

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

In the Matter of the Accusation and)
Notification of Violation and Imposition of)
Civil Penalty Against:)
)
)
Stewart W. Lovelace, M.D.)
)
)
Physician's & Surgeon's)
Certificate No. C 30263)
)
Respondent.)

MBC File # 20-2006-172480

**ORDER CORRECTING A
CLERICAL ERROR IN THE ORDER PORTION OF THE
DECISION AFTER REMAND FROM SUPERIOR COURT**

Pursuant to the provisions of Section 11518.5 of the Government Code and upon timely receipt of application for correction of a clerical error filed by Respondent, the Medical Board of California (hereafter "Board") finds that there is a clerical error in the Order portion of the Decision After Remand From Superior Court in the above-entitled matter and that such clerical error warrants correction so that the commencement of Respondent's probationary term comports with the Board's prior decision.

THEREFORE IT IS HEREBY ORDERED that the Order in the Decision After Remand From Superior Court is amended and corrected to read as follows:

ORDER

A. Respondent Stewart W. Lovelace shall pay to the Board, or its authorized designee, a civil penalty of \$10,000, according to a payment schedule to be determined by the Board or its authorized designee.

B. Physician's and Surgeon's Certificate No. C30263, issued to Respondent Stewart W. Lovelace, M.D., is revoked. However, the revocation is stayed and Respondent is placed on three years probation, effective September 28, 2007, upon the following terms and conditions.

1. 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.

2. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, 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.

3. Probation Unit Compliance

Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of his business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division 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).

Respondent shall not engage in the practice of medicine in his place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

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

4. Interview with the Division or its Designee

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

5. Residing or Practicing Out-of-State

In the event Respondent should leave the State of California to reside or to practice, Respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a

period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside 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 and Probation Unit Compliance.

Respondent's license shall be automatically cancelled if Respondent's periods of temporary or permanent residence or practice outside California total two years. However, Respondent's license shall not be cancelled as long as Respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

6. Failure to Practice Medicine - California Resident

In the event Respondent resides in the State of California and for any reason Respondent stops practicing medicine in California, he shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if Respondent resides in California and, for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

7. License Surrender

Following the effective date of this Decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, he may request the voluntary surrender of his license. The Division reserves the right to evaluate Respondent's request and to exercise its discretion 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 his wallet and wall certificate to the Division or its designee and Respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of Respondent's license shall be deemed disciplinary action. If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

8. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

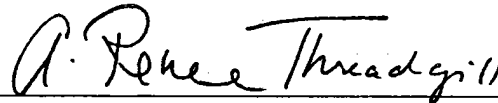
9. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If Respondent violates probation in any respect, the Division, 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 Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

10. Completion of Probation

Respondent shall comply with all financial obligations (e.g., 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.

Dated: February 10, 2009



A. Renee Threadgill, Chief of Enforcement
Medical Board of California

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

In the Matter of the Accusation and
Notification of Violation and Imposition of
Civil Penalty Against:

STEWART W. LOVELACE, M.D.
1112 Ocean Drive
Manhattan Beach, California 90266

Physician's and Surgeon's Certificate
Number C 30263,

Respondent.

Case No. 20-2006-172480

OAH No. L2006110092

DECISION AFTER REMAND FROM SUPERIOR COURT

This matter came on regularly for hearing on January 30, 2007, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

David T. Thornton (Complainant) was represented by Chris Leong, Deputy Attorney General.

Stewart W. Lovelace, M.D. (Respondent) was present and was represented by Steven D. Hunt, Attorney at Law.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision.

The proposed decision of the administrative law judge was submitted to the Division of Medical Quality, Medical Board of California (hereafter "division"¹ or Board) on February 13, 2007. After due consideration thereof, the division declined to adopt the proposed decision and thereafter on May 2, 2007 issued an Order of Remand and subsequently issued an order vacating the remand order, and granting complainant's petition for reconsideration. On July 24, 2007, the division issued a Notice of Hearing for Oral Argument. Oral argument was heard on August 20, 2007. Present were members Wender, Salomonson, Yaroslavsky, and Zerunyan. On August 29, 2007, the division, having considered written argument submitted by both parties, issued its decision adopting the Administrative Law Judge's proposed decision, which became effective September 28, 2007.

Respondent then filed a Petition for Writ of Administrative Mandamus in Sacramento Superior Court. On October 8, 2008, a judgment granting a Writ of Administrative Mandamus in this matter was entered. With respect to the \$244,000 civil penalty imposed against the Respondent, the Court remanded the matter back to the Board to reconsider its action in light of the Court's Statement of Decision but otherwise upheld the decision. On December 8, 2008, the Board reconsidered its action in light of the Court's ruling, and hereby makes and enters the following as its decision in the above-referenced matter:

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. In this case, Complainant seeks to discipline Respondent's physician's and surgeon's certificate on grounds of unprofessional conduct, pursuant to Business and Professions Code² section 2234, subdivision (a) for his failure to comply with a medical records request and his failure to comply with a citation order.
2. David T. Thornton made the Accusation and Notification of Violation and Imposition of Civil Penalty in his official capacity as Executive Director of the Medical Board of California (Board).
3. On July 19, 1968, the Board issued Physician's and Surgeon's Certificate No. C 30263 to Respondent. The certificate was in full force and effect at all relevant times and was scheduled to expire on December 31, 2006. The evidence failed to disclose whether Respondent's certificate is presently expired. However, if it has expired, the Board maintains jurisdiction over this matter pursuant to Code section 118, subdivision (b).

¹ There are no longer divisions within the Medical Board of California.

² All statutory references are to the Business and Professions Code unless otherwise specified.

