




STATE AND CONSUMER SERVICES AGENCY • ARNOLD SCHWARZENEGGER, GOVERNOR

LEGAL AFFAIRS

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**MEMORANDUM**

DATE	January 22, 2013
TO	Members Medical Board of California
FROM	Dianne R. Dobbs Senior Staff Counsel Department of Consumer Affairs 
SUBJECT	PROPOSED PRECEDENTIAL DECISION – <i>In the Matter of the Accusation Against Edward L. Spencer, M.D.</i>; Case No. 12-2010-205496; OAH No. 2011070380

In accordance with the procedure adopted by the Division of Medical Quality in July 2004 (Exhibit 1), the Office of the Attorney General has recommended that several sections of the above-captioned decision be designated as precedential. The executive director, chief of enforcement and I all agree with this recommendation.

Procedural Background

Dr. Spencer ("respondent") was the recipient of an Accusation. The matter was heard before Administrative Law Judge Nancy L. Rasmussen, who submitted a Proposed Decision to the Medical Board of California ("Board") on September 28, 2011. A panel of the board adopted that decision.

Facts/Findings of the Case

The relevant facts are as follows:

Complainant filed a Petition for Order Compelling Psychiatric Examination of respondent under Business and Professions Code ("BPC") section 820. The petition alleged that respondent's ability to safely practice medicine may be impaired due to mental illness. Supporting documents included an 805 report received from respondent's employer. Respondent was not provided a copy of the petition, nor was he offered an opportunity to present argument in opposition to the petition.

Respondent refused to meet with and be interviewed by the board investigator. The Board granted the petition and issued an Order Compelling Psychiatric Examination under section 820. The order directed respondent to submit to a psychiatric examination within 30 days to determine whether he was mentally ill to such an extent as to affect his ability to safely practice medicine. Respondent failed to appear for the scheduled examination, and

subsequently, filed Petition for Administrative Writ seeking to set aside the board's Order Compelling Psychiatric Examination. At the time of the administrative hearing, no court proceeding was scheduled on the Writ and no such hearing has subsequently occurred.

In the administrative hearing on the accusation, respondent contended that he could not be disciplined for failing to comply with the Order Compelling Psychiatric Examination because the order was improperly obtained, was overbroad, and was not authorized by statute.

The ALJ found these contentions meritless, and found that BPC section 820 did not require the Board to provide respondent with a copy of the petition before issuing its order compelling examination. The opinion further addresses why respondent's claims of due process violations failed.

Portions of Decision to be Designated as Precedential

The recommendation is that the following portions of the decision be designated as precedential:

*Factual Findings 1, 2, 5, 6, 7, and 8 and
Legal Conclusions 1, 2, 3, 4, and 5.*

If the Board approves the request to designate the above portions of the decision as precedential, those portions not accepted for publication will be redacted and replaced with asterisks. Exhibit 2 is the redacted version of the decision and is what those viewing the precedent decision would see. Exhibit 3 is the decision in its entirety.

Rationale

16 Cal. Code Regs. 1364.40(a) authorizes the division to designate, as a precedent decision, "any decision or part of any decision that contains a significant legal or policy determination of general application that is likely to recur."

Business and Professions Code section 820 authorizes the Board to order a mental or physical examination of any licensee, certificate or permit holder who appears to be unable to practice his or her profession safely due to mental or physical impairment. Due to concerns for public safety, the process is commenced by the filing of a petition which usually contains some investigative facts regarding the suspected impairment and frequently is accompanied by an expert opinion that states the licensee should be examined by a board appointed expert to determine whether he or she is safe to practice. The board, based on the petition and supporting evidence can issue an order compelling the examination.

Because in these circumstances public protection requires expedient action, the petition and supporting documents are not provided to the licensees prior to the ordering of the examination. In recent years, and with increasing regularity, this procedure has been challenged with claims that the board's failure to provide the licensee with the petition and supporting documents prior to ordering the examination deprives the licensee of due process.

This decision addresses why BPC section 820 does not require the board to provide the petition documents to respondents prior to the board granting the petition, and provides case law to support why the procedure survives a due process challenge.

