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

In the Matter of the Petition for Early Termination of Probation of:	)	
WILLIAM T. VICARY, M.D.	)	**Case No. 26-2013-234558**
	)	**OAH No. 2014090608**
Petitioner.	)	

DECISION

The Proposed Decision of H. Stuart Waxman, Administrative Law Judge, dated November 25, 2014 is attached hereto. Said decision is hereby amended, pursuant to Government Code section 11517(c)(2)(C), to correct technical or minor changes that do not affect the factual or legal basis of the proposed decision. The proposed decision is amended as follows:

1. Page 1, Case No. 26-2013-224558 is stricken and replaced with Case No. 26-2013-234558

The Proposed Decision as amended is hereby accepted and 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 **January 26, 2015.**

IT IS SO ORDERED **December 29, 2014.**

MEDICAL BOARD OF CALIFORNIA

Dev Gnanadev MD

By: _____
Dev Gnanadev, M.D., Chair
Panel B

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

In the Matter of the Petition for Early Termination of Probation of: WILLIAM T. VICARY, M.D., Petitioner.	Case No. 26-2013-224558 OAH No. 2014090608

PROPOSED DECISION

This matter came on regularly for hearing before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, on November 18, 2014, at Los Angeles, California.

Petitioner, William T. Vicary, M.D. (Petitioner), was present and represented himself.

Pursuant to the provisions of Government Code Section 11522, the Attorney General of the State of California was represented by Robert McKim Bell, Deputy Attorney General.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Petitioner is the holder of Physician and Surgeon Certificate Number G 30952. He earned a juris doctorate degree from Harvard Law School in 1969 and his medical doctorate degree from The University of Southern California in 1973.

///

///

///

///

2. Following his internship and residency at Los Angeles County/University of Southern California Medical Center (LAC/USC), Petitioner performed a fellowship at LAC/USC in forensic psychiatry, an area in which he has enjoyed an extensive, successful career. He has served as an expert witness in numerous criminal trials. He has taught forensic psychiatry on a volunteer basis at the Keck School of Medicine, University of Southern California since 1978. He is a long-time member and presently President of the Southern California Chapter of the American Academy of Psychiatry and the Law. Since 1974, he has volunteered his time and services, and has served as the Medical Director and Chairman of the Board of Directors of the Hollywood Sunset Free Clinic. Petitioner is extensively published and has served as an expert commentator in forensic psychiatry on numerous television shows. He is the recipient of numerous citations and awards from various entities including the Los Angeles City Council, the California State Assembly, and the California State Senate.

3. Petitioner seeks early termination of probation because "[t]his would allow [him] to stand for [his] recertification examination in forensic psychiatry which is a new requirement of all diplomates every ten years." (Exhibit 1, Narrative Statement, page 2.)

4. By decision effective June 29, 2012, made pursuant to a Stipulated Settlement and Disciplinary Order, the Medical Board of California (Board) revoked Petitioner's certificate, stayed the revocation, and placed Petitioner on probation for a period of 35 months under various terms and conditions including but not limited to attending and completing an education course, a prescribing practices course, and an ethics course.[1] (Exhibit 7.) Petitioner went beyond the terms and conditions of probation, taking 375 hours of continuing medical education courses, some of which he took before the effective date of the disciplinary order. He also changed his record keeping to a detailed, electronic system, and he almost eliminated his prescribing of controlled substances for pain symptoms.

///

///

///

///

///

///

///

[1] *In the Matter of the Accusation Against William Tice Vicary, M.D.*, Case No. 02-2008-194534; Office of Administrative Hearings No. 2011090688.

5. Petitioner did not admit the truth of the allegations in the Accusation but did admit that, at hearing, Complainant could prove a prima facie case as to each and every charge and allegation. However, he also agreed to Paragraph 8(b) of the Stipulated Settlement and Disciplinary Order which reads: "If Respondent [here, Petitioner] ever petitions to modify or terminate any term or condition set forth herein, including but not limited to probation, or should the Board or any other regulatory agency in California or elsewhere hereinafter institute any other action against Respondent, including but not limited to an Accusation and/or Petition to Revoke Probation, the allegations and facts set forth in the Accusation can be considered in determining the appropriateness of the relief requested or proper discipline to be imposed on Respondent."

