STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re: Vishal Verma, M.D.	)	Docket No. MPC 014-0220

STIPULATION AND CONSENT ORDER

NOW COME the State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and Vishal Verma, M.D., and stipulate and agree as follows:

1. Vishal Verma, M.D. ("Respondent") holds Vermont medical license number 042.0013365 first issued by the Vermont Board of Medical Practice on January 20, 2016. Respondent is a physician.

2. Jurisdiction in this matter vests with the Vermont Board of Medical Practice ("Board") pursuant to 26 V.S.A. §§ 1353-1354, 1370-74, and 3 V.S.A. §§ 809-814, and other authority.

Findings of Fact

3. Respondent is a physician who maintains a teleradiology practice and is licensed in all 50 states and the District of Columbia. He is also the founder and owner of SkinSolutions.MD, a web-based company through which he sells aesthetic products including bimatoprost ("Latisse") to customers throughout the United States.

4. The Board opened this matter in February 2020 after receiving notification from the National Practitioner Data Bank that the Maryland Board of Physicians ("Maryland Board") entered an order on January 31, 2020 that reprimanded, fined, placed Respondent on probation, and imposed other requirements. The Board assigned the investigation of the matter to the Central Investigative Committee ("Committee").

5. In its order disciplining Respondent, the Maryland Board concluded that he committed unprofessional conduct when he violated telemedicine regulations by not performing in-person or synchronous, audiovisual evaluations of patients to establish diagnoses before prescribing medication in violation of Md. Code Regs. § 10.32.05.05(C), and willfully made a false representation on his license renewal application concerning his prior discipline and investigation by other states in violation of Md. Code Ann., Health Occ. § 14-404(a)(36). See Exhibit A.

6. Respondent has been disciplined or had his license conditioned in more than a dozen states, largely based on his Maryland discipline.

7. Respondent does not prescribe medication to patients in Vermont.

8. Respondent cooperated with the Committee's investigation and provided relevant documents regarding the Maryland Board's action, as well as actions taken by other states' licensing authorities.

Conclusions of Law

9. A disciplinary sanction imposed upon a Vermont-licensed physician by another jurisdiction for one or more of the grounds specified in 26 V.S.A. § 1354 constitutes unprofessional conduct. Id. at § 1354(a)(23).

10. Md. Code Regs. § 10.32.05.05(C), in effect at the time of Respondent's conduct for which he was disciplined in Maryland, provided that "[i]f a physician-patient relationship does not include a prior in-person, face-to-face interaction with a patient, the physician shall incorporate real-time auditory communications or real-time auditory and visual communications to allow a free exchange of information between the patient and the physician performing the patient evaluation."

11. It is unprofessional conduct for a Vermont-licensed physician to provide, prescribe, dispense, or furnish prescription-only medication to a patient if the physician conducted the initial evaluation of the patient by "an electronic, on-line, or telephonic evaluation by questionnaire[.]" 26 V.S.A. § 1354(a)(33)(B).

12. Md. Code Ann., Health Occ. § 14-404(a)(36) provides that it is unprofessional conduct for a physician to "[w]illfully make a false representation when seeking or making application for licensure or any other application related to the practice of medicine[.]"

13. It is unprofessional conduct for a Vermont-licensed physician to commit "fraud or misrepresentation in applying for or procuring a medical license or in connection with applying for or procuring periodic renewal of a medical license[.]" 26 V.S.A. § 1354(a)(1).

14. Respondent acknowledges that if this matter were to proceed to a contested hearing, the State could prove that: (1) the Maryland Board found he committed unprofessional conduct by prescribing Latisse to patients without conducting an in-person evaluation; and (2) the Maryland Board found he committed unprofessional conduct by making false representations on his medical license application.

15. Consistent with Respondent's cooperation with the Board, he acknowledges that if the State were to file charges it could satisfy its burden at a hearing and a finding adverse to him could be entered by the Board pursuant to 26 V.S.A. §§ 1354(a)(23).

16. The Board adopts as its facts and conclusions in this matter Paragraphs 1 through 8 above, and Respondent agrees that this is an adequate basis for the Board actions set forth herein. Any representation by Respondent herein is made solely for the purposes set forth in this agreement.

17. Therefore, in the interest of Respondent's desire to fully and finally resolve the matter presently before the Board, he has determined that he shall enter into this agreement with the Board. Respondent enters no further admissions here, but to resolve this matter without further time, expense, and uncertainty he has concluded that this agreement is acceptable and in the best interest of the parties.

18. Respondent agrees and understands that by executing this document he is waiving any right to challenge the jurisdiction and continuing jurisdiction of the Board in this matter, to be presented with a specification of charges and evidence, to cross-examine witnesses, and to offer evidence of his own to contest any allegations by the State.

19. The parties agree that upon the Board's acceptance of this Stipulation and Consent Order, and pursuant to the terms herein, the above-captioned matter shall be resolved by the Board. Thereafter, the Board will take no further action as to this matter absent non-compliance with the terms and conditions of this document by Respondent.

20. This Stipulation and Consent Order is conditioned upon its acceptance by the Board. If the Board rejects any part of this document, the entire agreement shall be considered void. Respondent agrees that if the Board does not accept this agreement in its current form, he shall not assert in any subsequent proceeding any claim of prejudice from any such prior consideration. If the Board rejects any part of this agreement, none of its terms shall bind Respondent or constitute an admission of any of the facts of the alleged misconduct, it shall not be used against Respondent in any way, it shall be kept in strict confidence, and it shall be without prejudice to any future disciplinary proceeding and the Board's final determination of any charge against Respondent.

21. Respondent acknowledges and understands that this Stipulation and Consent Order shall be a matter of public record, shall be entered in his permanent Board file, shall constitute an enforceable legal agreement, and may and shall be reported to other licensing authorities, including but not limited to the Federation of State Medical Boards Board Action Databank and the National Practitioner Data Bank. In exchange for the actions by the Board, as set forth herein, Respondent expressly agrees to be bound by all terms and conditions of this Stipulation and Consent Order.

22. The parties therefore jointly agree that should the terms and conditions of this Stipulation and Consent Order be deemed acceptable by the Board, it may enter an order implementing the terms and conditions herein.

ORDER

WHEREFORE, based on the foregoing and the consent of Respondent, it is hereby ORDERED that:

1. Respondent shall be REPRIMANDED for the conduct set forth above.

2. Respondent shall pay an ADMINISTRATIVE PENALTY of $7,000.00 pursuant to 26 V.S.A. § 1374(b)(1)(A)(iii). Payment shall be made to the "State of Vermont Board of Medical Practice" and shall be sent to the Vermont Board of Medical Practice at the following address: David Herlihy, Executive Director, Vermont Board of Medical Practice, P.O. Box 70, Burlington, VT 05402-0070. The payment shall be due no later than six (6) months after this Stipulation and Consent Order is approved by the Board.

3. Respondent's license to practice medicine in the State off Vermont shall be designated as CONDITIONED and require that if he intends to prescribe or dispense prescription medication or prescription-only devices to patients in Vermont, Respondent must provide written

notification of his intent to do so to the Board prior to issuing a prescription or dispensing prescription medication. Respondent may petition the Committee for relief from this condition no sooner than five (5) years after this Stipulation and Consent Order is approved by the Board.

Dated at Montpelier, Vermont, this 23rd day of November, 2021.

STATE OF VERMONT
THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

by: Kurt A. Kuehl Digitally signed by Kurt A. Kuehl Date: 2021.11.23 16:59:31 -05'00'

Kurt A. Kuehl, Esq.
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

Dated at San Diego, California, this 8th day of ~~November~~ December, 2021.

Vishal Verma, M.D.

Dated at San Diego, California, this 8th day of ~~November~~ December, 2021.

Vincent J. Roth, Esq.
Counsel for Respondent

AS TO VISHAL VERMA, M.D.

APPROVED AND ORDERED
VERMONT BOARD OF MEDICAL PRACTICE

Signed on Behalf of the Vermont Board of Medical Practice

By: _____
Richard Bernstein, M.D.
Chair
Vermont Board of Medical Practice

Vote documented in the Vermont Board of Medical Practice meeting minutes, dated January 5, 2022

Dated: January 5, 2022

EXHIBIT A

IN THE MATTER OF	*	**BEFORE THE**
VISHAL VERMA, M.D.	*	**MARYLAND STATE**
Respondent.	*	**BOARD OF PHYSICIANS**
License No. D73570	*	**Case Numbers: 2017-0104B**

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FINAL DECISION AND ORDER

PROCEDURAL HISTORY

On March 19, 2018, Disciplinary Panel B of the Maryland State Board of Physicians (the "Board") charged Vishal Verma, M.D., with unprofessional conduct in the practice of medicine, failure to comply with the provisions of Section 12-102 of the Health Occupations Article, and willfully making a false representation when seeking or making application for licensure. *See* Md. Code Ann., Health Occ. § 14-404(a)(3)(ii), (28), and (36), respectively. The charges alleged that Dr. Verma, based on a brief online questionnaire, prescribed and dispensed Latisse[1] to over 1,300 Maryland residents. Dr. Verma did not have a Maryland Dispensing permit and did not conduct an in person or a synchronous audio-only or audio-visual patient evaluation. Dr. Verma further failed to accurately respond on his Renewal Application to questions pertaining to his prior discipline and his practice of telemedicine.

On March 4 and 5, 2019, an Administrative Law Judge ("ALJ") held an evidentiary hearing at the Office of Administrative Hearings. On May 23, 2019, the ALJ issued a proposed decision concluding that Dr. Verma was guilty of unprofessional conduct in the practice of medicine; failed to comply with the provisions of Section 12-102 of the Health Occupations

[1] Latisse is a prostaglandin analog, a prescription medication that grows longer, darker, and thicker eyelashes.

Article; and willfully made a false representation when seeking or making application for licensure. *See* Health Occ. § 14-404(a)(3)(ii), (28), and (36). The ALJ found that Dr. Verma's conduct was unprofessional in the practice of medicine based on his false representations on his licensure application. The ALJ did not find that Dr. Verma's violation of the Board's telemedicine regulations, constituted unprofessional conduct, nor did the ALJ find unprofessional conduct based on Dr. Verma's violation of the pharmacy regulations.

The ALJ recommended that Dr. Verma be reprimanded and that he be placed on probation for six months and that he complete courses on telemedicine, prescribing, and recordkeeping.

The Administrative Prosecutor filed exceptions on the State's behalf, challenging the ALJ's analysis and sanction. Dr. Verma filed exceptions to the ALJ's proposed legal conclusion that he willfully made a false representation when seeking an application for licensure and challenged specific factual findings made by the ALJ in the ALJ's discussion section. On October 16, 2019, both parties appeared before Disciplinary Panel A ("Panel A" or the "Panel") of the Board for an exceptions hearing.

FINDINGS OF FACT

The Panel adopts the ALJ's Stipulations of Facts and Proposed Findings of Fact, except as otherwise specifically noted.[2] The ALJ's Stipulation of Facts ¶¶ 1-9 and Proposed Findings of

[2] On page 7 of the ALJ's Proposed Decision, Panel A modifies the last sentence in Finding 1 to state, "His license is scheduled to expire on September 30, 2021."
On page 8 of the ALJ's Proposed Decision, Panel A modifies the second sentence in Finding 11 to state, "On behalf of his mother, the Complainant completed the online medical questionnaire, answering 'none' to the questions asking whether the customer had allergies, medical conditions and/or took medications."
On pages 8 and 9 of the ALJ's Proposed Decision, in Findings 15, 17, 18, 21, and 23 the phrase "SkinSolutions.MD diagnosed" is changed to "Dr. Verma diagnosed."
On page 11 of the ALJ's Proposed Decision, Panel A modifies the last sentence in Finding 26 to state, "The database had not been updated by Dr. Verma since March 2017."

Fact ¶¶ 10-31, 33-34 are incorporated by reference into the body of this document as if set forth in full. *See* attached ALJ Proposed Decision, Exhibit 1.[3] These findings of fact were proven by the preponderance of the evidence, are undisputed, and summarized below.[4]

Dr. Verma is a radiologist, who completed a radiology residency and an MRI fellowship. He is board-certified in radiology but does not have board-certification in dermatology or any other specialty. Dr. Verma was initially licensed to practice medicine in Maryland in 2012, resides in California, and holds medical licenses in all 50 states and the District of Columbia. In addition to his primary practice of radiology, Dr. Verma owns and operates an online store, SkinSolutions.MD, which sells aesthetic products.

Dr. Verma prescribed and dispensed Latisse, a prescription medication that grows thicker, longer, darker eyelashes, from February 27, 2014, until September 7, 2017. Dr. Verma sold the Latisse for $89 for 3 ml and $119 for 5 ml. It is undisputed that Dr. Verma did not conduct a physical examination before prescribing Latisse, rather patients filled out a form online that asks the patients' age, sex, allergies, medical conditions, current medications, whether they had used Latisse in the past, have high eye pressure, and whether the patients are pregnant or breastfeeding. Dr. Verma also required patients to upload a photograph of their face and photo identification. He then reviewed the medical history form for less than a minute, wrote a

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Panel A declines to adopt Finding 32.

Panel A adds a finding of fact stating: Dr. Verma was investigated by the State of West Virginia Board of Medicine in 2016 and 2017. In September, 2016, Dr. Verma filed a response to the complaint filed in West Virginia and a supplemental response to the West Virginia Board, and the case was closed without further action in March, 2017.

[3] Names have been redacted in the ALJ Proposed Decision for purposes of confidentiality.

[4] Dr. Verma takes exception to the facts as they are described by the ALJ, in a summary of testimony, however, these are not part of the ALJ's proposed finding of fact. They are part of the discussion section of the ALJ's Proposed Decision, which has not been adopted by Panel A.

prescription, and mailed the Latisse to the patient from his pharmacy in New York or California. Dr. Verma did not have a Maryland dispensing permit.