The facts presented in this case are very likely to be a recurring issue. For this reason, we believe that the portions of the decision proposed to be designated as precedent contain significant legal determinations and would provide guidance to counsel for respondent and complainant as well as guidance to the Office of Administrative Hearings.

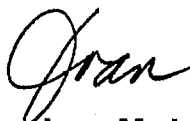
Attachments

EXHIBIT I

Memorandum

To : Carlos Ramirez, Asst. DAG
Tom Reilly, DAG
Mary Agnes Matyszewski, DAG
Health Quality Enforcement Section
Office of the Attorney General

Date: July 28, 2004



From : Joan M. Jerzak
Chief, Enforcement Program

Subject: Precedential Decisions Revised Procedures

As a follow-up to our meeting on July 21, 2004, with DCA Legal Counsel Anita Scuri, Board Counsel Nancy Vedera, Interim Executive Director Dave Thornton and me, the attached Precedent Decision Procedure was revised. I believe it incorporates all the offered suggestions and will serve as a guide for Board staff as decisions are selected for precedential designation.

Thank you all for your assistance.

PRECEDENT DECISION PROCEDURE

July 2004

Introduction

The purpose of this policy is to establish a procedure for identifying potential precedential decisions and reviewing and acting upon recommendations to designate decisions as precedential. Under the Administrative Procedure Act (APA) a decision that contains a significant legal or policy determination of general application that is likely to recur may be designated as precedential. (See Government Code (GC) Section 11425.60; Attachment 1) Once a decision is designated as precedential, the Division of Medical Quality (hereinafter "Division") may rely on it, and parties may cite to such decision in their argument to the Division and courts. Furthermore, it helps ensure consistency in decision-making by institutionalizing rulings that the Board feels reflects its position on various issues. The Division has adopted section 1364.40, Title 16, California Code of Regulations, to implement its authority to designate decisions as precedential.

Step 1: Identifying Potential Precedential Decisions

A decision or part of a decision that contains significant legal or policy determination of general application that is likely to recur may be recommended for designation as a precedential decision. Section 11425.60 does not preclude the Board from designating as precedential a decision that is already in effect. The recommendation shall be made to Board Counsel, giving the reasons why the person believes the decision meets the criteria to be designated as a precedential decision. Their recommendation shall be accompanied by a copy of the decision.

Step 2: Review of Recommendation

If the Executive Director, after consultation with the Chief of Enforcement and the Board Counsel, concludes that the Division should consider the decision for precedential designation, the matter will be placed on the Division's agenda for action. The agenda serves as public notice that the Division will consider the decision as a precedential decision.

Step 3: Preparation for Board Review

Board Counsel will then prepare or will arrange with the appropriate staff to prepare the precedential designation proposal for presentation to the Division for review and consideration.

The Board's Discipline Coordination Unit shall maintain a log of the decisions proposed to the Division for precedential designation. The log shall show the date of the Board meeting, decision number, respondent's name, a general description of the legal or policy issue, and whether the precedential decision was approved or not. A copy of the Board Counsel memorandum and minutes of the Board meeting (when the decision was discussed) will be maintained with the log.

If the Division adopts a decision as precedential, it will be assigned a precedential designation number. The precedential designation number shall begin with "MBC" and uses the calendar year and sequential numbering beginning with "01" for each year, followed by lettering for the Division designating the decision, DMQ (Division of Medical Quality) and DOL (Division of Licensing), (i.e., MBC-2004-01-DMQ for year 2004).

Step 4: Designation of a Precedential Decision

Board Counsel will prepare an order designating the decision, or portion(s) of the decision, as precedential for signature by the Division President. The effective date is the date the decision was designated as a precedential decision. (See Attachment 2 for an example of a Designation as Precedential Decision.)

Board Counsel will send a copy of the signed Designation as a Precedential Decision, including a copy of the decision, to the Office of Administrative Hearings. (The Office of Administrative Hearings maintains a file of precedential designations for reference by Administrative Law Judges.)

Step 5: Indexing

Under Government Code section 11425.60(c), the Division is required to maintain an index of significant legal and policy determinations made in precedential decisions. The Board's Discipline Coordination Unit will maintain the index.

