discharge paperwork was printed at the same time the Toradol injection was administered and A.P. signed the discharge instruction acknowledgement sheet 10 minutes later, indicating that A.P. would have been observed, reevaluated, and released no more than eight to nine minutes after receiving the injection. For the amount of items claimed to have been done, and to adequately assess and reassess A.P., the time spent was insufficient and represented a simple departure.

32. **Discharge Instructions.** Dr. Nageswaran found the discharge instructions to be lacking, with no direction to seek further care if the patient's pain does not decrease and/or he continues to vomit, with the concern being dehydration. In addition, there is no direction to report to the ED if the problem worsens or new symptoms appear. The lack of more complete or relevant written discharge recommendations, especially with several concerning findings, represents a simple departure.

RESPONDENT EXPERT – JOHN (JACK) WOOD, D.O.

33. Dr. Wood completed a Bachelor of Art in accounting in 1971, at Luther College, Decorah, Iowa. He earned his Doctor of Osteopathy in 1976, from Des Moines University, College of Osteopathic Medicine. Dr. Wood then completed a one-year internship at Des Moines General Hospital, and then a two-year residency in emergency medicine at the Los Angeles County/University of Southern California

Medical Center. In addition, he served in the United State Air Force, as a Major, from 1977 to 1984. In 1980, he became licensed to practice medicine in California. He is a Diplomate of the National Board of Medical Examiners for Osteopathic Medicine and Surgery, the American Board of Emergency Medicine (Board Certified 1983 to 2013), and the American Osteopathic Board of Emergency Medicine (Board Certified 1984 to present). He is also a Fellow of the American College of Emergency Physicians. Dr. Wood has treated patients in EDs for 39 years.

34. Currently, Dr. Wood is a physician in the ED at Mercy San Juan Medical Center. He handles both critical care patients, where the focus is on the immediate trauma or injury, and urgent care patients, where the focus is on triaging the chief complaints. He has seen thousands of patients in both critical and urgent care, and reviewed hundreds of urgent care medical records over his 39-year career. He is also the Medical Director for American Medical Response, National College of Technical Instruction (NCTI), and Yocha Dehe Fire Department, as well as a clinical professor at California Northstate University in Elk Grove, California. In addition, he is on the Quality Care Committee at Mercy San Juan, evaluating the care and treatment provided by Mercy doctors. Finally, Dr. Wood is an Oral Examiner for the Board. He has provided testimony in court and in deposition in civil matters, on behalf of the plaintiff only once.

35. Respondent retained Dr. Wood to conduct a review of documents and provide an opinion as to whether Respondent acted within the medical standard of care when he treated A.P. Dr. Wood reviewed the following documents: Respondent's Statement of Care (December 30, 2016) and letter to Board (March 28, 2018); medical records for A.P. from Sutter Medical Center and Sacramento Urgent Care from August 10, through 12, 2016; Respondent's Board interview transcript; Dr. Nageswaran's

Expert Report, addendums, and CV; the Board Investigative Report and Accusation; and A.R.'s and Respondent's civil deposition transcripts. On May 6, 2019, Dr. Wood drafted an Expert Report, finding Respondent made a single simple departure from the standard of care on one occasion in his care and treatment of A.P. Dr. Wood did note some deficiencies in medical recordkeeping, as discussed below. Dr. Wood testified at hearing consistent with his Report.

36. At hearing, Dr. Wood provided a review of the case, noting his opinions, and the basis upon which he made his findings. To evaluate Respondent's care and treatment of A.P., Dr. Wood compared it to how a reasonable or prudent doctor, in a Sacramento urgent care facility, who had the same or similar training, would treat a patient presenting with similar symptoms. For Dr. Wood, a simple departure from the standard of care is a minor deviation that does not affect the care and treatment of the patient, but an extreme departure is care that is out of the ordinary, something a reasonable or prudent doctor would not do, perform, or eliminate from the treatment plan.

37. In this case, Dr. Wood compared Respondent's care with the care and treatment appropriate for a patient presenting to a Sacramento urgent care environment with the same symptoms and presentation as A.P. More specifically, Dr. Wood addresses each issue/departure identified by Dr. Nageswaran, and he opined that Respondent engaged in one simple departure from the standard of care by failing to repeat A.P.'s vital signs before discharge.

Examination

38. **Medical History**. Dr. Wood found Respondent took a medical history of A.P. that complied with the standard of care The E/M or medical chart was complete

with answers to queries relevant to an adequate medical history, including: main problem, date of onset, location, list of related symptoms, severity, quality, causation, associated circumstances if applicable, chronic/inactive conditions, medications, surgeries, family history, substance use and allergies. In addition, Respondent evaluated A.P.'s heart rhythm, when he conducted a cardiovascular examination, finding normal results and no murmurs, rubs, gallops, or clicks. Dr. Wood noted that an abnormal sinus rhythm would have been documented in the medical chart, but not a normal sinus rhythm. Respondent found a heart rate of 120, which was not alarming given A.P.'s condition. This heart rate is not documented, and Respondent has no independent recollection of A.P.'s heart rate.