During its investigation, the Board issued a subpoena for a list of all patients prescribed Latisse residing in Maryland. Dr. Verma provided a list of approximately 1,313 Latisse patients in Maryland. The Board also subpoenaed medical records for six randomly chosen patients. Each of the six medical records contained a page titled Order Summary, which included customer information, a medical questionnaire section, and the order items. Five of the records contained a page with shipping and billing information. Four contained a general helpdesk ticket with the messages to the patient and order confirmation. The subpoenaed records were from February 27, 2014, through December 29, 2016. None of the records contained the patients' photographs.

Also, as part of the investigation, the Board's Compliance Manager purchased Latisse through the website, on September 7, 2017. Her order was filled by Dr. Verma from his California pharmacy and sent to her in Maryland.

Dr. Verma submitted a medical license renewal application to the Board on September 11, 2017. He delegated the completion of his renewal application to an employee of his radiology practice, KC. Dr. Verma did not electronically sign the renewal application and did not review it before it was submitted. Dr. Verma, through KC, answered "no" to a question asking whether any state licensing or disciplinary board had taken an action against his medical license, including required education, admonishment, or reprimand. Dr. Verma, through KC, also answered "no" to a question asking whether any licensing or disciplinary board had filed any complaints or charges against him or investigated him for any reason. KC relied on an internal credentialing database that was updated by Dr. Verma in March 2017. However, the

North Carolina Medical Board had investigated a complaint against Dr. Verma and, on February 2, 2017, required him to complete six hours of continuing medical education. The State of West Virginia Board of Medicine investigated Dr. Verma in 2016 and 2017 and closed the investigation on March 31, 2017. On June 16, 2017, the Texas Medical Board found that Dr. Verma violated the standard of care by failing to examine or establish a proper physician/patient relationship with a patient to whom he had prescribed Latisse. The Texas Medical Board imposed a non-disciplinary remedial plan requiring him to complete eight hours of continuing medical education. Dr. Verma had also been sent a letter by the Maryland Board of Physicians, who notified Dr. Verma that he was under investigation. Dr. Verma also answered "no" to the question on his Maryland renewal application that asked whether he had used telemedicine for any purpose in the prior 12 months.

DISCUSSION

Because the Findings of Facts are undisputed and because Panel A has not adopted the discussion section in the ALJ's Proposed Decision, Panel A will only address the ALJ's conclusions and reasoning and the exceptions relevant to Panel A's reasoning.

I. Failure to comply with Section 12-102 of the Health Occupations Article - Health Occ. § 14-404(a)(28)

A physician may only dispense prescription drugs if the physician is licensed in Maryland and possesses a dispensing permit from the Maryland Board of Physicians.[5] Health Occ. § 12-102(c)(2)(ii)(1)(C). Section 14-404(a)(28) of the Maryland Medical Practice Act requires licensees to comply with Section 12-102 of the Maryland Pharmacy Act. Dispensing prescription drugs without possessing the required dispensing permit is, therefore, a violation of

[5] There are several exceptions to the dispensing permit requirement, however, none of the exceptions are applicable to the facts of this case. See Health Occ. § 12-102(d)-(g).

Health Occ. § 14-404(a)(28). At all relevant times, Dr. Verma did not possess a Maryland dispensing permit. Dr. Verma dispensed Latisse in Maryland without a dispensing permit for over three and a half years, from February 27, 2014, until September 7, 2017, the latter being the date when the Board's Compliance Manager ordered Latisse. The ALJ found that Dr. Verma violated Health Occ. § 14-404(a)(28). Neither Dr. Verma nor the State filed exceptions to the ALJ's finding that Dr. Verma violated Health Occ. § 14-404(a)(28). Because this violation was proven and is undisputed, Panel A adopts this conclusion.

II. Unprofessional Conduct in the Practice of Medicine - Health Occ. § 14-404(a)(3)(ii)

With respect to the charge of unprofessional conduct, the ALJ considered Dr. Verma's violation of Health Occ. § 12-102; his violation of the telemedicine regulations, COMAR 10.32.05.05C; and his incorrect statements on his renewal application. The ALJ found Dr. Verma guilty of unprofessional conduct based on his misstatements on his renewal application. Though the ALJ found that Dr. Verma violated both the Pharmacy Act and the telemedicine regulations and that his reliance on his counsel's advice could not immunize him for these violations, the ALJ did not find unprofessional conduct for these violations. Instead, because the ALJ found that Dr. Verma, through counsel, made a good-faith effort to interpret Maryland law and regulations but did so erroneously, the ALJ found that his prescribing and dispensing Latisse did not display a lack of professionalism or unethical conduct.

A. Board's Telemedicine Regulations

With regard to the telemedicine regulations, COMAR 10.32.05, the first issue is whether Dr. Verma violated the regulations, specifically concerning patient evaluations. The specific subchapter concerning patient evaluations is COMAR 10.32.05.05. That regulation states, in

relevant part, "[i]f a physician-patient relationship does not include prior in-person, face-to-face interaction with a patient, the physician shall incorporate real-time auditory communications or real-time visual and auditory communications to allow a free exchange of information between the patient and the physician performing he patient evaluation." COMAR 10.32.05.05C.

It is undisputed that Dr. Verma did not have a prior in-person, face-to-face interaction with any of the approximately 1,313 patients in Maryland to whom he prescribed Latisse. For, at least, five of the six patients whose records were obtained by the Board, Dr. Verma did not incorporate a real-time auditory or audio-visual communication.[6] The Board's Compliance Manager also did not meet Dr. Verma in-person, nor did he use real-time auditory or audio-visual communication with her. Panel A, thus, concludes that Dr. Verma violated COMAR 10.32.05.05C.

The ALJ found that Dr. Verma violated COMAR 10.32.05.05C but concluded that his violation did not rise to the level of unprofessional conduct because the violation did not display a "lack of professionalism" and Dr. Verma did not "act in a manner that was considered to be unethical." The Panel does not adopt this conclusion.

The term unprofessional conduct is defined as "conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member of good standing of a profession." *Finucan v. Maryland Board of Physician Quality Assurance*, 380 Md. 577, 593 (2004). Unprofessional conduct may also be found when a physician abuses his or her status as a

[6] Patient AY reported talking to a physician at Skinsolutions.MD. Dr. Verma, in his interview claimed that he did not talk to Patient AY and there was no notation of the conversation in the medical records supplied by Dr. Verma.

physician in such a manner as to harm patients or diminish the standing of the medical profession in the eyes of a reasonable member of the general public.[7] *Id.* at 601.

The telemedicine regulations set forth basic requirements that must be met to treat patients using telemedicine. The Panel finds that the standards of professionalism, therefore, required Dr. Verma to comply with Maryland's telemedicine regulations. It is unprofessional for a physician to not have any real-time communication with a patient who never had a prior in-person visit, in violation of the regulation.

The ALJ discusses the legal analysis of Dr. Verma's counsel, Mr. Roth. As an initial matter, this analysis of Mr. Roth's advice has no bearing on whether Dr. Verma violated the law. Panel A agrees with the argument made in the State's exceptions that advice of counsel does not negate a violation in disciplinary cases. *See Maryland Board of Physicians v. Eist*, 417 Md. 545, 558 n. 9 (2011) (quoting *Giant of Md. v. State's Attorney*, 274 Md. 158, 179 (1975) ("'[T]he fact that failure to comply with the [order] . . . was based on the advice of counsel is generally held to be no justification.'")

Dr. Verma argues that these cases are inapposite because they concern individuals who relied on advice to disobey a court or agency directive. However, the *Giant* case relied on a similar case in which there was no advice to disobey a directive. *Giant*, 274 Md. at 179 (citing *Hopkins v. State*, 193 Md. 489 (1950)). In *Hopkins*, a State's Attorney allegedly advised an individual that it was permissible to erect signs advertising the performance of marriages, when, in fact, it was a criminal offense. *Hopkins*, 193 Md. at 498. The Court held, "[i]t is generally held that the advice of counsel, even though followed in good faith, furnishes no excuse to a

[7] The second part of 14-404(a)(3)(ii) is that the conduct is in the practice of medicine. Here, Dr. Verma's evaluation of patients and prescribing of Latisse is indisputably in the practice of medicine. *See* Health Occ. § 14-101(o)(2)(i) ("'[p]ractice medicine' includes . . . prescribing[.]")

person for violating the law and cannot be relied upon as a defense in a criminal action." *Id.* The *Hopkins* Court provided sound reasoning: "[t]hese rules are founded upon the maxim that ignorance of the law will not excuse its violation. If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law." *Id.*

Maryland law recognizes the reliance on counsel defense in distinct cases, such as in cases in which specific intent is required. *Attorney Grievance Comm'n of Md. v. Pennington*, 387 Md. 565, 588 (2005). But the *Pennington* Court ruled that the reliance on counsel defense does not apply when specific intent is not required, and it does not apply if the counsel whose advice was relied on was not admitted to practice law in Maryland. *Id.* at 590. Here, a violation of the telemedicine regulations is not a specific intent offense and Mr. Roth was also not admitted to practice law in Maryland.

Notwithstanding Dr. Verma's misplaced reliance on the advice of counsel defense, Panel A will further address this argument because it concerns Dr. Verma's and Mr. Roth's credibility. Dr. Verma's central claim is that he acted in good faith in relying on the advice of his counsel, Mr. Roth, who told him that he could dispense and prescribe Latisse without having any face-to-face interactions. Dr. Verma argues that the ALJ "did not feel that his conduct undertaken in reliance of counsel . . . was unprofessional conduct" and that finding "was based primarily on her credibility determinations." Verma's Response to State's Exceptions at 5. The ALJ stated that Mr. Roth, in conjunction with outside counsel, determined that Dr. Verma could dispense to Maryland patients by mail without a real-time consultation or audio/visual communication based on counsel's interpretation of a provision in the Maryland Medicaid regulations that carved-out dermatology, ophthalmology, and radiology from the definition of "Store and Forward." *See*

COMAR 10.09.49.02B(16)(b).[8] Mr. Roth claimed prescribing Latisse was dermatology and ophthalmology. He explained that he interpreted this exclusion of dermatology and ophthalmology from the "Store and Forward" definition in the Medicaid regulations as excluding dermatology and ophthalmology from the real-time requirements set forth in the Maryland Board of Physicians' regulations.

The argument by Dr. Verma and Mr. Roth is unconvincing because the Medicaid carve-out that they claim to have relied upon when deciding to prescribe via telemedicine in Maryland was not enacted until *after* the Latisse prescribing at issue in this case. Dr. Verma prescribed Latisse from February 17, 2014 until September 7, 2017 and the Medicaid regulation was enacted on October 23, 2017. The prior iterations of the Medicaid regulation, in effect when Dr. Verma prescribed Latisse between February 2014 and September 2017, did not contain the carve-out clause that Dr. Verma inaccurately claims to have relied upon.[9]

Concerning Dr. Verma's and Mr. Roth's credibility, both testified that Dr. Verma relied in "good faith" on Mr. Roth's legal advice because they both believed that prescribing without a real-time audio or audio-visual communication was acceptable based upon the Medicaid carve-out provision. Dr. Verma testified that "when we came here [to Maryland] and saw that the state

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[8] The relevant provision reads:
"(16) Store and Forward Technology.
(a) Store and forward technology means the transmission of medical images or other media captured by the originating site provider and sent electronically to a distant site provider, who does not physically interact with the patient located at the originating site.
(b) Store and forward technology does not mean dermatology, ophthalmology, or radiology services according to COMAR 10.09.02.07."

[9] The definition in the prior Medicaid regulation reads: "Store and Forward technology means the transmission of medical images or other media captured by the originating site provider and sent electronically to a distant site provider, who does not physically interact with the patient located at the originating site." COMAR 10.09.49.02B (Feb. 28, 2014- Oct. 22, 2017) (The Medicaid regulations had different numbering in various version of the regulations in 2014, but the content remained the same until the October 23, 2017 change.) This definition does not contain the carve-out language later added to the Medicaid regulations in October 2017.

of Maryland accepts teledermatology, teleophthalmology, teleradiology for the Medicaid population therefore given the general broad acceptance of the safety, clearly Maryland has determined that it was safe, and therefore if they are paying for it, it must be legal." (T. 206.) The Panel does not find Dr. Verma's testimony credible because that Medicaid provision was enacted over three and a half years after Dr. Verma began prescribing Latisse to Maryland patients.

Panel A also finds Mr. Roth's testimony not credible. Mr. Roth testified that he used a variety of resources to advise Dr. Verma. In September 2016, he wrote a letter to the Board on behalf of Dr. Verma that stated, "Maryland allows for telemedicine in lieu of an in-person examination." (T. 250; State Ex. 3.) Mr. Roth testified that he developed this legal interpretation in 2016 based, in part, on an "exception to the real time requirement in the Maryland Medical Assistance [Medicaid] Program where there were some very particular, very specific requirements for particular specialties, teleradiology, teleophthalmology and teledermatology." (T. 250-51.) However, as discussed above, Mr. Roth could not have advised Dr. Verma of this legal interpretation based on the Medicaid regulation carve-out provision because that provision was not enacted until October 2017, over a year after he wrote this letter to the Board.

The ALJ relied on Dr. Verma's and Mr. Roth's statements that they had determined that Dr. Verma "could dispense Latisse by mail without a real-time consultation or audio/visual communication because of the stated [Medicaid] exceptions." ALJ Proposed Decision at 27. The ALJ explained that she "took into account that [Dr. Verma] proceeded in good faith upon the advice of counsel." *Id.* Panel A rejects this conclusion and instead finds that Dr. Verma could not have relied in good faith on Mr. Roth's legal research when prescribing Latisse

because the law was not in effect until long after Dr. Verma had prescribed and dispensed Latisse to approximately 1,313 Maryland patients without any real-time communications.