The index shall be divided into three sections (Attachment 3) :

- 1) Decisions by fiscal year, including: the precedential designation number, the respondent's name, the MBC case number, the OAH case number and the precedential designation date (effective date).
- 2) Subject matter, followed by a general description of legal and/or policy issue, the precedential designation number and the respondent's name.
- 3) Code section number, followed by a general description of the section, the precedential designation number and the respondent's name.

NOTE: As decisions are added to the index, an asterisk will be entered after the cases, showing if they were appealed to the Superior Court, Court of Appeals or Supreme Court. Two asterisks following the case, will reflect the case was reversed as a precedential decision by the Board.

A copy of each precedential designation shall be maintained with the index and on the Board's website. The index shall be updated every time a decision is designated as precedential. The index is a public record, available for public inspection and copying. It shall be made available to the public by subscription and its availability shall be published annually in the California Regulatory Notice Register. Each January, Board staff will submit the index to the Office of Administrative Law for publication in the California Regulatory Notice Register.

Step 6: Reversal of Precedential Designation

The Executive Director, after consultation with the Chief of Enforcement and Board Counsel, may recommend that the Division reverse its designation of all or portion(s) of the precedential designation on a decision. The matter will then be placed on the agenda for action. Board Counsel will prepare or arrange with the appropriate staff to prepare the order, "Reversal of Precedential Designation," (Attachment 4). Board Counsel will then send a copy of the signed Reversal of Precedential Designation, including a copy of the decision to the Office of Administrative Hearings.

§ 11425.60. Decisions relied on as precedents

(a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.

HISTORY:

Added Stats 1995 ch 938 §21 (SB 523), operative July 1, 1997; Amended by Stats 1996 ch 390 §8 (SB 794), operative July 1, 1997.

Added "and indexing" in subd (d).

Law Revision Commission Comments:

1995_ Section 11425.60 limits the authority of an agency to rely on previous decisions unless the decisions have been publicly announced as precedential.

The first sentence of subdivision (b) recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Sections 12935(h) (Fair Employment and Housing Commission), 19582.5 (State Personnel Board); Unemp. Ins. Code 409 (Unemployment Insurance Appeals Board). Section 11425.60 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis.

Under the second sentence of subdivision (b), this section applies notwithstanding Section 11340.5 ("underground regulations"). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates former Government Code Section 11347.5 [now 11340.5] unless made pursuant to rulemaking procedures). The provision is drawn from Government Code Section 19582.5 (expressly exempting the State Personnel Board's precedent decision designations from rulemaking procedures). See also Unemp. Ins. Code 409 (Unemployment Insurance Appeals Board). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

The index required by subdivision (c) is a public record, available for public inspection and copying.

Subdivision (d) minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

SAMPLE

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

In the Matter of the Accusation)	
Against:)	OAH No.
NAME)	
)	
)	MBC Case No.
)	
Physician's and Surgeon's)	PRECEDENTIAL DECISION
Certificate No.)	No. MBC-2004-01-DMQ
)	
Respondent.)	
_____)	

DESIGNATION AS A PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Division of Medical Quality, Medical Board of California, hereby designates as precedential Decision No. MBC-2004-01-DMQ (or those sections of the decision listed below) in the Matter of the Accusation Against NAME.

- 1) Findings of Fact Nos. 3-6; and
- 2) Determination of Issues No. 5.

This precedential designation shall be effective July 30, 2004.

