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

In the Matter of the Accusation Against: John Thomas Alexander, II, M.D. Physician's and Surgeon's Certificate No. G 80280 Respondent.	Case No.: 800-2018-042045

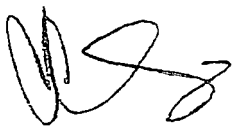
DECISION AFTER RECONSIDERATION

Consistent with the attached Stipulation of the Parties Re: Modified Decision After Reconsideration, the Medical Board of California, Department of Consumer Affairs, State of California adopts the Decision entered on January 25, 2022, except that the Decision is hereby modified to strike Condition No. 5 of the Order: Supervision of Physician Assistants and Advanced Practice Nurses. All other terms and conditions in the Decision shall remain the same.

This Decision shall become effective at 5:00 p.m. on April 22, 2022.

IT IS SO ORDERED: March 23, 2022.

MEDICAL BOARD OF CALIFORNIA



Laurie Rose Lubiano, J.D., Chair
Panel A

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Attorneys for Complainant

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

In the Matter of the Accusation Against: **JOHN THOMAS ALEXANDER, II, M.D.** **5720 Oberlin Dr.** **San Diego, CA 92121-1723** **Physician's and Surgeon's Certificate No. G 80280,** Respondent.	Case No. 800-2018-042045 OAH No. 2021020279 **STIPULATION OF THE PARTIES RE MODIFIED DECISION AFTER RECONSIDERATION**

To the Medical Board of California (Board):

On January 25, 2022, the Board entered a Decision and Order in Case No. 800-2018-042045 (Decision), thereby placing Respondent on probation for a period of three (3) years, subject to various terms and conditions, including Condition No. 5: Supervision of Physician Assistants and Advanced Practice Nurses, which states: "During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses."

On February 24, 2022, the Board granted Respondent's Petition for Reconsideration of the Decision, pursuant to Government Code section 11521, subdivision (a), based upon his request to strike Condition No. 5 of the Decision. Complainant did not object to this request.

To expedite this matter, the parties agree that the Decision shall be modified only to strike Condition No. 5 of the Order: Supervision of Physician Assistants and Advanced Practice Nurses, and that all other terms and conditions in the Decision shall remain the same.

The parties hereby waive their right to request oral argument or submit written argument, provided the Board limits its actions to modifying the Decision as noted above. After filing the fully executed stipulation with the Board, a stipulated Decision After Reconsideration shall be entered indicating that Condition No. 5: Supervision of Physician Assistants and Advanced Practice Nurses has been struck and shall become effective 30 days after the date of the Order.

IT IS SO STIPULATED:

Dated: 3/18/2022

JOHN THOMAS ALEXANDER II, M.D.
Respondent

Dated: 3/21/2022

STORM P. ANDERSON, ESQ.
Attorney for Respondent

Dated: 3/22/22

ROB BONTA
Attorney General of California
ALEXANDRA M. ALVAREZ
Supervising Deputy Attorney General

KAROLYN M. WESTFALL
Deputy Attorney General
Attorneys for Complainant

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

In the Matter of the Accusation Against: John Thomas Alexander II, M.D. Physician's & Surgeon's Certificate No G 80280 Respondent.	MBC File No. 800-2018-042045 OAH No: 2021020279

ORDER GRANTING RECONSIDERATION

The proposed decision of the administrative law judge in the above captioned matter was adopted by the Board on January 25, 2022 and was to become effective on February 24, 2022. A Petition for Reconsideration under Government Code Section 11521 was filed in a timely manner by Respondent.

The petition for reconsideration having been read and considered, the Board hereby orders reconsideration. The Board itself will reconsider the case based upon the entire record of the proceeding, including the transcript. Both complainant and respondent will be afforded the opportunity to present written argument to the Board. You will be notified of the time for submitting written argument. In addition to written argument, oral argument may be scheduled if any party files with the Board, a written request for oral argument 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 of oral argument. 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.

Your right to argue any matter is not limited, however, no new evidence will be heard. The Board is particularly interested in the reconsideration of the penalty order.

The decision with an effective date of February 24, 2022 is stayed. This stay shall remain in effect until the Board issues its decision after reconsideration. For its own use, the Board has ordered a copy of the hearing transcript and exhibits.

At your own expense, you may order a copy of the transcript by contacting the transcript clerk at:

Kennedy Court Reporters
920 W. 17th St., 2nd floor
Santa Ana, CA 92706

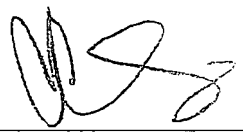
To order a copy of the exhibits, please submit a written request to this Board.

The address for serving written argument on the Board is:

Sharee Woods, Discipline Coordination Unit
Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815-3831

Please submit an original and 1 copy.

IT IS SO ORDERED: February 24, 2022



Laurie Rose Lubiano, J.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: John Thomas Alexander, II, M.D. Physician's and Surgeon's Certificate No. G 80280 Respondent.	Case No.: 800-2018-042045

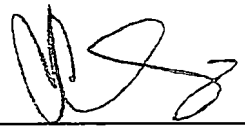
DECISION

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

This Decision shall become effective at 5:00 p.m. on February 24, 2022.

IT IS SO ORDERED: January 25, 2022.

MEDICAL BOARD OF CALIFORNIA



Laurie Rose Lubiano, J.D., Chair
Panel A

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

In the Matter of the Accusation Against:

JOHN THOMAS ALEXANDER II, M.D., Respondent

Physician's and Surgeon's Certificate No. G 80280

Case No. 800-2018-042045

OAH No. 2021020279

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by video/telephone conference on November 29, 30, and December 1, 2021.

Karolyn M. Westfall, Deputy Attorney General, represented complainant, William J. Prasifka, Executive Director of the Medical Board of California (board).

Storm P. Anderson, Attorney at Law, Hegeler & Anderson, A.P.C., represented respondent, John Thomas Alexander, II, M.D., who was present.

The matter was submitted on December 1, 2021.

SUMMARY

Complainant asserts that respondent's license should be disciplined because he committed gross negligence, repeated negligent acts, and failed to maintain adequate and accurate records in his care and treatment of Patient A, who underwent plastic surgery for several conditions. Complainant proved by clear and convincing evidence that respondent committed gross negligence, repeated negligent acts, and failed to maintain adequate and accurate records. After reviewing the record as a whole and considering required factors and the board's disciplinary guidelines, a three-year period of probation with terms and conditions will ensure public safety. Respondent's request for a public reprimand is denied.

PROTECTIVE ORDERS

A protective order has been issued on complainant's motion without objection sealing Exhibits 6-7, 9-18, and 22 to 23, and the confidential names list. A reviewing court, parties to this matter, and a government agency decision maker or designee under Government Code section 11517 may review materials subject to the protective order provided that this material is protected from disclosure to the public.

Also, in any transcription of the hearing the patient who is the subject of this matter will be identified as "Patient A" and not by her name. Her husband will be referred to as "Patient A's husband."

FACTUAL FINDINGS

Jurisdiction and Summary of Allegations

1. Respondent is a board-certified plastic surgeon and owns and operates Alexander Cosmetic Surgery and Alexander Surgery Center. He has been licensed to practice medicine since November 23, 1994, when the board issued Physician's and Surgeon's Certificate No. G 80280 to him. Respondent's certificate was in full force and effect relevant to the allegations in this matter and will expire on November 20, 2022. Respondent has no history of discipline.

