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

In the Matter of the Accusation Against:

Wayne Kelly, M.D.
33800 Pinewood Lane
Menifee, CA 92584

Physician’s and Surgeon’s Certificate No. C43073.

Respondent.

Complainant alleges:

PARTIES

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

2. On or about February 1, 1993, the Medical Board issued Physician’s and Surgeon’s Certificate No. C43073 to Wayne Kelly, M.D. (Respondent). The Physician’s and Surgeon’s Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on February 28, 2017, unless renewed.

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

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, be placed on probation and required to pay the costs of probation monitoring, be publicly reprimanded and ordered to complete relevant educational courses, or have such other action taken in relation to discipline as the Board or an administrative law judge deems proper.

5. Section 2234 of the Code, states:

   "The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

   "(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

   "(b) Gross negligence.

   "(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

   "(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

   "(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care."
“(d) Incompetence.

“(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

“(f) Any action or conduct which would have warranted the denial of a certificate.

“...”

6. Unprofessional conduct under California Business and Professions Code section 2234 is conduct which breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine.¹

7. Section 2261 of the Code states:

“Knowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine or podiatry which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct.”

8. Section 2266 of the Code states:

“The failure of a physician and surgeon to maintain adequate and accurate records relating to the provision of services to their patients constitutes unprofessional conduct.”

9. Section 2290.5 of the Code states:

“(a) For purposes of this division, the following definitions shall apply:

“(1) ‘Asynchronous store and forward’ means the transmission of a patient’s medical information from an originating site to the health care provider at a distant site without the presence of the patient.

“(2) ‘Distant site’ means a site where a health care provider who

provides health care services is located while providing these services via a telecommunications system.

“(3) ‘Health care provider’ means either of the following:

“(A) A person who is licensed under this division.

“(B) A marriage and family therapist intern or trainee functioning pursuant to Section 4980.43.

“(4) ‘Originating site’ means a site where a patient is located at the time health care services are provided via a telecommunications system or where the asynchronous store and forward service originates.

“(5) ‘Synchronous interaction’ means a real-time interaction between a patient and a health care provider located at a distant site.

“(6) ‘Telehealth’ means the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient’s health care while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.

“(b) Prior to the delivery of health care via telehealth, the health care provider initiating the use of telehealth shall inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health. The consent shall be documented.

“(c) Nothing in this section shall preclude a patient from receiving in-person health care delivery services during a specified course of health care and treatment after agreeing to receive services via telehealth.

“(d) The failure of a health care provider to comply with this section shall constitute unprofessional conduct. Section 2314 shall not apply to this section.
“(e) This section shall not be construed to alter the scope of practice of any health care provider or authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law.

“(f) All laws regarding the confidentiality of health care information and a patient’s rights to his or her medical information shall apply to telehealth interactions.

“(g) This section shall not apply to a patient under the jurisdiction of the Department of Corrections and Rehabilitation or any other correctional facility.

“(h)(1) Notwithstanding any other provision of law and for purposes of this section, the governing body of the hospital whose patients are receiving the telehealth services may grant privileges to, and verify and approve credentials for, providers of telehealth services based on its medical staff recommendations that rely on information provided by the distant-site hospital or telehealth entity, as described in Sections 482.12, 482.22, and 485.616 of Title 42 of the Code of Federal Regulations.

“...”

FIRST CAUSE FOR DISCIPLINE
(Gross Negligence)

10. Respondent is subject to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (b), of the Code, in that he committed gross negligence in his care and treatment of patients K.S. and A.J.T. as more particularly alleged hereinafter:

THE COMPASSIONATE HARVEST MEDICAL CLINIC OPERATION

11. Respondent is and was the “Owner, Operator, Practitioner” and “Medical Director” for the Compassionate Harvest Medical Clinic (Compassionate Harvest) from approximately 2010 to the present. In that capacity, respondent “[e]valuate[s] patients for medical marijuana recommendations.” According to information on Compassionate Harvest’s website, “over 10,000 patients” have been evaluated for medical marijuana recommendations. Those seeking medical marijuana recommendations from Compassionate Harvest can register online from the website or they can contact Compassionate Harvest by e-mail or phone. Compassionate Harvest is “typically able to book patients in just 24 hours [and] Walk-ins are also welcome.”
Compassionate Harvest patients can be seen in-person at any of its four locations in Hemet, Lake Elsinore, Rancho Cucamonga or San Marcos, California; or patients can be seen by respondent via “telemedicine” using Skype.\(^2\) According to the information on Compassionate Harvest’s website, “Telemedicine is used by [Compassionate Harvest] to accommodate ‘walk-in’ patients and individuals who wish to be evaluated immediately for a recommendation, even if a MD is not physically present.” The Compassionate Harvest website informs potential patients, that if they qualify for medical marijuana, they can get their recommendation “right away.”\(^3\)