LORIE RICE, President
Division of Medical Quality
Medical Board of California

SAMPLE

2004

**Medical Board of California
Precedential Decisions**

Index

MBC-2004-01-DMQ *Ridgill, Edward*, MBC Case No. 06-1997-78021,
OAH Number E-123545, July 30, 2004

Attachment 3
1 of 2 pages^{134.9}

SAMPLE

**Medical Board of California
Precedential Decisions**

Index 2004

by Subject Matter

Petition for Penalty Relief

**Evidence of rehabilitation, or
lack of, 2004-01-DMQ**

Rehabilitation

Petitioner's burden, 2004-01-DMQ

by Code Section

Business and Professions Code

**Section 2307 - Modification or
Termination of Probation –
2004-01-DMQ, *Ridgill***

134.10

2 of 2 pages

SAMPLE

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

In the Matter of the Accusation)	
Against:)	OAH No.
NAME)	
)	
)	MBC Case No.
)	
Physician's and Surgeon's)	PRECEDENTIAL DECISION
Certificate No.)	No. MBC-2004-01-DMQ
)	
Respondent.)	
_____)	

WITHDRAWAL OF PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Division of Medical Quality, Medical Board of California, hereby orders the withdrawal of precedential Decision No. DMQ-2004-01-DMQ (or those sections of the decision listed below) in the Matter of the Accusation Against NAME.

- 1) Findings of Fact Nos. 3-6; and
- 2) Determination of Issues No. 5.

The withdrawal of this precedential designation shall be effective July 30, 2005.

LORIE RICE, President
Division of Medical Quality
Medical Board of California

134.11

Attachment 4

EXHIBIT 2

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

In the Matter of the Accusation Against:

EDWARD L. SPENCER, M.D.

Physician's and Surgeon's Certificate
No. G 11138

Case No. 12-2010-205496

OAH No. 2011070380

Respondent.

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, State of California, Office of Administrative Hearings, heard this matter on August 23, 2011, in Oakland, California.

Deputy Attorney General Jane Zack Simon represented complainant Linda K. Whitney, Executive Director of the Medical Board of California.

John L. Fleer, Attorney at Law, represented respondent Edward L. Spencer, M.D., who was not present.

The record was held open for submission of written argument. On September 2, 2011, respondent's closing argument was received and marked as Exhibit A for identification. On September 8, 2011, complainant's reply argument was received and marked as Exhibit 13 for identification. The record was closed and the matter was deemed submitted for decision on September 8, 2011.

FACTUAL FINDINGS

1. On August 24, 1965, the Medical Board of California issued physician's and surgeon's certificate no. G 11138 to respondent Edward L. Spencer, M.D. The current expiration date is December 31, 2011.

2. On March 24, 2011 complainant filed with the board a Petition for Order Compelling Psychiatric Examination of Licensee, under Business and Professions Code

section 820.¹ The petition alleged that respondent's ability to safely practice medicine may be impaired due to mental illness. In support of this allegation, the petition detailed information the board received from Petaluma Valley Hospital (PVH) in a March 8, 2010, report filed under section 805 and in PVH documents later subpoenaed by a board investigator. When complainant filed her petition with the board, respondent was not given a copy of the petition, nor was he offered an opportunity to present argument in opposition to the petition.

5. On April 7, 2011, pursuant to complainant's petition filed on March 24, 2011, the board issued an Order Compelling Psychiatric Examination, under section 820. The order directed respondent to submit to a psychiatric examination within 30 days to determine whether he "is mentally ill to such an extent as to affect his ability to practice medicine." The order required respondent to "cooperate with the examination" and "permit prompt access to any treatment records or sources of information deemed necessary by the examiner(s)."

The order and a letter asking respondent to contact the board's Pleasant Hill office were sent to respondent at his address of record. Respondent did not contact the board's Pleasant Hill office, so Investigator Scully went to respondent's residence on April 18, 2011, and personally served him with a copy of the order. Scully also gave respondent a letter informing him that the psychiatric examination was scheduled for May 2, 2011, at 10:00 a.m., with Randall L. Solomon, M.D.

6. Respondent failed to appear for the psychiatric examination on May 2, 2011, and Scully later received a voice mail message from respondent's attorney saying that he planned on filing a petition for writ of mandate challenging the Order Compelling Psychiatric Examination.

7. On May 31, 2011, Investigator Scully served respondent and Nancy Spencer, respondent's wife or ex-wife, with investigative subpoenas requiring them to appear for questioning at the board's Pleasant Hill office on June 8 and June 7, respectively.