39. **Abnormal Vital Signs and Heart Examination**. Dr. Wood conceded, A.P. presented with abnormal vital signs. However, A.P. was an obese adolescent, presenting with complaints of nausea and vomiting, and appeared anxious and uncomfortable. Dr. Wood noted:

> It is extremely common for patients to present initially with elevated vital signs in this type of setting, and, after a brief period of time, the patient's vitals begin to normalize when they are settled in a more controlled and less threatening environment such as an examining room. It is also very common to have abnormal vitals when a patient is in pain and vomiting.

40. Following the initial vitals taken by MA Gill, Respondent conducted a physical examination of A.P. and listened to his heart. The E/M does not include a category for tachycardia, but given A.P.'s condition, an elevated blood pressure and tachycardic heart rate of 120, would not need to be noted. Dr. Wood noted that the

Sutter ED made the same normal finding. Nonetheless, for Dr. Wood, failing to document A.P. was tachycardic constitutes a medical record documentation deficiency, not a deviation from the standard of care.

Diagnosis

41. **Dehydration**. Dr. Wood found Respondent's evaluation of A.P.'s hydration status, finding several relevant categories to be normal or negative, was within the standard of care. Respondent conducted an ear, nose, and throat examination, with no findings of dry mucus membranes, dull or sunken eyes or dark circles below the eyes, pallor of the oral mucosa, or a lack of skin turgor. In addition, Respondent evaluated the cranial nerves (CN 2-12), which required Respondent to look in A.P.'s mouth to assess any asymmetric movement of the uvula, and found no dry mucus membranes. Finally, Respondent completed an abdominal examination of A.P. and did not note any diminished or absence of bowel sounds, a sign of dehydration. Dr. Wood noted that the Sutter ED made a finding of mildly dry mouth hours later.

42. **Non-infectious Diagnosis.** Dr. Wood agreed with the diagnosis of gastroenteritis non-infectious. Non-infectious gastroenteritis is a common inflammation of the gastrointestinal tract (acute gastroenteritis), food borne (food poisoning) or viral etiology (stomach flu). Infectious gastroenteritis usually applies to more serious gastrointestinal infections (e.g., Shigella, Salmonella, E. Coli), which can cause a more severe illness and spread to others with relatively close contact. In this case, no one else in A.P.'s family was ill, so the non-infectious label was appropriate. However, Dr. Wood would have wanted a history from A.P. of recently ingested foods to rule out food poisoning; Dr. Wood considers the failure to be a documentation deficiency.

Testing

43. **Orthostatic Vital Signs (OVS)**. Dr. Wood opined the standard of care did not require Respondent to take OVS from A.P. To test OVS, vital signs are taken from a patient to check coordination when moving, without feeling lightheaded or dizzy or a sensation of fainting or falling. Respondent noted in the medical chart, A.P. had normal gait and station, and could ambulate throughout the clinic; the OVS was unnecessary. In addition, A.P. was obese and in pain and taking OVS would have undoubtedly made him more uncomfortable. Finally, Dr. Wood referenced several journal articles, as well as his own personal experiences, finding OVS as an unreliable measurement for dehydration; he has not taken OVS for more than 15 years in the ED.

44. **Urinary Tract Infection (UTI)**. Dr. Wood opined the standard of care did not require Respondent to test A.P. for a UTI. A.P. had a low-grade fever, consistent with gastroenteritis, not an infection. A.P. had low back pain, not in the costovertebral angle area where kidney discomfort would be appreciated. A.P. made no complaints of decreased urine output, dysuria, discolored urine, urethral discharge, hematuria, flank pain or polyuria. In addition, a male adolescent has such an extremely low index of suspicion for urinary related pathology, it was unnecessary to include a UTI in a differential diagnosis. With a chief complaint of back pain, most doctors would find a musculoskeletal etiology.

45. **Blood Tests.** Dr. Wood opined the standard of care did not require Respondent to order blood tests for A.P. Blood tests are not a routine procedure in urgent care environments, especially when no indication for them are present. With a diagnosis of gastritis with low back pain, blood tests were not indicated. Further, it is unnecessary to document in the medical chart reasons blood tests were not ordered. Finally, blood tests have to be sent out for analysis from the urgent care facility, with

results returned in 24-72 hours; in general, blood tests are not practical in an urgent care environment.

Treatment

46. **Medication.** Dr. Wood found Respondent's diagnosis and treatment plan for A.P. to be within the standard of care. Respondent ordered a Toradol injection to reduce the pain; a commonly used NSAID to treat musculoskeletal pain or discomfort, with an uncommon potential to cause gastric upset. In addition, pain can often contribute to other symptoms, including nausea and vomiting. Dr. Wood frequently uses Toradol to treat patients with significant pain, along with nausea and vomiting, with excellent improvement in their discomfort and resolution of their nausea and vomiting as a result of the reduction in pain. Finally, the Toradol was effective in this case, because A.P. presented to the Sutter ED, a few hours later, with no complaints of back pain.

47. In addition, Respondent prescribed Zofran 8 mg ODT. Zofran is an anti-emetic medication appropriate to decrease nausea and vomiting. The oral dissolving tablet is placed under the tongue to dissolve without having to swallow the medication. In addition, A.P. was not actively vomiting upon discharge. Zofran was the appropriate medication to prescribe to A.P.