6. The Accusation contained causes for discipline of gross negligence, repeated negligent acts, incompetence, and inadequate and inaccurate record keeping arising out of Petitioner's dual relationship with a psychological assistant supervisee who also became his patient. The allegations in the Accusation read in part:

> 9.(A) Respondent knew L.C.[2] because he had worked with him at a clinical counseling center. Around 2002, L.C. approached Respondent for help on personal issues. Respondent initially saw L.C. as a courtesy providing him with advice and medication, and later began accepting payment for his services. The initial undated office note makes reference to L.C. having symptoms of depression, anxiety and insomnia. Respondent's chart contains 32 progress notes related to visits with the patient starting with the initial entry through the eight year treatment history through January 18, 2010.
>
> (B) At some point in the relationship, Respondent began serving as a supervisor for L.C. in regard to L.C.'s work as a psychological assistant, this occurred around 2007.
>
> (C) Respondent failed to obtain a patient history, conduct an initial physical examination or conduct subsequent periodic physical examinations before repeatedly prescribing dangerous drugs as that term is defined in [Business and Professions] Code section 4022.
>
> (D) Respondent did not monitor L.C.'s progress, or consult with his other care providers to determine the best way to treat L.C.'s complaints.
>
> (E) Respondent failed to document L.C.'s complaints, his objective vital and symptomatic signs, his treatment or prescription[s] and, with rare exceptions, examinations Respondent may have performed.

---

[2] This was a single-patient case. The Accusation referred to the patient by his initials in lieu of his name in order to protect his privacy.

(F) Respondent failed to separate his role as L.C.'s supervisor from his role as his treating physician.

[¶] . . . [¶]

11.(A) On April 30, 2010, a Medical Board of California investigator inspected Respondent's office. The investigator found twenty patients' medication bottles were stored there. Many were expired, and some were Schedule IV medications such as Lunesta and alprazolam, one was an amphetamine and one was Prolixin, an injectable antipsychotic medication. During a subsequent interview, Respondent confirmed that he sometimes gave patients medication that had belonged to other patients, and that he didn't believe this was a problem.

(B) These medications were in an unsecured, unlocked area accessible to employees and anyone else in the office.

[¶] . . . [¶]

13. Respondent . . . prescribed:

(A) An erectile dysfunction medication and a testosterone replacement for L.C. without supporting laboratory tests or physical examinations; and

(B) Adderall and Provigil to L.C. without documentation or adequate medical support.

(Exhibit 6, pages 6-7.)

7. The Board became aware of the dual relationship between Petitioner and L.C. when it was so notified by the Board of Psychology. During their dual relationship, L.C. was on probation with the Board of Psychology and was required to undergo biological fluid testing. After testing positive for Restoril, an anxiolytic and sleep-inducing medication, L.C. informed the Board of Psychology that his supervisor was prescribing medication for him.

8. At the hearing on the Petition for Early Termination of Probation, Petitioner testified and provided documentation explaining that the dual relationship of supervisor and physician he developed with L.C. came about gradually. Initially Petitioner was L.C.'s psychological assistant supervisor. Later, he was L.C.'s psychiatrist, serving as both therapist and medication manager. The dual relationship progressed so far that Petitioner prescribed refills of medications that had been initially prescribed by L.C.'s primary care physician. However, Petitioner testified that neither the patient nor anyone else was hurt by his actions, and that L.C. was happy and thanked Petitioner for what he had done for him.

///

9. The medications the Board investigator discovered in Petitioner's office were medications some of his patients had returned to him because they were displeased with them. Petitioner believed he could put the medications to good use by giving them to his indigent patients, especially those he saw at the Sunset Hollywood Free Clinic. He was aware that the Board's laws prohibited such use. However, if it meant a choice between following the laws or giving the medications to indigent patients who could use them, Petitioner believed it would be better to help the patients. He decided it was "appropriate even though, technically, it was not." (Petitioner's testimony.)

10. This is not the first time the Medical Board of California disciplined Petitioner's medical certificate. An Accusation was filed against him on October 9, 1997, alleging causes for discipline for gross negligence, falsifying medical documentation, and acts involving dishonesty.[3] That case was resolved by a settlement, effective April 10, 1998. According to that settlement, Petitioner's certificate was revoked, the revocation was stayed, and Petitioner was placed on probation for three years under various terms and conditions including but not limited to enrollment in and completion of an ethics course.

