

1 BILL LOCKYER, Attorney General
of the State of California
2 JOHN E. RITTMAYER, State Bar No. 67291
Deputy Attorney General
3 300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
4 Telephone: (213) 897-7485
Facsimile: (213) 897-9395
5

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO June 29, 20 06
BY Valerie Moran ANALYST

6 Attorneys for Complainant

7 **BEFORE THE**
8 **DIVISION OF MEDICAL QUALITY**
9 **MEDICAL BOARD OF CALIFORNIA**
10 **STATE OF CALIFORNIA**

10 In the Matter of the Accusation Against:
11 STUART J. FISCHBEIN, M.D.
12 10309 Santa Monica Blvd. Ste. 300
Los Angeles, California 90025
13 Physician's and Surgeon's Certificate No.
14 G52027
15 Respondent.

Case No. 06-2006172374
OAH No.
**FIRST AMENDED
ACCUSATION**

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17 Complainant alleges:

18 PARTIES

- 19 1. David T. Thornton (Complainant) brings this Accusation solely in his
20 official capacity as the Executive Director of the Medical Board of California.
21 2. On or about March 12, 1984, the Medical Board of California issued
22 Physician's and Surgeon's Certificate Number G52027 to Stuart J. Fischbein, M.D. (Respondent).
23 The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the
24 charges brought herein and will expire on July 31, 2007, unless renewed.

25
26 JURISDICTION

27 3. This Accusation is brought before the Division of Medical Quality,
28 Medical Board of California (Division), under the authority of the following laws. All section

1 references are to the Business and Professions Code unless otherwise indicated.

2 4. Section 2004 of the Code states:

3 "The Division of Medical Quality shall have the responsibility for the following:

4 "(a) The enforcement of the disciplinary and criminal provisions of the Medical
5 Practice Act.

6 "(b) The administration and hearing of disciplinary actions.

7 "(c) Carrying out disciplinary actions appropriate to findings made by a medical
8 quality review committee, the division, or an administrative law judge.

9 "(d) Suspending, revoking, or otherwise limiting certificates after the conclusion
10 of disciplinary actions.

11 "(e) Reviewing the quality of medical practice carried out by physician and
12 surgeon certificate holders under the jurisdiction of the board."

13 5. Section 2227 of the Code provides that a licensee who is found guilty
14 under the Medical Practice Act may have his or her license revoked, suspended for a period not
15 to exceed one year, placed on probation and required to pay the costs of probation monitoring, or
16 such other action taken in relation to discipline as the Division deems proper.

17 6. Section 2234 of the Code states:

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

21 "(a) Violating or attempting to violate, directly or indirectly, assisting in or
22 abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5,
23 the Medical Practice Act].

24 "...

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

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1 negligent acts.

2 “ . . . ”

3 7. Section 726 of the Code states:

4 “The commission of any act of sexual abuse, misconduct, or relations with a patient,
5 client, or customer constitutes unprofessional conduct and grounds for disciplinary action for
6 any person licensed under this division, under any initiative act referred to in this division and
7 under Chapter 17 (commencing with Section 9000) of Division 3.

8 “This section shall not apply to sexual contact between a physician and surgeon and his or
9 her spouse or person in an equivalent domestic relationship when that physician and surgeon
10 provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or
11 person in an equivalent domestic relationship.”

12 8. Section 729 of the Code states, in part:

13 “(a) Any physician and surgeon, psychotherapist, alcohol and drug abuse
14 counselor or any person holding himself or herself out to be a physician and surgeon,
15 psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual
16 intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former
17 patient or client when the relationship was terminated primarily for the purpose of engaging in
18 those acts, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse
19 counselor has referred the patient or client to an independent and objective physician and
20 surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third-party
21 physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment, is
22 guilty of sexual exploitation by a physician and surgeon, psychotherapist, or alcohol and drug
23 abuse counselor.”

24 “(b) (5)

25 “For purposes of subdivision (a), in no instance shall consent of the patient or
26 client be a defense. However, physicians and surgeons shall not be guilty of sexual exploitation
27 for touching any intimate part of a patient or client unless the touching is outside the scope of
28 medical examination and treatment, or the touching is done for sexual gratification.”

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9. Section 2236 of the Code states in part:

“(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
...

“(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section and Section 2236.1. The record of conviction shall be conclusive evidence of the fact that the conviction occurred.”

10. Section 490 of the Code states:

“A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.”

11. Section 493 of the Code states:

“Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in

1 order to fix the degree of discipline or to determine if the conviction is substantially related to the
2 qualifications, functions, and duties of the licensee in question.

3 "As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and
4 'registration.'"

5 FIRST CAUSE FOR DISCIPLINE

6 (Sexual Misconduct)

7 12. Respondent is subject to disciplinary action under Section 726 of the Code
8 in that he has committed acts of sexual misconduct, which also constitute acts of sexual
9 exploitation of a patient within the meaning of Section 729 of the Code. The circumstances are
10 as follows:

11 13. On or about August 17, 2005, S.K.^{1/} consulted Respondent about her
12 persistent abdominal pain. S.K.'s boyfriend of five years accompanied her to the consultation
13 and they discussed with Respondent their difficulty in conceiving a child after two years of
14 attempts.

15 14. Respondent recommended surgery for the cause of the pain, S.K. agreed,
16 and the two met in Respondent's office on or about September 8, 2005. At that meeting
17 Respondent scheduled surgery for September 16, 2005, but also discussed facts about his
18 personal life with S.K. He touched her intimately on the arm and hand.

19 15. On September 16, 2005, Respondent performed surgery on S.K. He
20 caressed her arm and hand as she was rolled into the operating room, and addressed her "Sweet
21 Pea" after she woke up from the anesthetic. In the next two days Respondent came to the
22 hospital and had two long visits with her in which he discussed S.K.'s life, her past marriage, his
23 past marriage, his children and family and other highly personal matters. He recommended that
24 she not marry her boyfriend. He told her she had more chance of getting pregnant with him than
25 with her boyfriend. He also advised her not to have sexual intercourse for four to six weeks.

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28 1. To protect privacy, the patient shall be designated by her initials in these proceedings.
Respondent will be provided with identifying information if discovery is requested.

1 cul-de-sac with an argon coagulator to stop bleeding. Sexual relations could have redamaged and
2 traumatized those organs. Further, sexual relations could have compromised the incision
3 Respondent made in S.K.'s abdominal wall in the course of the surgery. Finally, since
4 Respondent did not use a condom on either occasion, he placed S.K. at risk for sexually
5 transmitted diseases and/or pregnancy.

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7 THIRD CAUSE FOR DISCIPLINE

8 (Conviction of Substantially-Related Crime)

9 22. Respondent is subject to disciplinary action under section 2236, subdivision (a), in
10 he was convicted of a crime substantially related to the qualifications, functions, or duties of a
11 physician and surgeon. The circumstances are as follows:

12 23. On or about June 13, 2006, respondent was convicted by plea of nolo contendere
13 of a violation of Business and Professions Code section 729, a public offense, as charged in
14 Count 1 of the complaint in *People of the State of California v. Stuart James Fischbein*, Superior
15 Court, County of Los Angeles case number 6CA02400.

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17 PRAYER

18 WHEREFORE, Complainant requests that a hearing be held on the matters herein
19 alleged, and that following the hearing, the Division issue a decision:

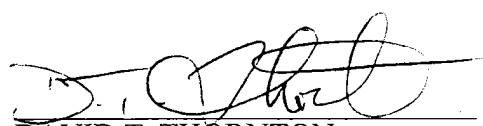
- 20 1. Revoking or suspending Physician's and Surgeon's Certificate Number
21 G52027, issued to Stuart J. Fischbein, M.D..
- 22 2. Ordering Stuart J. Fischbein, M.D. to pay the costs of probation
23 monitoring if placed on probation.

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

DATED: June 29, 2006



DAVID T. THORNTON
Executive Director
Medical Board of California
State of California
Complainant

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