Discharge

48. **Patient Status/Repeat Vital Signs.** Dr. Wood found Respondent's documentation of A.P.'s status, was within the standard of care. On the E/M, Respondent marked NAD (no acute distress), meaning A.P. was not likely to become unstable in the next five minutes. The Sutter ED found A.P. to be NAD as well. However, the E/M does not include repeat vital signs before A.P was discharged.

Typically, repeat vital signs are taken by nurses or medical assistants, and when abnormal, are reported to the treating doctor. In this case, MA Gill forgot to take repeat vitals of A.P. MA Gill did, however, check A.P.'s status after the Toradol injection and note the patient was "good." Nonetheless, Respondent is responsible for the care and treatment of A.P., including omissions by his staff. Dr. Wood found the failure to repeat vital signs a simple departure from the standard of care.

49. **Time with Patient.** Dr. Wood found A.P.'s time in the clinic to be approximately 27 minutes, sufficient for a history, physical examination, pharmaceutical intervention and reassessment. Dr. Wood noted that discharge instructions are almost always printed prior to actual patient discharge; on the assumption that the patient will get better with treatment. In this case, A.P. checked in about 1:54 p.m. His insurance was run at 1:56 p.m. and the E/M stickers were printed at 1:59 p.m. Between 2 and 2:12 p.m., MA Gill took vital signs and a medical history, then Respondent completed a physical examination and diagnosis. Then, Respondent directed MA Gill to give a Toradol injection. At approximately 2:13 p.m., A.P. was given a Toradol injection, and told to wait for 10 minutes. Also at 2:13 p.m., Respondent printed discharge instructions at the nursing station, and at 2:23 p.m., A.R. signed the discharge instructions acknowledgement form.

50. **Discharge Instruction.** Finally, A.R./A.P. were provided with discharge instructions for gastroenteritis and food poisoning, that complied with the standard of care. The discharge instructions included directions to "Get Prompt Medical Attention if any of the following symptoms occur," including "increasing abdominal pain or constant lower right abdominal pain, continued vomiting (unable to keep liquids down), frequent diarrhea (more than 5 times a day) . . . ." In addition, Respondent added, "Special Advice: back or go to the ER for worsening pain or fever."

51. In sum, Dr. Wood found Respondent did not commit an extreme departure from the standard of care in his evaluation, treatment and disposition of A.P. on August 10, 2016. Dr. Wood found one simple departure from the standard of care for failing to take repeat vitals of A.P. In addition, Dr. Wood indicated a need for improvement in Respondent's medical recordkeeping, but noted that Respondent has since taken the University of California, San Diego PACE (Physician Assessment and Clinical Education) Medical Recordkeeping course (April 2018).

Respondent

52. Since December 2016, Respondent has completed 57.5 hours of continuing education, in areas including: cardiology, cancer, breast cancer, vascular, atrial fibrillation, UTIs, renal failure, dyslipidemia, cognitive decline, palliative care, psoriasis, and medical recordkeeping at UC San Diego, PACE in April 2018. Respondent attended the PACE course to learn and improve his documentation. He appreciated the content and examples. He established a new baseline for good documentation and understands the legal implications thereof. He completed in-class exercises with oversight, and came away with a good understanding of the requirements for successful documentation.

53. Currently, Respondent is the Medical Director for Lincoln Medical Associates Inc., Sacramento Urgent Care Inc., Elk Grove Urgent Care Inc., Folsom Urgent Care Inc., and Davis Urgent Care Inc., providing direct patient care. In addition, Respondent teaches family medicine residents and physician assistant and nurse practitioner students. Respondent began opening urgent care clinics while working at Sutter. He was struck by the congestion of patients in the ED; people traveling long distances for treatment of minor injuries; and the lack of urgent care facilities in the Sacramento area.

In 2008, with Allen Lin, M.D., another Sutter ED physician, Respondent opened the Elk Grove Urgent Care Clinic. In 2009, they opened the Sacramento Urgent Care Clinic on Florin Road. In 2010, the primary care physician (PCP) from Lincoln Medical Associates called Respondent and relayed his plans for retirement; he asked Respondent to buy his practice, serving 3,000 seniors near the SunCity senior community. Respondent bought the Lincoln practice. In 2012, the PCP from Freeport Medical Center called Respondent and relayed his terminal medical diagnosis; he asked Respondent to buy his practice, serving a Cantonese speaking, Chinese immigrant population of seniors. Respondent bought the Freeport practice, and maintained current patients until they found new PCPs; he took a financial loss on the business and closed the practice in 2017. Currently, Respondent works three to four days per week in Lincoln and sees 25 to 30 patients each week. He works at Sacramento Urgent Care and Elk Grove Urgent Care clinics five to seven days per month, seeing 40 to 50 patients. He employs and supervises a staff of 100 employees.