2. Complainant filed the accusation against respondent on October 28, 2020, alleging gross negligence, repeated negligent acts, and inadequate and inaccurate record-keeping. The allegations concern respondent's decision to perform a labiaplasty on Patient A, who was 31 years old at the time, without her informed consent. A labiaplasty is a surgery to remove a portion of the labia minora on either side of the vaginal opening. Respondent performed the labiaplasty while Patient A was under anesthesia and after he performed an abdominoplasty (tummy tuck), bilateral breast lift, and VASER liposuction on her inner and outer thighs, procedures she had consented to having. Patient A filed a civil lawsuit against respondent alleging sexual and medical battery.

3. Respondent does not dispute that he did not have informed consent to perform the elective labiaplasty procedure on Patient A. He conceded he departed from the standard of care that required him to obtain this consent. Respondent argues that this departure did not constitute gross negligence because he thought he was exercising sound clinical judgment, his motivation was to help Patient A, he acted under what he thought at the time was some authority under the consent form Patient

A signed, and he obtained the "input" of respondent's husband while Patient A was under anesthesia. Respondent does not dispute that he failed to maintain adequate and accurate records. Because respondent recognized his mistake and has taken education courses, respondent asks for a public reprimand. Complainant seeks the imposition of discipline with a term of probation and terms consistent with the board's disciplinary guidelines.

The Doctrine of Informed Consent and Documents Admitted as Evidence Regarding Patient A's Consent to The Procedures

4. As mentioned, the central issue in this case involves respondent's failure to obtain the informed consent of Patient A when he performed a labiaplasty on her on April 15, 2015, at his surgical center. California courts have recognized the importance of informed consent as a matter of a patient's fundamental right to exercise control over his or her body, most recently in *Davis v. Physician Assistant* Board (2021) 66 Cal.App.5th 227, 276-277. Failure to obtain informed consent is a form of professional negligence. (*Ibid.*, citations omitted.) The *Davis* court articulated the foundation of informed consent as follows:

> The foundation for a physician's duty to obtain informed consent rests on four postulates: "The first is that patients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. The second is that a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. The third is that the patient's consent to

> treatment, to be effective, must be an informed consent. And the fourth is that the patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions." (*Cobbs v. Grant* (1972) 8 Cal.3d 229 at p. 242.)
>
> "It is the physician's duty" ' "to disclose to the patient all material information to enable the patient to make an informed decision regarding the proposed operation or treatment. [¶] Material information is information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure. ..." ' " (*Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 115, quoting *Arato v. Avedon* (1993) 5 Cal.4th 1172, 1188, fn. 9.)

(*Davis v. Physician Assistant Board, supra,* at pp. 276-277.)

5. At his surgery center respondent advised patients and prospective patients of their right to informed consent in a poster entitled in "A Patient's Bill of Rights." The following paragraphs are from that poster and state as follows:

> 3. The patient has the right to receive from his/her physician information necessary to give informed consent prior to the start of any procedure and/or treatment. Except in emergencies such information for informed consent

should include but not necessarily be limited to the specific procedure and/or treatment the medically significant risks involved and the probable duration of incapacitation. Where medically significant alternatives for care or treatment concerning medical alternatives the patient has the right to know the name of the person responsible for the procedures and/or treatment.

4. The patient has the right to refuse treatment to the extent permitted by law and to be informed of the medical consequences of his/her action.

6. The day Patient A underwent the procedures respondent performed, Patient A signed a document captioned "Consent to Operation." Patient A's medical record does not document that respondent advised Patient A regarding the risks and benefits of the procedures she intended to undergo. Respondent said this was a clerical error and the record should have been included in her chart. He said he was certain he discussed with her the risks and benefits of the procedures.

7. Patient A consented to the following procedures that day: Abdominoplasty, bilateral breast lift, and VASER liposuction to inner/outer thighs. Patient did not consent as noted to undergo a labiaplasty.

8. During the hearing respondent cited a paragraph of the consent form Patient A signed to show, as he put it in his testimony, he had some authority or permission to perform the labiaplasty although Patient A had not specifically consented to have him perform it:

Paragraph 3 states as follows:

> I recognize that during the course of the operation unforeseen conditions may necessitate additional or different procedures other than those set forth above. I therefore authorize and request [respondent] to perform such procedures as are necessary in his professional judgment. The authority granted under this paragraph shall extend to remedying conditions that are not known to this doctor before the surgery begins.

Summary of Patient A's Surgery and Patient A's Response to the Surgery

9. The facts of respondent's treatment and care of Patient A and her medical condition after the surgery are found in Patient A's medical records, the medical records from Patient A's obstetrician-gynecologist (OBGYN) Scott Capobianco, M.D.; medical records from Patient A's primary care provider; and the deposition transcripts from the civil action filed by Patient A of respondent, Patient A, Patient A's husband, Dr. Capobianco, surgical assistant James Koed, and two nurses who attended to Patient A during the procedure. Respondent also submitted a "Summary of Care" letter written by his lawyer on his behalf on June 1, 2018, to the board, a letter dated January 8, 2021, to the Deputy Attorney General representing complainant, a summary of care letter written by respondent's lawyer on his behalf dated June 1, 2018, and a transcript of respondent's July 10, 2020 interview with the Health Quality Investigation Unit (HQIU) of the Division of Investigation of the Department of Consumer Affairs.

These materials have been received as evidence. Dr Capobianco's deposition testimony and the testimony of Ashley Kothrade, one of the nurses who attended to Patient A have been considered as administrative hearsay pursuant to Government

Code section 11513, subdivision (d), to the extent they supplement or explain the evidence of record. These materials document the following:

PATIENT A'S SURGERY AND POST-OPERATIVE CARE

10. Patient A was referred to respondent by two of her in-laws and a friend. She was then 31 years old and has four children. She lives in Orange County and traveled to respondent's office to consult with respondent and undergo the treatments. On February 24, 2015, she consulted with respondent to have a tummy tuck, breast augmentation or lift, and possible liposuction. She told respondent her goal was "to be more comfortable with my mid-section." Patient A previously had breast augmentation surgery. Respondent conducted a physical examination of her and identified abdominoplasty, bilateral breast lift, and VASER liposuction to inner/outer thighs. As part of Patient A's record, he included drawings he made of the areas where procedures were to be performed. These areas included her lower abdomen and thighs.

11. Respondent performed surgery on Patient A on April 15, 2015. He documented in an operative report that he performed the following procedures on Patient A: "SAL outer thighs," "Labial reduction," "Vertical mastopexy," and "Abdominoplasty ventral diastasis repair." He identified her preoperative diagnosis as follows: "excessive fatty deposition," "medial/lateral thighs," "breast ptosis s/p implants," "abdominal fat and elastic skin."

12. Respondent did not discuss with Patient A at any time before the procedure performing the labiaplasty. Respondent decided to perform the labiaplasty although Patient A did not consent to the procedure for this reason as he recorded it

in his report: "The patient was noted to have prominent labia. After discussion with her husband, reduction was performed."

13. At his direction a nurse, Elyse Kopp, talked to Patient A's husband about her labia while respondent was performing liposuction on Patient A and under anesthesia and unable to consent to the procedure. Respondent directed Nurse Kopp to call Patient A's husband after Ms. Kopp brought to his attention her observation based on her pre-operative preparation of Patient A that Patient A's labia was "extremely disproportionate" to the rest of her body. She mentioned Patient A's "very large" labia to Nurse Kothrade at the surgical center.