4. On or about July 22, 2005, and August 11, 2005, Patient. S.S.³ presented to Respondent for treatment. She quickly became dissatisfied with Respondent and filed a complaint against him with the Board. At the time she filed her complaint, Respondent's medical records for S.S. consisted of two pages of handwritten notes.

5. On November 2, 2005, a Consumer Services Analyst for the Board wrote to Respondent advising him of S.S.'s complaint and requesting a certified copy of S.S.'s medical records. The patient's authorization for release of her medical records accompanied the letter. Pursuant to Code section 2225.5, Respondent was required to produce the records within 15 days of his receipt of the request. Respondent failed to timely respond to that request.

6. On December 7, 2005, the same Consumer Services Analyst again wrote to Respondent. In that letter, she advised Respondent that the certified copies of S.S.'s records had not yet been received and that, if they were not received by January 3, 2006, the Board would "be pursuing the civil penalties set forth in Section 2225.5 for each day the documents have not been produced." Respondent lost track of the due date and did not respond to that letter by the January 3, 2006 deadline.

7. On January 9, 2006, a Board representative attempted to reach Respondent at two different telephone numbers. No answer, either by an individual or by voicemail, was made at the first number. For reasons not disclosed by the evidence, the caller was unable to leave a voicemail message at the second number⁴.

8. On March 3, 2006, the Board issued Citation No. 20-2006-172480 to Respondent. According to the Citation Order, Respondent "failed to provide the Board with certified copies of a patient's medical records within 15 days of receiving a written request." He was therefore required "to provide the Board with certified copies of the patient's medical records" within 15 days from the date he received the Citation Order. He was also ordered to pay a fine of \$2,500 within 30 days from the date he received the Citation Order. S.S.'s name did not appear on the Citation Order.

9. Sometime in March 2006, Respondent received another letter from the Board. The letter did not reference a requirement that Respondent produce medical records, but did remind him to pay the \$2,500 fine. Respondent interpreted the letter to mean that the medical record production was no longer necessary.

³ The patient's initials are used in lieu of her name in order to protect her privacy.

⁴ At the hearing, Respondent claimed he had full voicemail capabilities in place on January 9, 2006. He therefore disputed the testimony regarding the Board representative's purported inability to leave a telephonic message. The statements of the Board representative and Respondent are not necessarily inconsistent. The calls may have been made at a time when, for unknown reasons, Respondent's voicemail system was temporarily inoperative. No reason exists to question the credibility of either the Board representative or Respondent on that issue.

10. On April 6, 2006, a Board representative wrote to Respondent advising him that, among other things, his license had been placed on hold and could not be renewed unless the Board received payment of the \$2,500 fine, and that the Board would pursue disciplinary action against Respondent unless it received the payment on or before April 20, 2006. Although the patient records were mentioned in the April 6, 2006 letter, no demand for their production was made.

11. On April 27, 2006, a Board representative sent another letter to Respondent. The letter was similar in form and content to that sent on April 6, 2006. According to that letter, the Board intended to pursue disciplinary action against Respondent unless he paid the fine on or before May 12, 2006. Although the letter referenced an Order of Abatement in connection with the citation, no mention was made of a present requirement to produce patient records.

12. On May 16, 2006, a Board representative sent a "Final Notice" to Respondent. According to that letter, the Board had submitted Respondent's name to the California Franchise Tax Board in an attempt to obtain payment of the administrative fine, in addition to having placed his license on hold pending that payment. The letter also contained the following language:

Please be advised, pursuant to Business and Professions Code section 125.9(b)(5), if the Medical Board has not received payment of the administrative fine by May 30, 2006, **and proof of your compliance with the Order of Abatement**, the Medical Board will refer this matter to the Office of the Attorney General for the filing of an Accusation alleging unprofessional conduct.
(Emphasis added.)

13. Despite the language in the Board's May 16, 2006 letter, Respondent still believed he was required to pay the fine but was not required to produce any patient records.

14. During the time the Board was attempting to obtain S.S.'s records and the administrative fine from Respondent, Respondent was embroiled in a civil lawsuit involving another patient, and he was going through a Chapter 13 personal bankruptcy requiring a restructuring and continued payment of his debts. He was extremely distracted by those two legal matters, and he misunderstood the Board to be seeking the medical records of the patient involved in the lawsuit rather than those of S.S. On October 14, 2006, Respondent mistakenly submitted the medical records of the patient involved in the lawsuit to the Board.

15. In approximately November of 2006, Respondent paid the \$2,500 administrative fine to the Board pursuant to the Citation Order. Because the instant Accusation was already pending, the check was forwarded to Complainant's counsel. Respondent had not paid the fine earlier because his financial condition precluded him from doing so.

16. On a date not disclosed by the evidence, Respondent was notified of his error regarding the identity of the patient whose records the Board was attempting to obtain. On December 22, 2006, Respondent's attorney forwarded the two pages of S.S.'s medical records to Complainant's counsel.

17. Respondent's bankruptcy was recently dismissed, but he is still "feeling the effects" of it financially. In addition, he was required to pay a large sum of money in connection with the civil lawsuit referenced above. He therefore claims he is unable to pay the over \$300,000 the Board is seeking as a civil penalty pursuant to Code section 2225.5.

18. Respondent recognizes, acknowledges and accepts responsibility for the errors he made in connection with his failure to timely produce S.S.'s records and his failure to pay the administrative fine required by the Citation Order. He is remorseful for those errors.

LEGAL CONCLUSIONS

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (a), for unprofessional conduct, as set forth in Findings 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

2. The issue of whether to affirm Citation No. 20-2006-172480 is moot. Respondent has complied with the Citation Order, albeit not in a timely manner.