On June 4, 2011, respondent's attorney faxed and mailed to Scully a letter objecting to the investigative subpoenas and stating that neither respondent nor Nancy Spencer would appear in response to the subpoenas. He also stated: "I have filed a petition for writ of mandate as to the Board's order compelling a psychiatric examination of Dr. Spencer. (Copy attached.) That matter is pending. Any discovery should occur

¹ All further statutory references are to the Business and Professions Code.

as part of that proceeding. I object to any attempt to circumvent same by way of an 'investigation.'"

8. On May 6, 2011, in the San Francisco Superior Court, respondent's attorney filed on respondent's behalf a Verified Petition for Administrative Writ against the board seeking a peremptory writ of mandate to set aside the Order Compelling Psychiatric Examination. Although Investigator Scully received a copy of this petition with the June 4 letter, the petition has not been legally served on the board. There have been no court proceedings on the petition and no proceedings are scheduled.

LEGAL CONCLUSIONS

1. Sections 820 and 821 provide:

Section 820

Whenever it appears that any person holding a license, certificate or permit under this division or under any initiative act referred to in this division may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness, or physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency. The report of the examiners shall be made available to the licentiate and may be received as direct evidence in proceedings conducted pursuant to Section 822.²

Section 821

The licentiate's failure to comply with an order issued under Section 820 shall constitute grounds for the suspension or revocation of the licentiate's certificate or license.

2. Respondent's failure to comply with the Order Compelling Psychiatric Examination issued under section 820 constitutes cause to suspend or revoke his physician's and surgeon's certificate under section 821.

² Section 822 authorizes the board to take action against a licentiate when it has determined that the licentiate's ability to practice safely is impaired because of mental illness, or physical illness affecting competency.

3. Respondent's failure to comply with the Order Compelling Psychiatric Examination also constitutes unprofessional conduct, for which his physician's and surgeon's certificate is subject to disciplinary action under section 2234.

4. Respondent contends that he cannot be disciplined for failing to comply with the Order Compelling Psychiatric Examination, because the order "was improperly obtained, is overbroad, and is not authorized by statute." These contentions are without legal merit.

Respondent asserts that his due process rights were violated by not being provided a copy of complainant's petition before the board's order was issued, but section 820 does not require such notice. A due process challenge to section 820 was rejected in *Alexander D. v. State Board of Dental Examiners* (1991) 231 Cal.App.3d 92. The court reasoned that the property interest or license of the dentist who had been ordered to undergo a psychiatric examination would not be at stake unless an action was brought under section 822, and in that adjudicatory proceeding he would have full due process rights. (*Id.* at p. 98.) Furthermore, the licensee's privacy was protected if there was insufficient evidence to bring an action under section 822, because section 828 mandates that all agency records regarding the psychiatric examination would then be kept confidential. (*Ibid.*) Respondent points out factual differences between that case and his, i.e., the dentist in *Alexander D.* was served with both the order and the petition, there were complaints against him of substandard practice, and the order under section 820 did not include "a requirement that the licensee waive all rights to privacy regarding his medical records." These differences do not advance respondent's position.

For the board to compel a psychiatric examination under section 820, there must be information from which "it appears that any person holding a license, certificate or permit...may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness." There need be no evidence of substandard practice or patient harm. In this case, the board had information from which it appears that respondent may be impaired by mental illness and unable to safely practice. The purpose of the psychiatric examination is to determine whether in fact this is the case. The provisions in the order requiring respondent to "cooperate with the examination" and "permit prompt access to any treatment records or sources of information deemed necessary by the examiner(s)" are reasonable to assure a thorough examination.

5. The mere filing of a petition for writ of mandate does not deprive the board of authority to discipline respondent's license for failing to comply with the Order Compelling Psychiatric Examination. Respondent has not legally served the petition on the board, much less obtained a stay or other court order.

Dated: September 28, 2011

NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT 3

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

In the Matter of the Accusation)
Against:)

Edward L. Spencer, M.D.)

Case No. 12-2010-205496

Physician's and Surgeon's)
Certificate No. G 11138)

Respondent)
_____)

DECISION

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

This Decision shall become effective at 5:00 p.m. on December 1, 2011.

IT IS SO ORDERED November 2, 2011.