Dr. Verma's Response to State's Exceptions claims that the ALJ was the only decision maker who observed the witnesses and quotes Maryland caselaw that such credibility findings of hearing officers "have almost conclusive force." Respondent's Response to State's Exceptions at 4 (quoting *Geier v. Maryland State Bd. of Physicians*, 223 Md. App. 404, 431 (2015)). That language that the hearing officer's findings "have almost conclusive force" originated in the *Anderson* Court. *Anderson v. Dep't of Public Safety*, 330 Md. 187, 217 (1993). However, in analyzing *Anderson*, the Court of Special Appeals in *Elliott* explained that this proposition was refined in *Department of Health & Mental Hygiene v. Shrieves*, which held that "only those findings of fact which are demeanor-based credibility determinations" are entitled to the special deference discussed in *Anderson*. *Maryland Board of Physicians v. Elliott*, 170 Md. App. 369, 387-88 (2006) (citing *Department of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 298-99 (1994) (holding that an agency defers to an ALJ's "testimonial inferences, 'credibility determinations based on demeanor,'" but owes no such duty to defer to an ALJ's "derivative inferences, 'inferences drawn from the evidence itself.'")

Elliott cited several cases that applied this *Anderson-Shrieves* Deference Rule, such as *Gabaldoni v. Board of Physician Quality Assurance*, 141 Md. App. 259, 262 (2001) (deferring to the Board's "different factual conclusions," finding a breach of the standard of care based on the Board's own derivative inferences unaffected by the *Anderson-Shrieves* Deference Rule).

Here, the ALJ did not describe any demeanor-based findings. The ALJ instead only stated that she "found all of the witnesses to be credible." ALJ Proposed Decision at 27, 30. The Panel does not conclude that this credibility determination was demeanor-based. Because the

credibility findings were derivative inferences, Panel A can make its own derivative inferences without deferring to the ALJ's credibility determinations and find Dr. Verma and Mr. Roth not to be credible witnesses based on the evidence that the Medicaid provision upon which Dr. Verma and Mr. Roth purportedly relied was not yet in effect during the prescribing period at issue in the case.[10] The Panel rejects the ALJ's credibility determination as to Dr. Verma and Mr. Roth and finds that the testimony of Dr. Verma and Mr. Roth was not credible as it pertains to Dr. Verma's reliance on Mr. Roth's legal advice.

Dr. Verma also argues that, under the pending telemedicine regulation, "store-and-forward" is now allowed, validating his position that he need not perform a real-time audio-visual examination. Panel A does not agree that any pending modifications to the telemedicine regulations could justify Dr. Verma's conduct. As the administrative prosecutor argued, proposed regulations cannot be relied upon before they are enacted. "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound." *Commodity Futures Trading Com'n. v. Schor*, 478 U.S. 833, 845 (1986).

Moreover, as enacted on August 12, 2019, the modified Maryland telehealth regulations clarify that Dr. Verma's conduct, if conducted now, would still be prohibited.[11] The regulations still require a "synchronous, audio-visual patient evaluation . . . before . . . prescribing

[10] Even if the inferences were due additional deference, the Panel has the authority to overrule even demeanor-based credibility findings if the Board "gives strong reasons for doing so." *Anderson*, 330 Md. at 217; *Shrieves*, 100 Md. App. at 298, 302. Here, the evidence that Dr. Verma and Mr. Roth could not have relied on the Medicaid carve-out statute in interpreting the telemedicine regulation because it had not yet been promulgated would constitute a strong reason to overturn the ALJ's credibility finding.

[11] The regulations pending at the time of the hearing were further modified before enactment.

medications."[12] COMAR 10.32.05.05A. The Board's new telehealth regulations, therefore, would still prohibit Dr. Verma's prescribing of Latisse in this manner.

B. Whether Violation of the Pharmacy Act Constitutes Unprofessional Conduct

With regard to conduct linked to the violation of the Pharmacy Act, Panel A does not find this conduct unprofessional, and, thus, it does not find that Dr. Verma committed unprofessional conduct, § 14-404(a)(3)(ii), for this violation. The State did not argue at the hearing that this conduct was unprofessional and did not raise any objection to the ALJ's proposed finding that such conduct was not considered unprofessional. While his dispensing without a permit is a violation of Health Occ. § 14-404(a)(28), Panel A has decided that it does not rise to the level of unprofessional conduct in this case.

C. Misstatements on Dr. Verma's Application

Dr. Verma's false statements on his application were also deemed by the ALJ to be unprofessional conduct in the practice of medicine. *See* Health Occ. § 14-404(a)(3)(ii). Providing false statements on an application is unprofessional conduct in the practice of medicine. *See Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 547-48 (2011) ("Petitioner's false statement on the application comes within the meaning of 'unprofessional conduct in the practice of medicine.'"). Dr. Verma does not dispute the fact that he, through KC, answered "no" to a question asking whether any a licensing or disciplinary board investigated him and whether a state licensing or disciplinary board required education or admonished him. Nor does Dr. Verma dispute that he did not disclose the investigations against him nor did he report that the North Carolina and Texas Medical Boards required him to complete continuing

[12] None of the exceptions to this provision apply here.

medical education. These false statements on his renewal application constitute unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(ii).

III. Willfully making a false representation when seeking or making application for licensure or any other application related to the practice of medicine - Health Occ. § 14-404(a)(36)

Dr. Verma was also charged with *willfully* making a false representation when seeking or making application for licensure. Health Occ. § 14-404(a)(36). Both parties agree that the holding in the *Kim* case is dispositive. *Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 546 (2011). Under *Kim*, "'[w]illful,' for purposes of § 14–404, requires proof that the conduct at issue was done intentionally, not that it was committed with the intent to deceive or with malice." *Id.* at 546; *see Attorney Grievance Comm'n v. Tayback*, 378 Md. 578 (2003) (in administrative cases, willfully means acts "committed voluntarily and intentionally, not accidentally.") The Panel addresses below § 14-404(a)(36) with respect to Dr. Verma's (1) prior discipline and investigations and (2) practice of telemedicine.

A. Prior Discipline and Investigations

On February 2, 2017, the North Carolina Medical Board required that Dr. Verma complete six hours of continuing medical education on the subject of medical record documentation. In June 2017, the Texas Medical Board also imposed a non-disciplinary remedial plan consisting of eight hours of continuing medical education in record keeping and risk management for violating the standard of care in failing to examine or establish a proper physician/patient relationship with a patient to whom he diagnosed and prescribed Latisse. The West Virginia Board of Medicine conducted an investigation of Dr. Verma in 2016 and 2017. In August 2017, prior to the submission of his Maryland renewal application, Dr. Verma also had

received a letter and subpoena from the Maryland Board notifying him that an investigation had been opened against him.

Dr. Verma delegated the completion and submission of his 2017 Maryland renewal application to an employee of his company, KC. Dr. Verma's 2017 Maryland renewal application was filed on September 11, 2017. To obtain information for completing the renewal application, KC used the company's outdated credentialing database, which had not been updated by Dr. Verma to include the recent actions and investigations by North Carolina, Texas, West Virginia, and Maryland.[13] KC also testified that Dr. Verma was supposed to inform her if any relevant actions had occurred prior to her completing the renewal application. Dr. Verma did not inform her to reflect these investigation or actions by the North Carolina, Texas, West Virginia, and Maryland boards. Simply put, Dr. Verma purposefully left KC in the dark about these investigations and actions while directing her to complete his renewal application.

On Dr. Verma's Maryland renewal application, KC, on behalf of Dr. Verma, answered "no" to the question asking whether a state licensing or disciplinary board took action against Dr. Verma's medical license, including limitations of practice, required education, admonishment or reprimand. KC, on behalf of Dr. Verma, also answered "no" on Dr. Verma's renewal application to the question asking whether a licensing or disciplinary board had filed any complaints or charges against him or had investigated him for any reason. Both answers were false.

Dr. Verma, through KC, also certified that Dr. Verma personally reviewed all responses and certified that all the information was true and correct to the best of his knowledge. Dr. Verma, however, had not reviewed the application before it was submitted. KC electronically signed on Dr. Verma's behalf and submitted the application on September 11, 2017.

[13] Dr. Verma updated his database in March 2017, however, that update did not include the February 2017 North Carolina action or the West Virginia and North Carolina investigations.

The ALJ found that Dr. Verma violated Health Occ. § 14-404(a)(36), because he willfully filed a false report by answering the above questions incorrectly, but the ALJ noted that these actions were a result of "sloppiness and disorganization." ALJ Proposed Decision at 31. While the Panel agrees with the ALJ that Dr. Verma violated Health Occ. § 14-404(a)(36), Panel A does not adopt the ALJ's reasoning. Instead, Panel A concludes that, by intentionally delegating the completion of his licensure renewal application to his employee, by failing to provide the employee with updated information necessary for correct responses, and by not reviewing the application before it was filed, Dr. Verma's conduct was not sloppy or disorganized, but purposeful. Under these circumstances, Dr. Verma is fully liable for his false answers on the application.

Dr. Verma was no stranger to the licensing process, as he was licensed in all fifty states. Dr. Verma knew that he had been the subject of several board investigations and had been required to complete education by two medical boards. Dr. Verma left KC to complete the application in which she would use a database that he had not kept accurate and updated. Dr. Verma intentionally left out the February 2017 North Carolina investigation and mandated education coursework and the West Virginia investigation when he updated the database in March 2017. Dr. Verma failed to supplement the database after he entered a remedial plan with the Texas Medical Board in June 2017 or was investigated by Maryland in August 2017, nor did he inform KC of these licensure actions and investigation. Whether KC personally was aware of the discipline against Dr. Verma is irrelevant. Dr. Verma knew that he had such discipline. He failed to update his database, ensuring that renewal applications he submitted would be false. By delegating to KC and failing to provide her with accurate information, Dr. Verma does not escape responsibility for the false answers, nor does he evade intentionality. Answering these

questions falsely, even through an agent, does not eliminate the willfulness of providing false answers, especially when the application required that Dr. Verma review the answers and certify they were accurate.

In his exceptions, Dr. Verma's argues that the ALJ erred in finding a violation of Health Occ. § 14-404(a)(36), because the ALJ found that Dr. Verma's conduct was negligent, careless, sloppy and disorganized and, therefore, the conduct was not willful. Dr. Verma argues that, "through his negligence, he allowed a staff member to complete and submit the application for him, but he did not intentionally make nor instruct his staff member to make any statement that was false." Resp. Exception at 5. The Panel rejects Dr. Verma's characterization of his conduct as negligent. Dr. Verma's actions were intentional and deceptive.

Moreover, Dr. Verma has demonstrated that he is prone to acting with deceit, as indicated by his testimony pertaining to his reliance on counsel. Dr. Verma's claims of negligence are belied by his intentional failure to update his database to exclude the North Carolina action and investigation, his intentional failure to update the database after the action in Texas or investigation in Maryland, and his intentional failure to inform KC otherwise of the actions and investigations against him as was KC's understanding of the procedures regarding changes that might affect the application. Although the Court in *Kim* rejected the argument that the Panel must show "intent to deceive" to demonstrate willfulness, the Panel does find his intent was to deceive. The fact that Dr. Verma did not instruct his staff to answer falsely is an insufficient defense. *Kim*, 423 Md. at 546. Dr. Verma intentionally delegated the completion of his application to an agent; he knew that he had been under investigation and subjected to education and admonishment by disciplinary boards; he did not disclose this information about his investigations, education, and admonishment to his agent; he did not ensure that the information

his agent relied upon was accurate; and he did not review the answers on the application before it was submitted. Dr. Verma's deliberate and willful acts ensured that his application answers were false on his 2017 Maryland renewal application.

Thus, the Panel finds that Dr. Verma willfully made a false representation on his renewal application, in violation of Health Occ. § 14-404(a)(36).

B. Misstatements Regarding Telemedicine

Dr. Verma, through KC, answered "no" to the question "[h]ave you used telemedicine for any purpose in the last 12 months?" Dr. Verma, in fact, had prescribed Latisse through telemedicine during that time period. KC gave a sworn declaration that she was confused by the questions pertaining to telemedicine.

In Dr. Verma's second exception, he argues that answering "no" to the question regarding telemedicine was not false. Dr. Verma argues that the application identified Dr. Verma's radiology practice as his primary practice, that the question was asking about the use of telemedicine for that practice and not for himself as an individual. Dr. Verma claims that, because his radiology practice had not engaged in telemedicine in Maryland for the previous twelve months, the answer was accurate. The introduction to the question stated, "*[p]lease complete the following [Health Information Technology] questions for:* StatRad." Panel A agrees that the question is ambiguous on whether the question pertained to Dr. Verma as an individual or his radiology practice, and, thus, the Panel does not find that Dr. Verma willfully answered this question falsely. This exception is granted.

IV. Other Exceptions

The State and Dr. Verma also took exception to various conclusions and discussions in the ALJ's Proposed Decision's Discussion section. The ALJ's Discussion section, however, is

not adopted by the Panel. The remaining exceptions that ask for a modification of the ALJ's proposed decision not adopted by the Panel are, thus, moot.

Additionally, the Panel does not reach any determination on whether Dr. Verma's conduct in prescribing Latisse was a standard of care violation. Dr. Verma was not charged with violating the standard of care. Panel A, therefore, will not make a determination on whether he violated the standard of care by prescribing and dispensing Latisse to patients based solely on medical questionnaires reviewed for less than a minute.

CONCLUSION OF LAW

Disciplinary Panel A concludes that Dr. Verma is guilty of unprofessional conduct in the practice of medicine, failed to comply with the provisions of Section 12-102 of the Health Occupations Article, and willfully made a false representation when seeking or making application for licensure, in violation of Section 14-404(a)(3)(ii), (28), and (36) of the Health Occupations Article, respectively.