Respondent maintains the same Clinical Policies and Procedure Manual at each clinic, last updated on September 20, 2015. The Manual, under Triage and Initial Assessment of the Patient to the Urgent Care Center, includes the following mandate: "all abnormal vitals must be rechecked before discharge and must notify provider to be signed off." Respondent explained that in A.P.'s case, MA Gill did not follow the mandate as required. After the Board notified Respondent of the Consumer Complaint, he counseled MA Gill, and distributed a new one-page policy to all employees, for signature, stating:

> When we have a patient that has abnormal vitals, you must repeat the vitals prior to the patient's departure, and inform the Provider on staff of the vitals before the patient leaves.

> The Provider must sign off on the first as well as the second set of vitals. Vitals should be repeated if: Abnormal EKG, Low O2 stats, breathing treatment [ordered], high blood pressure, low blood pressure, injection for pain med, all abnormal vitals in general.

54. Respondent is also a civic-minded person. He volunteers with the Sacramento Job Corps, providing on the job training to low-income students. He sponsors the Elk Grove Police Activities League Boxing and Football teams, and provides free physicals to all athletes, as well as medical care during tournaments. He also repeatedly sponsors: Cosumnes Community Service District parks and recreation t-ball, Elk Grove Girls softball, Mateen Boxing Club West Sacramento tournament, Elk Grove Artists, Elk Grove Annual Pumpkin and Harvest festivals, UC Davis Annual Picnic Day, Celebrate Davis Day, Mercy Foundation Annual Golf Tournament, Elk Grove Annual Dickens Faire, Elk Grove Youth Sports Foundation "Home Run" Scholarship, Elk Grove Summer Farmer's Market, and Elk Grove Old Town Association Chili Cook-off, among others. In addition, Respondent donates to The Lord's Grace Chinese Church in Roseville, the Davis Police Association, and the Crocker Art Museum.

55. Respondent offered eight character letters from professional colleagues, patients, and community organizations: Jose Alberto Arevalo, M.D., Chief Medical Officer, Sutter Independent Physicians, 10 years; Joseph J. Jammal, M.D., cardiologist, 10 years; Ban Truong, D.O., 10 years; and Dr. Li, 12 years; patients Douglas W. Gongaware, Jr., nine years and Amy Tong, seven years; and May-Va Vang, Work Based Learning Coordinator, Sacramento Job Corps Center, and Fo Quang Shan Bodhi Temple. In sum, the letters describe Respondent as:

> a hardworking physician with great medical knowledge in clinical medicine, [who is] professional, caring [and] compassionate; [he] provide[s] the highest level of quality medical care; [is] a role model in the community [and] well-respected; [and he] continues to improve his health care delivery; patients love Dr. Li.

56. Each letter makes specific reference to an act of kindness initiated by Respondent, both professionally and in the community, personally. The letters all acknowledge the Accusation issued by the Board, dismissing it as uncharacteristic of Respondent; knowing Respondent to only provide the utmost in care to his patients. Dr. Lin and Ms. Tong also testified at hearing consistent with their letters.

57. Finally, in a statement to the Board, Respondent reflected:

> I am remorseful for what happened to this patient. I take my Hippocratic Oath very seriously not to do harm, and in my 20 plus year medical career, I have abided by that oath, and have tried to help my patients as much as I can. I have always kept up with my CME and I have been to PACE to improve my recordkeeping. I have been quite humbled by this incident and I will continue to look for ways to improve myself.

Discussion

58. Respondent has practiced emergency and urgent care medicine for 22 years. He has an unblemished medical record. At issue: Respondent's care and treatment of A.P., a 16-year-old adolescent, in a Sacramento urgent care environment,

presenting with low back pain, nausea, vomiting, and diarrhea for three days. The standard of care in an urgent care environment is treatment for specific complaints or symptoms, not for diagnostic evaluation of chronic medical conditions, such as diabetes.

At Sacramento Urgent Care Clinic, MA Gill took a medical history and vital signs, Respondent conducted a focused physical examination, and A.P. was treated with a Toradol 60 mg. injection for low back pain and a prescription for Zofran 8 mg. ODT for the nausea and vomiting. He was observed for 10 minutes following the injection, then released. He was given discharge instructions for gastroenteritis and food poisoning, with detailed information, including the direction to go to the ED if symptoms worsened.

59. The Board offered Dr. Nageswaran to evaluate Respondent's care and treatment of A.P. Dr. Nageswaran has practiced medicine for 16 years, emergency medicine for two years and urgent care medicine for six years at four different clinics. She left the urgent care environments after becoming frustrated with management and the limited time allocated to each patient. She is familiar with the E/M used by Sacramento Urgent Care. She has used the same form, and believes simply checking boxes on the E/M is insufficient for adequate medical recordkeeping.

60. Dr. Nageswaran evaluated Respondent's care and treatment of A.P. and wrote a Report. Dr. Nageswaran's Report was lengthy. She divided the care and treatment of A.P. into subcategories, sometimes finding the same act to be negligent on multiple occasions. She faulted Respondent for failing to document or provide information that was in fact contained in the E/M and discharge instructions. She dismissed Respondent's normal/negative findings, because he simply checked boxes on the E/M and did not write out the same (e.g., found Respondent failed to evaluate

A.P. for dehydration, but Respondent checked boxes indicating a normal examination of his ears, nose, and throat, skin, and cranial nerves). She rejected the sufficiency of Respondent's documentation of patient status – pain/discomfort 10/10; instead, insisting specific language should have been included – "uncomfortable."

61. Dr. Wood has practiced emergency and urgent care medicine for 39 years. He is a seasoned veteran of the environment, and has experience evaluating doctors' quality of care. Dr. Wood found Respondent committed one simple departure from the standard of care and two documentation errors. Dr. Wood believes Respondent has addressed his documentation issues by attending the PACE course, and he found, in sum, Respondent practiced within the standard of care in his care and treatment of A.P.

62. Dr. Wood also has extensive experience in medical quality assurance evaluation, but has never evaluated cases for the Board, while Dr. Nageswaran has only evaluated cases for the Board. Dr. Wood conducts Board oral examinations, evaluating fledgling doctors, and has testified numerous times; Dr. Nageswaran has not. At hearing, Dr. Wood provided specific references to the E/M to support his opinions; Dr. Nageswaran pointed to her Report, which was written based on review of the records. While Dr. Nageswaran's testimony was less polished than Dr. Wood's, it provided a more persuasive assessment in key areas. Dr. Nageswaran did not testify as an advocate for the Board. She conceded points when warranted, and testified in a manner that was not outcome driven. In contrast, Dr. Wood's testimony appeared at times to be artificially constrained in order to limit his findings of the several deficiencies discussed to one simple departure, making him appear as an advocate for Respondent. Consequently, such factors generated some doubt concerning Dr.

Wood's expert testimony, rendering his opinion less convincing than Dr. Nageswaran's in the areas described below.

63. Relying on some but not all of an expert's opinions may be entirely appropriate. "It is well settled that the trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal. 3d 51, 67.) The trier of fact may also '"reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material.'" (*Id.* at pp. 67-68) Furthermore, the fact finder may also reject the testimony of a witness, even an expert, although it is not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal. 3d 875, 890.)

64. Given the above, there is clear and convincing evidence of one extreme departure from the standard of care by Respondent in the care and treatment of A.P.: MA Gill neglected to take repeat vital signs, which is entirely Respondent's responsibility. Additionally, there are two simple departures from the standard of care: Respondent failed to document A.P.'s heart rate, and failed to document A.P.'s history of recently ingested foods or bases for diagnosing gastroenteritis. Dr. Wood recognized the absence of this documentation as documentation deficiencies in Respondent's medical chart, but would not describe the deficiencies as simple departures from the standard of care. Dr. Nageswaran testified persuasively that the failure to document these items are simple departures from the standard of care.

LEGAL CONCLUSIONS

Standard of Proof

1. To revoke or suspend Respondent's medical license, complainant must establish the allegations and violations alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The requirement to produce clear and convincing evidence is a heavy burden, far in excess of the preponderance of evidence standard that is sufficient in most civil litigation. Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Purpose of Discipline

2. The purpose of the Medical Practice Act[2] is to assure the high quality of medical practice; in other words, to keep unqualified and undesirable persons and those guilty of unprofessional conduct out of the medical profession. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App. 3d 564, 574.) The imposition of license discipline does not depend on whether patients were injured by unprofessional medical practices. (See, *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d. 1471; *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.) Our courts

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[2] Business and Professions Code sections 2000, et seq.

have long held that the purpose of physician discipline by the Board is not penal but to "protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, the evils which could result from ignorance or incompetency or a lack of honesty and integrity." (*Furnish v. Board of Medical Examiners* (1957) 149 Cal.App.2d 326, 331.

Applicable Laws

3. Business and Professions Code section 2234 requires the Board to "take action against any licensee who is charged with unprofessional conduct." "Unprofessional conduct includes, but is not limited to: gross negligence and repeated negligent acts." (Bus. & Prof. Code, § 2234, subds. (b) & (c).) "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." (Bus. & Prof. Code, § 2234, subd. (c).)

4. In addition, Business and Professions Code section 2266 states: "[t]he failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct."

Cause for Discipline

5. Cause exists for disciplinary action under Business and Professions Code section 2234, subdivision (b), by reason of the matters set forth in the Factual Findings 6-63. Complainant proved by clear and convincing evidence Respondent engaged in gross negligence in his care and treatment of A.P.

6. Cause exists for disciplinary action under Business and Professions Code

section 2234, subdivision (c), by reason of the matters set forth in the Factual Findings 6-63. Complainant proved by clear and convincing evidence Respondent engaged in repeatedly negligent acts in his care and treatment of A.P.

7. Cause exists for disciplinary action under Business and Professions Code section 2266, by reason of the matters set forth in the Factual Findings 6-63. Complainant proved by clear and convincing evidence Respondent failed to maintain an adequate and accurate record for A.P. on August 10, 2016.