12. In the “About Us” section of the Compassionate Harvest website, potential patients are advised, among other things, that “[w]e provide the most comprehensive, medically professional, and legally indisputable process of Medical Cannibis evaluation, verification, and support possible” with potential patients being advised that “[w]e do not expect our patients to ‘prove’ their diagnosis with documentation.” In the “Frequently Asked Questions” section of the website, there is the following question and answer provided:

“Q. What do I need to bring into the office when I come in?

“A. All we need is some form of picture ID. We do not require any medical records.

If you happen to have something like an x-ray or prescription in regard to your illness we appreciate you bringing those in, but it is not necessary.”

The Compassionate Harvest website also contains a video in which respondent answers particular questions for potential patients. In this video, respondent advises potential patients, among other things, that “the side effect of cannabis is euphoria, you feel better” and answers the question of “How do I get my recommendation?” In doing so, respondent advises his potential patients “that it is a simple and easy process” to receive a medical marijuana recommendation.

\(^2\) Skype is a software application that enables conversations between the parties over the internet with simultaneous viewing of the parties using with a web camera.

\(^3\) The following questions and answers are in the “Frequently Asked Questions” section of the website: “Q. What do I get? Do I get my recommendation right away? A. Yes, assuming that you qualify, we will give you everything you need to legally carry, use and obtain your medication from any California dispensary.”
Potential patients are advised in the video that they can bring medical records if they like “but they are not required” and offers the following explanation:

“... [We] believe our patients, we believe the medical history that they provide us, so we can go basically on the history that the patient presents. You know, if you’re coming in because of insomnia and anxiety – who else but the patient knows that they have insomnia or anxiety? So, just like any doctor we have to believe our patients. I take them at their word. So when the patient comes in we ask them to fill out a medical history form that provides the information that we need to issue them a license [for medical marijuana].” (Italics added.)

In the video, respondent also answers the question of “how long does it take to get a recommendation?” Respondent advises his potential patients that “this usually takes about ten minutes” and “even quicker” if potential patients provide their medical history online. The potential patients are further advised that after they get their recommendation “the patient is able to go to any dispensary in California, buy and use whatever they wish of medical cannabis [and] that they will be completely legal as a buyer and user of cannabis.”

PATIENT K.S. – UNDERCOVER PATIENT

13. On or about May 15, 2016, an undercover visit was made to respondent’s office by an investigator posing as patient K.S., who was accompanied by another investigator. Patient K.S. advised the receptionist that she had registered online and wanted to get a med-card (recommendation). The receptionist advised patient K.S. that she would sign her up, all the information would go to respondent and that she would be speaking to respondent on Skype. The cost to obtain a recommendation was $75.00. Patient K.S. was told “[i]t’s gonna be really pretty quick” and that “you should be able to use it [the recommendation] today.” Among other things, patient K.S. was asked by the receptionist whether she had “any major medical concerns?” Patient K.S. replied “not really” and the receptionist responded “Okay. That’s fine.” Patient K.S. was asked whether she was taking any medications and she replied “just birth control.” Patient K.S. was also asked whether she had ever been hospitalized, whether she had any breathing concerns or heart problems, whether she smoked, whether she was unable to work because of a
medical injury, whether she was on parole or probation, whether she had been [convicted] of a
DUI [driving under the influence] and whether she was currently pregnant and she replied “no” to
all of the aforementioned questions. Patient K.S. was also asked whether she had “a history of
drug abuse?” and she replied “What do you mean by that?” The receptionist responded by asking
whether patient K.S. had ever been to rehab for serious drug problems and patient K.S. responded
“no.” Patient K.S. was also asked whether she drank alcohol and she responded “occasionally.”
After this information was obtained by the receptionist, patient K.S. was advised to have a seat
and that “You’ll Skype with him [respondent].”