MEDICAL BOARD OF CALIFORNIA

By: 

Hedy Chang, Chair
Panel B

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

In the Matter of the Accusation Against:

EDWARD L. SPENCER, M.D.

Physician's and Surgeon's Certificate
No. G 11138

Respondent.

Case No. 12-2010-205496

OAH No. 2011070380

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FACTUAL FINDINGS

1. On August 24, 1965, the Medical Board of California issued physician's and surgeon's certificate no. G 11138 to respondent Edward L. Spencer, M.D. The current expiration date is December 31, 2011.
2. On March 24, 2011 complainant filed with the board a Petition for Order Compelling Psychiatric Examination of Licensee, under Business and Professions Code

section 820.¹ The petition alleged that respondent's ability to safely practice medicine may be impaired due to mental illness. In support of this allegation, the petition detailed information the board received from Petaluma Valley Hospital (PVH) in a March 8, 2010, report filed under section 805 and in PVH documents later subpoenaed by a board investigator. When complainant filed her petition with the board, respondent was not given a copy of the petition, nor was he offered an opportunity to present argument in opposition to the petition.

3. Information from PVH indicates the following: Respondent is a neurologist who held consultant privileges at PVH. On March 3, 2010, he resigned from the PVH medical staff following notice of summary suspension of his clinical privileges on February 22, 2010, and the decision of the Medical Staff Executive Committee to investigate concerns regarding his mental health and ability to practice safely. The issues involved what PVH medical and executive staff considered to be respondent's increasingly irrational thought processes and his rejection of efforts by the Physician Well Being Committee to obtain psychiatric and neuropsychological evaluations. In a document accusing the Physician Well Being Committee of slander, respondent wrote: "There is no scientific proof psychiatry has any basis in logical reasoning to come up with the 'assessment' or 'evaluation' other than the name calling that it is, by agreement of a group of psychiatrists." In a letter to the Executive Committee on March 1, 2010, respondent wrote: "Mind control technology can confound any psychiatric or neurological evaluation." Because of respondent's resignation, the Executive Committee discontinued its investigation and reached no conclusions regarding the issues.

4. Board investigator Dennis Scully made arrangements with respondent's attorney to interview respondent on March 3, 2011. On February 24, 2011, respondent sent Scully a largely unintelligible writing which appeared to dispute the board's right to investigate him. On March 2, 2011, respondent's attorney notified Scully that respondent would not be attending the scheduled interview.

5. On April 7, 2011, pursuant to complainant's petition filed on March 24, 2011, the board issued an Order Compelling Psychiatric Examination, under section 820. The order directed respondent to submit to a psychiatric examination within 30 days to determine whether he "is mentally ill to such an extent as to affect his ability to practice medicine." The order required respondent to "cooperate with the examination" and "permit prompt access to any treatment records or sources of information deemed necessary by the examiner(s)."

The order and a letter asking respondent to contact the board's Pleasant Hill office were sent to respondent at his address of record. Respondent did not contact the board's Pleasant Hill office, so Investigator Scully went to respondent's residence on April 18, 2011, and personally served him with a copy of the order. Scully also gave respondent a letter

¹ All further statutory references are to the Business and Professions Code.

informing him that the psychiatric examination was scheduled for May 2, 2011, at 10:00 a.m., with Randall L. Solomon, M.D.

6. Respondent failed to appear for the psychiatric examination on May 2, 2011, and Scully later received a voice mail message from respondent's attorney saying that he planned on filing a petition for writ of mandate challenging the Order Compelling Psychiatric Examination.

7. On May 31, 2011, Investigator Scully served respondent and Nancy Spencer, respondent's wife or ex-wife, with investigative subpoenas requiring them to appear for questioning at the board's Pleasant Hill office on June 8 and June 7, respectively.

On June 4, 2011, respondent's attorney faxed and mailed to Scully a letter objecting to the investigative subpoenas and stating that neither respondent nor Nancy Spencer would appear in response to the subpoenas. He also stated: "I have filed a petition for writ of mandate as to the Board's order compelling a psychiatric examination of Dr. Spencer. (Copy attached.) That matter is pending. Any discovery should occur as part of that proceeding. I object to any attempt to circumvent same by way of an 'investigation.'"