11. The gravamen of the Accusation involved Petitioner's falsification of medical records that were used as evidence in a highly-publicized murder case that went to trial twice, ending first without a verdict and then in the conviction of two brothers who had murdered their parents. In signing the settlement stipulation, Petitioner admitted to the truth of the following language contained in Paragraph 9:

> 9. Respondent admits that he has subjected his license to disciplinary action under Business and Professions Code section 2261 for knowingly making a document related to the practice of medicine which falsely represented the existence or nonexistence of a state of facts. The manner of the commission of this offense was as stated in Paragraphs 4 through 10 of the Accusation in case number 17-96-62136, to wit:
>
> A. The respondent is a psychiatrist specializing in forensic psychiatry. In addition, he holds a graduate law degree from Harvard University. The focus of his professional life is performing forensic evaluations for the Los Angeles Superior Court. He has performed psychiatric evaluations in about 1,000 homicide cases and has testified in around 100 homicide cases.

///

///

///

[3] *In the Matter of the Accusation Against William Tice Vicary, M.D.*, Case No. 17-96-62136; Office of Administrative Hearings No. L-97100203.

B. Eric and Lyle Menendez are two brothers who were accused of killing their parents. They were tried twice. The first trial ended in a hung jury. At the second trial, both defendants were convicted and sentenced to life imprisonment without the possibility of parole.

C. In May 1990, three years before the first trial, Dr. Vicary was engaged by Erik Menendez's attorney, Leslie Abramson, and thereafter served as both a treating and forensic psychiatrist for Eric [*sic*] Menendez for a period of approximately five years. Dr. Vicary prepared written notes of his interviews with Erik Menendez which, as of the time of the first trial, had grown to 101 pages reflecting approximately 88 visits with Erik Menendez.

D. In November 1993, shortly before his testimony in the first trial, Vicary and Abramson met and went through his notes page-by-page. The defense attorney became angry and upset and demanded that he make changes in the notes or he would be removed from the case.

E. Dr. Vicary then rewrote approximately 10 pages of his clinical notes deleting passages containing potentially damaging material.

F. He rewrote his notes in such a way that they closely resembled the original notes and would not appear suspicious. His purpose in rewriting the notes was twofold: first, to conceal or destroy statements made by Erik Menendez that were contained in the original notes and, second, to conceal the fact that the original notes had been rewritten. After pages were rewritten, the originals were destroyed. He was aware when he rewrote his notes that his revised notes would be provided to prosecutors and others and would be used in court as though they were the originals.

G. The changes might never have come to light if not for happenstance. In April 1996, during the penalty phase of the second trial, Ms. Abramson inadvertently provided Dr. Park Dietz, a prosecution psychiatric expert, a copy of the original notes and when he was through with them, he gave them to the prosecuting attorney. When these notes were compared with the edited notes originally given to the prosecution, it became clear that alterations had been made.

(Exhibit 4, pages 4-5. [Stipulation and Order, pages 3-4.])

///

///

///

///

12. At the time he falsified the clinical records, Petitioner knew that what he was doing was "wrong and unethical" (Petitioner's testimony), and that it was being done to conceal information that should have been disclosed. However, he claims he did so out of loyalty to his patient. In a presentation to the southern California chapter of the American Academy of Psychiatry and the Law, Petitioner wrote:

> The proposed changes in my notes did have some legal justifications. I nevertheless felt that making such deletions was wrong and unethical. My moral dilemma occurred because I had important information about Erik's mental condition prior to his treatment at the jail, the course of his psychiatric treatment and medications and how dramatically different he was as a result of the treatment. I was the only medical doctor on the defense list of experts. I was also the first person that he trusted enough to reveal information about the molestation by his father. I felt that it would be crucial for the jury to know how that infor-mation [*sic*] came out in such a reluctant, halting, intermittent manner. There was no other expert in the case that had this information. Without my testimony the jury would not learn about any of this. It was conceivable that this data could make a critical difference in the outcome of the case. Erik was facing life in prison without the possibility of parole, as well as the death penalty. After agonizing about this for a period of time, I decided to make the changes so that I would be allowed to testify.

(Exhibit B, page 2.)

13. In the Narrative Statement Petitioner submitted in support of his Petition for Early Termination of Probation, Petitioner described the alteration of his clinical notes concerning Erik Menendez as "involuntary." It was not.

14. Upon his request, Petitioner was granted early termination of his prior probation effective February 13, 2001, approximately two months before his probation would have terminated as a matter of course.