14. Respondent then appeared via Skype to do his so-called evaluation of patient K.S.
After a brief introduction, respondent advised patient K.S. that “it’s a simple process. It only
takes us about 5 minutes.” Respondent advised patient K.S. that “we have to document that you
have a therapeutic symptom or diagnosis [and] [t]hat there is a reason to use cannabis, that meets
the State’s requirements.” Respondent then asked “[s]o, I just need to know from you how
cannabis helps you? or what you want to use it for?” Patient K.S. responded that “it just helps me
relax, you know, after a long hard day” and that “it just helps take the edge off.” Respondent
asked patient K.S. “do you use it to help you sleep at night?” and she responded “that’s not the
reason.” Respondent then prompted patient K.S. “so you might use it for insomnia?” and she
replied “I guess.” As part of his discussion with patient K.S., respondent also asked “and so when
you say it takes the stress off, you mean it…” and patient K.S. replied it just helped her relax to
which respondent asked “are you talking about anxiety?” and patient K.S. replied “Well, you
know, just the business of running a family and running here to there everyday – all day everyday”
at which point respondent advised patient K.S. “I have to put a diagnosis in to qualify you. So, I
mean, I can put anxiety down, or intermittent insomnia or something like that. That – those
qualify you. If you’re talking about stress and anxiety, I can qualify you – I can’t just say it helps
you relax.” Patient K.S. responded “[o]kay, well go ahead and put that then” and respondent
replied “Okay. So...‘stress and anxiety’... so I’m gonna put ‘stress, anxiety,’ and you know
‘occasional insomnia.’ Does that sound right?” Patient K.S. told respondent “Okay, sounds
good” and respondent informed her “Okay. Okay, that gets us to where we want to be then” and
issued a one year recommendation which “you’ll be able to use right away today…” The entire Skype evaluation with respondent took approximately four minutes.

15. During the course of the so-called evaluation, no vital signs were recorded; no prior medical records were reviewed; there was no physical examination of patient K.S.; there was no history taken and/or proper work-up or assessment related to patient K.S.’s alleged stress, anxiety and/or insomnia; no differential diagnoses or other causes of the alleged symptoms were considered; there was no detailed informed consent regarding the risks and benefits of cannabis; there was no discussion of titration and alternate methods of ingestion; and there was no discussion about follow up visits to evaluate the efficacy of the medical marijuana that was being recommended.

16. Respondent’s medical record for this visit indicates, among other things, that no vital signs were obtained; the extremities, lymph, neuro and psych section indicates “Not evaluated[;]” the discussion section of the record indicates “discussed titration and alternative methods of ingestion (even though that was never discussed with patient K.S.) and that the risks and side effect of cannabis were discussed (even though there was no such discussion); the diagnosis section lists the diagnoses of Anxiety Disorder – [CPT Code] 300.00, Insomnia – [CPT Code] 780.52, and Stress Reaction – [CPT Code] 308.4; the social and family history indicates “not answered” for cigarettes, alcohol, parole, probation, DUI and exercise (even though some of these questions were asked by the receptionist) and the evaluation system indicates “not evaluated” as to all the listed categories. There was no documentation to indicate that patient K.S. was seen by Skype or via telemedicine.

17. Patient K.S. was provided with a “Physician Statement and Recommendation” (recommendation) for medical marijuana. Among other things, the recommendation, that was signed by respondent, indicated that patient K.S. “has been examined by the physician [respondent] indicated on this document” that patient K.S. “qualifies…for the use of cannabis for medical purposes” and that “[t]he physician has discussed the potential medical benefits and risks of cannabis use.”
18. Respondent committed gross negligence in his care and treatment of patient K.S. which included, but was not limited to, the following:

(a) Respondent issued a medical marijuana recommendation to patient K.S. without adequate medical indication or justification;

(b) Respondent failed to obtain and document an appropriate and thorough medical history for patients K.S.;