8. - On May 6, 2011, in the San Francisco Superior Court, respondent's attorney filed on respondent's behalf a Verified Petition for Administrative Writ against the board seeking a peremptory writ of mandate to set aside the Order Compelling Psychiatric Examination. Although Investigator Scully received a copy of this petition with the June 4 letter, the petition has not been legally served on the board. There have been no court proceedings on the petition and no proceedings are scheduled.

9. The parties stipulated that respondent is not currently rendering medical services, i.e., he is not engaged in any activities for which a physician's and surgeon's certificate is required.

LEGAL CONCLUSIONS

1. Sections 820 and 821 provide:

Section 820:

Whenever it appears that any person holding a license, certificate or permit under this division or under any initiative act referred to in this division may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness, or physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency. The report of the examiners shall be made available to the licentiate and may be

received as direct evidence in proceedings conducted pursuant to Section 822.²

Section 821

The licentiate's failure to comply with an order issued under Section 820 shall constitute grounds for the suspension or revocation of the licentiate's certificate or license.

2. Respondent's failure to comply with the Order Compelling Psychiatric Examination issued under section 820 constitutes cause to suspend or revoke his physician's and surgeon's certificate under section 821.

3. Respondent's failure to comply with the Order Compelling Psychiatric Examination also constitutes unprofessional conduct, for which his physician's and surgeon's certificate is subject to disciplinary action under section 2234.

4. Respondent contends that he cannot be disciplined for failing to comply with the Order Compelling Psychiatric Examination, because the order "was improperly obtained, is overbroad, and is not authorized by statute." These contentions are without legal merit.

Respondent asserts that his due process rights were violated by not being provided a copy of complainant's petition before the board's order was issued, but section 820 does not require such notice. A due process challenge to section 820 was rejected in *Alexander D. v. State Board of Dental Examiners* (1991) 231 Cal.App.3d 92. The court reasoned that the property interest or license of the dentist who had been ordered to undergo a psychiatric examination would not be at stake unless an action was brought under section 822, and in that adjudicatory proceeding he would have full due process rights. (*Id.* at p. 98.) Furthermore, the licensee's privacy was protected if there was insufficient evidence to bring an action under section 822, because section 828 mandates that all agency records regarding the psychiatric examination would then be kept confidential. (*Ibid.*) Respondent points out factual differences between that case and his, i.e., the dentist in *Alexander D.* was served with both the order and the petition, there were complaints against him of substandard practice, and the order under section 820 did not include "a requirement that the licensee waive all rights to privacy regarding his medical records." These differences do not advance respondent's position.

For the board to compel a psychiatric examination under section 820, there must be information from which "it appears that any person holding a license, certificate or permit . . . may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness." There need be no evidence of substandard

² Section 822 authorizes the board to take action against a licentiate when it has determined that the licentiate's ability to practice safely is impaired because of mental illness, or physical illness affecting competency.

practice or patient harm. In this case, the board had information from which it appears that respondent may be impaired by mental illness and unable to safely practice. The purpose of the psychiatric examination is to determine whether in fact this is the case. The provisions in the order requiring respondent to "cooperate with the examination" and "permit prompt access to any treatment records or sources of information deemed necessary by the examiner(s)" are reasonable to assure a thorough examination.

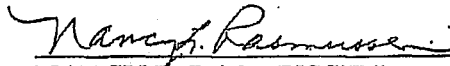
5. The mere filing of a petition for writ of mandate does not deprive the board of authority to discipline respondent's license for failing to comply with the Order Compelling Psychiatric Examination. Respondent has not legally served the petition on the board, much less obtained a stay or other court order.

6. It would be pointless to suspend respondent's physician's and surgeon's certificate when there is no reason to believe that he will comply with the board's Order Compelling Psychiatric Examination. The only appropriate measure of discipline is revocation.

ORDER

Physician's and surgeon's certificate no. G 11138 issued to respondent Edward L. Spencer, M.D., is revoked.

Dated: September 28, 2011



NANCY J. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings