

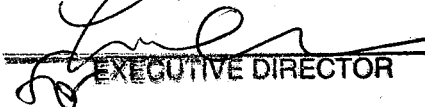
1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**  
2 **OF THE STATE OF NEVADA**

3 \* \* \* \* \*

4 **In The Matter of Charges and** )  
5 **Complaint Against** )  
6 **MANI NAMBIAR, M.D.,** )  
7 **Respondent.** )  
8 )

Case No. 07-7759-1  
NO. \_\_\_\_\_

FILED 1 April 2008

  
EXECUTIVE DIRECTOR

9 **SETTLEMENT, WAIVER AND CONSENT AGREEMENT**

10 **THIS AGREEMENT** is hereby entered into by and between the Investigative Committee (IC) of  
11 the Nevada State Board of Medical Examiners (the Board), composed of Charles N. Held, M.D.,  
12 Chairman, Jean Stoess, M.A., and Cindy Lamerson, M.D., by and through counsel, Edward Cousineau,  
13 Esq., and Mani Nambiar, M.D. (Respondent), as follows:

14 **WHEREAS**, on or about January 22, 2008, the Investigative Committee of the Nevada State  
15 Board of Medical Examiners filed a formal complaint in the above-referenced matter, charging  
16 Respondent with violations of the Medical Practice Act (NRS Chapter 630), to wit: suspension,  
17 modification or limitation of a license to practice medicine in another jurisdiction, a violation of NRS  
18 630.301(3).

19 **WHEREAS**, Respondent has received a copy of the Complaint, reviewed it, understands the  
20 nature and significance of the Complaint, and Respondent is fully advised concerning his rights and  
21 defenses to the Complaint as well as the possible sanctions that may be imposed if the Board finds and  
22 concludes that he has violated one or more provisions of the Medical Practice Act; and

23 **WHEREAS**, Respondent understands and agrees that he has certain rights under the United States  
24 Constitution and the Constitution of the state of Nevada, as well as under the Medical Practice Act  
25 (NRS Chapter 630) and the Nevada Administrative Procedures Act (NRS Chapter 233B), including but  
26 not limited to the right to a formal hearing on the charges against him, the right to representation by  
27 counsel in the preparation and presentation of his defense, the right to confrontation and cross-examination  
28 of witnesses against him, the right to present evidence and witnesses on his own behalf, the right to

1 written findings, conclusions and order regarding a final decision by the Board, and the right to judicial  
2 review of any final decision by the Board that is adverse to him; and

3       **WHEREAS**, provided this Agreement is approved by the Board, Respondent agrees to waive all  
4 of his rights under the United States Constitution, the Constitution of the state of Nevada, the Medical  
5 Practice Act, and the Nevada Administrative Procedures Act, including but not limited to the right to a  
6 hearing on the charges and written findings of fact, conclusions of law and order, and he agrees to settle  
7 and resolve this matter of the formal complaint against him by way of, and in accordance with, this  
8 Settlement, Waiver and Consent Agreement; and

9       **WHEREAS**, Respondent understands and agrees that this Agreement is entered into by and  
10 between himself and the Board's IC, and not with the Board, but that the IC will present this Agreement to  
11 the Board for consideration in open session at a regularly-scheduled quarterly meeting, duly noticed, and  
12 that the IC shall advocate approval of this Agreement by the Board, but that the Board has the right to  
13 decide in its own discretion whether or not to approve this Agreement; and

14       **WHEREAS**, Respondent and the IC each understand and agree that if the Board approves the  
15 terms, covenants and conditions of this Agreement, then the terms, covenants and conditions enumerated  
16 below shall be binding and enforceable upon Respondent and the Board's IC; and

17       **WHEREAS**, Respondent has reviewed and understands all the relevant facts and circumstances of  
18 this matter and after due consideration concedes that his active license to practice medicine in Utah has  
19 been suspended, modified and or limited as outlined in the Complaint filed by the Investigative Committee  
20 of the Nevada State Board of Medical Examiners in this case.

21       **NOW THEREFORE**, in order to resolve the above-captioned case and charges brought against  
22 him by the Board's Investigative Committee in said matter, Respondent and the Investigative Committee  
23 hereby agree to the following terms, covenants and conditions:

24       1.     **Jurisdiction**. Respondent is, and at all times mentioned in the complaint filed in the  
25 above-captioned matter was, a physician licensed to practice medicine in the state of Nevada subject to the  
26 jurisdiction of the Board to hear and adjudicate charges of violations of the Medical Practice Act (NRS  
27 630), and to impose sanctions as provided by the Act.

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1           2.       **Representation by Counsel.** Respondent acknowledges that he is not represented by  
2 counsel and wishes to proceed towards resolution in this matter as set forth in this Agreement without  
3 counsel. Respondent understands and acknowledges that he may retain and consult counsel prior to  
4 entering into this Agreement and agrees that if counsel is retained for representation in this matter prior to  
5 entering into this Agreement, that counsel for the Investigative Committee will be informed of such prior  
6 to Respondent executing this Agreement.

7           3.       **Waiver of Rights.** Respondent covenants and agrees that he enters into this Agreement  
8 knowingly, willingly, and intelligently with knowledge that he may consult with counsel prior to entering  
9 into this Agreement. In connection with this Agreement, and the terms, covenants and conditions  
10 contained herein, Respondent knowingly, willingly and intelligently, without the advice of counsel, waives  
11 all rights arising under or pursuant to the United States Constitution, the Constitution of the state of  
12 Nevada, NRS Chapter 630 and NRS Chapter 233B that may be available to him or that may apply to him  
13 in connection with the proceeding on the complaint filed herein, the defense of said complaint and the  
14 adjudication of the charges in said complaint, and Respondent further agrees that the matter of the  
15 disciplinary action commenced by complaint herein may be settled and resolved in accordance with this  
16 Agreement without a hearing or any further proceeding, and without the right to judicial review.

17           4.       **Acknowledgement of Reasonable Basis to Proceed.** Respondent covenants and agrees  
18 that the Board's Investigative Committee has a reasonable basis to believe that Respondent violated one or  
19 more provisions of the Medical Practice Act.

20           5.       **Consent to Entry of Order.** In order to resolve the matter of these disciplinary  
21 proceedings pending against him without any further cost and expense of providing a defense to the  
22 complaint, Respondent hereby agrees that an order may be entered herein by the Board against him,  
23 finding that Respondent has violated the Medical Practice Act to wit: suspension, modification or  
24 limitation of his California license to practice medicine, a violation of NRS 630.301(3), and ordering  
25 that Respondent's Nevada license to practice medicine be placed in a probationary status until  
26 February 9, 2010, and that he remain in compliance with the following terms and conditions:

27           a.       that Respondent both has, and shall continue to, comply with all the terms and conditions

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1 set forth by the California Medical Board in its Decision which became effective on February 9, 2005,  
2 and which was reaffirmed on March 11, 2005 (see Exhibit A);

3 b. that Respondent shall contact the Compliance Officer of the Nevada State Board of  
4 Medical Examiners (hereinafter "Compliance Officer") within thirty (30) days of the approval and  
5 acceptance of this Agreement in order to provide information regarding the most expeditious method of  
6 contacting him;

7 c. that Respondent shall sign a release of information allowing the Nevada State Board of  
8 Medical Examiners to communicate with the California Medical Board regarding Respondent's  
9 compliance with the terms of his California probation or provide proof of completion of said probation  
10 and reinstatement of his license without restrictions;

11 d. that Respondent shall comply with all federal, state and local laws and rules governing  
12 the practice of medicine in Nevada at all times he is practicing within the state;

13 e. that Respondent shall cooperate fully with the Compliance Officer, or any other  
14 designated person, in the administration and enforcement of this Agreement;

15 f. that Respondent agrees to pay the costs of investigation and prosecution of this matter in  
16 the current amount of \$559.99, along with the costs to conclude the matter, if any, within sixty (60) days  
17 of the Board's acceptance and approval of this Agreement;

18 6. **Procedure for Adoption of Agreement.** The Investigative Committee and counsel for  
19 the Investigative Committee shall recommend approval and adoption of the terms, covenants and  
20 conditions contained herein by the Board in resolution of the disciplinary proceedings pending herein  
21 against Respondent pursuant to the formal complaint. In the course of seeking Board approval,  
22 adoption and/or acceptance of this Agreement, counsel for the Investigative Committee may  
23 communicate directly with the Board staff and members of the panel of the Board who would  
24 adjudicate this case if it were to go to hearing. Respondent covenants and agrees that such contacts and  
25 communication may be made or conducted ex parte, without notice or opportunity to be heard on his  
26 part or on the part of his counsel, and that such contacts and communications may include, but not be  
27 limited to, matters concerning this Agreement, the complaint, the allegations in the complaint, any and

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1 all evidence that may exist in support of the complaint, and any and all information of every nature  
2 whatsoever related to the complaint against Respondent.

3 7. **Board Approval Required.** This Agreement will be placed on the next available Agenda  
4 of a regularly-scheduled and duly-noticed quarterly Board meeting. It is expressly understood that this  
5 Agreement will only become effective if the Board approves the recommendation of the Investigative  
6 Committee for acceptance.

7 8. **Effect of Acceptance of Agreement by Board.** In the event the Board approves,  
8 accepts and adopts the terms, covenants and conditions set out in this Agreement, counsel for the  
9 Investigative Committee will cause to be entered herein the Board's Order finding Respondent violated  
10 NRS 630.301(3), which states that the suspension, modification or limitation of a license to practice  
11 medicine by another jurisdiction is grounds for discipline, when his California license to practice  
12 medicine was suspended and/or modified.

13 9. **Effect of Rejection of Agreement by Board.** In the event the Board does not approve,  
14 accept and adopt the terms, covenants and conditions set out in this Agreement, this Agreement shall be  
15 null, void, and of no further force and effect except as to the following covenant and agreement  
16 regarding disqualification of adjudicating Board panel members. Respondent agrees that,  
17 notwithstanding rejection of this Agreement by the Board, nothing contained herein and nothing that  
18 occurs pursuant to efforts of the IC or its counsel to seek acceptance and adoption of this Agreement by  
19 the Board shall disqualify any member of the adjudicating panel of the Board from considering the  
20 charges against Respondent and participating in the disciplinary proceedings in any role, including  
21 adjudication of the case, and Respondent further agrees that he shall not seek to disqualify any such  
22 member absent evidence of bad faith.

23 10. **Release From Liability.** In execution of this Agreement, the Respondent, for himself,  
24 his executors, successors and assigns, hereby releases and forever discharges the state of Nevada, the  
25 Board, the Nevada Attorney General, and each of their members, agents and employees in their  
26 representative capacities, and in their individual capacities absent evidence of bad faith, from any and  
27 all manner of actions, causes of action, suits, debts, judgments, executions, claims and demands  
28 whatsoever, known and unknown, in law or equity, that Respondent ever had, now has, may have or

1 claim to have, against any or all of the persons or entities named in this paragraph arising out of or by  
2 reason of this investigation, this disciplinary action, this settlement or its administration, in connection  
3 with the complaint. The Investigative Committee hereby agrees to accept this Agreement in full  
4 settlement of all claims related to the complaint, with the understanding that the final decision rests with  
5 the Board.

6 11. **Binding Effect.** Respondent covenants and agrees that this Agreement is a binding and  
7 enforceable contract upon Respondent and the Board's Investigative Committee, which contract may be  
8 enforced in a court or tribunal having jurisdiction.

9 12. **Forum Selection Clause.** Respondent covenants and agrees that in the event either  
10 party is required to seek enforcement of this Agreement in the district court, he consents to such  
11 jurisdiction, and covenants and agrees that exclusive jurisdiction shall be in the Second Judicial District  
12 Court of the State of Nevada in and for the County of Washoe.

13 13. **Attorneys Fees and Costs.** Respondent covenants and agrees that in the event an action  
14 is commenced in the district court to enforce any provision of this Agreement, the prevailing party shall  
15 be entitled to recover reasonable costs and attorneys' fees.

16 14. **Failure to comply with terms.** In the event the Board enters its Order approving this  
17 Agreement, should Respondent fail to comply with the terms recited herein, the Board would then have  
18 grounds, after notice and a hearing, to take disciplinary action against Respondent in addition to that  
19 included herein for the subject's violation of an Order of the Board in accordance with  
20 NRS 630.3065(2)(a).

21 Dated this 24<sup>th</sup> day of January, 2008.

22 

23 Edward Cousineau, Esq.  
24 Attorney for the Investigative Committee  
25 of the Nevada State Board of Medical Examiners

26 ///  
27 ///  
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1 I am in agreement with all of the terms of the foregoing Settlement, Waiver and Consent  
2 Agreement signed on the 24<sup>th</sup> day of January by Edward Cousineau, Esq., Attorney for the Investigative  
3 Committee.

4 Dated this 22 day of FEBRUARY 2008.

5 *Mani Nambiar*

6 Mani Nambiar, M.D.  
7 Respondent

Signature of Mani Nambiar, M.D.  
subscribed and sworn to before me  
this 22 day of Feb. 2008

8 *See attached Jurat*  
9 Notary Public

1 IT IS HEREBY ORDERED that the foregoing Settlement, Waiver and Consent Agreement is approved  
2 and accepted by the Nevada State Board of Medical Examiners on the 28<sup>th</sup> day of March 2008, with the  
3 final total amount of costs due of \$559.99 pursuant to Paragraph 5 above.



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6 JAVAID ANWAR, President  
7 NEVADA STATE BOARD OF MEDICAL EXAMINERS  
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JURAT

State of California )

County of Riverside )

Subscribed and sworn to (or affirmed) before me this 22<sup>nd</sup> day of Feb, 2008,

by

Mani Nambiar, M.D., proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature *Gina Lourenco* (Seal)



# **EXHIBIT A**

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

In the Matter of the Accusation )  
Against: )  
)  
)  
Mani Nambiar, M.D. )  
)  
Physician's and Surgeon's )  
Certificate No. A 40026 )  
)  
Respondent )  
\_\_\_\_\_ )

File No. 18-2002-140168

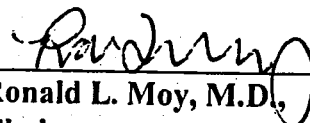
DECISION

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

This Decision shall become effective at 5:00 p.m. on February 9, 2005.

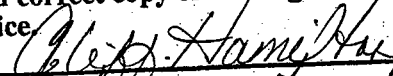
IT IS SO ORDERED January 10, 2005.

MEDICAL BOARD OF CALIFORNIA

By:   
Ronald L. Moy, M.D.,  
Chair  
Panel B  
Division of Medical Quality

MEDICAL BOARD OF CALIFORNIA

I do hereby certify that this document is a true and correct copy of the original on file in this office.

  
Signature  
*Assistant Custodian of records*  
Title  
April 27, 2005  
Date

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

In the Matter of the Accusation Against:

MANI NAMBIAR, M.D.  
130 S. Buena Vista St.  
Hemet, CA 92543

Physician's and Surgeon's Certificate  
No. A 40026

Respondent.

Case No. 18-2002-140168

OAH No. L2004020289

**PROPOSED DECISION**

On September 20-23 and November 22 and 23, 2004, in San Diego, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Samuel K. Hammond, Deputy Attorney General, represented complainant.

Charles Benninghoff III, Lay Representative, represented respondent.

The matter was submitted on December 16, 2004.

**FACTUAL FINDINGS**

*Jurisdiction*

1. On December 11, 2003, Ron Joseph, Executive Director, Medical Board of California (Board), filed Accusation No. 18-2002-140168 in his official capacity. Respondent filed a timely Notice of Defense.

The accusation alleges respondent committed gross negligence, repeated negligent acts, and was incompetent in his care and treatment of one patient during 2000 and 2001 when he performed liposuction on the patient, and she suffered a large abdominal wound and

developed scarring. The accusation also alleges respondent was dishonest when he submitted false information to a lender, and he failed to maintain accurate and adequate records, in connection with his treatment of this patient.

2. On July 1, 1983, the Board issued Physician's and Surgeon's certificate No. A 40026 to respondent.

### *Respondent's Background*

3. Respondent is 56 years of age. He attended college in India where received degrees in civil and structural engineering. He came to the United States in 1971 and first attended business school and obtained an MBA degree. He then attended St. Georges Medical School in Grenada for two years before moving to Detroit. Between 1981 and 1985, respondent was a resident in obstetrics and gynecology at St. Joseph's Hospital in Pontiac, Michigan. Respondent practiced medicine for two years in Philadelphia until July 1987, when he began a fellowship at the Graduate Hospital at the University of Pennsylvania in cosmetic surgery. The fellowship lasted one year. He estimated he assisted in approximately 1000 surgeries, including liposuction. He described it as "like a residency" and he felt lucky to have been accepted into that program.

Respondent became board certified in ob-gyn and practiced in that field in New Orleans from 1988 to 1989. He also performed cosmetic surgery. He then moved to Hemet and opened a private practice specializing in ob-gyn and cosmetic surgery. He has hospital privileges in two local hospitals, and serves as the chairman of the ob-gyn department at Hemet Valley Hospital, and serves on several committees. He is certified by the American Board of Cosmetic Surgery, and since completing his fellowship, he estimated he has performed 1000 liposuctions individually, and 3000 when they were combined with other procedures.

### *First Surgery and Post-Operative Care*

4. Patricia B-G is 39 years of age. In October or November 2000, she decided she wanted liposuction and began looking for a doctor. She learned of respondent on line. She read his qualifications and noted he had co-authored a book. She chose him because he had an office in Riverside near where she lived.

Patricia B-G made an appointment with respondent and saw him for a consultation on November 7, 2000. She told him she wanted a liposuction of her entire abdomen for weight loss and to improve her appearance. She also wanted to have her arms, hips, and neck done. Respondent agreed to perform the procedure and told her he could do everything for a good price. They agreed to a cost of \$6000.00, and respondent told her they had 100 percent financing. Patricia B-G applied for financing and ultimately received it.

5. Patricia B-G returned to respondent's office in Riverside on December 6, 2000 for a second consultation and pre-surgery. They decided respondent would perform surgery on December 8. Respondent noted in his chart Patricia B-G had a "double bubble defect"

and her "upper abdomen protrudes out much more than the lower and has an apron on the lower part." He indicated Patricia B-G said she had "social problems with the abdomen protruding out. Wants it flattened." Respondent noted a second session might be needed if the liposuction exceeded five liters. They discussed complications, and respondent told her skin necrosis occurred less than one percent. They also talked about the areas respondent would liposuction and respondent repeated several times Patricia B-G wanted her abdomen flattened and was willing to take the risks.

6. Patricia B-G went to the Eye Surgery Center of Riverside on December 8, 2000 and signed numerous forms. The forms were dated December 6 because that was the original date surgery was to be performed. Some of the forms were changed to reflect the December 8 date, others were not, and others were altered so that the date could not be read at all. Respondent then performed a liposuction of the upper and lower abdomen, sides, hips, arms, and neck. The operative notes indicate respondent removed 4900 cc. of fat.

7. Over the next few days, respondent's notes reflect the following occurred:

A. On December 10, Patricia B-G called and complained of swelling on top of her garment and she was advised to release the compression. She was not ambulating and she was told respondent needed to see her A.S.A.P.

B. Patricia B-G came to respondent's office on December 12 and "was doing well." However, respondent noted the patient was not moving well and there was ecchymosis in the upper abdomen. Respondent told her to return the next day.

C. Respondent has two chart entries for December 13, one in his Riverside office chart and one in his Hemet office chart. In his Riverside chart, he indicated he saw her in Riverside and charted ecchymosis in the upper abdomen, and hyperbaric treatment was scheduled for that day. He indicated he called Susan Rodriguez, (a certified hyperbaric technician) and made an appointment but Patricia B-G could not go because she had no one to drive her. Later, respondent spoke to Patricia B-G by telephone and charted, the ecchymosis had increased, he had spoke to Susan Rodriguez, and told Patricia B-G to clean her abdomen in the shower.

D. On December 15, Patricia B-G received hyperbaric treatment. The previous day, Patricia B-G went to the Rapid Recovery Hyperbarics, a facility owned by Rodriguez. Donald Underwood, D.O., worked there and examined Patricia B-G during the evening. He observed areas of hematoma and small erythematous areas.

E. Respondent noted on December 16 that Patricia B-G was doing better. He charted ecchymosis in the upper abdomen and some blistering, she was afebrile, her vital signs were stable, and there were no signs of infection. He observed the patient's abdomen had not been cleaned and told her to start showering. He cleaned her abdomen and indicated she would receive hyperbaric treatment.

F. Respondent called Patricia B-G on December 17. He charted she was doing well, there was no hyperbaric treatment, the patient said she had not showered because she could not and would not wash in the sink.

G. On December 18, Patricia B-G came to respondent's office and reported having a low-grade fever, but she was afebrile in the office. She also said she had an infection, but respondent saw no signs of infection or necrosis. He noted one of the cannula sites had an inflammation and the garment was causing blisters. He indicated the blistered skin in the ecchymosis area peeled in some locations. He aspirated about 10 cc. of fluid, and it was blood tinged. He did not observe a hematoma. He applied antibiotics to the area and left the garment off.

H. On December 19, respondent aspirated a small amount of fluid and told Patricia B-G to keep her abdomen soaked in sterile water. He indicated she was doing well with no fever. Respondent cleaned her abdomen, there was ecchymosis, and the epidermis was peeling off. He drained some clear fluid and applied antibiotics.

I. Patricia B-G was unable to get to respondent's office on December 20 or go to her hyperbaric treatment appointment the previous day.

J. On December 21, respondent indicated the patient was doing well but she had not gone for her hyperbaric treatment. He observed the epidermis sloughing and there was healthy tissue below it. He aspirated a small amount of fluid, dressed the abdomen, and told the patient to keep the wound clean. Respondent indicated the patient was very happy with her arms and face, and her abdomen size.

K. Patricia B-G did not appear for her appointment on December 22. On December 23, respondent noted a definite demarcation between the red and black areas in her abdomen. Respondent cleaned the abdomen and wound and put on a wet dressing.

L. On December 24, respondent told Patricia B-G there was definite tissue loss and he needed to remove the dermis. He drew a diagram of the wound in his chart and estimated its size as six inches by one-and-a half inches. He performed a full thickness removal and noted there were good margins and tissue. Respondent gave Patricia B-G some money for her to buy antibiotics and pain medication.

M. On Christmas day, December 25, respondent indicated Patricia B-G was doing well and excised full thickness dermis in another area below the area excised the day before. Respondent indicated no infection appeared and the wound was clean. He indicated to Patricia B-G the wound would heal by secondary intention, but it would take a long time and she would need scar revision. Respondent charted that Patricia B-G was happy about a 15 pound weight loss, and he assured her she would be hospitalized if necessary.

Patricia B-G was very concerned about her condition and wanted to be hospitalized. Respondent did not indicate this in his chart.<sup>1</sup>

N. Respondent cleaned Patricia B-G's wound on December 26 and indicated the edges needed some debridement. Patricia B-G remained concerned and they again discussed hospitalization. Respondent told her she may need a skin graft, but she did not want a skin graft. Respondent charted that he spoke to Dr. Golshahi and Dr. Yoho and that Dr. Yoho would see her after she said she wanted a second opinion. Respondent then took her to Dr. Yoho's office in Pasadena. According to respondent, Dr. Yoho said the wound was clean and would heal, but it would take time. Respondent felt Patricia B-G seemed very assured and extremely happy and encouraged. Respondent drove her back to his office and gave her vitamins and minerals to promote healing.

O. Respondent took photographs of the healing wound. By the end of January, the photographs showed extensive necrosis of the anterior abdominal skin up to the costal margins with an island of intact skin around the umbilicus. Also notable was severe skin excess in the infraumbilical area with visible folds of skin, and there was lesser scarring extending into the flanks with a band of hypopigmentation.

8. Respondent continued to see Patricia B-G in his office nearly every day over the next four months. On December 27, he excised the edges of some areas and the next day he accompanied her to hyperbaric treatment. He debrided the edges again the next day, cleaned the wound, and changed the dressing. On December 30, he noted she was afebrile and they discussed the option of going to the hospital for a possible skin graft. Respondent indicated Patricia B-G preferred secondary intention closing and revision.

On January 16, 2001, Patricia B-G called and said the gauze in the dressing was sticking. She went to his office later in the afternoon and was upset. They discussed a skin graft versus secondary healing and Patricia B-G indicated she did not want skin grafting but would have to have a scar revision after healing. On January 19, Patricia B-G said she wanted the scar to be revised after all the healing and wanted a fine line scar. On January 20, Patricia B-G told respondent she thought of checking into a hospital but did not for fear of having a skin graft and she was glad she did not do that.

On February 28, 2001, respondent reported the bottom part of the wound was closed and on March 2, the bottom was completely healed. He indicated on March 5 there was good closing. He did not see her again until March 11, when he charted the wound was almost healed. At Patricia B-G's next visit on March 21, respondent indicated the wound was completely healed.

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<sup>1</sup> Respondent testified he told Patricia B-G she had an open wound and if she wanted to go to the hospital, she would most likely receive a skin graft, but she never wanted him to hospitalize her for any reason. Respondent's testimony suggested he would have hospitalized the patient and she refused against his medical advice. That is inconsistent with the patient's testimony and the chart notes. The patient's testimony on this point was more credible.



Photographs taken in late February and early March show a band of raw scar tissue across Patricia B-G's upper central abdomen. Other areas are healed with thick scar and hypopigmentation extending into the flanks.

9. On March 23, Patricia B-G went to respondent's office for a consultation regarding a scar revision. They discussed the procedure and complications. Patricia B-G wanted it done in August. According to respondent, Patricia B-G was happy with the liposuction and her decreased waist line.

The next consultation relating to a scar revision was July 23, 2001. They considered the end of August and respondent indicated Patricia B-G was happy with the liposuction and her waist line.<sup>2</sup> On August 27, the patient returned for another consultation. Respondent wrote in his notes "Best plan would be to remove all from pulling down like a tummy tuck. Patient was thinking of pulling up and excising on top. Not good cosmetically. Patient to relax skin and do surgery where there is enough skin with a lower incision. Belly button to be repositioned. Plan to massage and excise lower abdomen."

On November 30, 2001, Patricia B-G called respondent and said she wanted the scar revision done on December 14. Respondent indicated, "Best would be to excise like a tummy tuck and cut around the umbilicus. If that is not possible, will revise the scar in stages—as cutting around all around may compromise blood supply. Patient is concerned if there is not enough skin. If not enough, then will only remove the scar. Will leave some on top to be excised later." They talked again by phone on December 5, when Patricia B-G again expressed concern there was not enough skin to pull down, and respondent replied if that were the case, it would be done as a scar revision in stages. Patricia B-G said she did not want to wait any longer.

The final consultation relating to the scar revision occurred on December 7. They discussed the procedure and complications. Respondent explained the procedure and drew a diagram showing how the scar revision would be performed

### *Second Surgery*

10. On December 14, 2001, Patricia B-G was admitted to the Aesthetic Surgery and Laser Center in Riverside for a scar revision. They discussed the possible options and the best possible method would be used. The patient signed a series of forms provided by the surgery center staff.

According to respondent's operative note, he performed a liposuction of the upper and lower abdomen and removed about 350 cc. of fat. He next removed the vertical scar on the right side and then created an upper and lower flap. Respondent tried to bring the flaps together but he found it impossible to close. He then performed a scar revision.

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<sup>2</sup> Much of this note is unintelligible. It is one of only two notes that were not transcribed and typewritten by respondent's staff.

11. Respondent saw Patricia B-G on December 16 and 21 for post-operative visits and he removed sutures on December 25 and 28, 2001.

On December 17, respondent spoke to Patricia B-G by telephone. His note reads: "called patient, patient accusing me of not doing lipo. Stated lipo was not done as much as I wanted because of the scar. Possible areas lipo was done. Because of the scar tissue, T.T. (tummy tuck) was not done and scar revision done—to talk to Dr. Grier (the anesthesiologist) and nurse in O.R. and they knew what was done and it is on record. Even told the nurse that I should see patient at home for post-op check."

#### *Subsequent Treating Physician*

12. Ben Childers, M.D., is a physician board-certified in plastic surgery and was an assistant and then associate professor in the Department of Surgery, Division of Plastic Surgery, at Loma Linda University School of Medicine between 1998 and 2002. He examined Patricia B-G many times in his office and wrote a summary of those visits on January 22, 2003. He also reviewed her records. Dr. Childers observed extensive scarring on her abdomen, and estimated only 30 percent of her abdomen looked good. He described the tissue as hard and firm and the tissue was different in color. He observed multiple incisions with hypertrophic scarring throughout. He noted there was severe tenderness along her abdominal wall.

In his opinion, Dr. Childers felt something went "terribly awry" during the operation and he wrote he had never seen such a loss of skin from liposuction. He expressed his dismay at respondent's failure to get anyone else involved with the patient's care. He testified at the hearing this was the worst scarring he had ever seen.

Dr. Childers and Patricia B-G discussed treatment. He said he would insert tissue expanders into her upper abdominal skin and transfer the expanded skin to replace the scar. He felt there would be a two-step process. He felt the expansion process would take three to four months and the entire process might take a year. He testified there was not enough tissue to perform a tummy tuck on the patient.

#### *Second Opinions*

13. On December 26, 2000, Patricia B-G told respondent she wanted a second opinion. Respondent said he would have Dr. Robert Yoho examine and advise her. Patricia B-G agreed. Respondent selected Dr. Yoho because Patricia B-G knew of him—she had seen his website—and respondent believed he had "vast experience" in treating the wound Patricia B-G had sustained. Respondent had operated in Dr. Yoho's surgicenter about seven or eight years earlier and was familiar with his work.

14. Dr. Yoho attended Oberlin College and then Case Western Reserve University Medical School for six years, graduating in 1981. He did a one-year internal medicine residency at the University of Cincinnati and a two-year residency in dermatology at the Dartmouth-Hitchcock Medical Center. Between 1983 and 1985, he did a residency in

emergency medicine at LAC/USC Medical Center and Huntington Memorial Hospital. He became board certified in emergency medicine in 1987 and was recertified in 1999.

About 13 years ago, Dr. Yoho changed specialties and became a cosmetic surgeon. In addition, he operated a hyperbaric chamber for four to five years, which he used for wound care. He had learned about the device during his residency and from reading, and he has since given lectures about it. He claims to have one of the largest experiences in the United States in the field of tumescent liposuction.

Dr. Yoho learned to perform liposuction by taking one training class a month for the last decade, and his instructors have been the originators of the procedure. He has observed others performing the procedure and believes he has received hundreds of hours of training. He performs about 600 cosmetic procedures a year, and he estimated about 85 percent of them included liposuction. He testified he has had 50 doctors rotate through his office on preceptorships and he has lectured about ten times on the subject of cosmetic surgery. He had been on the staff of hospitals until about three years ago, when he decided he did not need privileges. He is on the faculty staff at Martin Luther King Hospital in the Department of Dermatology. He is certified by the American Board of Cosmetic Surgery and became so when he "was grandfathered in." He is a member of various other boards in the field of cosmetic surgery.

15. Dr. Yoho examined Patricia B-G on December 26 at his office. He observed a cleanly debrided wound with a healing granulation base. It was about five or six inches long, about one or two inches high, and was located in the center of the patient's abdomen. He took her vital signs and found them stable. Patricia B-G was in pain but there was no infection or fever. He determined Patricia B-G could care for herself at home and the course of treatment respondent proposed was going fine. He knew respondent was using multiple daily dressing changes and he found no indication she should be admitted to the hospital. He felt the best wound treatment was healing by secondary intention, that it was a better treatment than "grafting or another fantasy." He did not talk to her about hospitalization.

Dr. Yoho saw Patricia B-G again about three or four weeks later and found everything was progressing as planned. He evaluated her and assured her everything was fine, and the wound was smaller and was healing. He felt at the time that because of respondent's care, the wound was healing faster than he expected.

16. Dr. Jesse Mitchell is a cosmetic surgeon and has been licensed in California since 1994 or 1995. He attended the University of North Carolina School of Medicine. He did a residency in dermatology in Ohio and a cosmetic surgery residency at Graduate Hospital after respondent did his residency there. He has received a letter of reprimand from the board in 2001 for his record keeping, and was required to take a record keeping course. He served as the director of cosmetic surgery at the University of Pittsburgh for four years and taught dermatology residents. He is board certified in dermatology and by the American Board of Cosmetic Surgery. He has taught cosmetic surgery techniques. He operates a surgery center in San Bernardino. In the past, respondent had discussed some cases with him. He believed respondent was a great surgeon.

17. Respondent spoke to Dr. Mitchell about Patricia B-G while the two of them were in his surgery center. The conversation occurred sometime between the first and second surgeries respondent performed on Patricia B-G. Respondent said he had a patient with a complication and they discussed the procedure respondent contemplated to correct the problem. They discussed a scar revision and/or an abdominoplasty, and he recalled they talked about doing the procedure in stages. Respondent showed him a picture of the patient; Dr. Mitchell never saw the patient. They discussed the possibility the patient might not have enough skin to do an abdominoplasty. Dr. Mitchell recommended a scar revision because he felt it would have been difficult to remove the scar through an abdominoplasty incision. Respondent appeared concerned about the patient and wanted what was best for her.

18. Respondent spoke to Dr. Goulshai about his treatment of Patricia B-G. Dr. Goulshai is a cosmetic surgeon who attended Graduate Hospital after respondent. Dr. Goulshai did not see the patient and did not testify at the hearing. Respondent did not testify as to what advice, if any, Dr Goulshai gave to him.

#### *Respondent's Records*

19. Respondent maintained three charts on Patricia B-G, one in his office in Hemet, one in the surgery center in Riverside where he performed the surgeries on Patricia B-G, and one that was kept by the surgery center staff. He made entries in those charts depending on where he was or where he saw the patient. In order to obtain a complete picture of respondent's treatment of Patricia B-G, it is necessary to review each chart. On some occasions, but not at all times, copies of an entry from one chart were entered into another chart. If, as occurred one time, he saw the patient in Riverside and later spoke to her by telephone from his office in Hemet, the chart entry for the in person visit was recorded in the Riverside chart and he charted the telephone call in his Hemet office chart. It is a confusing system.

The chart entry for the surgery on December 8, 2000 is particularly confusing. The surgery center chart at the top of the page sets forth the consultation of November 7 and respondent's description of the surgery with a date of December 8 in the middle of the page. However, another chart also contains the same November 7 consultation note, but a different note of the liposuction dated December 6.

20. Most of respondent's handwritten notes could not be deciphered. In connection with the investigation of this matter, respondent produced a typed version of his notes. It was typed by his staff. At the hearing, it turned out the typed notes were not complete in that the person typing them did not include entries from all the charts for a specific date or the typed notes contained chart entries for office visits or telephone calls which did not appear in the handwritten notes.

21. Patricia B-G's first surgery was scheduled for December 6, 2000 to be performed in the Eye Surgery Center of Riverside, a facility owned by Dr. Milton A. Miller, an ophthalmologist. Respondent believed himself to be an independent contractor. Pursuant

to the arrangement between respondent and Dr. Miller, employees of Dr. Miller prepared patient consent forms and other documents. They were dated December 6, the original surgery date. Amy Reynolds, an employee of Dr. Miller's, went over the forms with Patricia B-G and had her sign them. Patricia B-G signed all of the forms on December 8, 2000, the date of the surgery. Respondent had nothing to do with the preparation of any of the forms.

Many of the forms Patricia B-G signed had Dr. Miller's name on them as part of the letterhead, or his name had been entered in blanks on the preprinted forms. For example, a form entitled "General Instructions" had Dr. Miller's name on it; respondent's name does not appear anywhere on the document. On a form entitled "Authorization for and consent to surgery or special diagnostic or therapeutic procedures," Dr. Miller's name was typed in two places as Patricia B-G's attending physician. An employee of Dr. Miller's crossed out Dr. Miller's name and hand wrote respondent's name, but left the date as December 6. The employee did not initial the change or put a date as to when the change was made. Similarly, a "Consent for Surgery" form has Dr. Miller's name at the top, his name is crossed out, and respondent's name entered with no indication who made the change or when. The form is dated at the bottom as December 6.

In addition, respondent himself met with Patricia B-G on December 6 and discussed the procedure with her. He had her sign a form that set forth the risks and complications of liposuction.

22. A document dated November 7, 2000 entitled "Payment Policy" and "Surgery Quote Sheet" reflects the names of Dr. Miller and Dr. Isse on the top, with Patricia B-G's name, liposuction as the procedure, and a cost of \$7,000.00. Respondent's name does not appear on the form.

23. Patricia B-G did not have the funds to pay for the liposuction and sought a loan. She submitted several loan applications to PMC Patient Financing, a company that Dr. Miller's office used to finance medical treatment. The forms indicate Dr. Miller was the physician. PMC approved a third-party loan for Patricia B-G on November 15, 2000, with Dr. Miller indicated on the financing determination form as the physician. On November 27, 2000, PMC Patient Financing issued a check made payable to Dr. Miller to pay for Patricia B-G's surgery. Respondent's name does not appear on the check. According to respondent, Dr. Miller's sent him a portion of the funds Dr. Miller received to compensate him for surgical services, and retained the other portion as Dr. Miller's fee for the use of his surgical center and his staff.

24. Prior to the second surgery on December 14, 2001, Patricia B-G signed another set of forms similar to the forms she signed in connection with the first surgery on December 8, 2000.

#### *Expert Opinions*

25. Four expert witnesses testified at the hearing, two for complainant and two for respondent. Dr. Harold Rosenfeld testified for complainant. He graduated from USC

Medical School in 1965. After completing a rotating internship and then his military obligation, he completed a two-year general surgery internship at the Queen of Angels Hospital in Los Angeles and a two-year plastic surgery residency at LSU. He was board-certified in plastic surgery in 1979, and has maintained a private practice in plastic and reconstructive surgery since 1975. He has been on the faculty at USC since 1987, and is presently an associate professor of surgery. He has conducted research and written several articles on the treatment of lesions and scars. He has affiliations with five hospitals, including Huntington Memorial Hospital in Pasadena, where he has served as the Chair of the plastic surgery committee for five years and has been a member of the medical ethics committee since 1990. He also served as Chief of Plastic Surgery and Chief of Surgery at St. Luke Medical Center and was on the medical ethics committee there for 11 years. He has served as an expert for the Board and testified on behalf of the Board four times in the past. He was well qualified to render an opinion on the standard of care in this matter.

26. Dr. Rosenfeld wrote a report dated September 2, 2003 and testified at the hearing. He was provided and read the entire investigation report and listened to an audiotape of respondent's interview. In his view, there are no differences in the standard of care between cosmetic surgeons and plastic surgeons in performing a liposuction.

In Dr. Rosenfeld's opinion, respondent's documentation was an extreme departure from the standard of care. He noted the multiple notes of the first surgery yet they seem to have been written on different dates, and pointed to similar discrepancies on other dates as well. He criticized respondent for using preprinted forms that did not have respondent's name on them, and when changes were made to the forms, the person who made the changes and the date the changes were made were not indicated. He felt the way in which the patient obtained a loan, without any indication that respondent was the surgeon, and with payment from the lender to Dr. Miller, not to respondent, constituted a fraudulent fee-splitting arrangement and was below the standard of practice.

Dr. Rosenfeld believed respondent failed to satisfy the standard of care in the preparation of an operative note following the first surgery. He pointed to the preprinted Operative Note that merely indicated respondent had removed 4900 cc. of fat from the patient's upper and lower abdomen, hips, arms and neck, without any indication of how much fat was removed from each area. Respondent did not describe his technique, what instruments he used, the size and number of cannulas, and so forth. Dr. Rosenfeld believed an operative note should describe accurately what occurred and this note did not. It was, according to Dr. Rosenfeld, an extreme departure from the standard of care. He pointed out the note respondent wrote for the second surgery met the standard of care.

In Dr. Rosenfeld's opinion, respondent was incompetent in the way he handled the wound. He noted respondent saw Patricia B-G often, he was attentive to her, he used oral antibiotics and hyperbaric oxygen, and so forth. However, the patient had a large, open wound. After respondent debrided the dead tissue, and determined there was no infection, he should have closed the wound. He believed by leaving it open and treating the patient as an outpatient, the chances of infection, wound contracture and distortion of surrounding tissue, and scarring increased. In his view, the patient's safety was the overriding consideration for

immediate wound closure instead of healing by secondary intention. He believed the longer the wound remained open, the greater the chance of infection, because the wound would take about four months to heal, and would require constant dressing changes. In contrast, a surgically closed wound would take two to three weeks to heal. He also felt there was less chance of scarring if the wound were closed instead of allowing it to close on its own.

Lastly, Dr. Rosenfeld criticized respondent for using Dr. Yoho for a second opinion. Dr. Rosenfeld did not believe Dr. Yoho was qualified. Dr. Rosenfeld became familiar with Dr. Yoho's credentials in connection with his work for Huntington Memorial Hospital. He knew Dr. Yoho did not have any training in plastic surgery or major wound care, and did not have hospital privileges, and that his training was in emergency medicine. Dr. Rosenfeld noted that if respondent had referred the patient to Dr. Isse, who was associated with Dr. Miller, that would have been appropriate because Dr. Isse is board certified in plastic surgery and had worked in a burn unit.

27. Dr. Aaron Stone testified for complainant. He graduated magna cum laude from Brandeis University in 1981 and attended Yale Medical School until 1985. After doing a fellowship in clinical nutrition at University of Pennsylvania Hospital for a year, he began a general surgery residency at Wayne State University in 1986. He completed it in 1991, and then did a plastic reconstructive and hand surgery residency there for two years. He also did an aesthetic rotation at the Manhattan Eye, Ear and Throat Hospital and a fellowship in plastic, maxillofacial and hand surgery in Brazil. He is board certified in surgery and plastic surgery, and has served as an expert reviewer for the Board. He currently has hospital privileges at three hospitals. He had served as a qualified medical examiner for 10 years. He has been in private practice since 1994, and specializes in plastic and cosmetic surgery. He was well qualified to render opinions on the standard of care in the field of cosmetic surgery.

28. Dr. Stone wrote two reports on behalf of the complainant. He reviewed all the material obtained by the board's investigator. In his opinion, respondent committed gross negligence and was incompetent when he:

A. performed an aggressive superficial liposuction to achieve abdominal skin tightening and then applied a tight compression garment which resulted in full thickness skin necrosis.

Dr. Stone pointed out the pre-operative photographs showed redundant and excess skin and fat around the umbilicus. The patient wanted a flatter abdomen and that was not possible with liposuction because that procedure only removed fat, not skin. Patricia B-G needed an abdominoplasty to remove the excess skin. He reasoned it was apparent respondent tried to remove fat in an overly aggressive manner, and in so doing, damaged the vascularity of the skin, which in turn caused the skin to die. He noted respondent had the obligation to advise the patient there would be excess skin and the liposuction would not flatten her stomach. Nevertheless, it appeared to Dr. Stone that respondent tried to shrink the skin as well as remove fat and he cut off the blood supply instead. Dr. Stone was unable from respondent's operative note to determine the procedure respondent employed because it was simply a boilerplate note, not a report. He believed respondent was required to write an

individualized report and describe where he inserted the cannula and other relevant details. Finally, it appeared to Dr. Stone that respondent was incompetent because he did not have the requisite knowledge or training as to what he could and could not do with respect to the patient's desired outcome, and as a result, he did not practice safe medicine. He noted the scarring shown in the photographs was not the sort of result seen in a liposuction.

B. failed to recognize the severity of the skin necrosis.

Dr. Stone pointed out there was bruising four days after surgery, but respondent would not have debrided the patient for ecchymosis, so that meant there was more going on. Yet respondent did not recognize the skin had necrosed and when he did recognize it, he should have consulted with a doctor qualified to treat this kind of wound, and not have the wound treated with hyperbaric oxygen.

Dr. Stone believed the standard of care required respondent to admit the patient to a hospital, debride the wound under anesthesia<sup>3</sup>, and then work from a living base. Respondent should have thought how to close the wound at that time because it was inappropriate to leave a patient with an open wound of this size if that can be avoided. He felt the advantages of closing the wound at that point outweighed the advantages of allowing it to heal on its own, primarily because the healing time is shortened considerably. With an open wound, the risk of infection is much greater. He noted this wound did not heal until March. Dr. Stone further believed respondent's treatment showed he was incompetent because the appropriate treatment was outside his knowledge or training.

C. failed to hospitalize the patient or refer her for appropriate consultations.

In Dr. Stone's opinion, respondent should have referred Patricia B-G to an appropriate specialist for treatment of her wound, and that would have been a plastic or general surgeon, depending on their background. Respondent's failure to do that constituted gross negligence. He did not believe Dr. Yoho was appropriately trained for this treatment because he was trained as an emergency room physician; he noted such physicians are not trained to treat a patient's wound after the patient leaves the emergency room or take patients to surgery to close a wound. Further, he noted an emergency room doctor would not have admitting privileges.

D. took the patient back to surgery in December 2001 with the intention of performing an abdominoplasty without recognizing it could no longer be performed.

Dr. Stone's review of respondent's chart told him respondent intended to remove the remaining scar and leave the patient with a scar like the one produced by an abdominoplasty, and the patient believed she would receive an abdominoplasty-like result.

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<sup>3</sup> Dr. Stone doubted respondent could have done much debridement in his office because the patient was not under anesthesia. He also felt the wound was probably bigger than that described by respondent because if he could not entirely debride the patient, he could not determine the size of the wound.



He believed respondent was incompetent for believing he could perform an abdominoplasty because this procedure was not possible given Patricia B-G's situation at that time. He reasoned that with the skin necrosis, there was not sufficient skin to pull down to create a scar at the bikini line, and that if respondent wanted to create the scar, he needed to use tissue expanders.

E. performed additional liposuction probably incurring more permanent skin damage.

Dr. Stone felt respondent was grossly negligent for performing a liposuction during the second procedure because there was insufficient tissue present, and a liposuction could further damage the blood supply. He noted that after respondent performed the liposuction and removed the scar, he had trouble closing the wound and had to put in retention sutures.

In addition, he believed respondent committed unprofessional conduct when he falsified finance information applications with respect to the name of the operating surgeon, and in his notes following the first surgery, when he failed to set forth sufficient details to determine what respondent had done during the surgery.

29. Dr. Mark Berman testified on behalf of respondent. He graduated from UCLA with a BA degree in 1974 and from Chicago Medical School in 1979. He did an internship in surgery for one year at Loma Linda University and in 1983, completed a residency in otolaryngology-head and neck surgery. He became board certified in that field in 1983 but practices in the field of cosmetic surgery, and facial plastic and reconstructive surgery. He served as a clinical instructor at Loma Linda for three years in otolaryngology-head and neck surgery, and since 2001, has been a clinical instructor at USC in facial plastic surgery. He is also a diplomate of the American Board of Cosmetic Surgery and a fellow of the American College of Surgeons. He has hospital affiliations with three hospitals in the Los Angeles area and belongs to a number of organizations. He has written and published papers, given lectures, and appeared on television.

30. Dr. Berman reviewed records, although it was not clear what records he reviewed, reviewed the written reports of Drs. Stone and Rosenfeld, and spoke to Dr. Yoho and respondent. In his opinion, respondent did not violate the standard of care in his treatment of Patricia B-G and was not incompetent. He pointed out necrosis was a known complication of liposuction and it could happen from trauma or noncompliance by a patient. He testified the compression garment could compromise a skin flap, and felt that was the most likely cause of the necrosis. He believed other than the scarring, the results of the liposuction were normal.

Regarding respondent's post-operative care of Patricia B-G, Dr. Berman noted respondent saw her daily and paid a lot of attention to her care and the wound, and the wound closed. He felt the care was appropriate. He indicated there was sloughing as the tissue died and separated, and that was evidence her body was trying to heal itself. He felt healing by secondary intention caused less scarring, and was a better alternative than a skin

graft, which would cause a large skin deformity and be painful. He also noted it was less costly to the patient to allow the wound to heal on its own, both in terms of hospitalization, and the cost of a second surgery. Further, Dr. Berman knew Dr. Yoho and believed respondent's choice of him to offer a second opinion was appropriate. Indeed, he believed Dr. Yoho was better qualified to render a second opinion than a plastic surgeon such as Dr. Stone because of his board certification in cosmetic surgery and emergency medicine.

Dr. Berman pointed out the second surgery was a scar revision and there was no indication respondent performed an abdominoplasty. He believed the procedure respondent performed was appropriate. He found the liposuction respondent performed during this procedure did not cause any damage to the patient and therefore he could not conclude it was inappropriate to do it.

Dr. Berman reviewed respondent's notes and other documentation in his charts and found nothing wrong with them. He believed respondent's note of the first surgery was appropriate when respondent provided only a total of the fat removed rather than subtotals of fat removed from each area that respondent liposuctioned. He testified it was common to use the total because all the fat goes into a canister, and that is what is measured. Further, because this was a cosmetic procedure, it is the result, the appearance of the patient after the surgery, that is important. He believed respondent's preprinted note, plus another handwritten note and the anesthesia report together constituted an adequate record of the surgery.

Dr. Berman did not find respondent falsified records, illegally split his fee, or filled out the documents incorrectly. He did not believe the act of crossing out Dr. Miller's name was a violation of the standard of practice. As for the loan application, he noted the patient was trying to get financing and there was no evidence respondent was involved in it, and it made no difference whose name appeared on the loan application or who received the check from the lender.

31. Dr. Yoho testified on behalf of respondent. He reviewed records but did not enumerate those records. He did not believe respondent violated the standard of care in his treatment of Patricia B-G. He was familiar with respondent's experience and technique in performing liposuction and could not say respondent's technique was the cause of the skin necrosis. He thought the compression garment may have caused the necrosis. He testified respondent recognized the severity of the wound and treated it appropriately. He agreed with respondent that hyperbaric treatment might help the patient. He believed respondent did not promise to perform an abdominoplasty and testified respondent knew it was impossible because of the nature of the scar. He indicated respondent did not promise an abdominoplasty, and in fact performed a scar reduction. As for the second surgery, he testified doctors do touchups all the time and respondent's taking out a "trivial amount of fat to help close the wound" was fine.

Dr. Yoho found nothing inappropriate in respondent's records. He testified it was common for the operator of a surgicenter to apply for credit as Dr. Miller did. He testified it is common to use pre-printed forms when a cosmetic surgeon does a routine procedure

because the procedure is done the same way every time. He believed respondent's contemporaneous notes of the first surgery, which included the amount of solution used, met the standard of care, and the standard of care did not require respondent to describe how much fat was removed from each area. He added that frequently paperwork is changed and a simple notation and initial is all that is needed. In fact, as an owner of a surgicenter who rents it to other physicians, he insists on those physicians using his forms.

### *Undercover Patients*

32. Respondent hired two private investigators to pose as patients and talk to Dr. Stone and Dr. Rosenfeld about cosmetic surgery. During the course of their conversations with the doctors, the investigators asked them how they felt about cosmetic surgeons. Candace Les met Dr. Stone on September 9, 2004 and talked to him about a brow lift. She asked him the difference between plastic and cosmetic surgeons. He said there was a huge difference because cosmetic surgery was a procedure and plastic surgery was a medical specialty. He explained the requirements for certification as a plastic surgeon and said he did not know the process for certification of a cosmetic surgeon. When asked if he would ever recommend a cosmetic surgeon over a plastic surgeon, Dr. Stone said it would be a serious mistake for her to use a cosmetic surgeon for her case, and it was dangerous to use a cosmetic surgeon. He pointed out to her that the two were not the same. Later that day, Les went to Dr. Rosenfeld's office posing as a patient for a chin lift. He explained the difference between plastic and cosmetic surgeons and the choice could have serious consequences. He said plastic surgeons need three years after medical school but a cosmetic surgeon did not, and in fact could spend \$200 and go to courses on weekends which was not the same. Dr. Rosenfeld said not knowing the difference between the two could have consequences.

Neither doctor told Les she should not see a cosmetic surgeon or that cosmetic surgeons were quacks.

33. Melanie Paek posed as a patient for Dr. Stone on September 9 seeking to have a mole removed. He told her she should stay away from cosmetic surgeons because they did not have proper training, and that there is no specialty called cosmetic surgery, only words that had been made up. Dr. Stone said he was a plastic surgeon who performed cosmetic procedures occasionally. Paek went to Dr. Rosenfeld's office on September 15, 2004. He said she should not go to a cosmetic surgeon because she would not know if they had the proper training, while he had received the proper training. He said anybody can be a cosmetic surgeon.

### *Respondent's Testimony*

34. Respondent testified at length at the hearing. He estimated he has done more than 1,000 liposuctions over the years, and more than 3,000 when they were combined with other procedures. He testified he has had extensive experience over the last 23 years treating major and minor wounds, including debriding wounds inside and outside the belly. In this case, Patricia B-G suffered a slough of the fatty layer, and respondent testified he had experience going much deeper.

In respondent's opinion, it is impossible to conclude he performed an overly aggressive liposuction that caused the skin necrosis. He pointed out he performed a routine liposuction and indeed he removed more fat from the lower abdomen, where there was no necrosis, compared to the upper abdomen, where the necrosis occurred. He testified he used the same technique in both locations. He believed that people with darker skin, like Patricia B-G, have a thicker dermis and can withstand greater surgery. He raised the possibility that Patricia B-G used heat to treat her wound, and he felt if she did, it could cause burns. He also suggested her abdominal binder might have been too tight and rolled down, and when she did not see him as soon as he wanted immediately after surgery, this too-tight garment might have cut off the blood supply. He testified he was very familiar with the garment and had been using it for nearly 20 years.

Respondent did not believe he mistreated the wound. His concern when he saw her on December 12 was an embolus, and he was trying to get her out of bed and to his office, which was a problem. He felt if she had come to his office sooner, he would have changed or loosened the garment. On that day, he noted darkened areas and wanted to see her again the next day. He then arranged for hyperbaric treatment, but claimed the patient did not go. Respondent testified over the next several days, they talked about going to the hospital but the patient did not want to go because of financial considerations, i.e., the hospitalization would be more expensive than the original surgery. Respondent performed debridement on December 24 and 25 because, in his view, she was noncompliant. Respondent testified he stopped seeing the patient in Riverside because she was always late to her appointments, and he required her to come to his office in Hemet, so that even if she were late, it would not disrupt his practice.

Respondent took Patricia B-G to Dr. Yoho's office on December 26 in part because he recognized the potential problems, and the patient was aware of Dr. Yoho through his website and wanted to see him. After the consultation, according to respondent, Patricia B-G was satisfied the wound would heal but would take time, and she understood that and did not want to go to a hospital. Respondent changed her dressing and treated her nearly every day until the wound finally healed in late March. He believed that was the reason the wound healed as quickly as it did. In addition to consulting with Dr. Yoho, respondent spoke to Dr. Mitchell and Dr. Goushai about the patient.

Based on respondent's experience, he felt the best way to treat Patricia B-G's wound was by secondary intention, and that decision was confirmed by the other doctors. He and the other doctors did not believe there was any way to close the wound. Respondent pointed out he paid for the hyperbaric treatment, antibiotics, and the operating room for the second surgery after Patricia B-G's health insurer refused to cover those expenses.

Respondent denied he performed or intended to perform an abdominoplasty on Patricia B-G to revise the scar. He testified Patricia B-G wanted this and he told her if it was possible he could do it. He noted he had two patients in the past where he had performed such a procedure and he showed her pictures, but he also told her the chances were small. They discussed this possible procedure several times over the last few months of 2001, and

pointed to his chart note of August 27, where he described "a reverse tummy tuck" because she had some excess skin at the bottom and he could bring it up, but he did not know until he got there if he could do it. At that next consultation, respondent again explained all the possibilities to the patient and told her one option was to perform the revision in stages. He explained the diagram he drew in his chart on December 7 was an effort on his part to show the patient how the procedure she wanted might be done and the scar revised

Respondent explained the reason he removed fat during the second surgery was that by going under the skin with a cannula, he would create tunnels which could then be connected, and that was a better way to release the scar. In his opinion, this was a faster method and incurred less blood loss than using scissors. He described the cannula as simply a tool. He noted the patient claimed he did not do enough liposuction.

Regarding his charts, respondent explained he maintained three charts on Patricia B-G: one was in his office in Hemet, one was maintained by Dr. Miller's surgery center and contained only the information relating to the surgery, and one in Dr. Miller's office when he saw Patricia B-G there on occasions other than the surgery itself. He testified sometimes Dr. Miller's staff copied parts of the surgery chart and put the copies in the office chart. Respondent testified he went to Riverside on occasion to see Patricia B-G there instead of having her come to his office in Hemet as an accommodation to her, but he stopped doing that.

Respondent called himself an independent contractor with respect to Dr. Miller, and he has been working this way since his residency. He testified he was paid as the surgeon, and he denied he referred the patient to Dr. Miller. He explained the paperwork was done by Dr. Miller's office staff, including the application for the loan, and he had nothing to do with that. He pointed out he met the patient in his office and she signed a consent at that time after they discussed the surgery, and that was sufficient. He testified Dr. Miller's office received the check from the lender and paid respondent his surgical fee, and retained the rest as reimbursement for respondent's use of the surgery center and his staff.

Regarding his post-operative note of the December 8, 2000 surgery, respondent testified Dr. Miller's office did not have a dictation machine and instead provided preprinted forms which he filled out in part and signed. He believed he augmented the preprinted form with a handwritten chart note, and the two combined showed what he did and how much solution he used, and this met the standard of practice and was commonly done. He testified when fat is removed from different parts of the body, it is hard to measure how much is removed from each part because the patient is under anesthesia, and it takes time to measure the fat, thereby adding to the time the patient is under anesthesia. He testified if the patient had received a local anesthetic, he could have done this. He noted most cosmetic surgeons simply note how much went in and how much came out, and that was the standard. He pointed to operative notes that were written by surgeons while he was doing his fellowship as proof the standard of practice did not require the breakdown demanded by complainant's experts.

## *Settlement*

35. After respondent removed the stitches following the scar revision, Patricia B-G saw what she described as a "Frankenstein butcher job." She felt she had more scars than before, and the original scars were still there. She was angry because she felt respondent had lied to her for a year. She wanted to be fixed. On December 28, 2001, Patricia B-G wrote respondent a letter which she called a "Mediation Statement." She accused him of causing large gaping holes in her stomach and after three surgeries, he had caused her injuries that she did not have before. She also accused him of lying to her, asserting she had asked him to take her to a hospital and he had refused because he believed he could do a better job and leave her unscarred. She accused him of other unrelated wrongdoing. Patricia B-G sent respondent a "Settlement Agreement" dated December 28, 2001, in which she demanded compensation in the amount of \$15,000 for the "permanent scars," \$6,000 as a "full refund," and \$5,000 for "keloid removal." The total was \$26,000.

36. Respondent responded with a letter dated January 3, 2001. He indicated he had been doing liposuction for over 15 years and hers was the first complication he had had. He wrote he explained the risks and complications from the procedure, including skin loss, and suggested her skin loss might be due to the compression garment rolling over with increased swelling and immobilization. He indicated he had received her approval to remove the dead skin and he assured her the wound would close on its own with a scar, which could then be revised. He asserted she refused hospitalization and a skin graft all the time, and that healing without surgery was a better alternative. Respondent indicated he had absorbed the expenses for her post-operative care for three months since her insurance company would not cover them. As for the second surgery, respondent wrote he explained the scar revision in detail, including the two options: excision of the entire scar by a tummy tuck if possible or removal of most of the scar leaving a small bridge in the middle for support and blood supply.

Regarding Patricia B-G's settlement agreement, respondent wrote he had to inform his insurance carrier, and it would take 30 to 40 depositions, viewing of before and after pictures, expert opinions, hearings, counter suits, arguments, and a jury verdict. He informed Patricia B-G the liposuction was done and a complication developed which "was successfully treated" and the remaining issues would take four to five years. He indicated he wanted to talk to her about the entire matter.

37. A few days later, respondent and Patricia B-G met at a Dennys Restaurant where they agreed respondent would refund the surgical fee of \$6,000 to Patricia B-G. Respondent prepared a "Settlement Agreement and Release of All Claims" setting forth the terms of the settlement. Patricia B-G signed it on January 8 and respondent gave her a cashier's check in the amount of \$6,000.

38. A lawsuit between respondent and Patricia B-G is pending.

### Character Evidence

39. Farivar Sajed is a physician specializing in obstetrics and gynecology. He practiced in Hemet for 23 years and has known respondent for more than 20 years. They were colleagues working in the same hospital department. Respondent performed a liposuction on him and they have seen each other socially. Dr. Sajed testified he selected respondent because of his excellent reputation. He has referred patients to respondent and they have reported to him that they have been satisfied with respondent's work. He believed respondent was honest and he never had a problem with respondent's character.

40. Maria Borden is a beauty consultant and specializes in makeup. She went to respondent for a liposuction consultation in 1999. Respondent performed an abdominal liposuction and the results were very good. She testified respondent successfully treated a complication she experienced from a breast liposuction, and he acted in a professional manner. As a cosmetologist, she has referred a few clients to respondent and has never heard any negative comments about him.

41. Respondent submitted 13 letters and declarations attesting to his medical and surgical ability, his professionalism, and his demeanor as a physician.

### Costs

42. For the investigation and enforcement of this matter, the Board incurred Attorney General's costs in the amount of \$19,000.00, investigative services costs in the amount of \$8,815.72, and record review costs in the amount of \$2,082.00. The total is \$29,897.72. The amount is reasonable.

### LEGAL CONCLUSIONS

1. In this proceeding, complainant bears the burden of establishing the charges by clear and convincing evidence to a reasonable certainty. *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853. This requires the evidence be "of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth" of the charges (BAJI 2.62), and to be "so clear as to leave no substantial doubt." *In re Angelia P.* (1981) 28 Cal. 3d 908, 919; *In re David C.* (1984) 152 Cal.App.3d 1189, 1208. If the totality of the evidence serves only to raise concern, suspicion, conjecture or speculation, the standard is not met.

2. Respondent has a duty to perform professional medical services for patients with that degree of learning and skill ordinarily possessed by reputable physicians practicing in the same or similar locality and under similar circumstances. A failure to fulfill any such duty is negligence. *Keen v. Prisinzano* (1972) 23 Cal.App.3d 275, 279. A lack of ordinary care defines negligent conduct. Gross negligence is defined as a want of even scant care or an extreme departure from the ordinary standard of care. *Van Meter v. Bent Construction*

Co. (1946) 46 Cal. 2d 588. Repeated negligent acts by a physician consists of two or more negligent acts. *Zabetian v. Medical Board of California* (2000) 80 Cal.App.4th 462.

Incompetence is distinguished from negligence in that one may be competent or capable of performing a given duty, but negligent in performing that duty. A single act of negligence is not equivalent to incompetence. While a single negligent act under certain circumstances may reveal a general lack of ability to perform licensed duties, thereby supporting a finding of incompetence, a single honest failing in performing those duties, without more, does not constitute a finding of incompetence justifying sanctions. See *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040.

3. It is incumbent upon the trier of fact to determine the standard of professional learning, skill and care required of respondent only from the opinions of the physicians, including respondent, who have testified as expert witnesses as to such standard. The trier of fact must consider each such opinion and should weigh the qualifications of the witness and the reasons given for his or her opinion. The trier of fact must give each opinion the weight to which it deems it entitled. It must be remembered, however, that no expert witness has all the right answers and there will always be a difference of opinion.

4. Respondent's defense to the charges relating to his treatment of Patricia B-G was devoted in part to trying to show Dr. Stone and Dr. Rosenfeld were biased against him and therefore, their opinions should be accorded less or no weight. The evidence established, however, that respondent's expert witnesses, Dr. Yoho and Dr. Berman, were biased and that affects the weight to be given their testimony.

Dr. Yoho, in particular, was biased both in favor of respondent and against plastic surgeons in general. He has known respondent for many years, worked with him, and believed him to be an excellent surgeon. He was also involved in the management of Patricia B-G's wound, and agreed with respondent's decision in December 2000 to allow the wound to heal by secondary intention. Under these circumstances, and with his own decision at stake, it would be expected that Dr. Yoho would not criticize respondent's treatment of the patient. Indeed, his testimony amounted to a spirited defense of respondent's treatment, not a dispassionate and neutral evaluation of it. Furthermore, Dr. Yoho demonstrated a great deal of animosity towards plastic surgeons because of the way he perceives they have treated cosmetic surgeons. Complainant's experts were plastic surgeons, and his criticisms of plastic surgeons in general were by extension an attack upon their credibility. Dr. Yoho's efforts did not accomplish what he intended. Finally, Dr. Yoho was the least qualified expert to render an opinion on the standard of care. He was trained in emergency medicine, not surgery, and his claim an emergency physician received the training to handle difficult wounds either surgically or over time were unavailing. Dr. Yoho's demeanor while he testified showed he was impressed with his own abilities and knowledge, but his testimony did not inspire confidence. It was not persuasive. His testimony is completely disregarded.

Dr. Berman was more qualified to render an opinion on the standard of care because of his training in head and neck surgery and his subsequent teaching in that area. He is board certified in otolaryngology. However, he too was a defender of cosmetic surgeons and



critical of plastic surgeons. His testimony that there are many standards of care for a particular procedure, depending on which specialty the physician practiced, made little sense. Compared to the credentials of Dr. Stone and Dr. Rosenfeld as they related to the management of Patricia B-G's wound, Dr. Berman's testimony is given less weight.

Respondent took the unusual step of sending private investigators undercover to interview Dr. Stone and Dr. Rosenfeld and to surreptitiously solicit their views about cosmetic surgeons. One shortcoming with this effort was that neither investigator knew anything about the subject they were inquiring about, so the quality and reliability of their questions and the doctors' answers is open to question. Nevertheless, the statements they attributed to Dr. Stone and Dr. Rosenfeld show only that the doctors were concerned about the training cosmetic surgeons receive before they start performing surgery. There is no requirement a physician receive any surgical training. There is no certifying board approved by the American Board of Medical Specialties for cosmetic surgery like the American Board of Plastic Surgery. Thus, Dr. Rosenfeld and Dr. Stone could rightfully point to the extensive training they received before they became board certified, compare that to the little if any training a doctor might receive before performing cosmetic procedure, and then warn the patients to be wary of doctors who do not have the same training as they had.

In addition, respondent sought to show the board's experts had been prejudiced by having reviewed the report of Dr. Childers and the consultant's report. Respondent argued this violated board policy regarding the information that was to be provided to experts. As far as Dr. Childers' report is concerned, that was a chart note and he was a subsequent treating physician. It is common for the treatment records of subsequent treating physicians to be provided to experts. As far as the consultant's report is concerned, it is common for one expert to be given the report of another. In fact, both Dr. Yoho and Dr. Berman received the reports of Dr. Stone and Dr. Rosenfeld. There was no evidence to suggest either board expert was influenced in any way by the consultant's report.

In summary, the training and experience of Dr. Rosenfeld and Dr. Stone established they were better qualified to render impartial opinions regarding the standard of care and whether respondent met that standard, than Drs. Yoho and Berman. Further, the demeanor of Dr. Stone and Dr. Rosenfeld when testifying showed them to be neutral evaluators of respondent's treatment as opposed to defenders of his treatment. The Board's experts' opinions will therefore be given greater weight. Findings 14, 25, 27, 29.

5. The First, Second, and Third Causes for Discipline allege respondent committed gross negligence, repeated negligent acts, and was incompetent in violation of Business and Professions Code section 2234, subdivisions (b), (c), and (d), in connection with the two surgeries respondent performed on Patricia B-G and his care of the wound, in five respects. They will be considered separately.

A. It is alleged respondent's surgical technique and application of a tight compression garment caused the skin loss. This allegation is supported by Dr. Stone's testimony. He believed respondent tried to do too much for the patient, and in doing so, damaged the blood supply to the skin. However, Dr. Rosenfeld did not find anything wrong

with respondent's surgical technique. The other doctors offered several other reasons to explain the skin necrosis, such as a rollover of the garment causing additional pressure on the skin.

Dr. Stone's analysis was the most reasonable and the most likely reason for the skin necrosis. However, the evidence must be clear and convincing to a reasonable certainty, and his testimony does not meet that standard. The fact that Dr. Rosenfeld did not likewise find respondent caused the skin necrosis suggests other causes cannot be ruled out. It must be concluded this charge was not established. Findings 4-8, 26, 28.

B. It is alleged respondent failed to recognize the severity of Patricia B-G's wound, skin necrosis, and skin loss, and consequently failed to hospitalize the patient for appropriate treatment. Both Dr. Stone and Dr. Rosenfeld testified respondent mismanaged the patient's wound, and their testimony was persuasive. In addition, their testimony was supported by the testimony of Dr. Childers and the photographs. Findings 4-8, 12, 26, 28.

C. It is alleged respondent failed to recognize the severity of the wound, skin necrosis, and skin loss and failed to refer the patient to an appropriate specialist for consultation and treatment. Respondent testified at the hearing he had treated wounds like this one before, but in his letter to Patricia B-G, he wrote her complication was the first liposuction complication he had had. The statement respondent made in his letter to the patient is more likely the truth.

Respondent recognized he needed another opinion but the question raised by Dr. Stone and Dr. Rosenfeld was whether his selection of Dr. Yoho met the standard of care because they questioned his qualifications to render a second opinion regarding the management of the skin necrosis. Certainly Dr. Yoho and respondent believed Dr. Yoho was an expert in this field. Further, respondent had worked with Dr. Yoho, had collaborated with him on the writing of a book about cosmetic surgery, and the patient was familiar with him through his website. But the fact remains he was not qualified. He did not have surgical training or training in the management of wounds. Performing thousands of cosmetic procedures did not make respondent or Dr. Yoho qualified to handle a difficult complication that compromised the patient's health as well as her appearance. Despite some obvious allegiance respondent felt toward Dr. Yoho, had respondent carefully considered who best to refer the patient to, he would not have selected Dr. Yoho. The testimony from Dr. Rosenfeld and Dr. Stone was persuasive and satisfied complainant's burden of proof. Findings 4-8, 26, 28.

D. It is alleged respondent took Patricia B-G for the second surgery to repair the scar without recognizing the patients' skin loss and necrosis from the previous surgery made abdominoplasty an inappropriate treatment. This charge is based solely upon the testimony of Dr. Stone. Dr. Rosenfeld did not comment about this in his written report and was not asked about this during his testimony.

Respondent testified that he really did not plan to do an abdominoplasty because he knew it was not possible, but he would not know for sure until the surgery began.

In light of his records and the patient's expectation, this made no sense. He in fact considered doing it, and he should have known it was not possible. He therefore should not have led the patient to believe she would receive an outcome that he could not deliver. Nevertheless, he did not perform an abdominoplasty. It cannot be concluded the thought of performing an impossible surgical procedure is an extreme departure from the standard of care when the procedure was not performed. Nor does having that thought show respondent lacked sufficient knowledge or training in the field. It would be different if he had in fact attempted an abdominoplasty or some form of one. Respondent's conversations with the patient about this procedure were unfortunate, but do not constitute a cause for discipline. Findings 9-11.

E. It is alleged respondent performed the scar revision on December 14, 2001, and in so doing, performed a liposuction even though the patient had suffered substantial abdominal skin necrosis and skin loss during the first procedure. Again, this charge was supported solely by the testimony of Dr. Stone; Dr. Rosenfeld did not criticize respondent in this respect.

There was no evidence the patient suffered any harm from the liposuction. Certainly the patient wanted it performed, and was apparently upset respondent did not remove more fat. It cannot be concluded respondent was negligent in the way he performed this procedure. Findings 9-11.

6. Cause for discipline of respondent's license for violation of Business and Professions Code section 2234(b), gross negligence in connection with his care and treatment of Patricia B-G, was established by reason of Findings 4-8, 12, 26, and 28 and Legal Conclusions 4, 5B and 5C. The remaining allegations of gross negligence were not established and are dismissed. Legal Conclusions 5A, 5D, and 5E.

7. Cause for discipline of respondent's license for violation of Business and Professions Code section 2234(d), incompetence in connection with his care and treatment of Patricia B-G, was established by reason of Findings 4-8, 12, 26 and 28 and Legal Conclusions 4, 5B and 5C. The remaining allegations of incompetence were not established and are dismissed. Legal Conclusions 5A, 5D, and 5E.

8. Cause for discipline of respondent's license for violation of Business and Professions Code section 2234(c), repeated negligent acts in connection with his care and treatment of Patricia B-G, was established by reason of Findings 4-8, 12, 26, and 28 and Legal Conclusions 4, 5B, and 5C. The remaining allegations of repeated negligent acts were not established and are dismissed. Legal Conclusions 5A, 5D, and 5E.

9. Respondent's defense to the charges of dishonesty and the failure to maintain accurate and adequate records in the Fourth and Fifth Causes for Discipline is that he did not personally prepare any of the questioned documents and he had no control over the actions of the employees who did prepare them. Respondent's defense conflicts with the principle of a licensee's nondelegable duty which makes the licensee liable for the acts of his employees in a regulatory enforcement proceeding. *Cal. Ass'n of Health Facilities v. Dep't of Health*

Servs. (1997) 16 Cal. 4th 284, 295. The court in *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164 explained the reasoning behind the rule:

*[T]he objective of an administrative proceeding relating to a possible license suspension is to protect the public; to determine whether a licensee has exercised his privilege in derogation of the public interest . . . . It is necessary for the Department of Food and Agriculture to effectively regulate the dangerous business of pest control. Safety in the application of pesticides must be assured by fixing responsibility with that safety on the licensee.*

It does not matter whether the agent is an independent contractor or an employee. The principle that a licensee will be held liable for the acts of his agents remains the same. (See *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 713; *Rob-Mack, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797-798 *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192 overruled on another point by *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652; *Randle v. Cal. State Bd. of Pharmacy* (1966) 240 Cal.App.2d 254, 261.)

In *Eisenberg v. Myers* (1983) 148 Cal.App.3d 814, 824, the Department of Health Services filed an accusation against a Dr. Eisenberg for submitting false and misleading claims to Medi-Cal. His defense was that his employee did his billing. The court, citing *Camacho* and *Arenstein*, held:

*Eisenberg's defense that Bishop, his business manager, did his Medi-Cal billings is also unavailing. Whether Eisenberg reviewed the billings or even signed them, he was responsible for the acts of his agent as an independent contractor or employee, acting in the course of his business affecting the use of his Medi-Cal provider certificate. A licensee may not insulate himself from regulations by electing to function through employees or independent contractors.*

Respondent chose to do business by having Dr. Miller's office staff prepare forms and loan applications. He paid for this service when Dr. Miller retained a portion of the loan his office obtained from the lender. Respondent cannot avoid his responsibilities by doing business in this manner. He is as responsible for the conduct of Dr. Miller's employees as he would have been if they were his own employees. He chose not to exercise any oversight and he must live with the consequences of their mistakes.

10. Cause for discipline of respondent's license for violation of Business and Professions Code section 2234, subdivision (e), dishonesty, was established by reason of Findings 22 and 23, 26, and 28, and Legal Conclusions 4 and 9.

Respondent and his experts testified it was common for the owner of the surgery center to prepare loan applications and use the name of the owner of the surgery center as the provider of the services. It is doubtful such a practice is common. What is common is that it may be cause for discipline. See *Eisenberg v. Myers, supra*; *Fort v. Board of Medical*

*Quality Assurance* (1982) 136 Cal.App.3d 12. The testimony from Dr. Rosenfeld and Dr. Stone that respondent's conduct was unprofessional supports the conclusion it was dishonest.

11. The accusation alleges respondent failed to maintain accurate and adequate records in four respects: he did not dictate an operative report of the first liposuction, he did not indicate how much fat he removed from each area, he presented surgery consent forms that were on the letterhead of another physician, and he generated two different and inconsistent chart notes. The testimony of Dr. Rosenfeld and Dr. Stone establish these allegations.

Cause for discipline of respondent's license for violation of Business and Professions Code section 2266, failure to maintain accurate and adequate records, was established by reason of Findings 19-22 and 24 and Legal Conclusions 4 and 9.

12. By reason of Factual Finding 42, the Board incurred costs of investigation and enforcement of this matter in the amount of \$29,897.72. Although several charges were dismissed, that does not change the thrust of this case, which was respondent's mismanagement of a serious complication from liposuction. Therefore, reduction of costs is not warranted. The amount is reasonable.

Cause to require respondent to reimburse the Board for its costs of investigation and prosecution of this matter pursuant to Business and Professions Code section 125.3 in the amount of \$29,897.72 was established.

13. In order to properly assess the penalty to be imposed in this case, factors in mitigation and aggravation must be considered and weighed. In mitigation, this is the first disciplinary action brought against respondent and it involves only one patient. The effort he made to care for Patricia B-G shows his compassion and his dedication to his profession. That is corroborated by the declarations and testimony of those who know him. He wanted to provide good care to his patient and his efforts in seeing the patient nearly every day for months without charge were extraordinary. Then, after he attempted to revise the scar without success, he returned the patient's money to her.

In aggravation, respondent is not board certified in surgery and has worked in a solo practice in a small community for many years. He undertook to treat a serious complication of liposuction without adequate training and without seeking help from a knowledgeable source, and his treatment caused considerable harm to the patient. He also lacked a basic understanding of his obligations as a licensee to maintain records and take responsibility for mistakes made by others when those mistakes were made in the furtherance of his practice.

The factors in mitigation and aggravation roughly balance each other. Under these circumstances, there is no reason to depart from the Board's minimum guidelines. The thrust of this case was respondent's mismanagement of the skin necrosis that developed after the liposuction. That must be addressed. The other charges are minor ones and do not require the period of probation be extended or the imposition of a suspension. For violations of Business and Professions Code section 2234(b), (c), and (d), the guidelines call for a

revocation, stayed, a five-year period of probation and terms and conditions tailored to the violations that were established, and that is the most appropriate penalty.

## ORDER

Physician's and surgeon's certificate number A 40026 issued to respondent Mani Nambiar, M.D., is hereby revoked. However, the revocation is stayed and respondent is placed on probation for five (5) years on the following terms and conditions:

### 1. Clinical Training Program

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a clinical training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine ("Program").

The Program shall consist of a Comprehensive Assessment program comprised of a two-day assessment of respondent's physical and mental health; basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment pertaining to respondent's specialty or sub-specialty, and at minimum, a 40 hour program of clinical education in the area of practice in which respondent was alleged to be deficient and which takes into account data obtained from the assessment, Decision, Accusation, and any other information that the Division or its designee deems relevant. Respondent shall pay all expenses associated with the clinical training program.

Based on respondent's performance and test results in the assessment and clinical education, the Program will advise the Division or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, treatment for any medical condition, treatment for any psychological condition, or anything else affecting respondent's practice of medicine. Respondent shall comply with Program recommendations.

At the completion of any additional educational or clinical training, respondent shall submit to and pass an examination. The Program's determination whether or not respondent passed the examination or successfully completed the Program shall be binding.

Respondent shall complete the Program not later than six months after respondent's initial enrollment unless the Division or its designee agrees in writing to a later time for completion.

Failure to participate in and complete successfully all phases of the clinical training program outlined above is a violation of probation.

After respondent has successfully completed the clinical training program, respondent shall participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, which shall include quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at respondent's expense during the term of probation, or until the Division or its designee determines that further participation is no longer necessary.

Failure to participate in and complete successfully the professional enhancement program outlined above is a violation of probation.

## **2. Education Course**

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

## **3. Monitoring - Practice**

Within 30 calendar days of the effective date of this Decision, respondent shall submit to the Division or its designee for prior approval as a practice monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Division, including but not limited to any form of bartering, shall be in respondent's field of practice, and must agree to serve as respondent's monitor. Respondent shall pay all monitoring costs.

The Division or its designee shall provide the approved monitor with copies of the Decision and Accusation, and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision, Accusation, and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision and Accusation, fully understands the role of a monitor, and agrees or disagrees with the

proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement.

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

The monitor(s) shall submit a quarterly written report to the Division or its designee which includes an evaluation of respondent's performance, indicating whether respondent's practices are within the standards of practice of medicine or billing, or both, and whether respondent is practicing medicine safely, billing appropriately or both.

It shall be the sole responsibility of respondent to ensure that the monitor submits the quarterly written reports to the Division or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Division or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If respondent fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, respondent shall be suspended from the practice of medicine until a replacement monitor is approved and prepared to assume immediate monitoring responsibility. Respondent shall cease the practice of medicine within 3 calendar days after being so notified by the Division or designee.

In lieu of a monitor, respondent may participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, that includes, at minimum, quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at respondent's expense during the term of probation.

Failure to maintain all records, or to make all appropriate records available for immediate inspection and copying on the premises, or to comply with this condition as outlined above is a violation of probation.

#### **4. Ethics Course**

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a course in ethics, at respondent's expense, approved in advance by the Division or



its designee. Failure to successfully complete the course during the first year of probation is a violation of probation.

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

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

#### **5. Medical Record Keeping Course**

Within 60 calendar days of the effective date of this decision, respondent shall enroll in a course in medical record keeping, at respondent's expense, approved in advance by the Division or its designee. Failure to successfully complete the course during the first 6 months of probation is a violation of probation.

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

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

#### **6. Oral and/or Written Examination**

Within 60 calendar days of the effective date of this Decision, respondent shall take and pass an oral and/or written examination, administered by the Probation Unit. The Division or its designee shall administer the oral and/or written examination in a subject to be designated by the Division or its designee and the oral examination shall be audio tape recorded.

If respondent fails the first examination, respondent shall be allowed to take and pass a second examination, which may consist of an oral and/or written examination. The waiting period between the first and second examinations shall be at least 90 calendar days.

Failure to pass the required oral and/or written examination within 180 calendar days after the effective date of this Decision is a violation of probation. Respondent shall pay the costs of all examinations. For purposes of this condition, if respondent is required to take and pass a written exam, it shall be either the Special Purpose Examination (SPEX) or an equivalent examination as determined by the Division or its designee.

Respondent shall not practice medicine until respondent has passed the required examination and has been so notified by the Division or its designee in writing. This prohibition shall not bar respondent from practicing in a clinical training program approved by the Division or its designee. Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.

#### **7. Notification**

Prior to engaging in the practice of medicine the respondent shall provide a true copy of the Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Division or its designee within 15 calendar days.

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

#### **8. Supervision of Physician Assistants**

During probation, respondent is prohibited from supervising physician assistants.

#### **9. 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.

#### **10. 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.

## **11. Probation Unit Compliance**

Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of respondent's 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(b).

Respondent shall not engage in the practice of medicine in respondent's 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 thirty (30) calendar days.

## **12. 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.

## **13. 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 thirty 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; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals 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.

#### **14. 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, respondent 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 thirty 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.

#### **15. Completion of Probation**

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

#### **16. 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.

**17. Cost Recovery**

Within 90 calendar days from the effective date of the Decision or other period agreed to by the Division or its designee, respondent shall reimburse the Division the amount of \$29,897.72 for its investigative and prosecution costs. The filing of bankruptcy or period of non-practice by respondent shall not relieve the respondent his/her obligation to reimburse the Division for its costs.

**18. License Surrender**

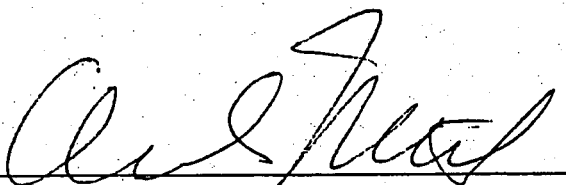
Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license. The Division reserves the right to evaluate 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 respondent's 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.

**19. 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.

DATED: 12/21/04



ALAN S. METH  
Administrative Law Judge  
Office of Administrative Hearings

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

RECEIVED  
MAY 04 2005  
NEVADA STATE BOARD OF  
MEDICAL EXAMINERS

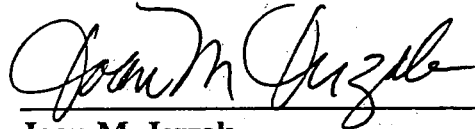
In the Matter of the Accusation )  
Against: )  
) No. 18-2002-140168  
)  
Mani Nambiar, M.D. )  
Physician and Surgeon's )  
Certificate No. A 40026 )  
)  
)  
)  
Petitioner )  
\_\_\_\_\_ )

ORDER DENYING PETITION FOR RECONSIDERATION

The Petition filed by Albert Garcia, attorney for Mani Nambiar, M.D., for reconsideration of the decision in the above-entitled matter having been read and considered by the Medical Board of California, is hereby denied.

This Decision remains effective at 5:00 p.m. on March 11, 2005

IT IS SO ORDERED: March 11, 2005



Joan M. Jerzak  
Chief of Enforcement  
Medical Board of California

MEDICAL BOARD OF CALIFORNIA

I do hereby certify that this document is a true and correct copy of the original on file in this office.

  
Signature

Title

April 27, 2005  
Date