14. After Ms. Kopp told respondent about Patient A's prominent labia as she saw it, respondent asked that she call respondent's husband. She called him from the surgery room and respondent was able to hear her end of the conversation. Ms. Kopp testified in this hearing respondent wanted certain information from Patient A's husband: Was her prominent labia something they were aware of, was it an issue, whether it bothered her or caused discomfort, and whether it was something she would want addressed if she were awake. Per Ms. Kopp, her husband answered affirmatively to these questions.

15. In his deposition, Patient A's husband denied he answered in the way Ms. Kopp said he did. He said he did not know what Ms. Kopp was talking about. Patient A's husband said he was asked if he knew whether labiaplasty was something that his wife would want to get done. He told Ms. Kopp that if it is what the doctor and his wife discussed, then it should be done. He added he was confused why they were calling him about this. During his deposition, he repeated he was confused why they were calling him. He then said, "whatever the doctor – the doctor knows what's best. Whatever she's discussed I'm sure that's what you now he's – he's going to perform."

He said Ms. Kopp said, "Oh okay. Great." He emphasized he was confused and concerned about his wife's health and why Nurse Kopp was calling him. Patient A's husband added that he didn't correlate "labia" as referenced by Ms. Kopp with Patient A's vagina.

16. Respondent and Ms. Kopp did not document Ms. Kopp's conversation with Patient's husband. In fact, respondent's only record of the discussion is his statement in his operative report where he said after the discussion with Patient A's husband, he performed the labiaplasty. The only reference to indicate a labiaplasty was performed, aside from the operative report, is found in one note. The note in Patient A's record reads as follows: "~~Excised~~ labiaplasty." It is signed by "J. Coed," who was a surgical assistant at the center.

17. Based on the discussion between Patient A's husband and Ms. Kopp, respondent performed the labiaplasty and removed 1.5 cm (one half inch) of Patient A's labia as he recorded it in his operative report. Respondent testified he incorrectly noted the tissue removed was 1.5 cm, and he, in fact, removed an inch or more of Patient A's labia.

18. During the hearing there was much discussion regarding the prominence of Patient A's labia. Respondent emphasized how abnormal it was as part of his effort to show he acted reasonably despite not getting her consent. Complainant's expert, Susan Downey M.D., testified that the 1.5 cm of tissue respondent recorded he excised was a small amount of tissue suggesting that the labia was not as prominent as claimed by respondent. Patient A's OB/GYN at the time, Dr. Capobianco, did not document in Patient A's records that Patient A had a prominent labia. A medical illustration *respondent* commissioned to illustrate Patient A's labia as part of his defense to the civil action does not show that the labia was prominent or abnormal.

Patient A did not think her labia was abnormal. In contrast, respondent said Patient A's labia was the most prominent one he had seen in 20 years of practice, and he removed one to two inches of it, although he documented he only excised about half an inch.

19. The issue of the prominence of Patient A's labia does not need to be resolved in this proceeding. Respondent conceded the labiaplasty was not medically or surgically necessary and was an entirely elective procedure. Dr. Downey and respondent's expert, Diane Breister Ghosh, M.D., agreed. The factual dispute however serves to illustrate the importance of informed consent to a totally elective cosmetic procedure and for this procedure in particular. It was important for respondent to have obtained Patient A's informed consent for *her* to decide whether she felt her labia was prominent.

20. Post-operatively, in her discharge instructions, Patient A was advised to place an ice pack on her vagina. In his deposition, respondent said he told Patient A she had absorbable stitches as she was leaving the office, but he did not document this in her medical records. Respondent also advised her to avoid sex for four to six weeks. This is not documented in Patient's A's chart. Ms. Kopp again did not document that she discussed the labiaplasty with Patient A as part of the post-operative procedure.

21. Respondent talked to Patient A about the labiaplasty on two occasions. He talked to her about two-and-a-half hours after her surgery when she was recovering at the hotel and on April 16, 2015, at her post-operative appointment. Respondent testified he had a five-minute conversation with Patient A on April 16, 2015. He said he discussed with her exactly what was found and his line of reasoning. Respondent said out of respect for her privacy, he did not examine her labia after the procedure and did not want to go into detail about it. He asked her how was

everything "down there" and she said fine. He said that as a matter of his practice, he did not examine the vagina after a labiaplasty for any of his patients. Respondent said at that time, he thought "they" were fine with his decision to do the labiaplasty and it "made sense to them."

22. After April 16, 2015, Patient A saw respondent for follow-up appointments on April 22, 2015, April 28, 2015, and on June 16, 2015. Patient A was reported to be doing well at these visits. Respondent scheduled her for additional follow-up visits for July 28, 2015, September 24, 2015, and October 13, 2015, but she did not show for these appointments. On July 11, 2015, Patient A's lawyer sent a Notice of Intent letter advising respondent Patient A intended to pursue a civil action against him. This letter was sent shortly after Patient A asked for her medical records.

PATIENT A'S REACTION TO THE LABIAPLASTY

23. In her deposition testimony, Patient A said she did not know respondent performed a labiaplasty on her until she was at her hotel room recovering from the procedure. She said she noticed her labia was cut when she went to the bathroom and had pain while peeing and her underwear was stuck on something. She asked her husband whether she had stiches on her labia. At that point he told her he thought respondent performed a procedure on her labia. She could not believe she had stiches in her labia.

24. Patient A felt violated by respondent's decision to perform the labiaplasty without her consent. She said respondent took advantage of her, "mutilated" her, and she questioned his motives in performing the procedure. Patient A said the following in her deposition:

> I believe that if you are going to do that to a woman without talking to her personally and discussing every single possible outcome and getting her advice on whether or not she wanted to do it, I think that's unacceptable and cause for inflicting harm on somebody without them asking.

25. The procedure caused Patient A a lot of anxiety and emotional distress. She saw a counselor because of the stress. Patient A said when she was younger, she was molested. Patient A also said the unauthorized procedure caused a lot of stress to her marriage because she and her husband were struggling with their marriage at the time. Patient A believed that by asking for her husband to consent to the procedure, respondent put him in a bad situation. She said her husband felt "he was the one that somewhat made a decision on [proceeding with the labiaplasty]."

26. Regarding her decision to pursue legal action, Patient A said she does not want to see what happened to her happen to another patient. She decided to take legal action against respondent after a friend who worked for a plastic surgeon told her that respondent should not have cut her labia without her consent. Initially, Patient A wanted to minimize what happened to her the way she did after she was molested as a child. But after she told her husband she felt violated, they agreed to seek legal representation.

27. As a result of the procedure, Patient A said has had trouble sexually and she has experienced pain in that area. She said she has had bacterial infections she never had before. Patient said that her vagina now "looks cut" and not normal like it used to be. She said she was always comfortable with how her vagina looked, and she and her husband never discussed it as a candidate for labiaplasty.

Testimony of Complainant's Expert, Susan Downey, M.D.

28. Complainant called Susan Downey, M.D., as an expert. In addition to her testimony, Dr. Downey prepared a report she submitted to the board's complaint unit, which was received as evidence. Her testimony was consistent with what she wrote in her report.