Level of Discipline

8. Considering the Factual Findings and Legal Conclusions, discipline is warranted in this case for public protection based on each separate and independent cause for discipline. The Board's *Manual of Model Disciplinary Orders and Disciplinary Guidelines* (12th Edition, 2016) (Disciplinary Guidelines) recommend five years' probation as the minimum level of discipline for each of the categories of misconduct found in this matter, in addition to various terms and conditions. Departure from the recommended length of probation and some of the recommended conditions is warranted here after taking the following into consideration: This case involved a single patient; Respondent had no prior disciplinary action against his certificate; and Respondent has expressed remorse for the deficiencies in this case, acknowledged there is room for improvement, and has taken steps on his own to begin remediation. In 2018, Respondent attended a PACE Medical Recordkeeping class, providing him a refresher course and refocusing him on recordkeeping as a priority, along with his care and treatment of patients. With regard to the failure to take repeat vital signs, Respondent counseled MA Gill, and issued a reminder policy to all employees regarding the necessity for repeat vital signs. Consequently, deviation from the Disciplinary Guidelines is appropriate in this matter, and a three-year probationary

period, an education course, medical record keeping course, and a practice monitor will serve to protect the public and support Respondent's remediation. Such educational requirements and monitoring are necessary to ensure Respondent effectively incorporates changes into his practice for patient safety.

ORDER

Certificate No. A 87986 issued to Respondent Quinn Li, M.D., is revoked. However, the revocation is stayed, and Respondent is placed on probation for three (3) years upon the following terms and conditions.

1. Education Course

Within 60 calendar days of the effective date of this Decision, and on an annual basis thereafter, Respondent shall submit to the Board or its designee for its prior approval educational program(s) or course(s) which shall not be less than 40 hours per year, for each year of probation. The educational program(s) or course(s) shall be aimed at correcting any areas of deficient practice or knowledge and shall be Category I certified. The educational program(s) or course(s) shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure. Following the completion of each course, the Board or its designee may administer an examination to test Respondent's knowledge of the course. Respondent shall provide proof of attendance for 65 hours of CME of which 40 hours were in satisfaction of this condition.

2. Medical Record Keeping Course

Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a course in medical record keeping approved in advance by the Board or its designee. Respondent shall provide the approved course provider with any information and documents that the approved course provider may deem pertinent. Respondent shall participate in and successfully complete the classroom component of the course not later than six (6) months after Respondent's initial enrollment. Respondent shall successfully complete any other component of the course within one (1) year of enrollment. The medical record keeping course shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A medical record keeping course taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Board or its designee had the course been taken after the effective date of this Decision.

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

3. Monitoring - Practice

Within 30 calendar days of the effective date of this Decision, Respondent shall submit to the Board or its designee for prior approval as a practice monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose

licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with Respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in Respondent's field of practice, and must agree to serve as Respondent's monitor. Respondent shall pay all monitoring costs.

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

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

If Respondent fails to obtain approval of a monitor within 60 calendar days of the effective date of this Decision, Respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a monitor is approved to provide monitoring responsibility.

The monitor(s) shall submit a quarterly written report to the Board or its designee which includes an evaluation of Respondent's performance, indicating whether Respondent's practices are within the standards of practice of medicine, and whether Respondent is practicing medicine safely. It shall be the sole responsibility of Respondent to ensure that the monitor submits the quarterly written reports to the Board or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, Respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If Respondent fails to obtain approval of a replacement monitor within 60 calendar days of the resignation or unavailability of the monitor, Respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified Respondent shall cease the practice of medicine until a replacement monitor is approved and assumes monitoring responsibility.

In lieu of a monitor, Respondent may participate in a professional enhancement program approved in advance by the Board or its designee, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at Respondent's expense during the term of probation.

4. Notification

Within seven (7) days of the effective date of this Decision, the Respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to

Respondent, at any other facility where Respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to Respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

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

5. Supervision of Physician Assistants and Advanced Practice Nurses

During probation, Respondent is prohibited from supervising physician assistants and advanced practice nurses.

6. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

7. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

8. General Probation Requirements

COMPLIANCE WITH PROBATION UNIT

Respondent shall comply with the Board's probation unit.

ADDRESS CHANGES

Respondent shall, at all times, keep the Board informed of Respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021, subdivision (b).

PLACE OF PRACTICE

Respondent shall not engage in the practice of medicine in Respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

LICENSE RENEWAL

Respondent shall maintain a current and renewed California physician's and surgeon's license.

TRAVEL OR RESIDENCE OUTSIDE CALIFORNIA

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

In the event Respondent should leave the State of California to reside or to practice Respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

9. Interview with the Board or its Designee

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

10. Non-practice While on Probation

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of Respondent's return to practice. Non-practice is defined as any period of time Respondent is not practicing medicine as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If Respondent resides in California and is considered to be in non-practice, Respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve Respondent from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event Respondent's period of non-practice while on probation exceeds 18 calendar months, Respondent shall successfully complete the Federation of State

Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Respondent's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice for a Respondent residing outside of California, will relieve Respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

11. Completion of Probation

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

12. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If Respondent violates probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke

Probation, or an Interim Suspension Order is filed against Respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

13. License Surrender

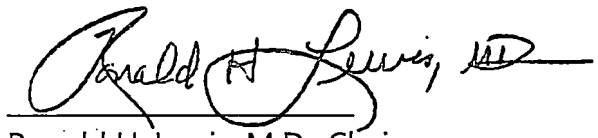
Following the effective date of this Decision, if Respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may request to surrender his or her license. The Board reserves the right to evaluate Respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, Respondent shall within 15 calendar days deliver Respondent's wallet and wall certificate to the Board or its designee and Respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

14. Probation Monitoring Costs

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

The Decision shall become effective at 5:00 p.m. on **June 26, 2020.**

IT IS SO ORDERED this **28th** day of May, 2020.



Ronald H. Lewis, M.D., Chair
Panel A
Medical Board of California

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

In the Matter of the Accusation Against:	)	
	)	
Quinn Li, M.D.	)	Case No.: 800-2016-028347
	)	
Physician's and Surgeon's Certificate No. A 87986	)	OAH No.: 2018080648
	)	
	)	
Respondent	)	
	)	

ORDER OF NON-ADOPTION
OF PROPOSED DECISION

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted.** A panel of the Medical Board of California (Board) will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit directed at whether the decision should be modified to impose discipline to protect the public, and if so, on what grounds. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Diamond Court Reporters, 1107 2nd St., Ste. 300, Sacramento, CA 95814. The telephone number is (916) 498-9288

To order a copy of the exhibits, please submit a written request to this Board.

In addition, oral argument will only be scheduled if a party files a request for oral argument with the Board within 20 days from the date of this notice. If a timely request is filed, the Board will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed penalty should be modified. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel. The Board directs the parties' attention to Title 16 of the California Code of Regulations, sections 1364.30 and 1364.32 for additional requirements regarding the submission of oral and written argument.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Board. The mailing address of the Board is as follows:

MEDICAL BOARD OF CALIFORNIA
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815-3831
(916) 263-2442
Attention: Andrea Geremia

Date: February 5, 2020

Ronald H. Lewis, M.D., Chair
Panel A

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Attorneys for Complainant

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO April 10, 2018
BY: ANALYST

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

In the Matter of the Accusation Against: **Quinn Li, M.D.** **841 Sterling Pkwy Ste 120** **Lincoln, CA 95648-7324** **Physician's and Surgeon's Certificate No. A 87986,** Respondent.	Case No. 800-2016-028347 **A C C U S A T I O N**

Complainant alleges:

PARTIES

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

2. On or about July 1, 2004, the Medical Board issued Physician's and Surgeon's Certificate Number A 87986 to Quinn Li, 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 July 31, 2018, 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 unless otherwise indicated.

4. 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.

"...."

5. Section 2266 of the Code states: "The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct."

STATEMENT OF FACTS

6. On August 10, 2016, patient A.P.[1], age 16, went to the Sacramento Urgent Care Clinic with his mother, seeking treatment for back pain, nausea, vomiting, and diarrhea. A.P. officially checked into the clinic at 1:59 p.m. Sacramento Urgent Care staff, and Respondent found that A.P.'s vital signs were all abnormal—he had a low grade fever, very elevated heart rate high blood pressure, and elevated breathing rate. The clinic record notes that A.P. was uncomfortable due to his nausea and vomiting. Respondent diagnosed A.P. with back pain, nausea and vomiting due to gastroenteritis. Respondent ordered an injection of Toradol, a pain medication, to treat Respondent's back pain and prescribed an oral anti-emetic medicine to counter the vomiting.

7. Respondent did not document in the Urgent Care Clinic records that A.P. was obese. Respondent did not take a past medical history or family medical history, and did not document his observations about A.P.'s condition.

8. In addition, Respondent incorrectly noted in the chart that A.P.'s heart examination was normal, when in fact, A.P. had an extremely elevated heart rate, in the 140's range. A normal heartbeat for a teenager A.P.'s age would be 60-100. Respondent did not document whether A.P. had a lower heart rate any time during the time he was in the clinic. Respondent did not consider the possible causes of this high heart rate, and did not document any changes in A.P.'s rapid heart beat, or whether the rhythm—a separate vital sign from the rate-- was normal. Furthermore, A.P. presented with symptoms concerning for dehydration, but Respondent failed to document A.P.'s hydration status on physical examination.

9. Despite the fact that A.P. presented with elevated temperature, significant low back pain, nausea and vomiting, Respondent did not order any urinalysis. Nor did Respondent order any diagnostic blood tests for A.P. Respondent furthermore did not document whether he or any other staff at Sacramento Urgent care checked to see whether A.P. was able to tolerate fluids, or whether he was in need of IV fluids. And, Toradol, the pain medicine injection that Respondent

[1] To preserve patient confidentiality, the subject patient is referred to herein as A.P. The patient's full name is known to Respondent.

ordered for A.P., causes gastric upset—a fact that Respondent ignored or overlooked in his treatment of A.P.

10. Respondent noted that A.P. generally appeared to have improved after the Toradol injection, but Respondent did not document any specific improvement in A.P.'s vital signs, before sending him home. Respondent diagnosed A.P. with "gastro-enteritis, non-infectious" but did not take an adequate history to make a diagnosis about the cause of A.P.'s vomiting—such as whether it was viral, bacterial, or resulted from something he ate, or other possible cause. And, Respondent did not include any diagnosis for dehydration, even though A.P.'s vital signs pointed to dehydration as a diagnosis.

11. A.P. and his mother received discharge instructions 14 minutes after they checked in at the front desk. Thus, according to the chart, Respondent did not take adequate time to fully assess and reassess A.P.'s symptoms. Respondent issued discharge instructions to A.P. that did not advise him what to do if his pain persisted, or if he had further vomiting. The discharge instructions contained only a generic disclaimer to return or consult a physician "if your problem worsens or you new symptoms appear . . .."

12. Around 9 hours after Respondent discharged A.P. from the Sacramento Urgent Care Clinic, A.P.'s mother took him to the Sutter Medical Center Emergency Room. Sutter admitted A.P. to the Pediatric Intensive Care Unit, where he was found to have significant diabetic ketoacidosis, due to Type 1 diabetes, and pancreatitis. A.P. thereafter suffered multiple organ failures, and died on December 12, 2016.

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence and Repeated Negligent Acts)

(Code Sections 2234(b)and (c))

13. Respondent Quinn Li, M.D. is subject to disciplinary action under section 2234(b) and 2234(c) in that Respondent's actions and omissions in the course of his care of A.P., as set forth in paragraphs 6-12, above, comprise gross negligence and/or repeated negligent acts in the course of his care of A.P., as set forth in paragraphs 6-12. Respondent is guilty of unprofessional conduct and Respondent's certificate is subject to discipline pursuant to sections 2234 and/or

2234(b) and/or 2234(c) based upon his negligent care and treatment of Patient A.P., including but not limited to the following:

A. Respondent failed to include appropriate documentation in A.P.'s medical record, given the acute nature of A.P.'s presentation with multiple abnormal vital signs.

B. Respondent documented the abnormal vital sign of a heart rate of 140, but Respondent claimed during his later interview that A.P.'s heart rate was much lower during his heart exam. Respondent also claimed that A.P.'s slightly elevated body temperature interfered with the accurate measurement of A.P.'s heart rate, but Respondent did not repeat the measurement of the heart rate, or document any different results; and, a slightly elevated body temperature does not interfere with accurate measurement of a patient's heart rate.

C. Respondent documented that A.P. had a normal heart examination, when in fact., A.P.'s heart rate was well above normal.

D. Respondent presented with symptoms that were concerning for dehydration, but Respondent did not take note of A.P.'s hydration status.

E. Respondent did not take an adequate medical history for a patient who presented with a heart rate of 140, and did not evaluate whether A.P.'s heart rhythm was a normal sinus rhythm, or an abnormal rhythm.

F. Even though A.P. presented with an elevated heart rate and signs of dehydration, Respondent did not evaluate A.P.'s orthostatic vital signs—taking the same vital signs in sitting, standing and lying down positions-- which would have provided additional clinical information to evaluate A.P.'s condition. Orthostatic vital signs disclose a pattern, in that heart rate and blood pressure will change when the patient changes position, if the patient is dehydrated. Respondent should have measured A.P.'s orthostatic vital signs given A.P.'s clinical presentation of elevated heart rate and signs of dehydration.

G. A.P. presented with elevated temperature, low back pain, nausea and vomiting. Given these symptoms, Respondent should have checked for a Urinary Tract Infection. Respondent did not check A.P. for a urinary tract infection.

H. Respondent did not document any reasons why he did not order blood tests for A.P.

I. Respondent prescribed anti-emetic medication, but did not check whether A.P. was able to tolerate oral fluids, or that he was able to tolerate ingesting the medication; nor did Respondent adequately document any instructions to this minor patient and his mother that they should go to the Emergency Room if A.P.'s fever, vomiting and back pain symptoms did not improve.

J. Respondent treated A.P.'s back pain with an injection of Toradol, even though A.P. was experiencing gastric upset, and Toradol, even when injected, can cause gastric upset.

K. Respondent charted that the A.P. was both "uncomfortable" and "NAD" (not in acute distress.) Respondent did not adequately document the clinical status of A.P.'s discomfort, and did not document any improvement in this vital sign before sending him home.

L. Respondent diagnosed A.P. as having "acute gastro-enteritis, non-infectious" but did not document any history regarding potential infectious or non-infectious causes of A.P.'s illness, and omitted a diagnosis of dehydration.

M. Given that A.P.'s discharge instructions were printed around 14 minutes after A.P. checked in at the front desk, Respondent did not take sufficient time to adequately assess and reassess A.P. before sending A.P. home from the clinic.

N. Respondent did not give A.P. and his mother adequate, relevant discharge instructions, in the face of very concerning symptoms, in a patient who did not spend a very long time in the clinic.

SECOND CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate and Accurate Medical Records)

(Code Section 2266)

14. Respondent Quinn Li, M.D. is subject to disciplinary action under section 2266 in that the facts and circumstances described in paragraphs 6-13 above, reflect that Respondent failed to maintain adequate and accurate medical records as required by law.

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PRAYER

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

1. Revoking or suspending Physician's and Surgeon's Certificate Number A 87986, issued to Quinn Li, M.D.;

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

3. Ordering Quinn Li, 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: April 10, 2018

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

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