15. Respondent claims that the material he deleted from his clinical notes did not have, and would not have had, any impact on the outcome of the trial. Therefore, no one was hurt by his actions.

16. In both of his disciplinary matters brought by the Board, Petitioner quickly acknowledged responsibility for his wrongdoing and cooperated with the Board in its investigations.

17. Petitioner found the four-day ethics course he took "amazing," "profound," and "piercingly effective" (Petitioner's testimony) in helping him see character weaknesses in himself, including a need to be liked by others and a "risky" self-confidence. He recognized that he had taken chances with the rules of proper medical practice for the benefit of his patients.

18. Petitioner possesses a very strong loyalty to his patients. In illustrating this point during the administrative hearing, he told the story of an incident that occurred earlier in his career when he was caring for a patient suffering from internal bleeding. The medical staff had been unable to locate and stop the bleed. The patient was a Jehovah's Witness, and she expressly refused a transfusion. One night, when the patient was asleep and close to death, Petitioner transfused the patient with full knowledge that doing so was against her will. When she awakened the next morning, he told the patient what he had done, and she thanked him for it.

19. Petitioner further testified that, although 95 percent of all physicians would never do what he did with respect to transfusing an unconscious patient who had expressly refused a transfusion, he would do so again today because he is interested in helping and caring for people, even when it places him in jeopardy.

20. Petitioner offered three letters in support of his petition.[4] All three authors pointed out the positive changes Petitioner has made in his record keeping and prescribing practices since being placed on probation. None of the authors specifically addressed the various ethical violations Petitioner has committed over the years.

21. Petitioner argued that he does not pose a risk to the public. He based his opinion on his treatment of thousands of patients without any lawsuits filed against him, the respect he has garnered from the students he has taught at USC, and his assertion that he is the only psychiatrist in Los Angeles County who volunteers at a free clinic and prescribes medication for psychotic patients.

LEGAL CONCLUSIONS

1. Petitioner has not established, by clear and convincing evidence to a reasonable certainty, that cause exists to grant the Petition for Early Termination of Probation under the provisions of Business and Professions Code section 2307, by reason of Findings 2 through 21.

///

///

///

---

[4] One of the letters was written by Tacy Padua, the Executive Director of the Hollywood Sunset Free Clinic. There is no indication that Ms. Padua is a medical doctor, and her letter was not verified. However, the other two letters were written by physicians and signed under penalty of perjury. Ms. Padua's letter was received without objection. The other two letters, which were also received without objection, satisfy the criteria set forth in Business and Professions Code section 2307, subdivision (c).

2. Petitioner bore the burden of proving both his rehabilitation and his fitness to practice medicine. (*Houseman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084; *Feinstein v. State Bar* (1952) 39 Cal.2d 541.) This means the burden rests on Petitioner to establish his rehabilitation and fitness to practice by proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.) Petitioner's burden required a showing that he was no longer deserving of the adverse character judgment associated with the discipline imposed against his certificate. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395.)

3. The relief sought by Petitioner is governed by Business and Professions Code section 2307. Subdivision (e) of that statute reads in relevant part: "The panel of the board or the administrative law judge hearing the petition may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioner's rehabilitative efforts, general reputation for truth, and professional ability."

4. California Code of Regulations, title 16, section 1360.2, states:

> When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the petitioner considering the following criteria:
>
> (a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.
>
> (b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.
>
> (c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).
>
> (d) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, subsections (b), (d) and (e).
>
> (e) Evidence, if any, of rehabilitation submitted by the applicant.

///

///

5. Petitioner's current probation is based on the dual relationship he developed with a supervisee when he agreed to provide psychotherapy and medications. The development of that relationship, which lasted for a number of years, constituted serious misconduct. Petitioner's description of the dual relationship's innocent, gradual and insidious development was not entirely convincing, especially in light of his eventual preparation of progress notes, and his writing prescriptions for refills of medications initially prescribed by the patient's primary care physician.