3. Respondent engaged in unprofessional conduct by failing to timely comply with the Board's request for S.S.'s medical records and by failing to either comply with the Citation Order or timely appeal the citation. Those failures have subjected his physician's and surgeon's certificate to discipline. His failure to produce the records when required has subjected him to the civil penalty referenced in Code section 2225.5.

4. Code section 2225.5, subdivision (a) states:

(1) A licensee who fails or refuses to comply with a request for the medical records of a patient, that is accompanied by that patient's written authorization for release of records to the board, within 15 days of receiving the request and authorization, shall pay to the board a civil penalty of one thousand dollars (\$1,000) per day for each day that the documents have not been produced after the 15th day, unless the licensee is unable to provide the documents within this time period for good cause.

(2) A health care facility shall comply with a request for the medical records of a patient that is accompanied by that patient's written authorization for release of records to the board together with a notice citing this section and describing the penalties for failure to comply with this section. Failure to provide the authorizing patient's medical records to the board within 30 days of receiving the request, authorization, and notice shall subject the health care facility to a civil penalty, payable to the board, of up to one thousand dollars (\$1,000) per day for each day that the documents have not been produced after the 30th day, up to ten thousand dollars (\$10,000), unless the health care facility is unable to provide the documents within this time period for good cause. This paragraph shall not require health care facilities to assist the board in obtaining the patient's authorization. The board shall pay the reasonable costs of copying the medical records.

5. Respondent argued that he is financially unable to pay a \$1,000 per day civil penalty and that, pursuant to *Zuckerman v. v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 [124 Cal.Rptr.2d 701], the Board should excuse, or at least decrease, the amount of the penalty based on his inability to pay.

6. Respondent's reliance of *Zuckerman* is misplaced. In that case, the Court found that the possibility of having to pay a substantial sum for the licensing agency's costs of investigation and prosecution could impose such a burden on a respondent facing a disciplinary matter, that he/she could feel forced to settle the case to avoid that possibility, even if he/she believed the case was defensible. Thus, the potential exposure to substantial costs could have a chilling effect on a licensee's exercise of his/her right to a hearing on the merits. The court stated:

The Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that regulation 317.5 does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing. Thus, the Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [citation]. Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [citation], the Board must determine that the chiropractor will be financially able to make later payments. Finally, the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a chiropractor engaged in relatively innocuous misconduct. [footnote omitted.] (*Id.* at 45.)

7. In the instant matter, Respondent did not forgo his right to a hearing on the merits of a potentially meritorious case in order to avoid having to pay costs of investigation and prosecution. In fact, by statute, the Board no longer seeks those costs in its disciplinary actions. (Bus. & Prof. Code § 125.3, subd. (k).) Rather, Respondent failed to comply with the Board's request to produce a patient's records in response to that patient's complaint against him. The potential for incurring a large financial obligation has the opposite effect under Code section 2225.5 than it does under Code section 125.3 (for agencies other than the Medical Board that are under the umbrella of the Department of Consumer Affairs). Under Code section 2225.5, the risk of a large civil penalty serves as a motivation to produce the requested medical records in a timely manner, and thus lacks the "chilling effect" extant in connection with Code section 125.3, unless the physician has strong reason to believe the records should not be produced. That was not the case here.

8. Respondent also argued that the civil penalty imposed under Code section 2225.5 should be limited to \$5,000 pursuant to Code section 125.9. That statute states:

(a) Except with respect to persons regulated under Chapter 11 (commencing with Section 7500), and Chapter 11.6 (commencing with Section 7590) of Division 3, any board, bureau, or commission within the [D]epartment [of Consumer Affairs], the board created by the Chiropractic Initiative Act, and the Osteopathic Medical Board of California, may establish, by regulation, a system for the issuance to a licensee of a citation which may contain an order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto.

(b) The system shall contain the following provisions:

(1) Citations shall be in writing and shall describe with particularity the nature of the violation, including specific reference to the provision of law determined to have been violated.

(2) Whenever appropriate, the citation shall contain an order of abatement fixing a reasonable time for abatement of the violation.

(3) In no event shall the administrative fine assessed by the board, bureau, or commission exceed five thousand dollars (\$5,000) for each inspection or each investigation made with respect to the violation, or five thousand dollars (\$5,000) for each violation or count if the violation involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare. In assessing a fine, the board, bureau, or commission shall give due consideration to the appropriateness of the amount of the fine with respect to factors such as the gravity of the violation, the good faith of the licensee, and the history of previous violations.

(4) A citation or fine assessment issued pursuant to a citation shall inform the licensee that if he or she desires a hearing to contest the finding of a violation, that hearing shall be requested by written notice to the board, bureau, or commission within 30 days of the date of issuance of the citation or assessment. If a hearing is not requested pursuant to this section, payment of any fine shall not constitute an admission of the violation charged. Hearings shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(5) Failure of a licensee to pay a fine within 30 days of the date of assessment, unless the citation is being appealed, may result in disciplinary action being taken by the board, bureau, or commission. Where a citation is not contested and a fine is not paid, the full amount of the assessed fine shall be added to the fee for renewal of the license. A license shall not be renewed without payment of the renewal fee and fine.

(c) The system may contain the following provisions:

(1) A citation may be issued without the assessment of an administrative fine.

(2) Assessment of administrative fines may be limited to only particular violations of the applicable licensing act.

(d) Notwithstanding any other provision of law, if a fine is paid to satisfy an assessment based on the finding of a violation, payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure.

(e) Administrative fines collected pursuant to this section shall be deposited in the special fund of the particular board, bureau, or commission.

9. Respondent's argument is not well taken. In enacting Code section 125.9, the Legislature permitted certain licensing agencies to develop a citation system according to which they could, among other things, impose administrative fines. However, the Legislature limited the agencies to a maximum of \$5,000 for each inspection or violation. The Legislature, however, did not so limit itself. The \$1,000 per day fine imposed pursuant to Code section 2225.5 is imposed by the Legislature itself, not by a regulatory agency under the Legislature's authority. Thus, although the administrative fine imposed by the Board in its Citation Order could not, and did not, exceed the statutory limit imposed by Code section 125.9, the civil penalty imposed by the Legislature pursuant to Code section 2225.5 is not limited.

10. Finally, Respondent argued that, because Code section 2225.5, subdivision (b) places a \$10,000 limit for the civil penalty imposed against a health care facility, it is not equitable to impose an unlimited penalty against a physician for the same offense. Regardless of whether the argument is meritorious, the issue is moot in that the Administrative Law Judge is obligated to follow the statute and is without authority to craft a remedy for Respondent that would be inconsistent with the plain language of Code section 2225.5, subdivision (a).

11. What can be addressed, however, is whether, based on good cause, Respondent was unable to produce S.S.'s records at any time between November 2, 2005 (the date of the Board's first notice) and December 22, 2006 (the date Respondent's counsel forwarded the two pages of records to Complainant's counsel). That question is answered in the affirmative.

12. The Board's initial notice was issued on November 2, 2005. Pursuant to Code section 2225.5, subdivision (a), it gave Respondent 15 days to submit S.S.'s medical records. The deadline for the record production was therefore November 17, 2005. Although Respondent failed to meet that deadline, the warning from the Board in its letter of December 7, 2005, indicated that civil penalties would be pursued if the records were not produced by January 3, 2006. Thus, the Board tacitly waived enforcement of the statute between November 17, 2005, and January 3, 2006, a total of 47 days.

13. The penalty period therefore started on January 3, 2006. The Board issued its citation on March 3, 2006, requiring production of the records and payment of the \$2,500 administrative fine. However, in its first warning letter, dated April 6, 2006, the Board required payment of the fine but did not mention a requirement that Respondent produce the medical records. Respondent was therefore justified in believing that the production was no longer necessary. Accordingly, Respondent's initial penalty period ran from January 3, 2006, to April 6, 2006, a total of 93 days.

14. The Board sent another follow-up letter on April 27, 2006, but again, no mention was made of the record production. However, in its Final Notice, dated May 16, 2006, the Board required payment of the administrative fine and proof of compliance with the Order of Abatement. Therefore, as of May 16, 2006, Respondent was back on notice that he was required to submit the two pages of S.S.'s medical records. Accordingly, good cause existed for non-production between April 6, 2006, and May 16, 2006, a total of 40 days. However, good cause did not exist for Respondent's failure to produce the records between May 16, 2006, and October 14, 2006, the date he erroneously produced the wrong patient's records, a total of 151 days. Respondent was not immediately notified of his error and, upon learning of it, he submitted S.S.'s medical records on December 22, 2006. Since he reasonably believed he had complied with the Board's request to produce medical records, he was not subject to the civil penalty between October 14, 2006, and December 22, 2006.

15. A total of 400 days lapsed between November 17, 2005, the first penalty day, and December 22, 2006, the day Respondent produced S.S.'s medical records. Of that time, Respondent was unable to produce the records for good cause on 156 days. Good cause for non-production did not exist for the remaining 244 days.

16. Although Respondent did not act maliciously or intend to prevent the Board from properly investigating S.S.'s complaint, his distractions because of his bankruptcy and civil lawsuit do not constitute good cause that prevented him from producing the two pages of S.S.'s medical records.

17. At the time he was required to submit S.S.'s medical records to the Board pursuant to Code section 2225.5, and to pay the \$2,500 administrative fine pursuant to the Citation Order, Respondent was overwhelmed with legal and financial problems. Although his conduct was unprofessional and therefore subject to discipline, it was not borne of ignoble motives. The purpose of a disciplinary proceeding such as the one *sub judice* is not to punish the licensee, but rather to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161; *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1015; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Further, "[i]n exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, the division, or the California Board of Podiatric Medicine, shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence." (Code § 2229, subd. (b).) In this case, the public health, safety, welfare and interest should be best served by the imposition of a civil penalty covering the appropriate number of days, and by a properly conditioned probationary order.

Discussion of Superior Court's Statement of Decision

18. In its Statement of Decision, the Sacramento Superior Court opined that the \$244,000 civil penalty assessed against Respondent was invalid as it was an excessive fine and therefore violated constitutional standards. The Court noted in its statement that the exercise of reasoned discretion by the Board had been replaced with the adding machine and that the statute which authorized the Board to assess such a civil penalty, section 2225.5 of the Business and Professions Code, while not facially unconstitutional, was unconstitutional as applied to Respondent in the instant matter. The Court found that the Board did not consider Respondent's ability to pay or the nature of his conduct in determining the amount of the civil penalty. Finally, the Court noted that a health care facility that did not produce requested medical records would be subjected to a maximum penalty of \$10,000. (See § 2225.5 (a)(2).) No such maximum exists for physicians, such as Respondent.

A. The Board, after consideration and thorough review of the Court's ruling, reduces the civil penalty assessed against Respondent in this matter to \$10,000. The Board is not persuaded that it must consider the negligence or malicious intent of a licensee when assessing this type of penalty, as section 2225.5 is silent on that account. It has chosen to set the civil penalty amount in this particular case at an amount equal to that maximum penalty that may be assessed by the Board against a health care facility.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

A. Respondent Stewart W. Lovelace shall pay to the Board, or its authorized designee, a civil penalty of \$10,000, according to a payment schedule to be determined by the Board or its authorized designee.

B. Physician's and Surgeon's Certificate No. C 30263, issued to Respondent Stewart W. Lovelace, is revoked. However, the revocation is stayed and Respondent is placed on probation for three years upon the following terms and conditions.

1. 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.

2. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, 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.

3. Probation Unit Compliance

Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of his business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division 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).

Respondent shall not engage in the practice of medicine in his place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

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

4. Interview with the Division or its Designee

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

5. Residing or Practicing Out-of-State

In the event Respondent should leave the State of California to reside or to practice, Respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside 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 and Probation Unit Compliance.

Respondent's license shall be automatically cancelled if Respondent's periods of temporary or permanent residence or practice outside California total two years. However, Respondent's license shall not be cancelled as long as Respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

6. Failure to Practice Medicine - California Resident

In the event Respondent resides in the State of California and for any reason Respondent stops practicing medicine in California, he shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if Respondent resides in California and, for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

7. License Surrender

Following the effective date of this Decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, he may request the voluntary surrender of his license. The Division reserves the right to evaluate Respondent's request and to exercise its discretion 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 his wallet and wall certificate to the Division or its designee and Respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of Respondent's license shall be deemed disciplinary action. If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

8. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

9. Violation of Probation

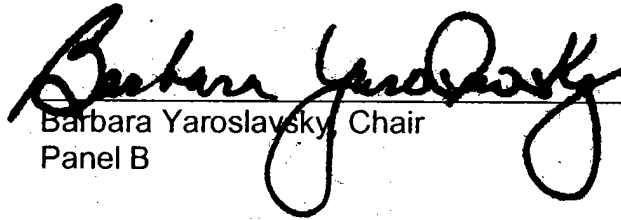
Failure to fully comply with any term or condition of probation is a violation of probation. If Respondent violates probation in any respect, the Division, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against Respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

10. Completion of Probation

Respondent shall comply with all financial obligations (e.g., 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.

This Decision shall become effective on February 25, 2009.

IT IS SO ORDERED THIS 26th day of January, 2009.


Barbara Yaroslavsky, Chair
Panel B

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

In the Matter of the Accusation and Notification of
Violation and Imposition of Civil Penalty Against:

STEWART W. LOVELACE, M.D.

Physician's and Surgeon's Certificate No. C 30263

Respondent.

Case No. 20-2006-172480

OAH No. L2006110092

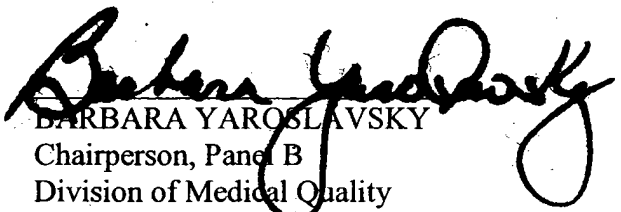
DECISION AFTER RECONSIDERATION

The proposed decision of the administrative law judge was submitted to the Division of Medical Quality, Medical Board of California (hereafter "division") on February 13, 2007. After due consideration thereof, the division declined to adopt the proposed decision and thereafter on May 2, 2007 issued an Order of Remand and subsequently issued an order vacating the remand order, and granting complainant's petition for reconsideration. On July 24, 2007, the division issued a Notice of Hearing for Oral Argument. Oral argument was heard on August 20, 2007. Present were members Wender, Salomonson, Yaroslavsky, and Zerunyan. The time for filing written argument in this matter having expired, written argument having been filed by both parties and such written argument, together with the entire record, including the transcript of said hearing, having been read and considered, pursuant to Government Code Section 11517, the division hereby makes the following decision and order:

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the division as its decision in this matter.

This decision shall become effective on September 28, 2007

IT IS SO ORDERED this 29th day of August 2007.


BARBARA YAROSLAVSKY
Chairperson, Panel B
Division of Medical Quality
Medical Board of California

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

**In the Matter of the Accusation and
Notification of Violation and Imposition of
Civil Penalty Against:**

**STEWART W. LOVELACE, M.D.
1112 Ocean Drive
Manhattan Beach, California 90266**

**Physician's and Surgeon's Certificate
Number C 30263**

Respondent.

Case No. 20-2006-172480

OAH No. L2006110092

PROPOSED DECISION

This matter came on regularly for hearing on January 30, 2007, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

David T. Thornton (Complainant) was represented by Chris Leong, Deputy Attorney General.

Stewart W. Lovelace, M.D. (Respondent) was present and was represented by Steven D. Hunt, Attorney at Law.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision.

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FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. In this case, Complainant seeks to discipline Respondent's physician's and surgeon's certificate on grounds of unprofessional conduct, pursuant to Business and Professions Code¹ section 2234, subdivision (a) for his failure to comply with a medical records request and his failure to comply with a citation order.

2. David T. Thornton made the Accusation and Notification of Violation and Imposition of Civil Penalty in his official capacity as Executive Director of the Medical Board of California (Board).

3. On July 19, 1968, the Board issued Physician and Surgeon Certificate No. C 30263 to Respondent. The certificate was in full force and effect at all relevant times and was scheduled to expire on December 31, 2006. The evidence failed to disclose whether Respondent's certificate is presently expired. However, if it has expired, the Board maintains jurisdiction over this matter pursuant to Code section 118, subdivision (b).

4. On or about July 22, 2005, and August 11, 2005, Patient. S.S.² presented to Respondent for treatment. She quickly became dissatisfied with Respondent and filed a complaint against him with the Board. At the time she filed her complaint, Respondent's medical records for S.S. consisted of two pages of handwritten notes.

5. On November 2, 2005, a Consumer Services Analyst for the Board wrote to Respondent advising him of S.S.'s complaint and requesting a certified copy of S.S.'s medical records. The patient's authorization for release of her medical records accompanied the letter. Pursuant to Code section 2225.5, Respondent was required to produce the records within 15 days of his receipt of the request. Respondent failed to timely respond to that request.

6. On December 7, 2005, the same Consumer Services Analyst again wrote to Respondent. In that letter, she advised Respondent that the certified copies of S.S.'s records had not yet been received and that, if they were not received by January 3, 2006, the Board would "be pursuing the civil penalties set forth in Section 2225.5 for each day the documents have not been produced." Respondent lost track of the due date and did not respond to that letter by the January 3, 2006 deadline.

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¹ All statutory references are to the Business and Professions Code unless otherwise specified.

² The patient's initials are used in lieu of her name in order to protect her privacy.

7. On January 9, 2006, a Board representative attempted to reach Respondent at two different telephone numbers. No answer, either by an individual or by voicemail, was made at the first number. For reasons not disclosed by the evidence, the caller was unable to leave a voicemail message at the second number³.

8. On March 3, 2006, the Board issued Citation No. 20-2006-172480 to Respondent. According to the Citation Order, Respondent "failed to provide the Board with certified copies of a patient's medical records within 15 days of receiving a written request." He was therefore required "to provide the Board with certified copies of the patient's medical records" within 15 days from the date he received the Citation Order. He was also ordered to pay a fine of \$2,500 within 30 days from the date he received the Citation Order. S.S.'s name did not appear on the Citation Order.

9. Sometime in March 2006, Respondent received another letter from the Board. The letter did not reference a requirement that Respondent produce medical records, but did remind him to pay the \$2,500 fine. Respondent interpreted the letter to mean that the medical record production was no longer necessary.

10. On April 6, 2006, a Board representative wrote to Respondent advising him that, among other things, his license had been placed on hold and could not be renewed unless the Board received payment of the \$2,500 fine, and that the Board would pursue disciplinary action against Respondent unless it received the payment on or before April 20, 2006. Although the patient records were mentioned in the April 6, 2006 letter, no demand for their production was made.

11. On April 27, 2006, a Board representative sent another letter to Respondent. The letter was similar in form and content to that sent on April 6, 2006. According to that letter, the Board intended to pursue disciplinary action against Respondent unless he paid the fine on or before May 12, 2006. Although the letter referenced an Order of Abatement in connection with the citation, no mention was made of a present requirement to produce patient records.

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³ At the hearing, Respondent claimed he had full voicemail capabilities in place on January 9, 2006. He therefore disputed the testimony regarding the Board representative's purported inability to leave a telephonic message. The statements of the Board representative and Respondent are not necessarily inconsistent. The calls may have been made at a time when, for unknown reasons, Respondent's voicemail system was temporarily inoperative. No reason exists to question the credibility of either the Board representative or Respondent on that issue.

12. On May 16, 2006, a Board representative sent a "Final Notice" to Respondent. According to that letter, the Board had submitted Respondent's name to the California Franchise Tax Board in an attempt to obtain payment of the administrative fine, in addition to having placed his license on hold pending that payment. The letter also contained the following language:

Please be advised, pursuant to Business and Professions Code section 125.9(b)(5), if the Medical Board has not received payment of the administrative fine by May 30, 2006, **and proof of your compliance with the Order of Abatement**, the Medical Board will refer this matter to the Office of the Attorney General for the filing of an Accusation alleging unprofessional conduct.

(Emphasis added.)

13. Despite the language in the Board's May 16, 2006 letter, Respondent still believed he was required to pay the fine but was not required to produce any patient records.

14. During the time the Board was attempting to obtain S.S.'s records and the administrative fine from Respondent, Respondent was embroiled in a civil lawsuit involving another patient, and he was going through a Chapter 13 personal bankruptcy requiring a restructuring and continued payment of his debts. He was extremely distracted by those two legal matters, and he misunderstood the Board to be seeking the medical records of the patient involved in the lawsuit rather than those of S.S. On October 14, 2006, Respondent mistakenly submitted the medical records of the patient involved in the lawsuit to the Board.

15. In approximately November of 2006, Respondent paid the \$2,500 administrative fine to the Board pursuant to the Citation Order. Because the instant Accusation was already pending, the check was forwarded to Complainant's counsel. Respondent had not paid the fine earlier because his financial condition precluded him from doing so.

16. On a date not disclosed by the evidence, Respondent was notified of his error regarding the identity of the patient whose records the Board was attempting to obtain. On December 22, 2006, Respondent's attorney forwarded the two pages of S.S.'s medical records to Complainant's counsel.

17. Respondent's bankruptcy was recently dismissed, but he is still "feeling the effects" of it financially. In addition, he was required to pay a large sum of money in connection with the civil lawsuit referenced above. He therefore claims he is unable to pay the over \$300,000 the Board is seeking as a civil penalty pursuant to Code section 2225.5.

18. Respondent recognizes, acknowledges and accepts responsibility for the errors he made in connection with his failure to timely produce S.S.'s records and his failure to pay the administrative fine required by the Citation Order. He is remorseful for those errors.

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LEGAL CONCLUSIONS

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to discipline Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (a), for unprofessional conduct, as set forth in Findings 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

2. The issue of whether to affirm Citation No.20-2006-172480 is moot. Respondent has complied with the Citation Order, albeit not in a timely manner.

3. Respondent engaged in unprofessional conduct by failing to timely comply with the Board's request for S.S.'s medical records and by failing to either comply with the Citation Order or timely appeal the citation. Those failures have subjected his physician's and surgeon's certificate to discipline. His failure to produce the records when required has subjected him to the civil penalty referenced in Code section 2225.5.

4. Code section 2225.5, subdivision (a) states:

(1) A licensee who fails or refuses to comply with a request for the medical records of a patient, that is accompanied by that patient's written authorization for release of records to the board, within 15 days of receiving the request and authorization, shall pay to the board a civil penalty of one thousand dollars (\$1,000) per day for each day that the documents have not been produced after the 15th day, unless the licensee is unable to provide the documents within this time period for good cause.

(2) A health care facility shall comply with a request for the medical records of a patient that is accompanied by that patient's written authorization for release of records to the board together with a notice citing this section and describing the penalties for failure to comply with this section. Failure to provide the authorizing patient's medical records to the board within 30 days of receiving the request, authorization, and notice shall subject the health care facility to a civil penalty, payable to the board, of up to one thousand dollars (\$1,000) per day for each day that the documents have not been produced after the 30th day, up to ten thousand dollars (\$10,000), unless the health care facility is unable to provide the documents within this time period for good cause. This paragraph shall not require health care facilities to assist the board in obtaining the patient's authorization. The board shall pay the reasonable costs of copying the medical records.

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5. Respondent argued that he is financially unable to pay a \$1,000 per day civil penalty and that, pursuant to *Zuckerman v. v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 [124 Cal.Rptr.2d 701], the Board should excuse, or at least decrease, the amount of the penalty based on his inability to pay.

6. Respondent's reliance of *Zuckerman* is misplaced. In that case, the Court found that the possibility of having to pay a substantial sum for the licensing agency's costs of investigation and prosecution could impose such a burden on a respondent facing a disciplinary matter, that he/she could feel forced to settle the case to avoid that possibility, even if he/she believed the case was defensible. Thus, the potential exposure to substantial costs could have a chilling effect on a licensee's exercise of his/her right to a hearing on the merits. The court stated:

The Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that regulation 317.5 does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing. Thus, the Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [citation]. Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [citation], the Board must determine that the chiropractor will be financially able to make later payments. Finally, the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a chiropractor engaged in relatively innocuous misconduct. [footnote omitted.] (*Id.* at 45.)

7. In the instant matter, Respondent did not forgo his right to a hearing on the merits of a potentially meritorious case in order to avoid having to pay costs of investigation and prosecution. In fact, by statute, the Board no longer seeks those costs in its disciplinary actions. (Bus. & Prof. Code § 125.3, subd. (k).) Rather, Respondent failed to comply with the Board's request to produce a patient's records in response to that patient's complaint against him. The potential for incurring a large financial obligation has the opposite effect under Code section 2225.5 than it does under Code section 125.3 (for agencies other than the Medical Board that are under the umbrella of the Department of Consumer Affairs). Under Code section 2225.5, the risk of a large civil penalty serves as a motivation to produce the requested medical records in a timely manner, and thus lacks the "chilling effect" extant in connection with Code section 125.3, unless the physician has strong reason to believe the records should not be produced. That was not the case here.

8. Respondent also argued that the civil penalty imposed under Code section 2225.5 should be limited to \$5,000 pursuant to Code section 125.9. That statute states:

(a) Except with respect to persons regulated under Chapter 11 (commencing with Section 7500), and Chapter 11.6 (commencing with Section 7590) of Division 3, any board, bureau, or commission within the [D]epartment [of Consumer Affairs], the board created by the Chiropractic Initiative Act, and the Osteopathic Medical Board of California, may establish, by regulation, a system for the issuance to a licensee of a citation which may contain an order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto.

(b) The system shall contain the following provisions:

(1) Citations shall be in writing and shall describe with particularity the nature of the violation, including specific reference to the provision of law determined to have been violated.

(2) Whenever appropriate, the citation shall contain an order of abatement fixing a reasonable time for abatement of the violation.

(3) In no event shall the administrative fine assessed by the board, bureau, or commission exceed five thousand dollars (\$5,000) for each inspection or each investigation made with respect to the violation, or five thousand dollars (\$5,000) for each violation or count if the violation involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare. In assessing a fine, the board, bureau, or commission shall give due consideration to the appropriateness of the amount of the fine with respect to factors such as the gravity of the violation, the good faith of the licensee, and the history of previous violations.

(4) A citation or fine assessment issued pursuant to a citation shall inform the licensee that if he or she desires a hearing to contest the finding of a violation, that hearing shall be requested by written notice to the board, bureau, or commission within 30 days of the date of issuance of the citation or assessment. If a hearing is not requested pursuant to this section, payment of any fine shall not constitute an admission of the violation charged. Hearings shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

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(5) Failure of a licensee to pay a fine within 30 days of the date of assessment, unless the citation is being appealed, may result in disciplinary action being taken by the board, bureau, or commission. Where a citation is not contested and a fine is not paid, the full amount of the assessed fine shall be added to the fee for renewal of the license. A license shall not be renewed without payment of the renewal fee and fine.

(c) The system may contain the following provisions:

(1) A citation may be issued without the assessment of an administrative fine.

(2) Assessment of administrative fines may be limited to only particular violations of the applicable licensing act.

(d) Notwithstanding any other provision of law, if a fine is paid to satisfy an assessment based on the finding of a violation, payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure.

(e) Administrative fines collected pursuant to this section shall be deposited in the special fund of the particular board, bureau, or commission.

9. Respondent's argument is not well taken. In enacting Code section 125.9, the Legislature permitted certain licensing agencies to develop a citation system according to which they could, among other things, impose administrative fines. However, the Legislature limited the agencies to a maximum of \$5,000 for each inspection or violation. The Legislature, however, did not so limit itself. The \$1,000 per day fine imposed pursuant to Code section 2225.5 is imposed by the Legislature itself, not by a regulatory agency under the Legislature's authority. Thus, although the administrative fine imposed by the Board in its Citation Order could not, and did not, exceed the statutory limit imposed by Code section 125.9, the civil penalty imposed by the Legislature pursuant to Code section 2225.5 is not limited.

10. Finally, Respondent argued that, because Code section 2225.5, subdivision (b) places a \$10,000 limit for the civil penalty imposed against a health care facility, it is not equitable to impose an unlimited penalty against a physician for the same offense. Regardless of whether the argument is meritorious, the issue is moot in that the Administrative Law Judge is obligated to follow the statute and is without authority to craft a remedy for Respondent that would be inconsistent with the plain language of Code section 2225.5, subdivision (a).

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11. What can be addressed, however, is whether, based on good cause, Respondent was unable to produce S.S.'s records at any time between November 2, 2005 (the date of the Board's first notice) and December 22, 2006 (the date Respondent's counsel forwarded the two pages of records to Complainant's counsel). That question is answered in the affirmative.

12. The Board's initial notice was issued on November 2, 2005. Pursuant to Code section 2225.5, subdivision (a), it gave Respondent 15 days to submit S.S.'s medical records. The deadline for the record production was therefore November 17, 2005. Although Respondent failed to meet that deadline, the warning from the Board in its letter of December 7, 2005, indicated that civil penalties would be pursued if the records were not produced by January 3, 2006. Thus, the Board tacitly waived enforcement of the statute between November 17, 2005, and January 3, 2006, a total of 47 days.

13. The penalty period therefore started on January 3, 2006. The Board issued its citation on March 3, 2006, requiring production of the records and payment of the \$2,500 administrative fine. However, in its first warning letter, dated April 6, 2006, the Board required payment of the fine but did not mention a requirement that Respondent produce the medical records. Respondent was therefore justified in believing that the production was no longer necessary. Accordingly, Respondent's initial penalty period ran from January 3, 2006, to April 6, 2006, a total of 93 days.

14. The Board sent another follow-up letter on April 27, 2006, but again, no mention was made of the record production. However, in its Final Notice, dated May 16, 2006, the Board required payment of the administrative fine and proof of compliance with the Order of Abatement. Therefore, as of May 16, 2006, Respondent was back on notice that he was required to submit the two pages of S.S.'s medical records. Accordingly, good cause existed for non-production between April 6, 2006, and May 16, 2006, a total of 40 days. However, good cause did not exist for Respondent's failure to produce the records between May 16, 2006, and October 14, 2006, the date he erroneously produced the wrong patient's records, a total of 151 days. Respondent was not immediately notified of his error and, upon learning of it, he submitted S.S.'s medical records on December 22, 2006. Since he reasonably believed he had complied with the Board's request to produce medical records, he was not subject to the civil penalty between October 14, 2006, and December 22, 2006.

15. A total of 400 days lapsed between November 17, 2005, the first penalty day, and December 22, 2006, the day Respondent produced S.S.'s medical records. Of that time, Respondent was unable to produce the records for good cause on 156 days. Good cause for non-production did not exist for the remaining 244 days.

16. Although Respondent did not act maliciously or intend to prevent the Board from properly investigating S.S.'s complaint, his distractions because of his bankruptcy and civil lawsuit do not constitute good cause that prevented him from producing the two pages of S.S.'s medical records.

17. At the time he was required to submit S.S.'s medical records to the Board pursuant to Code section 2225.5, and to pay the \$2,500 administrative fine pursuant to the Citation Order, Respondent was overwhelmed with legal and financial problems. Although his conduct was unprofessional and therefore subject to discipline, it was not borne of ignoble motives. The purpose of a disciplinary proceeding such as the one *sub judice* is not to punish the licensee, but rather to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161; *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1015; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Further, "[i]n exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, the division, or the California Board of Podiatric Medicine, shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence." (Code § 2229, subd. (b).) In this case, the public health, safety, welfare and interest should be best served by the imposition of a civil penalty covering the appropriate number of days, and by a properly conditioned probationary order.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Respondent Stewart W. Lovelace shall pay to the Board, or its authorized designee, a civil penalty of \$244,000, according to a payment schedule to be determined by the Board or its authorized designee.

2. Physician's and Surgeon's Certificate No. C 30263, issued to Respondent Stewart W. Lovelace, is revoked. However, the revocation is stayed and Respondent is placed on probation for three years upon the following terms and conditions.

1. 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.

2. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, 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.

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3. Probation Unit Compliance

Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of his business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division 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).

Respondent shall not engage in the practice of medicine in his place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

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

4. Interview with the Division or its Designee

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

5. Residing or Practicing Out-of-State

In the event Respondent should leave the State of California to reside or to practice, Respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside 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 and Probation Unit Compliance.

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Respondent's license shall be automatically cancelled if Respondent's periods of temporary or permanent residence or practice outside California total two years. However, Respondent's license shall not be cancelled as long as Respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

6. Failure to Practice Medicine - California Resident

In the event Respondent resides in the State of California and for any reason Respondent stops practicing medicine in California, he shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve Respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which Respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if Respondent resides in California and, for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

7. License Surrender

Following the effective date of this Decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, he may request the voluntary surrender of his license. The Division reserves the right to evaluate Respondent's request and to exercise its discretion 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 his wallet and wall certificate to the Division or its designee and Respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of Respondent's license shall be deemed disciplinary action. If Respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

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8. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

9. 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 Division, 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 Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

10. Completion of Probation

Respondent shall comply with all financial obligations (e.g., 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.

DATED: February 13, 2007



H. STUART WAXMAN

Administrative Law Judge

Office of Administrative Hearings