29. Dr. Downey is board-certified in plastic surgery and a Fellow of the American College of Surgeons. She obtained her medical degree from Columbia University and completed an internship and residency in general surgery from the Hospital of the University of Pennsylvania in 1985 and a residency in plastic surgery at Columbia University Presbyterian Hospital in 1988. She completed a fellowship in pediatric plastic surgery at Children's Hospital in Los Angeles in 1989. Since 2006, she has been a clinical associate of plastic surgery at the Keck School of Medicine at the University of Southern California (USC). She is licensed to practice medicine in California. Dr. Downey has served as an expert reviewer for the medical board since 2018.

30. Dr. Downey reviewed the materials which were admitted as evidence in this matter. Her testimony is summarized as follows:

31. Dr. Downey is familiar with the definitions of standards of care for informed consent and medical record keeping and extreme and simple departures from standards of care.

32. Dr. Downey identified the standard of care for informed consent as follows: Prior to surgery, the patient needs to be provided information necessary to give informed consent prior to the start of any procedure and/or treatment regarding the risks and benefits of the surgery, the probable period of incapacitation including

the option to not have the surgery done, and medically significant alternatives. On Day 1 of medical school, a doctor is taught the importance of obtaining a patient's informed consent before proceeding with surgery.

33. Dr. Downey testified respondent departed from the standard of care requiring this consent when he performed the totally elective and cosmetic labiaplasty on Patient A without her consent. She found this to be an extreme departure. As she wrote in her report, asking the husband through a third party does not excuse respondent's action.

34. Dr. Downey strongly disagreed with respondent's assertion he had Patient A's permission to perform the labiaplasty because her prominent labia was an "unforeseen condition." While the consent form Patient A signed stated that "unforeseen conditions may necessitate additional or different procedures," Dr. Downey said this language does not give a surgeon authority to perform any procedure he sees fit to perform when the patient is asleep. It does not give the surgeon consent over any and every part of a patient's body, and it does not give the surgeon authority to perform a procedure outside the surgical field. Dr. Downey did not agree with respondent's assertion that the labia was within the surgical field of the inner and outer thighs. The labiaplasty respondent performed was a totally elective procedure. Respondent's concern that the labia would have caused a bulge in her swimwear, as he said in his deposition and hearing testimony, did not make it a medically necessary procedure. Moreover, Patient A's labia was within the normal size range. Finally, Dr. Downey noted that the patient should have been apprised of the risks of such a procedure, which can include frequent itching due to scarring and loss of sensitivity.

35. Dr. Downey found respondent committed an extreme departure when he performed the labiaplasty without Patient A's consent because no reasonably prudent doctor would have performed it without consent. She said the procedure should not have been done without consent under any circumstance.

36. With respect to respondent's record keeping, Dr. Downey found that respondent committed simple departures in these respects: His records did not record that respondent had a preoperative consultation regarding the surgical procedures as the standard of care required him to do. In addition, respondent did not record in Patient A's chart his discussion with Patient A's husband regarding a change in the surgical plan. The standard of care required respondent to make the call himself with a witness and also document it in the record.

Testimony of Respondent's Expert, Diane Breister Ghosh, M.D.

37. Respondent called, Diana Breister Ghosh, M.D., as an expert. Dr. Ghosh obtained her medical degree from New York Medical College in 1994 and completed a four-year general surgical residency at Kaiser Permanent Hospital in Los Angeles in 1998, and a three-year Plastic and Reconstructive Surgery Training at USC in 2001. She served as a clinical assistant professor of surgery at USC and a plastic and reconstructive surgeon at City of Hope National Medical Center. Since 2002 Dr. Ghosh has been in private practice as a board-certified plastic and reconstructive surgeon. Dr. Ghosh has performed plastic surgery procedures at respondent's surgical center and considers respondent a "mentor." Dr. Ghosh's testimony is summarized as follows:

38. Dr. Ghosh reviewed the materials of record in this matter and prepared a declaration for the civil action in respondent's defense. In that action, Patient A alleged that respondent committed sexual and medical battery on her. Respondent submitted

Dr. Ghosh's declaration in support of his summary judgment motion in that civil action in which Dr. Ghosh was asked to form an opinion whether respondent committed sexual battery on Patient A. In that action, Dr. Ghosh was not asked to offer an opinion whether respondent departed from applicable standards of care.

39. Dr. Ghosh testified respondent's decision to perform the surgery "retrospectively" was the wrong decision and violated Patient A's right of consent. She repeated that "in retrospect," and "in this one case," his decision was not right. Dr. Ghosh agreed with Dr. Downey that respondent's decision was a departure from the standard of care. Dr. Ghosh did not agree it was an extreme departure given the care respondent gave Patient A and the "thought he put into his decision" to perform the labiaplasty. Dr. Ghosh defined extreme departure as a reckless decision without care or thought.

40. Dr. Ghosh further agreed with Dr. Downey that asking Patient A's husband through a third party did not excuse his actions. On cross examination, Dr. Ghosh conceded that paragraph 3 of the consent form did not authorize respondent to perform an elective non-emergency procedure. At the same time, she said Paragraph 3 gave respondent "some authority" to proceed. It is not clear what she meant by "some authority."

41. Regarding respondent's record keeping, Dr. Ghosh agreed respondent's failure to record the discussion with Patient A and the risks and benefits of the procedures was "suboptimal" and a "small departure" from the standard of care. She also agreed that respondent's failure to record the discussion Ms. Kopp had with Patient A's husband was "suboptimal." She stated that this discussion should have been documented.

42. Dr. Ghosh minimized, as respondent did in his testimony, the risks the labiaplasty posed to Patient A. She described it as a low complication rate and high satisfaction rate procedure. But Dr. Ghosh recognized, according to the American Society of Plastic Surgeons, the known risks of labiaplasty include bleeding, infection, and loss of sexual sensation. These are not minimal risks. In fact, in the consent form Dr. Ghosh uses for a labiaplasty procedure, Dr. Ghosh identifies these risks for patients.

43. Dr. Ghosh was asked to offer her opinion whether she believes respondent poses a threat to public safety. She said he does not because he recognizes he made a mistake.

Respondent's Testimony

44. Respondent's testimony is summarized as follows:

Respondent obtained his medical degree from the University of Maryland School of Medicine in 1989. He completed an internship in surgery at the University of North Carolina in 1990 and completed a residency at the UNC in 1994. Respondent completed a residency in plastic surgery in 1996 at the University of California, San Francisco. He is board certified by American Board of Surgery and the American Board of Plastic Surgery. In addition to his medical training, respondent obtained a law degree in 2006 and is licensed to practice law in California. Since 1996, he has practiced plastic surgery and owns and operates Alexander Cosmetic Surgery and Alexander Surgery Center.

45. Respondent said that his decision to proceed with the labiaplasty was a mistake and a bad decision. Respondent stressed he performed the surgery thinking he was acting in Patient A's best interest with no benefit for himself. He stressed his

motivation was to help her achieve her surgical goals. He thought he acted "reasonably" and with compassion given the information he had at the time.

Respondent's position regarding his authority to proceed has changed over the years. During the initial investigation into his conduct, respondent insisted he had the authority to proceed with the surgery based on "the unforeseen condition" clause in the consent form Patient A signed. In the "Summary of Care" letter dated June 1, 2018, respondent's lawyer wrote on his behalf, that was submitted to the board's investigation unit, respondent argued this clause gave him consent to proceed. At his July 10, 2020, interview with HQIU, respondent said the clause authorized him to perform the labiaplasty. But in his letter to Deputy Attorney General Westfall dated January 8, 2021, respondent reversed course, writing, "Retrospectively, I understand that I did not have the patient's informed consent to perform labiaplasty."

46. At the hearing, respondent conceded he did not have Patient A's consent and he departed from the standard of care.

47. Respondent presented the following as mitigating evidence: He put a great deal of thought into his decision to perform the labiaplasty; he believed at the time he had the authority to proceed under paragraph 3 of the consent form Patient A signed because her condition was "unforeseen"; he obtained the "input" of Patient A's husband; and he considered Patient A's financial and other circumstances to avoid having her incur the cost of an additional surgical procedure, and the risk of having that surgery under anesthesia.

48. In terms of his thought process, in his view, Patient A had the most prominent labia he had observed in his career, and he was convinced it was something that Patient A would like to have addressed. Respondent described the procedure as

"incredibly minor" with an "extremely great benefit," and a procedure in his mind "100 percent of patients in [Patient A's] situation would want done."

49. Respondent explained that he felt Patient A would want this procedure because if she did not, there would be a bulge in her swimsuit because the fat in the thighs that concealed the condition was being removed and there would be a gap between her thighs. This statement seems to conflict with what respondent stated during his HQIU interview, where he admitted he did not know how much of a problem this condition was for Patient A and whether it would have bothered her. In his interview, respondent also recognized the labiaplasty was not a medically or surgically necessary procedure. Also, nowhere did respondent document that Patient A's labia was large, which was curious given that it was "the largest he had ever seen."

50. In terms of his belief that Patient A had an "unforeseen condition" that authorized him to operate on her labia, he argued that the labia was part of the "surgical field" and "very related anatomically" to the thighs. Here, respondent distinguished "informed consent" from "consent" with the understanding that the language in paragraph 3, he believed at the time, gave him "broad permission to do the procedure."

51. To illustrate his point regarding unforeseen conditions, respondent gave two examples where he found unforeseen conditions that he considered analogous to Patient A's unforeseen condition: In one case, while performing an abdominoplasty, he found the patient had an inguinal hernia. The bowel was protruding from it, and he needed to repair it to avoid strangulation. The second case occurred during an abdominoplasty with a heavy-set woman. During the procedure, he found a mango sized lipoma and removed it.

However, in response to questions on cross-examination, respondent acknowledged that the "unforeseen condition" clause did not give him authority to perform any elective surgery he felt Patient A needed.

52. With respect to obtaining Patient A's husband's input, respondent valued his perspective concerning what Patient A would want because he found Patient A was "extremely deferential to [her husband's] opinion on what she should or shouldn't do." He was careful in his testimony, and in his responses during the HQIU interview, to say he did not believe the discussion with Patient A's husband gave him consent to proceed. He said in his deposition he sought the husband's input because he seemed to have her best interests in mind, and he was "much more involved than most husbands."

53. As additional factors in his decision, respondent considered the cost to Patient A of an additional surgery because she had to travel from Orange County and cost seemed to be an issue for her and her husband, and he wanted to avoid having Patient A undergo a second surgical procedure under general anesthesia with the attendant risks that would involve.

54. As a further factor in his decision-making process, respondent said he considered labiaplasty to be a very simple procedure and in 20 years he never had a single complication performing the procedure. He said the procedure was a quick and unremarkable recovery. He added he usually performs the procedure as a standalone procedure.

55. After respondent performed the procedure, respondent discussed with her the labiaplasty two times. He first talked to her about two-and-a-half hours after

the surgery and then the day after the surgery when he asked her if everything was "ok down there."

56. When Patient A notified respondent of her intent to sue him and filed suit against him he was shocked. He was shocked that Patient A was not happy with the labiaplasty and accused him of sexual and medical battery. He said he thought he really helped Patient A. He said he lost sleep because he was worried about Patient A's mental and physical state. Respondent felt Patient A would have wanted the procedure if she had heard the risks and benefits of the procedure. The reason she did not want it was because "no one likes surprises."

57. Concerning the allegation that respondent's record keeping fell below the standard of care, respondent did not dispute Dr. Downey's finding in this regard.

58. As a result of the lawsuit and this administrative action, respondent has come to recognize he did the wrong thing and is sorry that he performed the labiaplasty for many reasons. As a matter of his rehabilitation, respondent has taken and completed several courses including a medical record keeping course through the University of California, San Diego, School of Medicine, a course in medical ethics at the University of California, Irvine, School of Medicine, and several courses on informed consent. Respondent said he found the courses meaningful and has incorporated what he learned from these courses into his practice.

59. Respondent has changed his practice. He said under no circumstance would he proceed with any surgery without informed consent even if a condition is unforeseen. From this point forward, he plans to obtain the explicit consent from a patient before moving forward. He also has improved his medical record keeping.

Witnesses on Respondent's Behalf and Letters Written on His Behalf

60. Respondent called two persons on his behalf: Darci J. Tom, M.D., and Gregory Nelson. In addition to their testimony both persons wrote letters on respondent's behalf which have been received as evidence. Their testimony is summarized as follows:

61. Dr. Tom is a board-certified anesthesiologist who has worked with respondent for over 20 years. She is familiar with the allegations against respondent although she has not read the accusation. Dr. Tom has worked with respondent hundreds of times.

Dr. Tom said that respondent is an excellent and thoughtful surgeon who has good preoperative judgment. He does not pressure patients to undergo surgeries and he has never acted outside of the best interest of patients. Dr. Tom does not believe respondent is a threat to public safety.

62. Mr. Nelson is an attorney who practices corporate and contract law. He has known respondent through their church for 20 to 25 years. He acknowledged he is not fully familiar with the allegations against respondent in this matter.

Through their church, Mr. Nelson has worked with respondent on a variety of projects and activities. Mr. Nelson said respondent's motivation is always to serve others and he has a great deal of humility. He said respondent has good values and he serves as an example of how to treat people.

Mr. Nelson gave as an example of respondent's service to others an instance where respondent cosigned the lease and paid the rent of a church member who was

going through a tough time. When Mr. Nelson told respondent to ask the church to reimburse him, respondent declined.

Mr. Nelson said that respondent has treated members of his family and he trusts respondent as a physician. He said he does not believe respondent is a danger to the public.

63. In addition to Dr. Tom's and Mr. Nelson's testimony and letters, respondent submitted letters from the following persons: Joseph H. Kelleher, M.D., Ronald J. Edelson, M.D., and Kurt Wickham.

64. Dr. Kelleher wrote that he is an anestheoligist who has worked with respondent for over 20 years. He described respondent as an excellent and conscientious physician and a person of high integrity. He said that as a result of the incident involving Patient A, respondent implemented an audit of the surgery center's informed consent procedures and now there is a much more "literal interpretations of the procedures listed on the consent form." He said that a second incident will never happen. Dr. Kelleher said that respondent did his best "to make good and learn his lesson afterwards."

65. Dr. Edelson wrote that he joined respondent's father's plastic surgery practice in 1987 and has worked with respondent since respondent joined the practice in 1997. He has worked closely with respondent on a daily basis. He regards respondent as a talented surgeon with a sincere commitment to the care and well-being of his patients. He trusts respondent's judgment. Dr. Edelson noted that patients have often said respondent is kind and caring. He added that respondent holds himself to the highest ethical standards and is dedicated to his community and family.

66. Mr. Wickham wrote that he has known respondent for over 20 years through their church where he has interacted closely with him and served with him in various capacities. He said that respondent has displayed integrity, kindness, and a desire to serve others. Mr. Wickham said that numerous times respondent has helped those in need. He detailed several examples where respondent has helped others including providing pro bono medical services.

Parties' Arguments

67. Complainant, in closing, argued he met his burden that respondent committed an extreme departure from the standard of care for failing to obtain Patient A's consent. Dr. Downey's opinion that respondent committed an extreme departure should be accepted over Dr. Ghosh's opinion that respondent committed only a simple departure. Complainant also argued that he met his burden to show that respondent committed repeated negligent acts for failing to document appropriately his preoperative discussion with Patient A and his failure to document the discussion with Patient A's husband. The record keeping violations additionally constitute violations under Business and Professions Code section 2666 for failing to maintain adequate and accurate records.

Complainant stressed that respondent's failure to obtain Patient A's informed consent before operating on her labia was a serious matter as a matter of the practice of medicine and for Patient A. Complainant cited *Davis, supra,* and other court decisions for the principle of informed consent. Complainant also stressed that this principle gives a patient the meaningful opportunity to exercise control over his or her own body.

68. Complainant finds it shocking that respondent would think he should cut a sexual organ because he or his nurses did not like the way it looked and further finds it disappointing that respondent argued Paragraph 3 gave him limitless authority to make changes to Patient A's body.

69. Regarding the degree of discipline, complainant asked that respondent's certificate be placed on probation for a minimum of five years with standard terms and conditions consistent with the board's disciplinary guidelines. Complainant is not asking that respondent be required to complete a clinical competency course, have a practice monitor, or that he be barred from the solo practice of medicine as these guidelines recommend.

70. Respondent argued in closing and in his trial brief that respondent's conduct does not constitute gross negligence and serious discipline is not warranted for these reasons: In retrospect, respondent admits he made a mistake. At the time, he thought he exercised his judgment thoughtfully; it was not a lapse in judgment. Respondent stressed his motive was solely to help Patient A. When he learned Patient A was upset about the procedure, he was devasted. He said he never denied there was a lack of informed consent; he cited Paragraph 3 to defend himself in the aggressive civil action.

71. Respondent asserted that Dr. Ghosh contradicted Dr. Downey's opinion that no reasonably prudent physician would perform the surgery without informed consent and thus it was not an extreme departure from the standard of care.

72. Respondent noted additionally that he has no history of discipline.

73. Respondent stated that the evidence he submitted of rehabilitation supports his argument that serious discipline is not warranted. As a matter of this

evidence, in addition to taking responsibility for his conduct respondent took courses to educate himself, made changes to his practice to ensure he does not perform surgery again without informed consent, and he has improved his record keeping.

74. In terms of the degree of discipline to impose respondent asked that consistent with the board's guidelines for repeated negligent acts involving a single patient a public reprimand be issued.

75. In reply, complainant asserted the evidence shows respondent committed an extreme departure from the standard of care and a reprimand would not be an appropriate disposition. But even if respondent were found to have committed repeated negligent acts, the shocking facts of this case would not warrant a public reprimand: Respondent cut Patient A's sexual organ without her consent after calling Patient A's husband regarding performing the procedure.

Complainant is not confident respondent understands the gravity of his error and respondent has not taken full responsibility for his conduct based on his confusing and contradictory testimony: Respondent said what he did was wrong but what he did was also reasonable. He finally admitted he made a mistake five years after his conduct.

Evaluation of Expert Testimony and Evidence

76. The decision in this matter requires resolving the conflict in the testimony of the experts. In this regard, consideration has been given to their qualifications and credibility, including their biases that could color their opinions and review of the evidence, the reasons for their opinions, and the factual bases of their opinions. California courts have repeatedly underscored that an expert's opinion is only as good as the facts and reasons upon which that opinion is based. (*Kennemur v. State of*

California (1982) 133 Cal.App.3d 907, 924.) After given due consideration to these factors Dr. Downey's opinion that respondent committed an extreme departure from the standard of care on the issue of informed consent is found more persuasive than Dr. Ghosh's opinion that respondent committed a simple departure and is accepted for these reasons:

77. Drs. Downey and Ghosh agree that respondent departed from the standard of care when he performed the labiaplasty on Patient A without her consent. The issue is thus whether the departure was extreme or simple. Dr. Downey testified that respondent committed an extreme departure from the standard of care because no reasonably prudent physician should have performed the labiaplasty on Patient A without her consent. Her testimony here was clear unequivocal and consistent with the evidence. The labiaplasty was an entirely elective procedure; it was not surgically or medically necessary. Patient A had the right to decide for herself whether to have this totally elective procedure performed on her. It was not her husband's or respondent's decision to make. Respondent should have been very familiar with informed consent as a guiding principle of medical care. The requirement of informed consent is a fundamental and clear principle to ensure patients can exercise meaningful control over their medical care and their bodies.

78. In reaching her conclusion Dr. Downey correctly dismissed respondent's claim that Paragraph 3 gave him some authority to perform the labiaplasty on Patient A as an "unforeseen condition." Contrary to respondent's interpretation, Paragraph 3 did not give him a blank check to perform any procedure he thought Patient A needed because he deemed the procedure an unforeseen condition. Unlike an inguinal hernia or lipoma, the labiaplasty was not an unforeseen condition; it was not medically or surgically necessary. A reading that would have given respondent the authority to

perform this totally elective procedure would have rendered meaningless the informed consent principle. If respondent believed the labia was truly part of the surgical field he should have identified the possibility of the need for the labiaplasty in the consent form Patient A signed.

79. Dr. Ghosh's opinion that respondent committed only a simple departure because of the thoughtfulness he put into the decision to perform the labiaplasty is not accepted. The degree of thought respondent put into his decision to proceed is not determinative of the degree of the departure from the standard of care. Respondent may have put a lot of thought into his decision to perform the labiaplasty, but he made the clearly wrong decision. Giving it lots of thought and choosing to perform it without Patient A's consent calls respondent's judgment into question. He now admits he made the wrong decision. The decision to not proceed with the labiaplasty on Patient A because she did not consent to it was the correct decision to make and did not require a lot of thought.

It is noted here that Dr. Ghosh offered her opinion as part of respondent's defense in the civil action. Her declaration was submitted as part of that defense. In that civil action respondent was accused of surgical and sexual battery and his intention in performing the labiaplasty was an issue. It is not an issue as far as the degree of departure from the standard of care is concerned.

80. Dr. Ghosh did not disagree with Dr. Downey's opinion that respondent committed simple departures in his record keeping when he failed to document the risks and benefits of the procedures respondent agreed to have him perform and when he failed to document the discussion with respondent's husband. She termed his record keeping "suboptimal." Her repeated use of the term "suboptimal" highlights her attempt to minimize his conduct. Finally, it is noted that she views respondent as a

mentor, which clearly has colored her judgment about respondent's conduct. In this regard, her testimony and opinion cannot be considered unbiased.

LEGAL CONCLUSIONS

Purpose of Physician Discipline

1. The purpose of the Medical Practice Act (Chapter I, Division 2, of the Business and Professions Code) 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 purpose of administrative discipline is not to punish, but to protect the public by eliminating those practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

Standard of Proof

2. Complainant bears the burden of proof of establishing that the charges in the accusation are true.

The standard of proof in an administrative action seeking to suspend or revoke a physician's certificate is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Applicable Statutes Regarding Causes to Impose Discipline

3. Section[1] 2227, subdivision (a), states:

> A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may in accordance with the provisions of this chapter:
>
> (1) Have his or her license revoked upon order of the board.
>
> (2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.
>
> (3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.
>
> (4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

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[1] Statutory references are to the Business and Professions Code unless otherwise stated.

(5) Have any other action taken in relation to the discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

4. Section 2234, subdivisions (b) and (c) , provide in part:

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:

[¶] . . . [¶]

(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.

5. Section 2266 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."

Decisional Authority Regarding Standard of Care

6. The standard of care requires the exercise of a reasonable degree of skill, knowledge, and care that is ordinarily possessed and exercised by members of the medical profession under similar circumstances. The standard of care involving the

acts of a physician must be established by expert testimony. (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 317.) It is often a function of custom and practice. (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 280.)

Case Law Regarding Gross Negligence

7. Medical providers must exercise that degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.) Because the standard of care is a matter peculiarly within the knowledge of experts, expert testimony is required to prove or disprove that a medical practitioner acted within the standard of care unless negligence is obvious to a layperson. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

8. Courts have defined gross negligence as "the want of even scant care or an extreme departure from the ordinary standard of care." (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3rd 1040, 1052.) Simple negligence is merely a departure from the standard of care.

Cause Exists to Impose Discipline Against Respondent's License for Gross Negligence Repeated Negligent Acts and Failure to Maintain Adequate and Accurate Records

9. Complainant proved by clear and convincing evidence that respondent committed gross negligence pursuant to Section 2234, subdivision (b), in his treatment and care of Patient A when he performed a labiaplasty on her without her consent.

10. Complainant proved by clear and convincing evidence that respondent committed repeated negligent acts pursuant to Section 2234, subdivision (c), in his

care and treatment of Patient A when he performed a labiaplasty on Patient A without her consent, when he failed to appropriately document a preoperative consultation with Patient A regarding the risks and benefits of the procedures she agreed to have performed, and when he failed to appropriately document the discussion during the operation with Patient A's husband regarding the labiaplasty.

11. Complainant proved by clear and convincing evidence that respondent failed to maintain adequate and accurate records pursuant to Section 2266 when he failed to document a preoperative consultation with Patient A regarding the risks and benefits of the procedures she agreed to have him perform and when he failed to document the discussion with Patient A's husband during the operation regarding the labiaplasty.

The Board's Disciplinary Guidelines

12. With cause for discipline found, the determination now must be made regarding the degree of discipline and the terms and conditions to impose. In this regard, the board's Manual of Model Disciplinary Orders and Disciplinary Guidelines (12th Edition 2016) states:

> The Board expects that, absent mitigating or other appropriate circumstances such as early acceptance of responsibility, demonstrated willingness to undertake Board-ordered rehabilitation, the age of the case, and evidentiary problems, Administrative Law Judges hearing cases on behalf of the Board and proposed settlements submitted to the Board will follow the guidelines, including those imposing suspensions. Any proposed decision or

settlement that departs from the disciplinary guidelines shall identify the departures and the facts supporting the departure.

13. For the causes of discipline that have been found the board's disciplinary guidelines provide that revocation is the maximum discipline and the minimum recommended term and conditions are as follows: For gross negligence under Business and Professions Code section 2234, subdivision (b), repeated negligent acts under section subdivision (c), and failure to maintain adequate records under section 2266, stayed revocation, five years' probation, with conditions including an education course, prescribing practices course, medical record keeping course, professionalism program (ethics course), clinical competence assessment program, monitoring, solo practice prohibition, and prohibited practices.

Disciplinary Considerations and Disposition Regarding the Degree of Discipline

14. As noted, the purpose of an administrative proceeding seeking the revocation or suspension of a professional license is not to punish the individual, the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Fahmy, supra*, 38 Cal.App.4th at p. 817.) Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.)

15. The determination whether respondent's license should be revoked or suspended includes an evaluation of the nature and severity of the conduct and

rehabilitation and mitigation factors as set forth under California Code of Regulations, title 16, section 1360.1, which provides as follows:

> When considering the suspension or revocation of a license, certificate or permit on the ground that a person holding a license, certificate or permit under the Medical Practice Act has been convicted of a crime, the division, in evaluating the rehabilitation of such person and his or her eligibility for a license, certificate or permit shall consider the following criteria:
>
> (a) The nature and severity of the act(s) or offense(s).
>
> (b) The total criminal record.
>
> (c) The time that has elapsed since commission of the act(s) or offense(s).
>
> (d) Whether the licensee, certificate or permit holder has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.
>
> (e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
>
> (f) Evidence, if any, of rehabilitation submitted by the licensee, certificate or permit holder.

16. After considering the board's guidelines, and the factors under California Code of Regulations, title 16, section 1360.1, the evidence of rehabilitation, and

mitigation, and the evidence of record as a whole, it is determined that a three-year period of probation with terms and conditions will ensure public protection. This conclusion is reached for these reasons:

Respondent's failure to obtain Patient A's consent before performing the labiaplasty on her was a serious violation of Patient A's right to decide whether she would have wanted the labiaplasty, a totally elective procedure. By proceeding with the labiaplasty without Patient A's consent, respondent violated Patient A's personal autonomy and caused her deep distress and anxiety, and stress in her marriage.

The nature and degree of respondent's violation of Patient A's right of informed consent is best summarized by respondent's statement in his operative report: "After discussion with her husband, [labial] reduction was performed." It suggests that respondent's decision to perform the procedure was based on the wishes of her husband. This statement is shocking and disturbing. Respondent's failure to document the discussion with Patient A's husband and explain his reasoning in Patient A's medical record is of further concern.

Patient A saliently described the nature of respondent's misconduct in her deposition as follows:

> I believe that if you are going to do that to a woman without talking to her personally and discussing every single possible outcome and getting her advice on whether or not she wanted to do it I think that's unacceptable and cause for inflicting harm on somebody without them asking.

17. Respondent admitted, as he repeatedly said, "in retrospect," he made a mistake, and his decision was wrong. He came to this conclusion sometime after the

April 15, 2016, surgery, as documented in the January 8, 2021, letter he sent to Deputy Attorney General Westfall. But respondent did not take full responsibility for his misconduct. His testimony regarding his acceptance of responsibility was confusing and hard to follow: While he testified he made a mistake, he also said he acted reasonably. He maintained he wanted to help Patient A, and he put a lot of thought into the decision to proceed. He claimed to have considered her personal and financial circumstances, and he wanted to avoid requiring her to have a second surgery under anesthesia, which would have subjected her to additional risk. Finally, respondent claimed he wanted respondent's husband's input to help him in his decision, although he went to great strides to maintain that he was not seeking her husband's consent. The circumstance by which he sought Patient A's husband's input (through a nurse) is not a mitigating factor.

18. As mitigating factors, the conduct at issue involves a single patient, is not recent, and respondent does not have a history of discipline. Respondent stated he learned from his mistake and he will not proceed with surgery without obtaining the informed consent of his patients in the future. He has taken education courses on informed consent, medical ethics, and record keeping. Individuals who know him describe him as a caring and compassionate physician and valued member of his community who is committed to helping others.

19. As a result of these factors, departures from recommendations in the guidelines are warranted. A three-year period of probation will ensure public protection. In addition, it is not necessary to ensure public protection that respondent participate in a clinical competency assessment program or that he be monitored or supervised. Respondent does not need to be prohibited from engaging in the solo practice of medicine as a matter of public protection.

20. Respondent's request for a public reprimand has been considered. But departure from the guidelines to that extent is not warranted. As noted, his misconduct was serious. While he now admits he made a mistake and has taken steps to ensure that he does not engage is such conduct again, respondent came to this recognition late, and only after he made several specious arguments in an attempt to justify his conduct. Finally, respondent did not take full responsibility for his misconduct at this hearing and maintained he acted reasonably. That he attempted to analogize his actions to fixing a hernia or removing a possibly cancerous growth and claimed that the patient's vagina was "very related anatomically" to the thigh, show respondent still does not understand the nature of informed consent or the seriousness of his conduct.

ORDER

Certificate No. G 80280 issued to respondent John Thomas Alexander II, M.D., is revoked. However, revocation is stayed, and respondent is placed on probation for three years on 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. Professionalism Program (Ethics Course)

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a professionalism program, that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358.1. Respondent shall participate in and successfully complete that program. Respondent shall provide any information and documents that the program may deem pertinent. Respondent shall successfully complete the classroom component of the program not later than six (6) months after respondent's initial enrollment, and the longitudinal component of the program not later than the time specified by the program, but no later than one (1) year after attending the classroom component. The professionalism program shall be at respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A professionalism program 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 program would have been approved by the Board or its designee had the program 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 program or not later than 15 calendar days after the effective date of the Decision, whichever is later.

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(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.

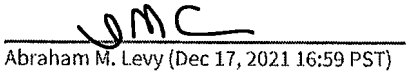
13. License Surrender

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.

DATE: December 17, 2021



Abraham M. Levy (Dec 17, 2021 16:59 PST)

ABRAHAM M. LEVY

Administrative Law Judge

Office of Administrative Hearings

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Attorneys for Complainant

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

In the Matter of the Accusation Against:	Case No. 800-2018-042045
JOHN THOMAS ALEXANDER, II, M.D. **5720 Oberlin Dr.** **San Diego, CA 92121-1723** **Physician's and Surgeon's Certificate No. G 80280,** Respondent.	**A C C U S A T I O N**

PARTIES

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

2. On or about November 23, 1994, the Medical Board issued Physician's and Surgeon's Certificate No. G 80280 to John Thomas Alexander, II, 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 November 30, 2022, unless renewed.

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JURISDICTION

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

4. Section 2234 of the Code, states, in pertinent part:

> 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:
>
> ...
>
> (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.
>
> ...

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.

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence)

6. Respondent has subjected his Physician's and Surgeon's Certificate No. G 80280 to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (b), of the Code, in that he was grossly negligent in his care and treatment of Patient A,[1] as more particularly alleged hereinafter:

7. On or about February 24, 2015, Patient A, a then thirty-one-year-old female, presented to Respondent for a plastic surgery consultation. The patient had a history of prior breast augmentation and the birth of four children. At this initial appointment, Patient A indicated that she wanted to become more comfortable with her midsection, and was interested in

[1] To protect the privacy of the patient involved, the patient's name has not been included in this pleading. Respondent is aware of the identity of the patient referred to herein.

a tummy tuck, breast augmentation or lift, and possible liposuction. Respondent did not have any discussion with Patient A about her labia at this visit. Other than the patient's intake form and an undated document that includes several drawings, the patient's medical record contains no other documentation regarding this initial visit.

8. Between on or about March 2, 2015, and on or about March 9, 2015, Patient A exchanged multiple emails with Respondent's office regarding scheduling a second consultation and surgery.

9. On or about March 31, 2015, Patient A was seen by Respondent for her preoperative appointment. Respondent did not have any discussion with Patient A about her labia at this visit. On that date, Patient A completed a health questionnaire and signed a Consent to Operation form authorizing Respondent to perform "abdominoplasty, bilateral breast-lift and VASER liposuction to inner/outer thighs." Contained within this document was a paragraph that states:

> I recognize that during the course of the operation unforeseen conditions may necessitate additional or different procedures other than those set forth above. I therefore authorize and request Dr. Alexander to perform such procedures as are necessary in his professional judgment. The authority granted under this paragraph shall extend to remedying conditions that are not known to the doctor before the surgery begins.

Other than the consent forms, her health questionnaire, and some photographs, the patient's medical record contains no other documentation regarding this preoperative visit.

10. On or about April 15, 2015, Patient A presented to Respondent for her anticipated surgical procedures, including abdominoplasty, bilateral breast lift and VASER liposuction to inner/outer thighs. After the patient's husband dropped her off at the clinic, Patient A was prepped for surgery and placed under anesthesia.

11. While performing the inner thigh liposuction on Patient A, Respondent noted for the first time that the patient had "prominent labia." Respondent became concerned that upon completion of the liposuction, Patient A's "prominent labia" would create a readily apparent bulge in swimwear or other form-fitting clothing. Respondent then directed his nurse to contact Patient A's husband to inquire if he was aware of the condition, if it was something that has bothered her, and if he thinks Patient A would want it addressed.

12. While Patient A was still under anesthesia, Respondent's nurse stepped outside the surgical suite and contacted Patient A's husband by phone. During this discussion, the nurse understood Patient A's husband to indicate that Patient A would want her "prominent labia" addressed.[2]

13. Sometime after Respondent's nurse spoke with Patient A's husband, and while Patient A was still under anesthesia, Respondent performed a labiaplasty on Patient A, removing approximately 1.5 c.m. of tissue. Before performing the procedure, Respondent had never seen or examined Patient A's vagina, and had never had a discussion with her about her labia or the risks and benefits associated with this procedure.

14. On or about April 16, 2015, Patient A presented to Respondent for her post-operative visit. During this visit, Respondent asked the patient if everything was "alright down there," but did not look at or examine her vagina.

15. On or about April 22, 2015, April 28, 2015, and June 16, 2015, Patient A returned for additional post-operative visits. During each of these visits, Respondent did not look at or examine Patient A's vagina and did not inquire about its healing.

16. Respondent committed gross negligence in his care and treatment of Patient A, by performing a labiaplasty on the patient without her consent.

SECOND CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

17. Respondent has further subjected his Physician's and Surgeon's Certificate No. G 80280 to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (c), of the Code, in that he committed repeated negligent acts in his care and treatment of Patient A, as more particularly alleged hereinafter:

A. Paragraphs 6 through 16, above, are hereby incorporated by reference and realleged as if fully set forth herein;

///

[2] In a civil deposition dated February 3, 2017, Patient A's husband indicated that he did not fully understand what the nurse was calling him about, and that he informed her that whatever Respondent had discussed with Patient A is what Respondent should do.

B. Respondent failed to appropriately document a preoperative consultation with the patient, and failed to appropriately document the discussion with the patient's husband during the operation that changed the surgical plan.

THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain Adequate and Accurate Records)

18. Respondent has further subjected his Physician's and Surgeon's Certificate No. G 80280 to disciplinary action under sections 2227 and 2234, as defined by section 2266, of the Code, in that he failed to maintain adequate and accurate records regarding his care and treatment of Patient A, as more particularly alleged in paragraphs 6 through 17, above, which are hereby incorporated by reference and realleged as if fully set forth herein.

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 No. G 80280, issued to Respondent, John Thomas Alexander, II, M.D.;

2. Revoking, suspending or denying approval of Respondent, John Thomas Alexander, II, M.D.'s authority to supervise physician assistants and advanced practice nurses;

3. Ordering Respondent, John Thomas Alexander, II, 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: OCT 28 2020

WILLIAM PRASIFKA
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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