SANCTION

As a sanction, the ALJ recommended a reprimand, a six-month probation, and coursework. Dr. Verma did not object to the ALJ's proposed sanction. The State argues that, in addition to the ALJ's proposed sanction, Dr. Verma should also be fined $50,000 and be prohibited from dispensing medications to Maryland residents during probation.

The ALJ noted in the sanction discussion that her primary reason for the sanction concerned the false information provided on the renewal application. The ALJ seems not to have placed much weight on Dr. Verma's lack of a dispensing permit in determining the proposed sanction. The ALJ stated that Dr. Verma "has been candid throughout the investigation regarding his errors in interpretation of applicable law." The ALJ took into account, as a

mitigating factor, "that his actions were not deliberate and attempts were made to comply with the regulations regarding telemedicine and physician dispensing" and that Dr. Verma "relied and acted upon the advice of Mr. Roth." ALJ Proposed Decision 35-36. As indicated previously, the Panel finds that Dr. Verma and Mr. Roth were not candid when discussing their interpretation of the applicable law and that Dr. Verma did not act in good faith regarding advice of counsel on the telemedicine regulations or his dispensing without a permit. The Panel's impression of Dr. Verma's good faith and candidness departs significantly from that of the ALJ.

Dr. Verma violated COMAR 10.32.05.05C and Health Occ. § 12-102 approximately 1,313 times by prescribing and dispensing Latisse to patients without any real-time auditory or audio-visual evaluation and without having a dispensing permit over the course of three-and-a-half years. The Panel agrees with the ALJ that Dr. Verma received significant financial gain from the prescription of Latisse in Maryland in a manner that was violative of Maryland laws. Moreover, Dr. Verma's false statements on his renewal application were significant, and his attempt to deflect these false statements to his employee is unpersuasive.

Panel A considered the aggravating and mitigating factors of COMAR 10.32.02.09B. Dr. Verma had no prior disciplinary record with the Board; has since implemented remedial measures to prevent violating the law regarding his prescribing or dispensing in Maryland and to prevent providing incorrect answers on his applications; and there was minimal potential harm to patients because of the minimal potential for harm from Latisse prescriptions. COMAR 10.32.02.09B(5)(a), (d), (h). The aggravating factors include a pattern of detrimental conduct, which spanned more than three years from 2014 until 2017 and approximately 1,313 patients; the offender committed a combination of factually discrete offences adjudicated in a single action (violation of the pharmacy statute, violation of telemedicine regulations, and willfully making a

false statement); and Dr. Verma presented false testimony in his defense. COMAR 10.32.02.09B(6)(d), (e), and (i).

Based on the discussion above and the aggravating and mitigating factors, Panel A concludes that a Reprimand, Probation for a minimum of six months, coursework as recommended by the ALJ, and a fine of $50,000 are warranted.

ORDER

It is, by an affirmative vote of a majority of a quorum of Disciplinary Panel A, hereby

ORDERED that Vishal Verma, M.D., is **REPRIMANDED**; and it is further

ORDERED that Dr. Verma is placed on **PROBATION** for a minimum of **SIX MONTHS** with probationary conditions.[14] Dr. Verma shall comply with the following probationary conditions within **SIX MONTHS**:

(1) Dr. Verma shall successfully complete Board-approved courses on telemedicine, prescribing of medication, and recordkeeping. The following terms apply:
(a) it is Dr. Verma's responsibility to locate, enroll in and obtain the disciplinary panel's approval of the courses before a course is begun;
(b) the disciplinary panel will not accept courses taken over the internet;
(c) Dr. Verma must provide documentation to the disciplinary panel that he has successfully completed the courses;
(d) the courses may not be used to fulfill the continuing medical education credits required for license renewal;
(e) Dr. Verma is responsible for the cost of the courses; and

(2) Dr. Verma shall pay a civil fine of $50,000. The Payment shall be by money order or bank certified check made payable to the Maryland Board of Physicians and mailed to P.O. Box 37217, Baltimore, Maryland 21297. The Board will not renew or reinstate Dr. Verma's license if Dr. Verma fails to timely pay the fine to the Board; and it is further

ORDERED that a violation of probation constitutes a violation of this Final Decision and Order; and it is further

[14] If the Respondent's license expires during the period of probation, the probation and any conditions will be tolled.

ORDERED that, after Dr. Verma has complied with all terms and conditions of probation and the minimum period of probation imposed by the Final Decision and Order has passed, Dr. Verma may submit a written petition for termination of probation. After consideration of the petition, Dr. Verma's probation may be administratively terminated through an order of the disciplinary panel if Dr. Verma has complied with all probationary terms and conditions and there are no pending complaints relating to the charges; and it is further

ORDERED that Dr. Verma is responsible for all costs incurred in fulfilling the terms and conditions of this Final Decision and Order; and it is further

ORDERED that, if Dr. Verma allegedly fails to comply with any term or condition imposed by this Final Decision and Order, Dr. Verma shall be given notice and an opportunity for a hearing. If Disciplinary Panel A determines there is a genuine dispute as to a material fact, the hearing shall be before an Administrative Law Judge of the Office of Administrative Hearings followed by an exceptions process before a disciplinary panel. If Disciplinary Panel A determines there is no genuine dispute as to a material fact, Dr. Verma shall be given a show cause hearing before Disciplinary Panel A; and it is further

ORDERED that, after the appropriate hearing, if the disciplinary panel determines that Dr. Verma has failed to comply with any term or condition imposed by this Final Decision and Order, the disciplinary panel may reprimand Dr. Verma, place Dr. Verma on probation with appropriate terms and conditions, or suspend with appropriate terms and conditions, or revoke Dr. Verma's license to practice medicine in Maryland. The disciplinary panel may, in addition to one or more of the sanctions set forth above, impose a civil monetary fine on Dr. Verma; and it is further

ORDERED that the effective date of the Final Decision and Order is the date the Final Decision and Order is signed by the Executive Director of the Board. The Executive Director signs the Final Decision and Order on behalf of Disciplinary Panel A; and it is further

ORDERED that this Final Decision and Order is a public document. *See* Health Occ. §§ 1-607, 14-411.1(b)(2) and Gen. Prov. § 4-333(b)(6).

01/31/2020
Date

Signature on File

Christine A. Farrelly, Executive Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Md. Code Ann., Health Occ. § 14-408(a), Dr. Verma has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review shall be filed within 30 days from the date of mailing of this Final Decision and Order. The cover letter accompanying this final decision and order indicates the date the decision is mailed. Any petition for judicial review shall be made as provided for in the Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222 and Title 7, Chapter 200 of the Maryland Rules of Procedure.

If Dr. Verma files a petition for judicial review, the Board is a party and should be served with the court's process at the following address:

Maryland State Board of Physicians
Christine A. Farrelly, Executive Director
4201 Patterson Avenue
Baltimore, Maryland 21215

Notice of any petition should also be sent to the Board's counsel at the following address:

David S. Finkler
Assistant Attorney General

Maryland Department of Health
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

Exhibit 1

MARYLAND STATE BOARD OF	*	BEFORE SUSAN A. SINROD,
PHYSICIANS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
VISHAL VERMA, M.D.	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	
LICENSE No.: D73570	*	OAH No.: MDH-MBP2-71-18-33081

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
PROPOSED DISPOSITION

STATEMENT OF THE CASE

On March 19, 2018, Disciplinary Panel B of the Maryland State Board of Physicians (Board) issued charges against Vishal Verma, M.D. (Respondent) alleging violations of the Medical Practice Act (the Act). Md. Code Ann., Health Occ. §§ 14-101 through 14-508, and 14-601 through 14-607 (2014 & Supp. 2018).[1] Specifically, the Respondent is charged with violating the following sections of the Act: 14-404(a)(3)(ii) (unprofessional conduct in the practice of medicine), 14-404(a)(28) (failure to comply with the provisions of Section 12-102 of the Health Occupations Article of the Maryland Code) and 14-404(a)(36) (willfully making a false representation when seeking or making application for licensure). *See also* Code of Maryland Regulations (COMAR) 10.32.02.03E(3)(d). Disciplinary Panel B forwarded the

[1] The Board issued amended charges on February 22, 2019. The amended charges did not add any new charges; it supplemented one of the original charges with additional facts.

charges to the Office of the Attorney General for prosecution. COMAR 10.32.02.03E(5). On October 19, 2018, another disciplinary panel delegated the matter to the Office of Administrative Hearings (OAH) to conduct a hearing and for issuance of proposed findings of fact, proposed conclusions of law, and a proposed disposition. Md. Code Ann., State Gov't § 10-205(b) (2014); COMAR 10.32.02.04B(1).

I conducted a hearing on March 4 and 5, 2019 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland 21031. Health Occ. § 14-405(a) (Supp. 2018); COMAR 10.32.02.04. Victoria H. Pepper, Assistant Attorney General and Administrative Prosecutor, represented the State of Maryland (State). M. Natalie McSherry, Esquire, represented the Respondent, who was present.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules for Hearings Before the Board of Physicians, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 10.32.02; COMAR 28.02.01.

ISSUES

1. Did the Respondent engage in unprofessional conduct in the practice of medicine in violation of Section 14-404(a)(3)(ii) of the Act?
2. Did the Respondent fail to comply with Section 12-102 of the Health Occupations Article of the Maryland Code, in violation of Section 14-404(a)(28) of the Act?
3. Did the Respondent willfully make a false representation when making application for licensure in violation of Section 14-404(a)(36) of the Act?
2. What, if any, sanctions are appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the State, unless otherwise noted:

State Ex. #1- Complaint, received by the Board on August 15, 2016

State Ex. #2- Subpoena *Duces Tecum*, dated August 26, 2016

State Ex. #3- Email from the Respondent to Maureen Sammons, Intake Unit Manager, Board, dated September 7, 2016, with Response to Complaint, dated September 7, 2016, attached

State Ex. #4- Subpoena *Duces Tecum,* dated September 9, 2016

State Ex. #5- Subpoena *Duces Tecum,* with patient records attached, received by the Board on September 23, 2016

State Ex. #6- Letter from Amanda K. Miller, Compliance Analyst, Board, to the Respondent, dated November 28, 2016, with Information Form, Subpoena *Duces Tecum*, dated November 28, 2016 and Certification of Medical Records attached

State Ex. #7- Subpoena *Duces Tecum,* dated December 13, 2016.

State Ex. #8- Letter from James Mehigan, Esquire, Gordon & Rees, LLP, dated December 22, 2016, with Respondent's patient list attached

State Ex. #9- Letter from Amanda K. Miller, Compliance Analyst, Board, to the Respondent, dated February 6, 2017, with Subpoena *Duces Tecum,* dated February 6, 2017 and blank Certification of Medical Records attached

State Ex. #10- Letter from the Respondent to Amanda K. Miller, Compliance Analyst, Board, dated February 17, 2017

State Ex. #11- Letter from James C. Mehigan, Esquire, Gordon & Rees, LLP to Amanda K. Miller, Compliance Analyst, Board, dated February 21, 2017

State Ex. #11A- Certification of Medical Records, dated February 10, 2017, with patient records for the patient CF,[2] attached

[2] Consistent with the State's list of exhibits, I will refer to patients by their initials to protect their confidentiality.

State Ex. #11B- Certification of Medical Records, dated February 10, 2017, with patient records for the patient BH, attached

State Ex. #11C- Certification of Medical Records, dated February 10, 2017, with patient records for the patient AY, attached

State Ex. #11D- Certification of Medical Records, dated February 10, 2017, with patient records for the patient DT, attached

State Ex. #11E- Certification of Medical Records, dated February 10, 2017, with patient records for the patient MD, attached

State Ex. #11F- Certification of Medical Records, dated February 17, 2017, with patient records of the patient GK, attached

State Ex. #12- Investigations Memorandum from Andrea Doucet, Compliance Analyst, Board, to File, dated June 7, 2017

State Ex. #13- Memorandum from Sandra Kracke, Compliance Investigator, Maryland Board of Pharmacy to Maureen Sammons, Manager, Intake Unit, Board, dated June 22, 2017

State Ex. #14- Subpoena *Ad Testificandum*, dated August 2, 2017

State Ex. #15- Email chain between [redacted] and Amanda Miller, dated August 7, 2017 and August 15, 2017

State Ex. #16- Email chain between Vincent Roth, Esquire and Amanda K. Miller, dated August 8 and 9, 2017; SkinSolutions.MD Website Summary; Letter from Steve Yoelin, M.D., addressed "To Whom It May Concern," dated February 25, 2017

State Ex. #17- Transcript of telephone interview of the Respondent, dated August 24, 2017

State Ex. #18- Documents pertaining to customer order with Skinsolutions.MD by Doreen Noppinger, Compliance Manager, Board, dated September 7, 2017

State Ex. #19- Board License Renewal Application, dated September 11, 2017; Board Certified Docs, American Board of Medical Specialties physician's information printout, dated October 19, 2016; American Medical Association Physician Profile, dated December 19, 2016

State Ex. #20- Not offered

State Ex. #21- Memorandum from Amanda Miller, Compliance Analyst, Board, to File, dated November 30, 2017

State Ex. #22- Not offered

State Ex. #23- Charges Under the Maryland Medical Practice Act, dated March 19, 2018

State Ex. #24- Texas Medical Board Remedial Plan, dated June 16, 2017

State Ex. #25- Texas Medical Board Public Verification/Physician Profile, dated February 22, 2019

State Ex. #26- Amended Charges Under the Maryland Medical Practice Act, dated February 22, 2019

State Ex. #27- Frequently Asked Questions from SkinSolutions.MD website, undated

State Ex. #28- Application for Physician's Permit to Dispense Prescription Drugs, undated; Email chain between Ms. Pepper, Doreen Noppinger, and Dierdra Rufus, dated February 15 and February 21, 2019

I admitted the following exhibits into evidence on behalf of the Respondent, unless otherwise noted:

Resp. Ex. #1- *Curriculum Vitae* of the Respondent, undated

Resp. Ex. #2- *Curriculum Vitae* of Steve Yoelin, M.D., undated

Resp. Ex. #3- Not offered

Resp. Ex. #4- Not offered

Resp. Ex. #5- Not offered

Resp. Ex. #6- Information Form, dated February 10, 2017

Resp. Ex. #7- Letter from the Respondent to Amanda K. Miller, Compliance Analyst, Board, dated February 17, 2017; Complaint, in the United States District Court, Central District of California, Southern Division, *Allergan, Inc. et. Cal. v. Global Boost MD, LLC, et al.* Case No. 8:16-cv-2244

Resp. Ex. #8- Not offered

Resp. Ex. #9- Letter from Sandra Kracke, Compliance Investigator, Maryland Board of Pharmacy to [redacted], dated June 22, 2017

Resp. Ex. #10- Not offered

Resp. Ex. #11- Email chain between Vincent Roth and Amanda Miller, dated August 9, 2017; SkinSolutions.MD Website Summary, dated August 15, 2017

Resp. Ex. #12- Letter from the Texas Medical Board to the Respondent, dated September 28, 2016; Letter from Erika Calderon, Consumer Services Analyst, Medical Board of California, dated April 10, 2017; Letter from Virginia K. Herold, Executive Officer, California State Board of Pharmacy, by Jeff Morrison, Complaint Unit Analyst, dated January 26, 2018; Letter from Mark A. Spangler, State of West Virginia Board of Medicine, dated March 31, 2017; Decision of the West Virginia Board of Medicine, dated March 13, 2017; Letter form Eleanor E, Greene, M.D., President, North Carolina Medical Board, dated February 2, 2017; Email chain between Judie B. Clark, North Carolina Medical Board, and the Respondent, of varying dates

Resp. Ex. #13- Allergan, specifications for Latisse, 2013

Resp. Ex. #14- Letter from Steve Yoelin, M.D., addressed "To Whom It May Concern, dated February 25, 2017

Resp. Ex. #15- Not offered

Resp. Ex. #16- Information from SkinSolutions.MD website regarding Latisse, undated

Resp. Ex. #17- Frequently Asked Questions from SkinSolutions.MD website

Resp. Ex. #18- Declaration of K[redacted] C[redacted], dated April 19, 2018

Resp. Ex. #19- Excerpt from Maryland Register, Volume 45, Issue 24, pages 1, 31-33, Issue Date, November 26, 2018

Resp. Ex. #20- Respondent's expert testimony report, dated February 18, 2019

Testimony

The following witnesses testified on behalf of the Board:

1. Amanda Miller, Compliance Analyst, Board; and

2. Doreen Noppinger, Compliance Manager, Board.

The Respondent testified in his own behalf, and was accepted as an expert witness in the safe prescribing of Latisse through a telemedicine platform. He also presented the testimony of the following witnesses:

1. Steven Yoelin, M.D., accepted as an expert witness in Latisse and the sale and prescribing of Latisse. Dr. Yoelin testified via Skype;

2. Vincent Roth, Esquire, General Counsel and Corporate Secretary of SkinSolutions.MD. Mr. Roth testified via Skype; and

3. K[redacted] C[redacted], employee of NucleusHealth.

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. At all times relevant hereto, the Respondent was and is licensed to practice medicine in the State of Maryland. The Respondent was originally licensed to practice medicine in Maryland on January 23, 2012. His license is scheduled to expire on September 30, 2019.

2. The Respondent has not applied for, nor does he hold, a Maryland Physician's Permit to Dispense Prescription Drugs.

3. The Respondent is licensed to practice medicine in all fifty states and the District of Columbia.

4. The Respondent is board-certified in radiology.

5. At all times relevant, the Respondent was the owner and Chief Executive Officer of SkinSolutions.MD, a website that sells aesthetic products.

6. Latisse is one of the products offered by the Respondent on the SkinSolutions.MD website. Latisse, a prostaglandin analog, is approved by the U.S. Food and Drug Administration to treat inadequate eyelashes (hypotrichosis).

7. Latisse is a prescription medication.

8. In furtherance of the Board's investigation, Board staff interviewed the Respondent under oath.

9. The medical records, transmitted to the Board by the Respondent in response to the Board's subpoena, are authentic.

PROPOSED FINDINGS OF FACT

Having considered all of the evidence presented, I find the following additional facts by a preponderance of the evidence:

10. The Licensee also maintains a teleradiology practice called NucleusHealth. He has a staff of seventy-one radiologists with privileges in many hospitals in many different states. NucelusHealth reads and interprets radiological imaging electronically.

11. On August 4, 2016, [redacted] ordered Latisse for his mother through the SkinSolutions.MD website. On behalf of his mother, Mr. [redacted] completed the online medical questionnaire, answering "not sure" to the questions asking whether the customer had allergies, medical conditions and/or took medications.

12. After Mr. [redacted] placed the order, he received a standard, boilerplate email stating that the health questionnaire was being reviewed and he would be contacted prior to shipping of the order if the Respondent had any further questions.

13. Mr [redacted]'s fiancée owns [redacted], which is a main competitor of SkinSolutions.MD. Mr. [redacted] filed complaints against the Respondent in several states in an effort to harm his reputation. Mr. [redacted] withdrew his complaint from the Board on August 7, 2017.

14. CF was a Maryland resident and ordered Latisse through the SkinSolutions.MD website on April 17, 2016. After placing her order, she received a standard email from the

Respondent indicating that SkinSolutions.MD was currently reviewing her health questionnaire and would contact her prior to shipping if there were any further questions.

15. On the health questionnaire, CF answered "none" to the questions asking whether she had any allergies, took any medications, had any medical conditions, or had high eye pressure. She waived an evaluation. SkinSolutions.MD diagnosed her with hypotrichosis, cleared her for Latisse, and gave her the option to fill the prescription at a local pharmacy. She did not exercise that option; therefore, SkinSolutions.MD shipped the Latisse to CF.

16. BH was a Maryland resident when he ordered Latisse through the SkinSolutions.MD website on August 3, 2015. On August 4, 2015, BH received a standard email from the Respondent indicating that SkinSolutions.MD was currently reviewing his health questionnaire and would contact him prior to shipping if there were any further questions.

17. On the health questionnaire, BH answered "none" to the questions asking whether he had any allergies, medical conditions, took medications, or had high eye pressure. He waived an evaluation. SkinSolutions.MD diagnosed BH with hypotrichosis, cleared him for Latisse, and gave him the option to fill the prescription at a local pharmacy. BH did not exercise that option; therefore, SkinSolutions.MD shipped the Latisse to BH.

18. AY was a Maryland resident when she ordered Latisse from SkinSolutions.MD on December 13, 2014. On the health questionnaire, AY answered "none" to the questions asking whether she had any allergies, medical conditions, or took medications, and she answered "no" to the question asking if she had high eye pressure. She waived an evaluation. SkinSolutions.MD diagnosed her with hypertrichosis, cleared her for Latisse, and gave her an option to fill the prescription at a local pharmacy. AY spoke to a physician from SkinSolutions.MD who asked her for her medical history. AY did not exercise the option to fill the prescription at a local pharmacy; therefore, SkinSolutions.MD shipped the Latisse to AY.

19. DT was a Maryland resident when she ordered Latisse from SkinSolutions.MD on or around February 27, 2014. On February 27, 2014, DT received an email from the Respondent indicating that SkinSolutions.MD was reviewing her health questionnaire and would contact her if there were any further questions prior to shipping. SkinSolutions.MD shipped the Latisse to DT.

20. MD was a Maryland resident when she ordered Latisse from SkinSolutions.MD on October 6, 2016 and December 29, 2016. After placing the October 6, 2016 order, MD received an email from the Respondent indicating that SkinSolutions.MD was reviewing the health questionnaire. The email stated further that "unless I see something in your history that might require further evaluation, I will proceed with issuing you a prescription." State Ex. #11E.

21. On the health questionnaire for both orders, MD answered "none" to the questions that asked whether she had any allergies, medical conditions, or took medications, and she answered "no" to the question that asked whether she had high eye pressure. SkinSolutions.MD diagnosed MD with hypertrichosis, cleared her for Latisse, and gave her the option to fill the prescription at a local pharmacy. MD did not exercise that option; therefore, SkinSolutions.MD shipped the Latisse to MD on both occasions.

22. GK was a Maryland resident when she ordered Latisse through the SkinSolutions.MD website on August 22, 2016. After she placed her order, she received an email from the Respondent indicating that SkinSolutions.MD was reviewing her health questionnaire and would contact her prior to shipping if there were any further questions.

23. On the health questionnaire, GK answered "none" to the questions that asked if she had any allergies or medical conditions. She answered "tretinoin cream" to the question that asked if she was on any medications. She answered "no" to the question that asked if she had high eye pressure. SkinSolutions.MD diagnosed her with hypotrichosis, cleared her for Latisse

and gave her the option to fill the prescription at a local pharmacy. She did not exercise that option; therefore, SkinSolutions.MD shipped the Latisse to AS, a Maryland resident, as directed by GK's order.

24. K[redacted] C[redacted], an employee of NucleusHealth, returned to work in June 2017 after being on maternity leave. Ms. C[redacted] worked remotely from her home in Florida. She assisted in licensing and credentialing of the physicians that work for NucleusHealth.

25. Ms. C[redacted] completed and filed the renewal application on behalf of the Respondent on September 11, 2017. The Respondent never reviewed the application before it was filed.

26. Ms. C[redacted] used the Respondent's most recent credentialing license, and the NucleusHealth database to obtain information for the renewal license. The database had not been updated.

27. On that application, Ms. C[redacted] answered "no" to the question that asked whether a state licensing or disciplinary board had ever taken action against the Respondent's medical license, including limitations of practice, required education, admonishment or reprimand. She also answered "no" to the question that asked whether any licensing or disciplinary board had filed any complaints or charges against the Respondent, or investigated him for any reason.

28. Also on the renewal application, Ms. C[redacted] answered "no" to the question that asked whether StatRad[3] had used telemedicine for any purpose in the prior twelve months. She also answered "0" to the question that asked approximately how many times the Respondent had used telemedicine for any purpose.

[3]NucleusHealth previously operated under the name StatRad.

29. Ms. C [redacted] checked the portion of the renewal application that certified the Respondent personally reviewed all of the responses in the application and that the responses were true and correct to the best of his knowledge.

30. On February 2, 2017, following a complaint also filed by Mr. [redacted], the North Carolina Medical Board required that the Respondent complete six hours of continuing medical education on the subject of medical record documentation.

31. On June 16, 2017, the Texas Medical Board imposed a remedial plan against the Respondent because he violated the standard of care in failing to examine or establish a proper physician/patient relationship with a patient to whom he diagnosed and prescribed Latisse. The remedial plan required that he complete eight hours of continuing medical education in record keeping and risk management. The Texas Medical Board considered the remedial plan to be non-disciplinary.

32. Latisse is a very safe medication with no contraindications. A very small percentage of Latisse users have experienced eye itchiness, irritation and discharge, and those symptoms cease immediately upon discontinued use.

33. No patient was ever harmed as a result of the Respondent prescribing Latisse in Maryland.

34. The Board has never previously disciplined the Respondent.

DISCUSSION

The Board is Maryland's "governmental agency responsible for investigating and disciplining physicians for professional misconduct." *Cornfeld v. Board of Physicians*, 174 Md. App. 456, 481 (2007). "The Board's mission [is] to regulate the use of physician's licenses in Maryland in order to protect and preserve the public health." *Id.* at 481 (internal quotations and

citations omitted). The purpose for the Board's disciplinary authority is to protect the public, not to punish physicians. *McDonnell v. Comm. on Med. Disc.*, 301 Md. 426, 436 (1984).

Applicable Law

The grounds for reprimand, probation, suspension or revocation of a medical license under the Act include the following:

> (a) *In general.* – Subject to the hearing provisions of § 14-405 of this subtitle, a disciplinary panel, on the affirmative vote of a majority of the quorum of the disciplinary panel, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:
>
> ...
>
> (3) Is guilty of:
>
> ...
>
> (ii) Unprofessional conduct in the practice of medicine;
>
> ...
>
> (28) Fails to comply with the provisions of § 12-102 of this article;[4]
>
> ...
>
> (36) Willfully makes a false representation when seeking or making application for licensure or any other application related to the practice of medicine.

Md. Code Ann., Health Occ. § 14-404(a)(3)(ii), (28) and (36) (Supp. 2018).

Regarding telemedicine, COMAR 10.32.05.05 requires the following:

> **.05 Patient Evaluation.**
>
> A. A physician shall perform a patient evaluation adequate to establish diagnoses and identify underlying conditions or contraindications to recommended treatment options before providing treatment or prescribing medication.
>
> B. A Maryland-licensed physician may rely on a patient evaluation performed by another Maryland-licensed physician if one physician is providing coverage for the other physician.
>
> C. If a physician-patient relationship does not include prior in-person, face-to-face interaction with a patient, the physician shall incorporate real-time auditory communications or real-time visual and auditory communications to allow a free

[4] Section 12-102 of the Maryland Pharmacy Act governs the preparing, administering and dispensing of prescription drugs.

exchange of information between the patient and the physician performing the patient evaluation.

COMAR 10.32.05.05.

Section 12-102 of the Health Occupations article of the Maryland Code (Maryland Pharmacy Act), provides:

(a)(1) In this section the following terms have the meanings indicated.

(2) "In the public interest" means the dispensing of drugs or devices by a licensed dentist, physician, or podiatrist to a patient when a pharmacy is not conveniently available to the patient.

(3) "Personally preparing and dispensing" means that the licensed dentist, physician, or podiatrist:

(i) Is physically present on the premises where the prescription is filled; and

(ii) Performs a final check of the prescription before it is provided to the patient.

In general

(b) This title does not limit the right of an individual to practice a health occupation that the individual is authorized to practice under this article.

Preparation, dispensing of prescriptions, generally

(c)(1) This subsection does not apply to a licensed dentist who obtains a permit from the State Board of Dental Examiners under subsection (h) of this section.

(2) This title does not prohibit:

...

(ii) A licensed dentist, physician, or podiatrist from personally preparing and dispensing the dentist's, physician's, or podiatrist's prescriptions when:

1. The dentist, physician, or podiatrist:

A. Has applied to the board of licensure in this State which licensed the dentist, physician, or podiatrist;

B. Has demonstrated to the satisfaction of that board that the dispensing of prescription drugs or devices by the dentist, physician, or podiatrist is in the public interest;

C. Has received a written permit from that board to dispense prescription drugs or devices except that a written permit is not required in order to dispense starter dosages or samples without charge; and

...

3. The dentist, physician, or podiatrist does not have a substantial financial interest in a pharmacy; and

4. The dentist, physician, or podiatrist:

...

F. Does not direct patients to a single pharmacist or pharmacy in accordance with § 12-403(c)(8) of this title;

...

K. Purchases prescription drugs from a pharmacy or wholesale distributor who holds a permit issued by the Board of Pharmacy, as verified by the Board of Pharmacy;

COMAR 10.09.49.02B(16), a regulation pertaining to the telehealth programs reimbursed by the Maryland Medicaid Program, defines "store and forward" prescription technology:

(16) Store and Forward Technology.

(a) "Store and forward technology" means the transmission of medical images or other media captured by the originating site provider and sent electronically to a distant site provider, who does not physically interact with the patient located at the originating site.

(b) "Store and forward technology" does not mean dermatology, ophthalmology, or radiology services according to COMAR 10.09.02.07.

Testimony of Witnesses

The State presented the testimony of Amanda K. Miller, Compliance Analyst, Board. She investigated this matter for the Board, after receiving the complaint from [redacted]. State Ex. #1.[5] She went through the online questionnaire that Mr. [redacted] completed on his mother's behalf.[6] Ms. Miller noted the Respondent does not have a license to dispense drugs in Maryland. Ms. Miller reviewed subpoenaed documentation the Respondent

[5] The Respondent objected to the admission of this complaint into evidence because Mr. [redacted] lived in West Virginia. I overruled the objection because the patient at issue, his mother, lived in Maryland.

[6] As noted above, Mr. [redacted]'s fiancée was the Chief Executive Officer of [redacted] a competitor of SkinSolutions.MD. Although not relevant to the merits of this case, the record contains evidence that on December 23, 2016, Allergan, the owner of the trademark for Latisse, filed a lawsuit against [redacted] for various allegations of fraud and breach of contract regarding the sale of Latisse. State Ex. #10. Mr. [redacted] ultimately withdrew his Complaint against the Respondent on August 7, 2017. However, the Board continued its investigation of the Respondent.

submitted to the Board regarding SkinSolutions.MD's Latisse customers the Board randomly selected.

Ms. Miller conducted a telephone interview of the Respondent on behalf of the Board on August 24, 2017. Mr. Miller worked as a team in this investigation with Andrea Doucet, another Compliance Analyst. State Ex. #17. Ms. Miller discussed the process of her investigation and her findings regarding the randomly selected Latisse patients, as set forth in the Findings of Fact in this decision. She testified that the Respondent was cooperative during the investigation and always provided information the Board requested. Ms. Miller testified that the Respondent was honest about his telemedicine activity, did not provide any false information and did not conceal any information.

Doreen Noppinger, Compliance Manager, Board, testified on behalf of the State. She is Ms. Miller's supervisor. After Ms. Miller interviewed the Respondent, Ms. Noppinger went onto the SkinSolutions.MD website to see changes to the website that the Respondent referred to during the telephone interview. State Ex. #17, pp. 146, 147. In order to see the changes, Ms. Noppinger was required to create an account and order Latisse. Ms. Noppinger printed screen shots of everything she observed on the website. State Ex. #18. She said that she was not provided an opportunity to fill the prescription at a local pharmacy. She completed the health questionnaire, which was the same as those completed by the customers analyzed as part of Ms. Miller's investigation. State Ex. #11(a), (b), (c), (e) and (f); State Ex. #18, p. 165. Ms. Noppinger was required to click on the informed consent in order to proceed and noted that it said that the prescriptions are fulfilled from [redacted] Pharmacy, doing business as [redacted] Pharmacy in states where [redacted] Pharmacy is licensed. State Ex. #18, p. 172. She was required to provide a photograph and a Maryland driver's license. State Ex. #18, p. 179. She had no personal communication with any doctor during the process. She did receive standard

emails thanking her for her order, and notification that her Latisse had been shipped. State Ex. #18, pp. 180-184.

Ms. Noppinger testified that she checked the acknowledgements indicating that she could contact the Respondent at any time by telephone or email, and that her prescription could not be submitted until she has fully complied with all requirements including the medical history and submission of a photograph and a government issued identification to verify her identify. State Ex. #18, pp. 180-184.

The Respondent was accepted as an expert witness in the safe dispensing of Latisse in a telemedicine platform after testifying about his experience. He explained the details of his teleradiology practice with NucleusHealth, a partnership he has with his wife in [redacted], and his development of SkinSolutions.MD. When he launched the SkinSolutions.MD website in 2013-2014, it started with non-prescription products, and then he began exploring the prescription of Latisse online, since he knew Latisse was in high demand from his experience with [redacted]. He already had medical licenses in all fifty states due to his teleradiology practice with NucleusHealth. Mr. Roth, General Counsel and Corporate Secretary of SkinSolutions.MD, together with outside counsel, researched the regulations in every state. The Respondent noted that there were dramatic differences from state to state. He explained that the concept of store and forward technology had been progressing nationwide; it is now acceptable in forty-two states. However, the states differ in their requirements; it was difficult to get straight-forward answers as to what was acceptable in each state. According to the Respondent, it was always his intent to proceed safely and properly in every state, and the research to ensure that occurred took months. In states where an in-person evaluation was required, he set up the SkinSolutions.MD website so that Latisse could not be ordered online.

The Respondent explained that Latisse has no contraindications. Allergan, the owner/manufacturer of Latisse, is attempting to have it accepted as an over-the-counter item. The only side effects have occurred in a small percentage of people, who have experienced itchiness, redness and discharge. In all of those cases, the symptoms went away after discontinued use. In order to prescribe Latisse properly and safely, the Respondent explained he needs to know whether the customer has an active eye infection or glaucoma. Even though Latisse has no effect on eye pressure, he will refer a glaucoma patient to his/her eye doctor if he/she answers the health questionnaire in the affirmative regarding glaucoma. When asked how an individual would know whether he/she has an active eye infection, the Respondent answered that there would be symptoms and the individual would know.

Regarding the ability to dispense Latisse in different states, the Respondent testified a representative from the Maryland Board of Pharmacy incorrectly told Mr. Roth, upon inquiry, that the Respondent did not need a permit to dispense pharmaceuticals in Maryland. Once he realized the error, he immediately stopped dispensing Latisse in Maryland. He said he easily could have sent a prescription to a Maryland resident, rather than the product itself had he known. According to the Respondent, eight states out of fifty do not allow telemedicine, or at the very least, require audio/visual evaluation or require a patient to go to a health care facility. Other states allow store and forward. The Respondent said he did not ship Latisse to those eight states he because of their regulations. The SkinSolutions.MD website is designed such that if the individual ordering Latisse resides in one of those states, the website will not put the order through. Additionally, if an individual says she is pregnant or breastfeeding, or has an eye infection, the website blocks the individual from going any further with the order. For the orders that go through, the Respondent will go into a system that allows him to pick a pharmacy, unless the customer lives in a state that allows physician dispensing. In those states, he sends the

Latisse from his office. According to the Respondent, his attorneys attempted to contact the Board about whether store and forward telemedicine was permitted, but there is no one at the Board that will answer those types of questions; they said they could not comment. He said when his attorneys researched whether store and forward was legal in Maryland, they found that the State reimburses for store and forward in ophthalmology, radiology and dermatology under the State Medicaid Program; therefore, they found the prescription of Latisse fell under ophthalmology and radiology, and presumed it was legal. Admittedly, this turned out to be in error. According to the Respondent, he and his attorneys made every attempt to comply. He thought, on the advice of counsel, that he could dispense Latisse in Maryland. The Respondent now knows that in order to sell Latisse in Maryland, he needs to complete a live audio/visual evaluation of the customer and ship prescriptions rather than the product itself.

The Respondent explained further that he reviews the health questionnaire for every order for Latisse, and in most cases that review takes less than one minute. He opined that the review of the medical questionnaire on the WebSolutions.MD website is a legitimate review and is all that is required for the safe prescription of Latisse. Given that there are no serious contraindications in the use of Latisse, the questionnaire asks all questions to necessary approve or disapprove an order.

The Respondent's assistant, K[redacted] C[redacted], completed his September 11, 2017 renewal application. She works for NucleusHealth. Ms. C[redacted] lives on the East Coast and had been on maternity leave when the Respondent received the remedial plan from the Texas Medical Board. The Respondent insisted that the errors on his renewal application resulted from miscommunication; Ms. C[redacted] was unaware of the encounter with the Texas Medical Board when she returned from maternity leave and he had not updated his internal credentialing systems to reflect the information. The Respondent took responsibility for the failure to

communicate with Ms. C[redacted] and said his application renewal process has changed. He also said that, at the time, Ms. C[redacted] did not fully understand SkinSolutions.MD. The Respondent conceded that Ms. C[redacted] was authorized to submit the renewal application on his behalf; he did not review it or submit it himself. The Respondent said that if Ms. C[redacted] had told him the application required personal review, he certainly would have done so; however, he never intended to misrepresent or conceal anything including his telemedicine practice or the situation in Texas. According to the Respondent, he now ensures that each application is reviewed three times, once by the person completing the application, once by himself, and once by Mr. Roth.

Steven Yoelin, M.D., testified on behalf of the Respondent and was accepted as an expert in Lattise, and the sale and prescribing of Lattise. Dr. Yoelin is board certified in ophthalmology. After practicing for several years, Dr. Yoelin began doing laser eye treatments, facial injectables and aesthetics, and has been involved in those areas since 2001. Dr. Yoelin conducted research for Allergan, who owned the molecule Bimatoprost, the active ingredient in its glaucoma treatment called Lumigan, now also sold for aesthetic purposes as Latisse. That research revealed that this glaucoma treatment had the side effect of creating longer, thicker eyelashes. Hypotrichosis, he explained, is the thinning of eyelashes that occurs as people age. Dr. Yoelin's research studied individuals using Bimatoprost as an aesthetic treatment, and resulted in all participants growing longer and thicker eyelashes with no adverse events. The studies showed it to be safe and effective for enhancing eyelashes, and it was ultimately approved by the FDA to be used for that purpose. Allergan subsequently launched Latisse for the aesthetic use of Bimatoprost. According to Dr. Yoelin, Latisse has never caused a serious complication. Only very rarely, some redness or irritation has occurred, which completely

disappeared with discontinued use. In Dr. Yoelin's opinion, the SkinSolutions.MD questionnaire gathers sufficient medical history for the safe prescribing of Latisse.

Vincent Roth, General Counsel and Corporate Secretary for SkinSolutions.MD and NucleusHealth, also testified on behalf of the Respondent. He works with physician licensing and credentialing for both entities. He utilizes many different sources including outside law firms to ensure compliance with every state's laws regarding telemedicine.

Mr. Roth said that he made every effort to understand the laws in Maryland. He referred to the letter he wrote in response to Mr. [redacted]'s complaint to Ms. Sammons, the Board's Intake Manager.[7] In that letter, Mr. Roth said that Maryland allows for telemedicine in lieu of an in-person examination and face-to-face patient physician relationship. State Ex. #3. This was Mr. Roth's understanding at the time. He looked deeper into Maryland law and realized there was a "real-time" patient evaluation requirement. However, he also found the Medicaid regulations he thought created an exception to that requirement, allowing for store and forward in ophthalmology, dermatology and radiology services. Mr. Roth spoke to an ophthalmologist and a dermatologist who considered the eyelid to fall within the areas of ophthalmology and dermatology. After discussion with outside attorneys, they concluded the prescription of Latisse fell squarely into that exception. *See* COMAR 10.09.49.02B(16) and .10C. Mr. Roth took responsibility for this erroneous interpretation and conceded that the Respondent did not participate in the Maryland Medicaid program. Mr. Roth apologized for the misinterpretation and insisted it was not the fault of the Respondent. Mr. Roth was aware that regulations have been proposed that would allow store and forward, but did not believe those regulations have yet been adopted. Resp. Ex. #19.

[7] The letter appears with the Respondent's signature; however, Mr. Roth said he wrote it.

Mr. Roth discussed his communication with the Maryland Board of Pharmacy representative in March 2017. He had come across a one page application for a Maryland physician dispensing permit; however, there was only space on the form to list a Maryland office, which the Respondent did not have. The woman from the Board of Pharmacy told Mr. Roth not to worry about it, and she would let him know if something was needed in that regard. He had several conversations with this woman, but she never mentioned that the Respondent needed a physician dispensing permit.

Ms. C[redacted] testified that she assists radiologists in their initial and renewal license applications in her employment with NucleusHealth. To do so, she reviews the most recent re-credentialing application and other information in the NucleusHealth database to see if any information needed to be updated or changed. When she returned to NucleusHealth after maternity leave in June 2017, she was not aware of the action by the Texas Medical Board. She did not intend to falsify any answers; she was simply unaware. As it turned out, the NucleusHealth database had not been updated. Ms. C[redacted] also testified that when she completed the Respondent's September 2017 renewal application, she was not aware of SkinSolutions.MD's activity in Maryland. NucleusHealth had not been practicing radiology in Maryland because it lost its hospital contract with MedStar Health. She was unaware that the Respondent conducted telemedicine in Maryland. Ms. C[redacted] did not notice the part of the application where the Respondent was required to certify he personally reviewed all responses and that the responses were true and correct to the best of his knowledge. State Ex. #19, p. 196. Had she noticed, she would have had the Respondent review the application before she submitted it. Ms. C[redacted] noted that now, both the Respondent and Mr. Roth review the applications before submission. Ms. C[redacted] insisted that no one instructed her to answer any questions falsely and she did not intend to do so. Ms. C[redacted] conceded that at the time she

completed the Respondent's September 2017 application, the last internal system update had occurred in March 2017. She did not think to ask the Respondent if there had been any updates in the interim. She assumed he would have informed her if there had been.

Argument of the Parties

The State argued that Mr. Roth's interpretation that the Medicaid regulations provided justification for the Respondent's store and forward practice in Maryland was logically absurd and should be rejected in its entirety. The State cited *State v. Price*, 820 A.2d. 956 (2003), a Rhode Island case which held that reliance upon the advice of counsel was not a defense to a criminal contempt charge. The State also cited *[Board]* v. *Eist*, 417 Md. 545, 558, fn. 9 (2011), which cited cases that held generally reliance upon counsel was no justification for failure to comply with a judicial order. *See, Giant of Md. v. State's Attorney*, 274 Md. 158, 179 (1975); *Weaver v. State*, 244 Md. 640, 644 (1966). The State insisted the Respondent cannot abdicate his duty to comply with applicable regulations because of the advice of counsel, nor can he blame staff for filing an application with false information. It was the State's position that he was required to personally review the information contained in the application and certify to its truthfulness. He failed to do so, and failed to update his systems so that Ms. C[redacted] would have the most recent information.

The State maintained that the Board relies upon the integrity of its doctors. It receives voluminous renewal applications per year and must be able to trust the information contained therein; the Board simply does not have the resources to verify the accuracy and truthfulness of each. The State cited *Attorney Grievance Commission v. Glenn*, 341 Md. 448, 478, which stated that an attorney cannot escape responsibility to his clients by blaming shortcomings on his staff. The State argued it is irrelevant that Ms. C[redacted] may have been well intended. Based upon the holding in *Kim v. [Board)*, 423 MD 523, 546 (2011), the State maintained it is not required to

prove intent. The term "willful" as utilized in the Act, requires only evidence that the conduct occurred intentionally; there is no requirement to establish fraudulent intent or malice. The State emphasized the Respondent delegated the completion of his renewal application to his staff; he did not personally review it for accuracy or sign it. Therefore, his conduct was willful. The State also requested that I not place too much emphasis upon the Respondent's assertion that he was always cooperative with the Board; such cooperation is expected and he deserves no extra consideration for doing so. Similarly, the State also asked that I not place much weight upon the proposed regulation that would have rendered the Respondent's store and forward prescription process to be legal. It cited *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 845 (1986), which states that a proposed regulation does not constitute an agency's interpretation of his own regulations.[8] The State maintained it met its burden of establishing all of its charges, and requested that the Respondent be reprimanded, prohibited from dispensing pharmaceuticals through the mail in Maryland, and placed on probation for six months. During that period of probation, the State requested that the Respondent be required to pay a fine of $50,000.00, payable by certified check or money order. The State also requested that the Respondent not be permitted to apply for early termination of probation, and that he be required to respond to future applications truthfully.

The Respondent acknowledged that the facts are not in dispute. He argued that he undertook to comply with the regulations by consulting many resources; however, compliance with all states' regulations is a mammoth undertaking. Some allow store and forward, some require real time evaluations, some do not allow participation in telehealth at all. It was the

[8] In the November 18, 2018 Maryland Register, the Secretary of Health proposed to repeal the existing regulations, set forth in COMAR 10.32.05, regarding telehealth, and proposed new regulations. Resp. Ex. #19. If adopted, the new regulations would change the requirement for a real-time or audio or visual evaluation and allow other options including remote medical examinations. The proposed regulations would still prohibit the prescription of medicine solely based upon an online questionnaire. Resp. Ex. #19.

Respondent's position that he set up the SkinSolutions.MD website so that a customer could not place an order if he lived in a state where such telemedicine or store and forward was illegal. He maintained he made good faith attempts to comply with all laws. The Respondent noted that the law in Maryland is confusing; the Act itself does not even address telemedicine. Telemedicine is only mentioned in the regulations. The Respondent reasoned that he complied with all applicable regulations with the exception of the requirement for a real-time communication evaluation if no prior physician/patient relationship had yet been established. He had a Maryland license, his website set forth all information regarding licensure, privacy policies and fees, he had a procedure for verifying identification, and complied with all of the other requirements set forth in COMAR 10.32.05.04 regarding standards for telemedicine. He was always available for questions, and his online patient evaluation was sufficient given the fact that Latisse is so safe.

The Respondent insisted that he must be able to reasonably rely upon the advice of counsel. Telemedicine is an evolving area and the attorneys are constantly analyzing the regulations in all fifty states. The Respondent countered the State's argument regarding reliance upon the Medicaid regulations; insisting that if Maryland reimbursed for store and forward for the purpose of Medicaid in dermatology, ophthalmology and radiology, it was not unreasonable to conclude that store and forward would be permissible. Several attorneys, including Mr. Roth and outside law firms, concluded, based on the Medicaid regulation, that the Respondent was acting within an exception to the prohibition of store and forward. Regarding the proposed regulations, the Respondent agreed that this case cannot be judged upon a proposed regulation, but the proposed new regulations constitute one more indication that Maryland recognizes that store and forward constitutes safe technology.

The Respondent strongly disagreed that violation of telemedicine regulations constituted unprofessional conduct in the practice of medicine, especially given that there is no good

definition of telemedicine in the statute. He referred to the Board's sanctioning guidelines in COMAR 10.32.02.10B(3), which sets forth sanctioning guidelines for immoral or unprofessional conduct consisting of sexual and ethical violations and failure to complete the required continuing medical education. The Respondent disputed that this case involves anything in that category, and maintained that this was more akin to a standard of care case. He repeatedly noted that he made a good faith undertaking to comply with the regulations, and only violated one of many requirements regarding telemedicine. He also noted that no Board regulations regarding the need for a physician dispensing permit existed until March 2018, there is nothing in the Act about the need for a dispensing permit, and Title 12 of the Health Occupations Article is confusing about dispensing permits.

The Respondent's position is that he must utilize staff for his licensing and credentialing processes; the undertaking is just too big for him to do himself. Although not an excuse for the errors, the Respondent emphasized that the mistakes were not intentional. He contended there would be no reason to hide the Texas Medical Board's requirement that he participate in additional continuing medical education; the action was not considered to be disciplinary. According to the Respondent, the misrepresentations were accidental, not intentional or willful. The Respondent asked that I place weight upon the credibility, integrity and honesty of the witnesses who testified on his behalf. He asked that I dismiss the charge under section 14-404(a)(3)(ii) regarding unprofessional conduct, and section 14-404(a)(36) regarding willful misrepresentation, because there is no evidence of either. He asked that a non-punitive sanction be imposed, without permanent probation or the maximum $50,000.00 fine. He also asked that I consider the mitigating factors under COMAR 10.32.02.09B(5), noting that almost all of the mitigating factors are present, and almost none of the aggravating factors are present.

Applications of the Law to the Facts

14-404(a)(3)(ii): Unprofessional Conduct in the Practice of Medicine

The facts of this case were undisputed. I found all of the witnesses to be credible. The State established through the Respondent's records of six patients, that between 2014 and 2016, the Respondent prescribed Latisse to those patients in Maryland. The Respondent did not have a physician's permit to dispense as required by section 12-102(c)(2)(ii)(1)(C). When prescribing Latisse, the Respondent did not conduct a real-time auditory or auditory and visual evaluation with Latisse customers even though he had no prior face-to-face interaction, as COMAR 10.32.05.05C requires.

SkinSolutions.MD, of which the Respondent is Chief Executive Officer, has taken on a huge undertaking in its endeavor to prescribe Latisse nationwide. Although an inherently safe drug with little contraindications, it is still only available by prescription, and therefore, prescription of Latisse must comply with each state's regulations regarding drug prescription. Mr. Roth, in conjunction with outside counsel, erroneously determined the Respondent could dispense Latisse by mail without a real-time consultation or audio/visual communication because of the stated exceptions to store and forward for dermatology, radiology and ophthalmology services defined within COMAR 10.09.42.02B(16)(b). I took into account that the Respondent proceeded in good faith upon the advice of counsel.

I also considered Mr. Roth's testimony that the Board of Pharmacy gave him no indication, after his inquiry, that the Respondent needed a physician's permit to dispense medicine in Maryland. Mr. Roth somehow came upon the one page form application that asked

the applicant to list only a Maryland address.[9] He had several telephone conversations with a representative from the Maryland Board of Pharmacy, and inquired whether he needed to file that form even though the Respondent did not have a Maryland address. According to Mr. Roth, she told him not to worry about it, and she would let him know if there was anything needed in that regard. Mr. Roth heard nothing further about the issue. The Maryland Board of Pharmacy closed the matter[10] and referred the case to the Board. State Ex. #13. Thereafter, Mr. Roth thought the Respondent was in compliance with any dispensing permit requirement in Maryland.

I agree with the State that reliance upon the advice of counsel cannot be a justification for a physician to violate applicable law. The term "unprofessional" as used in section 14-404(a)(3)(ii) is undefined in the applicable statutes and regulations. COMAR 10.32.02.10B(3), the sanctioning guidelines for physicians, sets forth sanctions for immoral or unprofessional conduct in the practice of medicine consisting of sexual violations, ethical violations, and misrepresentation of continuing medical education credits. The Respondent's conduct did not fall within any of these categories, and there is no other mention of unprofessional conduct in the sanctioning guidelines. The evidence established that the Respondent, through counsel, made efforts to interpret Maryland's regulations. He did so erroneously. He proceeded to prescribe Latisse in conjunction with that erroneous interpretation in violation of the applicable statute and regulations. However, he did not commit any act in the practice of medicine that displayed a

[9]The State presented an Application For Physician's Permit to Dispense Prescription Drugs, with an email from Dierdra Rufus from the Board, indicating that this was the application that existed during the time Mr. Roth indicated he discovered the one-page application form that asked for only a Maryland address. State Ex. #28. Over the objection of the Respondent for lack of authentication, I admitted the exhibit and indicated I would consider her objection in my determination regarding the weight to be placed on this exhibit. That form has a blank space for any address; it does not request only a Maryland address. State Ex. #28. However, I agree with the Respondent that it was not properly authenticated, and the email is confusing regarding the difference between the old and new application and the old and new regulations. I did not place any weight upon this exhibit. I found Mr. Roth's testimony to be credible regarding the form he saw and his conversations with the representative of the Maryland Board of Pharmacy.

[10] Mr. [redacted] filed a complaint against the Respondent with the Maryland Board of Pharmacy as well.

lack of professionalism. He did not act in a manner that was considered to be unethical. In his attempts to comply with state regulations, he configured his website to block orders of Latisse in states that physician dispensing is not permitted. He complied with all but one of Maryland's telemedicine requirements, which is the requirement for a real-time audio or visual evaluation. "Unprofessional conduct in the practice of medicine" inherently involves an affirmative action on the part of a physician that displays unprofessionalism while practicing medicine. I cannot conclude that the Respondent's failure to comply with section 12-102 of the Health Occupations article and COMAR 10.32.03.05C rose to the level of unprofessional conduct in the practice of medicine, under section 14-404(a)(3)(ii) of the Act.

However, the evidence revealed that on September 11, 2017, Ms. C[redacted] submitted a renewal application to the Board on behalf of the Respondent. She answered "no" to the questions that asked if any licensing authority or disciplinary board had taken action, including required education, against a medical license, and "no" to the question that asked if any complaints or charges had been filed against the Respondent or if any licensing board investigated him. State Ex. #19, p. 188. She answered "no" to the question that asked if the Respondent used telemedicine for any purpose in the last twelve months. State Ex. #19, p. 193A. She checked the section that certified the Respondent personally reviewed all responses in the application and all information contained therein was true and correct to the best of his knowledge. State Ex. #19, p. 196. However, on June 17, 2017, the Texas Medical Board imposed a remedial plan upon the Respondent, which required him to complete eight hours of continuing medical education in prescribed subject areas including medical record keeping and risk management. State Ex. #24. The Texas Medical Board considered this remedial plan to be non-disciplinary. On February 2, 2017, following a complaint also filed by Mr. [redacted], the North Carolina Medical Board required the Respondent to complete six hours of continuing

medical education on the subject of medical record documentation. Additionally, the Respondent had been practicing telemedicine through SkinSolutions.MD and NucleusHealth.

Ms. C[redacted] was working for the Respondent remotely from Florida when she came back from maternity leave in June 2017 and completed the Respondent's renewal application for Maryland in September 2011. In order to so, she utilized the Respondent's most recent recredentialing application and his internal database used for licensing and credentialing. Because she had been out on maternity leave, she was unaware that the Texas Medical Board had investigated the Respondent and imposed a remedial plan that required continuing medical education on June 16, 2017. She was also unaware that North Carolina had imposed a requirement of continuing medical education on February 2, 2017. Additionally, she was unaware of the sale of Latisse in Maryland by SkinSolutions.MD. She checked the certification in the application that required the Respondent to personally review and certify to the truth of the information contained therein. I found the testimony of the Respondent, Mr. Roth and Ms. C[redacted] to be credible that the Respondent and Mr. Roth now review all applications before they are submitted.

The *Kim* case clarifies that such false statements constitute unprofessional conduct in the practice of medicine. The holding states, in pertinent part:

> In the present case, the Board made no legal error in concluding that Petitioner's submission of his license renewal application occurred "in the practice of medicine." We made plain in *Banks* that, in "considering whether a physician's conduct was within the statutory requirement of 'in the practice of medicine,' a critical factor has been whether the conduct occurred while the physician was performing a task integral to his or her medical practice." Petitioner's completion and filing of his application to renew his physician's license is unquestionably "a task integral to his ... practice." Without a license, Petitioner would have no authority to practice.
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> Moreover, the Board did not err in adopting the ALJ's finding that filing a license renewal application is sufficiently intertwined with patient care. We appreciate that the Board must be able to rely on the accuracy of information conveyed in license applications in order to investigate and determine physicians' fitness to

> practice medicine. A physician's submission of false information regarding malpractice claims in license renewal applications impedes the Board's ability to make accurate determinations about a physician's continued fitness. Although, at best, false information might merely delay investigation, at worst, false information could form the basis upon which the Board renews or grants a license, potentially to an unfit applicant. The Board is entitled to expect truthful submissions, particularly with respect to information concerning suits for malpractice, given that such suits directly raise questions regarding a physician's fitness to practice. (Internal citations omitted).

Kim, 423 Md. at 542.

The Respondent, through sloppiness and disorganization, caused the submission of false application responses to the Board. I found the State's argument and the holding in *Kim* to be compelling that the Board needs to be able to trust the veracity and accuracy of its licensees in their renewal applications. Clearly, the Respondent is spread too thin and has taken on more than his staff of attorneys and licensing specialists can handle. He is licensed in all fifty states, he operates a teleradiology practice reading radiological imaging day and night, and he is involved in SkinSolutions.MD which involves the prescription of Latisse in fifty states with different laws that govern telemedicine and physician medication dispensing. He used Ms. C[redacted], who lived across the country and was just back from maternity leave, to file his renewal application in Maryland. He had not updated his system; she was unaware of the Texas Medical Board's investigation and ultimate remedial plan, and North Carolina's requirement for continuing education. She was not aware that SkinSolutions.MD dispensed Latisse in Maryland. The Respondent delegated the duty of filing his application without his review to Ms. C[redacted], which required a certification to his personal review and to the truthfulness of the responses.

Based on this analysis, and the holding in *Kim,* I conclude that the Respondent's conduct regarding the filing of his September 11, 2017 renewal application, constituted unprofessional conduct in the practice of medicine, in violation of Section 14-404(a)(3)(ii) of the Act.

14-404(a)(28): Failure to Comply with the Provisions of Section 12-102 of the Health Occupations Article

For the reasons already stated, I conclude that the Respondent failed to comply with Section 12-102(c)(2)(ii)(1)(C) of the Health Occupations article. Despite reliance upon a non-answer from the Maryland Board of Pharmacy, the Respondent dispensed medication in Maryland without the proper permit, in violation of Section 12-102 of the Health Occupations Article. This constituted a violation of Section 14-404(a)(28) of the Act.

14-404(a)(36): Willfully Making a False Representation When Seeking or Making Application for Licensure or any other application related to the practice of medicine

In *Kim*, 423 Md. 523 (2011), the Court of Appeals considered whether a physician's false statement regarding a pending malpractice action on a renewal application was willful, when the physician claimed he did so because he did not understand English well. Citing a thorough discussion about the statutory construction of the term "willful" in *Deibler v. State*, 365 Md. 185 (2001), the Court of Appeals in *Kim* stated:

> "[W]illful" has received four different constructions from the courts. The first, and most restrictive, is that an act is willful only if it is done with a bad purpose or evil motive—deliberately to violate the law. A second interpretation considers an act to be willful "if it is done with an intent to commit the act and with a knowledge that the act is in violation of the law." That construction does not require that the defendant possess a sinister motivation, but, like the first interpretation, it does require knowledge that the act is unlawful. The third interpretation "requires only that the act be committed voluntarily and intentionally as opposed to one that is committed through inadvertence, accident, or ordinary negligence." Under that approach, "[a]s long as there is an intent to commit the act, there can be a finding of willfulness even though the actor was consciously attempting to comply with the law and was acting with the good faith belief that the action was lawful." What is required is "an objective intent to commit the act but not necessarily a knowledge that the act will bring about the illegal result." Finally ... some courts have gone so far as to find an act willful even though it was not committed intentionally, but through oversight, inadvertence, or negligence. We concluded that most applications of "willful," if not all, fell within the third definition: a willful act is committed voluntarily and intentionally, not necessarily with the intent to deceive. (Internal citations omitted).

In *Kim*, the Court of Appeals went on to note that it has rejected that the term "willful" required deceitful or fraudulent intent in attorney grievance cases, and in other civil litigation and administrative contexts. 423 Md. at 545. I conclude that the term "willful," as used in Section 14-404(a)(36) of the Act regarding willful, fraudulent statements on an application, requires a finding that the act was voluntary and intentional, but not fraudulent or deceitful.

The Respondent utilized Ms. C [redacted] to complete his September 17, 2011 renewal application. She had been out on maternity leave until June 2017. She obtained the requested information from the NucleusHealth database that had not been updated. As a result of the outdated information, she responded to questions on the renewal application falsely, and checked the certification that the Respondent personally reviewed all responses and certified to their truth and accuracy. Further, she was unaware of the telemedicine activity that SkinSolutions.MD conducted. I blame this on the Respondent. I found the Respondent's lack of diligence and the resulting false application responses to be willful, as the Court of Appeals has defined the term, and a violation of Section 14-404(a)(36) of the Act.

Sanctions

The State requested that I propose that the Respondent receive a reprimand, be prohibited from filling prescriptions by mail in Maryland, be placed on probation for six months without the possibility of early termination of probation, and impose the maximum $50,000.00 fine. Md. Code Ann., Health Occ. §§ 14-404(a) (Supp. 2018); 14-405.1(a) (2014); COMAR 10.32.02.09A and B; COMAR 10.32.02.10. I have concluded that the State has established a violation of Section 14-404(a)(3)(ii), unprofessional conduct in the practice of medicine. I have concluded that the State has established violations of Sections 14-404(a)(28) and (36). The violation of section 14-404(a)(3)(ii) and (36) are the more serious of the three proven violations, carrying the

potential for a maximum $50,000.00 fine and revocation of his license to practice medicine in Maryland.

COMAR 10.32.02.09B sets forth that aggravating and mitigating factors can be considered in determining a sanction upon a physician. It states, in pertinent part;

> B. Aggravating and Mitigating Factors.
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> (1) Depending on the facts and circumstances of each case, and to the extent that the facts and circumstances apply, the disciplinary panel may consider the aggravating and mitigating factors set out in §B(5) and (6) of this regulation and may in its discretion determine, based on those factors, that an exception should be made and that the sanction in a particular case should fall outside the range of sanctions listed in the sanctioning guidelines.
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> (2) Nothing in this regulation requires the disciplinary panel or an administrative law judge to make findings of fact with respect to any of these factors.
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> (3) A departure from the sanctioning guidelines set forth in Regulation .10 of this chapter is not a ground for any hearing or appeal of a disciplinary panel action.
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> (4) The existence of one or more of these factors does not impose on the disciplinary panel or an administrative law judge any requirement to articulate its reasoning for not exercising its discretion to impose a sanction outside of the range of sanctions set out in the sanctioning guidelines.
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> (5) Mitigating factors may include, but are not limited to, the following:
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> (a) The absence of a prior disciplinary record;
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> (b) The offender self-reported the incident;
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> (c) The offender voluntarily admitted the misconduct, made full disclosure to the disciplinary panel and was cooperative during the disciplinary panel proceedings;
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> (d) The offender implemented remedial measures to correct or mitigate the harm arising from the misconduct;
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> (e) The offender made good faith efforts to make restitution or to rectify the consequences of the misconduct;
>
> (f) The offender has been rehabilitated or exhibits rehabilitative potential;
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> (g) The misconduct was not premeditated;

(h) There was no potential harm to patients or the public or other adverse impact; or

(i) The incident was isolated and is not likely to recur.

(6) Aggravating factors may include, but are not limited to, the following:

(a) The offender has a previous criminal or administrative disciplinary history;

(b) The offense was committed deliberately or with gross negligence or recklessness;

(c) The offense had the potential for or actually did cause patient harm;

(d) The offense was part of a pattern of detrimental conduct;

(e) The offender committed a combination of factually discrete offenses adjudicated in a single action;

(f) The offender pursued his or her financial gain over the patient's welfare;

(g) The patient was especially vulnerable;

(h) The offender attempted to hide the error or misconduct from patients or others;

(i) The offender concealed, falsified or destroyed evidence, or presented false testimony or evidence;

(j) The offender did not cooperate with the investigation; or

(k) Previous attempts to rehabilitate the offender were unsuccessful.

In this case, a brief discussion of both the mitigating and aggravating factors is helpful. Latisse is a very safe drug with no contraindications. The Respondent's actions did not cause harm to anyone. In fact, the complaint that triggered the Board's investigation came from a competitor to SkinSolutions.MD, in an effort to harm its reputation. The Respondent has been candid throughout the investigation regarding his errors in interpretation of applicable law, and regarding his carelessness in delegating the renewal application process to Ms. C[redacted] without oversight or review. The Board has never previously disciplined the Respondent and he has only received non-disciplinary action other states. The Respondent stopped prescribing and dispensing Latisse in Maryland once informed he was acting in violation of Maryland's

regulations. The Respondent and Mr. Roth now review every application before submission. This testimony was credible and unrefuted. His violations were not premeditated, but they were the result of negligence and in the pursuit of financial gain.

I have considered the cases set forth above and the Court of Appeals' analysis in *Attorney Grievance Comm'n of Md. v. Harris*, 371 Md. 510 (2002), which, while addressing attorney misconduct, provides helpful guidance on the purpose of professional disciplinary processes. As the *Harris* Court noted, the "purpose of disciplinary proceedings is to protect the public, not to punish" the erring licensed professional. *Id.* at 553 (citations omitted). The severity of the sanction depends on the nature and extent of the licensed professional's misconduct in a given case. *Id.*

Considering all of the evidence in this case and the aggravating and mitigating factors that I am permitted to consider, I conclude that the appropriate sanction in this case is a reprimand and a six month probationary period, during which time the Respondent should be required to complete continuing medical education related to Maryland law in telemedicine and physician dispensing as well as record-keeping, for the amount of hours the Board deems appropriate. I further propose that the Respondent shall strictly comply with statutes and regulations regarding telemedicine and prescription of medication in Maryland. Although the Respondent has clearly received significant financial gain from the prescription of Latisse in Maryland in a manner that was violative of Maryland laws, I have considered the mitigating factors and place weight upon the fact that his actions were not deliberate and attempts were made to comply with the regulations regarding telemedicine and physician dispensing. Although no justification, the Respondent relied and acted upon the advice of Mr. Roth; I find that to be a mitigating factor. Regarding the false information on the renewal application, the Respondent's carelessness led to the Board's distrust of the Respondent, and leaves a shadow upon the application and renewal process. This is the primary reason I conclude that a disciplinary

sanction is appropriate. Although the Respondent received financial gain from the prescription of Latisse in Maryland, a fine would serve only as punishment of the Respondent. The goal in a case such as this is to remedy, educate and provide assurance to the public that physicians licensed by the Board comply with all applicable laws and standards. Due to the existence of multiple mitigating factors, the lack of harm, and due to the fact that the Respondent's violations were the result of carelessness and disorganization only, I conclude that the imposition of a fine would not be appropriate.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Sections 14-404(a)(3)(ii), (28) and (36) of the Medical Practice Act. As a result, I conclude that the Respondent should be subject to a reprimand and probation period of six months, during which time he shall be required to attend continuing medical education in Maryland law regarding telemedicine, prescription of medication and record keeping as the Board deems appropriate, COMAR 10.32.02.09A(3)(a)(ii).

I further conclude that the Respondent should not be subject to a fine for the cited violations. Md. Code Ann., Health Occ. § 14-405.1(a) (2014); COMAR 10.32.02.09(3)(d).

PROPOSED DISPOSITION

I **PROPOSE** that the charges filed by the Maryland State Board of Physicians against the Respondent for violations of Sections 14-404(a)(3)(ii), (28) and (36) of the Act be **UPHELD**; and

I PROPOSE that the Respondent be sanctioned by reprimand and a probationary period of six months, during which time he shall attend continuing medical education in accordance with this decision.

May 23, 2019
Date Decision Issued

Susan A. Sinrod
Administrative Law Judge

SAS/cj
#179644

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this proposed decision may file written exceptions with the disciplinary panel of the Maryland State Board of Physicians that delegated the captioned case to the OAH, and request a hearing on the exceptions. Md. Code Ann., State Gov't § 10-216(a) (2014); COMAR 10.32.02.05. Exceptions must be filed within fifteen (15) days of the date of issuance of this proposed order. COMAR 10.32.02.05B(1). The exceptions and request for hearing must be addressed to the Disciplinary Panel of the Board of Physicians, 4201 Patterson Avenue, Baltimore, MD, 21215-2299, Attn: Christine A. Farrelly, Executive Director.

A copy of the exceptions should be mailed to the opposing attorney, and the other party will have fifteen (15) days from the filing of exceptions to file a written response addressed as above. *Id.* The disciplinary panel will issue a final order following the exceptions hearing or other formal panel proceedings. Md. Code Ann., State Gov't §§ 10-216, 10-221 (2014); COMAR 10.32.02.05C. The OAH is not a party to any review process.