(c) Respondent failed to conduct and document an appropriate physical examination on patient K.S. and failed to investigate and exclude other possible causes for her alleged symptoms and diagnoses. Among other things, respondent failed to obtain and document vital signs; failed to examine the skin, eyes and/or neurological system; and failed to examine the airway or neck of patient K.S. in regard to her alleged insomnia;

(d) Respondent made no attempt to obtain prior medical records in order to verify patient K.S.’s alleged medical conditions that were the bases for the medical marijuana recommendation;

(e) Respondent failed to provide adequate informed consent to patient K.S. pertaining to the use of medical marijuana;

(f) Respondent demonstrated a lack of knowledge regarding the potential risks associated with cannabis;

(g) Respondent failed to schedule and/or provide for any periodic review or assessment of the safety and efficacy of the medical marijuana recommendation he recommended for patient K.S.;

(h) Respondent failed to maintain adequate and accurate records in regard to the issuance of a medical marijuana recommendation to patients K.S. The records, among other things, were inaccurate, fraudulent, contained intentional and materially false representations and lacked adequate detail and specificity to justify the issuance of a medical marijuana recommendation to patients K.S.; and
(i) Respondent failed to document that patient K.S. was seen by Skype or via telemedicine.

**PATIENT A.J.T. — UNDERCOVER PATIENT**

19. On or about July 9, 2015, an undercover visit was made to respondent’s office by an investigator posing as patient A.J.T., who was accompanied by another investigator, seeking to obtain a medical marijuana recommendation. The cost to obtain a recommendation was $75.00. After waiting awhile, patient A.J.T. was asked by the receptionist “what are you medically diagnosed with?” and she replied “nothing” which prompted the receptionist to inquire “[d]o you want to say like ‘Anxiety’ or something?” Patient A.J.T. replied “I need it for work” and the receptionist responded “So, like stress?” Patient A.J.T. replied “I don’t really have a reason” and the receptionist told her “Oh? I’ll just put stress. Just cause he’s [respondent is] gonna ask you...”. At this point, patient A.J.T. then explained that she had a drug test with a new employer coming up and she was afraid she would test positive after eating some brownies that a friend made for her birthday on the 4th of July. The receptionist asked patient A.J.T. whether she had any major medical concerns and/or whether she had “any alternate therapy or methods that she use[d]? Patient A.J.T. asked “[f]or what?” and the receptionist replied “[f]or your like – well for like anxiety and insomnia?” to which patient A.J.T. replied “no.” The receptionist then asked patient A.J.T., among other things, whether she had any allergies, whether she had ever been hospitalized, whether she had any major surgeries, breathing concerns or heart problems, whether she smoked, whether she had a history of drug abuse, whether she was unable to work because of a medical injury, whether she was on parole or probation, whether she had been convicted of a DUI, whether she was currently pregnant or breastfeeding and she replied “no” to all of the aforementioned questions. When asked, patient A.J.T. told the receptionist she was employed and that she occasionally drank alcohol.

20. After the discussion above, and prior to the Skype evaluation, the receptionist explained to patient A.J.T. that “I have to speak to and explain to the doctor and everything like
anxiety and insomnia, so you kind of like go along with it...” Patient A.J.T. replied “Why don’t I just tell him the truth that I – I’m gonna get drug tested” and the receptionist then cautioned patient A.J.T. “I don’t think he’s gonna give it [the recommendation] to you then...” and “...because like – yeah, I’m just telling you right now, like honestly he’s not gonna give it to you if you don’t like have a reason.” After thinking about it, and some further discussion, patient A.J.T. advised the receptionist that she was “gonna tell him my whole story” and the receptionist replied “Yeah. Just tell him, and then see what he says...” At one point, the receptionist told patient A.J.T. “we’ll be honest...” and patient A.J.T. apologized with respondent replying “No, you’re fine. I don’t want to get you to get in trouble, like I don’t want to lie either...” However, shortly thereafter, the receptionist prompted patient A.J.T. that if respondent “asks you like, oh did you like smoke it or eat it [presumably referring to the cannabis that was in her system from the 4th of July]” to say that she ingested the cannabis “cause you were in pain or something...” to which patient A.J.T. replied “I wasn’t feeling any pain that night.” At another point during their conversation, the receptionist again attempted to coach patient A.J.T. on what to say after she told the receptionist “I’m just going to tell him the truth” with the receptionist noting “cause you said ‘Work,’ that sounds like stress” and patient A.J.T. said “no.” After some discussion about how long cannabis stays in a person’s system, patient A.J.T. again reiterated that “I want to get a recommendation because I have it [cannabis] in my system” with the receptionist again cautioning patient A.J.T. that she might not get the recommendation if she were to tell the truth, i.e., that she wanted the recommendation in case she came up positive for cannabis when tested by her employer. Shortly thereafter, the receptionist set up the Skype evaluation with respondent.

21. After a brief introduction at the beginning of the first Skype appearance, the following discussion took place between respondent and patient A.J.T.:

4 This was despite the fact that patient A.J.T. never claimed to having insomnia or anxiety but, instead, that she needed the recommendation because of an upcoming drug test.

5 Specifically, after patient A.J.T. indicated she was going to tell respondent she “want[ed] to get the recommendation because I have it in my system” and the receptionist advised her “like, I don’t know, cause I feel like I think he won’t – like you will not get it if it’s not medical – like if it’s not legit. Like if you don’t have stress – if you don’t have anxiety...”
"[Patient A.J.T.]: Um, hi Dr. Kelly, my name's [patient A.J.T.], and I had a quick question before, um, your receptionist checked me in about a marijuana recommendation.

"[Respondent]: Sure.

"[Patient A.J.T.]: I recently got a job at a company as a secretary, and haven't worked in a very long time. *And this past 4th of July I ate brownies that were infused with marijuana. And next week I gonna be having a drug test. So, I wanted to get a recommendation if they ask me what's in my system, I can show that I have a medical marijuana recommendation.* (Italics added.)

"[Respondent] Right. Good idea and then you're legal. (Italics added.)

"[Patient A.J.T.]: Right. Exactly, so I don't really think about all these questions that she was asking me before. *I don't really think I have any medical history or anything. I just think - I just got a heads up from my friend who works at this company, and she said that even if somebody's on prescription drugs, they have to have a prescription for it. So since I ingested it, and if I wanted to have it...I want it legally, I just wanted to get a recommendation from you.* (Italics added.)

"[Respondent]: Yeah, well I can definitely do that for you. I mean - I mean we can do [sic] on the basis of insomnia or any condition like that, anxiety or insomnia. If you have any kind of problems sleeping, we can probably give you a recommendation. It's totally confidential. Uh, but the standard protocol is, you know, if it shows up in your test and you show them your license, tell them that you're using it legally, under a doctor's recommendation. (Italics added.)

"..."

"[Patient A.J.T.]: I wanted to be perfectly honest, though with you, and say that I don't really have any issues, but - what - I don't know, I don't know how this works, uh. (Italics added.)

"[Respondent]: I go on what's written on your intake form, so if you fill out the intake form, and it says 'Anxiety,' or it says 'Insomnia,' or something like..."
that, then you know, we believe our patients. So you know what is – its what you put – what you put down in writing that counts. (Italics added.)

“[Patient A.J.T.]: Okay, then.

“[Respondent]: Okay?

“[Patient A.J.T.]: Okay, then.

“[Respondent]: So I appreciate you being honest and visiting – you know, I’ll leave it to you to fill out the intake form and we’ll go – you know, we’ll go from there, okay?

“[Patient A.J.T.]: Okay, thank you so much.”

22. After being advised of the “standard protocol” by respondent, and having been coached on what to put on the intake form in order to receive a medical marijuana recommendation, the intake form was completed, with the assistance of the receptionist, and a second Skype call was arranged between patient A.J.T. and respondent. Respondent indicated “I’m back” and “let me pull your file, okay?” The “Diagnosis” section of the Intake Note for July 9, 2015, indicated patient A.J.T.’s diagnoses were “Stress Reaction - [CPT Code] 308.4,” “Insomnia – [CPT Code] 780.52” and “Anxiety Disorder – [CPT Code] 300.00.” After a brief discussion about A.J.T.’s employment, she was advised “…well listen, stress reaction is one of the diagnoses that’s valid for using cannabis so, uh, who doesn’t experience light stress? So… stress, anxiety and insomnia are perfectly good reasons to do this for you. So we do it for a year, as long as we can, and you’ll be able to use it right away today, okay?” After answering a brief call, respondent finished up his session with patient A.J.T. In doing so, the following exchange took place:

“[Respondent]: Okay, so just give me a minute here to complete your chart. So I’m putting ‘stress reaction, insomnia and anxiety’ down. Sound right?

“[Patient A.J.T.]: Mm-Hmm. Yeah, that sounds good.

“[Respondent]: Okay.

6 The “Diagnosis” section also listed “Other” which listed stress, anxiety and insomnia.
"[Patient A.J.T.]: Whatever you need to do to make me legal. Ha, ha.

[Respondent]: Uh, who doesn’t suffer from anxiety and stress?

..."

[Respondent]: Okay, so I’m gonna go ahead then and sign your file and get you legal. This will be good for the year, and you will be able to use it the minute you walk out the door."

Before finishing up the Skype session, respondent told patient A.J.T. “and as I said, I am willing to write letters for patients. If you, uh, do run into a problem and you need a letter, just come in and let me know...” The entire two Skype evaluations with respondent took a total of four minutes and forty-five seconds.7

23. During the course of the so-called evaluation, no vital signs were recorded; no prior medical records were reviewed; there was no physical examination of patient A.J.T.; there was no history taken and/or proper work-up or assessment related to patient A.J.T.’s alleged stress, anxiety and/or insomnia and, in truth and fact, she had stated to respondent that she had no ailments and instead needed the recommendation because she was concerned about testing positive on an upcoming drug test; no differential diagnoses or other causes of the alleged symptoms were considered; there was no detailed informed consent regarding the risks and benefits of cannabis; there was no discussion of titration and alternate methods of ingestion; and there was no discussion about follow up visits to evaluate the efficacy of the medical marijuana that was being recommended

24. Respondent’s medical record for this visit indicates, among other things, that no vital signs were obtained; the extremities, lymph, neuro and psych section indicates “Not evaluated[;]” the discussion section of the record indicates “discussed titration and alternative methods of ingestion (even though that was never discussed with patient A.J.T.) and that the risks and side effect of cannabis were discussed (even though there was no such discussion); the diagnosis

7 The first session took two minutes and forty-five seconds (2:45 minutes) while the second session took two minutes (2:00 minutes) not including a short break by respondent to respond to another call.
section lists the diagnoses of Stress Reaction – [CPT Code] 308.4, Insomnia – [CPT Code] 780.52 and Anxiety Disorder – [CPT Code] 300.00, and the social and family history indicates “not answered” for cigarettes, alcohol, parole, probation, DUI and exercise (even though some of these questions were asked by the receptionist) and the evaluation section indicates “not evaluated” as to all the listed categories. There was no documentation to indicate that patient A.J.T. was seen by Skype or via telemedicine.

25. Patient A.J.T. was provided with a “Physician Statement and Recommendation” (recommendation) for medical marijuana. Among other things, the recommendation, that was signed by respondent, indicated that patient A.J.T. “has been examined by the physician [respondent] indicated on this document” that patient A.J.T. “qualifies…for the use of cannabis for medical purposes” and that “[t]he physician has discussed the potential medical benefits and risks of cannabis use.”

26. On or about September 4, 2015, respondent wrote a letter for patient A.J.T. that was directed to the Genesis Corporation which provided, in pertinent part:

“Dear Genesis Corporation,

“Ms. [A.J.T.] has issued a recommendation to use medical Cannabis legally at night for insomnia/anxiety disorder under Ca Prop 215. She has given permission to release her medical information. Diagnoses are stated below:

“ICD9 code: Anxiety Disorder – 300.00
“ICD9 code: Insomnia – 780.52
“ICD9 code: Stress Reaction – 308.4

“Treatment Plan: To incorporate medical cannabis into the patient’s current treatment protocol from their PTP [t]o continue care with current treating providers. Patient will pursue further evaluation and treatment as indicated for current symptoms.

“Ms. [A.J.T.] uses medical Cannabis appropriately under my supervision. If you have any questions or concerns, please feel free to contact me.

“Sincerely,

[Signature]

“Dr. Wayne Kelly, M.D.
License # C43073
Phone # [Omitted]
Fax # [Omitted]”
27. Respondent committed gross negligence in his care and treatment of patient A.J.T. which included, but was not limited to, the following:

(a) Respondent issued a medical marijuana recommendation to patient A.J.T. without adequate medical indication or justification;

(b) Respondent failed to obtain and document an appropriate and thorough medical history for patients A.J.T.;

(c) Respondent failed to conduct and document an appropriate physical examination on patient A.J.T. and failed to investigate and exclude other possible causes for her alleged symptoms and diagnoses. Among other things, respondent failed to obtain and document vital signs; failed to examine the skin, eyes and/or neurological system; and failed to examine the airway or neck of patient A.J.T. in regard to her alleged insomnia diagnosis;

(d) Respondent made no attempt to obtain prior medical records in order to verify patient A.J.T.’s alleged medical conditions that were the bases for the medical marijuana recommendation;

(e) Respondent failed to provide adequate informed consent to patient A.J.T. pertaining to the use of medical marijuana;

(f) Respondent demonstrated a lack of knowledge regarding the potential risks associated with cannabis;

(g) Respondent failed to schedule and/or provide for any periodic review or assessment of the safety and efficacy of the medical marijuana he recommended for patient A.J.T.;

(h) Respondent failed to maintain adequate and accurate records in regard to the issuance of a medical marijuana recommendation to patient A.J.T. The records, among other things, were inaccurate, fraudulent, contained intentional and materially false representations and lacked adequate detail and specificity to justify the issuance of a medical marijuana recommendation to patients A.J.T.; and
(i) Respondent failed to document that patient A.J.T. was seen by Skype or via telemedicine.

SECOND CAUSE FOR DISCIPLINE

(Repeatebd Negligent Acts)

28. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (c), of the Code, in that he committed repeated negligent acts in her care and treatment of patients K.S. and A.J.T., as more particularly alleged in paragraphs 10 through 27, above, which are hereby incorporated by reference and realleged as if fully set forth herein. The repeated negligent acts included, but were not limited to the following:

PATIENT K.S.

(a) Respondent issued a medical marijuana recommendation to patient K.S. without adequate medical indication or justification;

(b) Respondent failed to obtain and document an appropriate and thorough medical history for patients K.S.;

(c) Respondent failed to conduct and document an appropriate physical examination on patient K.S. and failed to investigate and exclude other possible causes for her alleged symptoms and diagnoses. Among other things, respondent failed to obtain and document vital signs; failed to examine the skin, eyes and/or neurological system; and failed to examine the airway or neck of patient K.S. in regard to her complaints of insomnia;

(d) Respondent made no attempt to obtain prior medical records in order to verify patient K.S.’s alleged medical conditions that were the bases for the medical marijuana recommendation;

(e) Respondent failed to provide adequate informed consent to patient K.S. pertaining to the use of medical marijuana;

(f) Respondent demonstrated a lack of knowledge regarding the potential risks associated with cannabis;
(g) Respondent failed to schedule and/or provide for any periodic review or assessment of the safety and efficacy of the medical marijuana he recommended for patient K.S.;

(h) Respondent failed to maintain adequate and accurate records in regard to the issuance of a medical marijuana recommendation to patients K.S. The records, among other things, were inaccurate, fraudulent, contained intentional and materially false representations and lacked adequate detail and specificity to justify the issuance of a medical marijuana recommendation to patients K.S.; and

(i) Respondent failed to document that patient K.S. was seen by Skype or via telemedicine.

PATIENT A.J.T.

(a) Respondent issued a medical marijuana recommendation to patient A.J.T. without adequate medical indication or justification;

(b) Respondent failed to obtain and document an appropriate and thorough medical history for patients A.J.T.;

(c) Respondent failed to conduct and document an appropriate physical examination on patient A.J.T. and failed to investigate and exclude other possible causes for her alleged symptoms and diagnoses. Among other things, respondent failed to obtain and document vital signs; failed to examine the skin, eyes and/or neurological system; and failed to examine the airway or neck of patient A.J.T. in regard to her alleged insomnia diagnosis;

(d) Respondent made no attempt to obtain prior medical records in order to verify patient A.J.T.’s alleged medical conditions that were the bases for the medical marijuana recommendation;

(e) Respondent failed to provide adequate informed consent to patient A.J.T. pertaining to the use of medical marijuana;

(f) Respondent demonstrated a lack of knowledge regarding the potential risks associated with cannabis;
(g) Respondent failed to schedule and/or provide for any periodic review or assessment of the safety and efficacy of the medical marijuana he recommended for patient A.J.T.;

(h) Respondent failed to maintain adequate and accurate records in regard to the issuance of a medical marijuana recommendation to patients A.J.T. The records, among other things, were inaccurate, fraudulent, contained intentional and materially false representations and lacked adequate detail and specificity to justify the issuance of a medical marijuana recommendation to patients A.J.T.; and

(i) Respondent failed to document that patient A.J.T. was seen by Skype or via telemedicine.

THIRD CAUSE FOR DISCIPLINE

(Incompetence)

29. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (d), of the Code, in that he has demonstrated incompetence in the care and treatment of patients K.S. and A.J.T., as more particularly alleged hereinafter:

(a) Paragraphs 10 through 27, above, are hereby incorporated by reference and realleged as if fully set forth herein;

(b) Respondent exhibited a lack of knowledge in regard to the potentially serious adverse effects associated with medical marijuana.

FOURTH CAUSE FOR DISCIPLINE

(False Representations)

30. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2261, of the Code, in that he made and/or signed documents related to the practice of medicine that falsely represented the existence or nonexistence of facts related to his care and treatment of patients K.S. and A.J.T., as more particularly alleged hereinafter:

(a) Paragraphs 10 through 27, above, are hereby incorporated by reference and realleged as if fully set forth herein;

/////
(b) Respondent knowingly made and/or signed documents related to the practice of medicine that falsely represented the existence or nonexistence of facts when he, among other things, (1) executed the Physician Statement and Recommendations for patients K.S. and A.J.T. attesting that both patients qualified for the use of medical marijuana when, in truth and fact, they did not; (2) documented the diagnoses of stress reaction, insomnia and/or anxiety in order to justify the medical marijuana recommendations when, in truth and fact, there was no legitimate bases for the diagnoses; (3) documented that he had discussed titration and alternative methods of ingestion and the risks and side effects of cannabis with patients K.S. and A.J.T. when, in truth and fact, he did not; and (4) when he drafted and executed correspondence for patient A.J.T. addressed to Genesis Corporation dated September 4, 2015, setting forth that patient A.J.T. had legitimate diagnoses that legally qualified her for medical marijuana when, in truth and fact, she had informed respondent she had no such medical conditions and, instead, needed a medical marijuana recommendation as legal justification in case she were to test positive on any drug tests conducted by her employer.

**FIFTH CAUSE FOR DISCIPLINE**
(Dishonesty or Corruption)

31. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2234, subdivision (e), of the Code, in that he has engaged in an act or acts of dishonesty or corruption substantially related to the qualifications, functions, or duties of a physician, as more particularly alleged in paragraphs 10 through 30, above, which are hereby incorporated by reference and realleged as if fully set forth herein.

**SIXTH CAUSE FOR DISCIPLINE**
(Failure to Maintain Adequate or Accurate Records)

32. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2266, of the Code, in that she failed to maintain adequate and accurate records in his care and treatment of patients K.S. and A.J.T., as more particularly alleged in paragraphs 10
through 30, above, which are hereby incorporated by reference and realleged as if fully set forth herein.

SEVENTH CAUSE FOR DISCIPLINE
(General Unprofessional Conduct)

33. Respondent is further subject to disciplinary action under sections 2227 and 2234, as defined by section 2234, of the Code, in that he has engaged in conduct which breached the rules or ethical code of the medical profession or which was unbecoming a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine, as more particularly alleged in paragraphs 10 through 32, above, are hereby incorporated by reference and realleged as if fully set forth herein.

PRAYER

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

1. Revoking or suspending Physician’s and Surgeon’s Certificate Number C43073, issued to respondent Wayne Kelly, M.D.;

2. Revoking, suspending or denying approval of respondent Wayne Kelly, M.D.’s authority to supervise physician assistants, pursuant to section 3527 of the Code;

3. Ordering respondent Wayne Kelly, M.D., if placed on probation, to pay the Board the costs of probation monitoring; and

4. Taking such other and further action as deemed necessary and proper.

DATED: November 7, 2016

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