6. Petitioner has complied with, and in some manner exceeded, the terms and conditions of his probation. However, he has failed to demonstrate rehabilitation. On the contrary, he has demonstrated, and even expressed a willingness, to flout the rules of his profession in order to do what he considers to be a proper course of conduct. This attitude is manifest in at least three cases:

a. When Petitioner chose to transfuse a Jehovah's Witness after she had expressly refused a transfusion, and while she was asleep, he placed his value system over that of his patient, and he substituted his clinical judgment for the patient's religious beliefs and her preferences with respect to her own body and health. Petitioner described this incident at the administrative hearing as an example of how much he cares for his patients. In truth, it evinced just the opposite. Even more troubling was Petitioner's testimony that he would repeat the same conduct if he was faced with the same situation today.

b. With respect to the Menendez case, Petitioner admits he was aware that falsifying Erik Menendez's records was "wrong and unethical." He nonetheless made the conscious decision to do so with full knowledge that the falsified records would be used in the trial. He altered the records because he wanted to testify and feared that defense counsel would not permit him to do so unless he complied with her wishes.

c. In the case that resulted in his present discipline, Petitioner not only engaged in a dual relationship, he also hoarded medications his patients had returned to him, some of which had expired, in order to give them to his other patients. He did so despite his understanding that such action was prohibited.

7. Each of the above scenarios bodes poorly for public protection. Collectively, they reflect a pattern of ongoing unlawful activity that presents a significant danger to the public.

///

///

///

///

8. In *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473, the court stated: "[T]he fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense. Nor [does] the court have to accept respondent's own protestation of rehabilitation." In this case, Petitioner has complied with the express terms and conditions of probation thus far. However, despite two disciplinary actions resulting in two periods of probationary practice and completion of two ethics courses, Petitioner has not changed his long-standing unethical conduct. This leads to an inference that Petitioner subordinates the statutes and regulations governing the practice of medicine to his judgment of what is "right."

9. It is laudable that Petitioner has updated his record keeping and changed his prescribing practices with respect to pain medication, but those improvements stand in stark contrast to his predilection toward placing his interests above the law. The letters of recommendation are complimentary of Petitioner's new record keeping and prescribing practices, but they shed no more light on Petitioner's rehabilitation than Petitioner did for himself. "While letters of recommendation are admissible in proceedings of this character, neither such letters nor the testimony of witnesses as to the good character of petitioner, however numerous or laudatory, can overcome the direct and positive evidence as to petitioner's character." (*Wettlin v. State Bar of California* (1944) 24 Cal.2d 862, 869.)

10. Petitioner argued in support of his petition that no one was hurt in any of the three incidents addressed at the hearing. That argument was not persuasive. First, actual injury or harm is not required for a physician's certificate to be subject to discipline. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1053.) Secondly, the fact that, fortuitously, no one is injured or harmed when a physician commits a violation of the Medical Practice Act, does not serve as a factor in mitigation or rehabilitation in determining the propriety of discipline or the termination of discipline in connection with that violation. In *In re Kelley* (1990) 52 Cal.3d 487, 495, the Court stated: "We cannot and should not sit back and wait until petitioner's alcohol abuse problem begins to affect her practice of law." The reasoning in *In re Kelley* is not limited to alcohol abuse or the practice of law. It also holds true for a physician who flouts the laws governing his/her profession. (Cf. *Griffiths v.Superior Court* (2002) 96 Cal.App.4th 757, 770-773.)

///

///

///

///

///

///

///

11. Business and Professions Code section 2229 states:

(a) Protection of the public shall be the highest priority for the Division of Medical Quality, the California Board of Podiatric Medicine, and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.

(b) In 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.

(c) It is the intent of the Legislature that the division, the California Board of Podiatric Medicine, and the enforcement program shall seek out those licensees who have demonstrated deficiencies in competency and then take those actions as are indicated, with priority given to those measures, including further education, restrictions from practice, or other means, that will remove those deficiencies. **Where rehabilitation and protection are inconsistent, protection shall be paramount.** (Emphasis added.)

12. After two Accusations, two settlements, two periods of probation, two ethics courses, hundreds of hours of continuing medical education, and one early termination of probation, Petitioner is still not rehabilitated. He bore the burden of showing, by clear and convincing evidence to a reasonable certainty, that he is deserving of an early termination of his probation. He failed to sustain that burden. He has failed to gain sufficient insight into the consistencies across his various violations of the Medical Practice Act, and he has failed to take appropriate action to ensure against another recurrence. The public health, safety, welfare and interest can be adequately protected only while Petitioner remains on probation for the remainder of his probationary period.

ORDER

The Petition of William T. Vicary, M.D. for early termination of probation is denied.

Dated: November 25, 2014

H. Stuart Waxman

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings