OFFICE OF THE GENERAL COUNSEL
Nevada State Board of Medical Examiners
9600 Gateway Drive
Reno, Nevada 89521
(775) 688-2559

BEFORE THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEVADA

* * * * *

In the Matter of Charges and Complaint Against: **DAVID JAMES SMITH, M.D., Respondent.**	**Case No. 25-47823-1**

FILED
JUN 24 2025
NEVADA STATE BOARD OF MEDICAL EXAMINERS
By:

COMPLAINT

The Investigative Committee[1] (IC) of the Nevada State Board of Medical Examiners (Board), by and through Donald K. White, Senior Deputy General Counsel and attorney for the IC, having a reasonable basis to believe that David James Smith, M.D. (Respondent) violated the provisions of Nevada Revised Statutes (NRS) Chapter 630 and Nevada Administrative Code (NAC) Chapter 630 (collectively, the Medical Practice Act), hereby issues its Complaint, stating the IC's charges and allegations as follows:

1. Respondent was at all times relative to this Complaint a medical doctor holding an active-probation license to practice medicine in the State of Nevada (License No. 17853). Respondent was originally licensed by the Board on April 16, 2018.

2. Respondent was also licensed by the California Medical Board (California Board) (Certificate No. F66777). This license was issued on August 21, 1989, and expired January 31, 2025.

3. Between 2018 and 2022, several legal matters were addressed through the California Board and the State Courts of California through an appeals process.

4. The California Board sought to revoke Respondent's probation through a duly noticed hearing and was submitted for decision on June 14, 2024.

[1] The Investigative Committee of the Nevada State Board of Medical Examiners, at the time this formal Complaint was authorized for filing, was composed of Board members Bret W. Frey, M.D., Carl N. Williams, Jr., M.D., and Col. Eric D. Wade (USAF) Ret.

5. The California Board ultimately determined in its Decision in case no. 800-2021-081615 that a complete revocation of Respondent's probation and California physician's license was appropriate. *See* **Exhibit 1**.

6. Respondent's license to practice medicine in California was revoked on July 25, 2024.

COUNT I

NRS 630.301(3) – Disciplinary Action by Another State Medical Board

7. All of the allegations contained in the above paragraphs are hereby incorporated by reference as though fully set forth herein.

8. NRS 630.301(3) provides that any disciplinary action, including, without limitation, the revocation, suspension, modification or limitation of a license to practice any type of medicine, taken by another state, among other parties, is grounds for initiating disciplinary action against a licensee.

9. Pursuant to a Decision dated July 25, 2024, in case no. 800-2021-081615, the California Board found that "the probation granted to respondent David James Smith in Case No. 800-2018-042234, is revoked. The stay of the disciplinary order is lifted. Respondent's Physician's and Surgeon's Certificate No. G 66777 is revoked."

10. By reason of the foregoing, Respondent is subject to discipline by the Board as provided in NRS 630.352.

WHEREFORE, the Investigative Committee prays:

1. That the Board give Respondent notice of the charges herein against him and give him notice that he may file an answer to the Complaint herein as set forth in NRS 630.339(2) within twenty (20) days of service of the Complaint;

2. That the Board set a time and place for a formal hearing after holding an Early Case Conference pursuant to NRS 630.339(3);

3. That the Board determine what sanctions to impose if it determines there has been a violation or violations of the Medical Practice Act committed by Respondent;

4. That the Board award fees and costs for the investigation and prosecution of this case as outlined in NRS 622.400;

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5. That the Board make, issue and serve on Respondent its findings of fact, conclusions of law and order, in writing, that includes the sanctions imposed; and

6. That the Board take such other and further action as may be just and proper in these premises.

DATED this 24th day of June, 2025.

INVESTIGATIVE COMMITTEE OF THE
NEVADA STATE BOARD OF MEDICAL EXAMINERS

By: _____

DONALD K. WHITE
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VERIFICATION

STATE OF NEVADA)
: ss.
COUNTY OF WASHOE)

Bret W. Frey, M.D., having been duly sworn, hereby deposes and states under penalty of perjury that he is the Chairman of the Investigative Committee of the Nevada State Board of Medical Examiners that authorized the Complaint against the Respondent herein; that he has read the foregoing Complaint; and that based upon information discovered in the course of the investigation into a complaint against Respondent, he believes that the allegations and charges in the foregoing Complaint against Respondent are true, accurate and correct.

DATED this 24th day of June, 2025.

INVESTIGATIVE COMMITTEE OF THE
NEVADA STATE BOARD OF MEDICAL EXAMINERS

By: _____
BRET W. FREY, M.D.
Chairman of the Investigative Committee

OFFICE OF THE GENERAL COUNSEL
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9600 Gateway Drive
Reno, Nevada 89521
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EXHIBIT 1

EXHIBIT 1

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

In the Matter of the Petition to Revoke Probation Against: **David James Smith, M.D.** **Physician's & Surgeon's Certificate No. G 66777** **Respondent.**	**Case No. 800-2021-081615**

DECISION

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

This Decision shall become effective at 5:00 p.m. on August 23, 2024.

IT IS SO ORDERED: July 25, 2024.

MEDICAL BOARD OF CALIFORNIA

Richard E. Thorp, M.D.

Richard E. Thorp, M.D., Chair
Panel B

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

In the Matter of the Petition to Revoke Probation Against:

DAVID JAMES SMITH, M.D., Physician's and Surgeon's Certificate No. G 66777, Respondent

Agency Case No. 800-2021-081615

OAH No. 2023090106

PROPOSED DECISION

Alan R. Alvord, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on April 24, 2024, and May 23 and 24, 2024.

Joseph F. McKenna III, Deputy Attorney General, represented petitioner Reji Varghese, Executive Director, Medical Board of California (board), Department of Consumer Affairs.

Matthew D. Rifat, Law Offices of Matthew D. Rifat, APC, represented respondent David James Smith, M.D., who was present throughout the hearing.

Oral and documentary evidence was received. The record was held open to allow the parties to submit written closing arguments. Written closing arguments and

rebuttals were received. The record was closed, and the matter was submitted for decision on June 14, 2024.

PROTECTIVE ORDERS SEALING CONFIDENTIAL RECORDS

To protect the privacy of individuals whose personal information is contained in the documents, and because it is impractical to redact the private information, the following documents were sealed from public disclosure under Government Code section 11425.20 and California Code of Regulations, title 1, section 1030:

Exhibits 4, 5, 6, 7, 9, 10, 12, 13, 15, and 27, in their entirety.

DECISION SUMMARY

The board sought to revoke respondent's probation based on alleged violations of probationary terms that demonstrated unprofessional conduct. Respondent's probation prohibited him from practice involving intrathecal pumps. Respondent provided intrathecal pump treatment to three patients at a time when he was prohibited from doing so. In addition, respondent violated his informed consent duty to patients by knowingly making false and misleading disclosures to patients concerning his disciplinary status. These false statements to patients constituted unprofessional conduct. Based on the evidence in this case, the only remedy that ensures public protection is revocation of respondent's probation, thereby revoking his physician's and surgeon's certificate.

FACTUAL FINDINGS

Jurisdictional Matters

1. The board issued Physician's and Surgeon's Certificate No. G 66777 to respondent on August 21, 1989. The certificate is in full force and effect and expires January 31, 2025, unless renewed.

2. On July 11, 2023, petitioner issued a Petition to Revoke Probation. Respondent submitted a timely notice of defense. This hearing followed.

Summary of Allegations and Defenses

3. Petitioner asserted one cause to revoke probation, alleging respondent engaged in unprofessional conduct and failed to comply with the terms of his probation by performing care or treatment with patients involving the use, management, or surgical procedure related to intrathecal (IT) pumps on at least three patients (labeled A, B, and C) at a time when he was prohibited from doing so, and by knowingly making false and misleading written disclosures that misrepresented his probation status and practice restrictions.

4. Respondent argued that he was not prohibited from performing any IT pump care with patients A, B, and C, at the time because of a Superior Court judgment granting a writ of administrative mandate, and a Medical Board letter lifting his IT pump practice restriction. Respondent also argued that some of the care he rendered to the patients was not prohibited because it was not IT pump treatment. Respondent also raised due process issues concerning partially redacted information given in discovery that he contends denied him a fair hearing.

Respondent's Motion to Exclude Exhibit 15 and Gojny Testimony

5. During the first day of hearing, respondent objected to petitioner's Exhibit 15, the investigation report, and to the testimony of petitioner's investigator, Lucila Gojny. A briefing schedule was established. On May 9, 2024, respondent filed a motion to exclude Ms. Gojny's testimony and Exhibit 15. Petitioner filed an opposition on May 16, 2024, and respondent filed a reply on May 17, 2024. On May 19, 2024, OAH issued a written tentative ruling denying the motion. The parties were given an opportunity for oral argument at the hearing on May 23, 2024, and the tentative ruling was confirmed on the record. Respondent had notice of the redacted material since August 2023 and did not file a motion to compel. The redacted material properly protected the identity of an anonymous informant. Petitioner provided a partially unredacted copy of Exhibit 15, and respondent had an opportunity at hearing to question Ms. Gojny about the information in the exhibit. Respondent was not denied due process; his motion was therefore denied.

History of Prior Discipline

6. The chronology of respondent's prior discipline is important to the outcome of this case. The prior disciplinary matters and board and court actions are therefore discussed in chronological order.

The Board's 2020 Decision Placing Respondent on Probation

7. The board's Executive Officer issued an accusation against respondent's license on April 27, 2018 (Case No. 800-2015-012651), alleging violations of the Medical Practice Act. A first amended accusation added additional alleged violations regarding respondent's care and treatment of five patients using IT pumps, labeled anonymously A through E. Respondent's treatment of these five patients occurred at

various times between 2004 and 2017. The matter (OAH No. 2018080617) proceeded to hearing in September and October 2019, and January 2020. On August 25, 2020, the board adopted the administrative law judge's proposed decision, with an effective date of September 25, 2020 (2020 Board Decision). In this proposed decision, board disciplinary decisions are identified by the year the decision became effective, not the date the ALJ issued the decisions.

8. The 2020 Board Decision found that respondent committed gross negligence in his care and treatment of Patients A, B, C, and D; repeated negligent acts in the care and treatment of Patients A, B, C, D, and E; incompetence in his care and treatment of Patient A; excessively prescribed drugs to Patients A, B, and C; failed to maintain adequate and accurate records in connection with his care and treatment of Patients A, B, C, D, and E; and engaged in unprofessional conduct in his care and treatment of Patients A, B, C, D, and E.

9. The 2020 Board Decision revoked respondent's certificate, stayed the revocation, and placed respondent on probation for seven years with certain terms and conditions. The terms and conditions relevant to the petition include maintaining a controlled substance prescription log; taking education courses, a prescribing practices course, a medical record keeping course, and an ethics course; completing a clinical competence assessment program; having a practice monitor; and disclosing his discipline to patients. The 2020 Board Decision prohibited respondent from prescribing certain controlled substances and from:

> performing any care or treatment with patients involving the use, management or any surgical procedures related to intrathecal pumps until after successful completion of

Clinical Competence Assessment Program has been provided to the board.

10. Respondent filed a writ petition in the Superior Court (Case No. 20STCP03757) challenging the 2020 Board Decision on November 13, 2020, (Writ I). The Superior Court granted the petition in Writ I and overturned the 2020 Board Decision on January 24, 2022. The details of the Superior Court's ruling on Writ I and the board's subsequent actions are discussed below.

11. During the two years that Writ I was pending, there were many other events that are relevant to this case.

THE EXECUTIVE OFFICER FILES NEW ACCUSATION DECEMBER 22, 2020

12. Petitioner, as complainant, filed a new accusation (2020 Accusation), Case No. 800-2018-042234, against respondent on December 22, 2020, three months after the 2020 Board Decision became effective. The 2020 Accusation concerned respondent's IT pump treatment of three additional patients in 2015 through 2018, and alleged respondent committed gross negligence, repeated negligent acts, engaged in unprofessional conduct, and failed to maintain adequate and accurate medical records.

13. The 2020 Accusation went to hearing in October 2021 and resulted in additional discipline. The outcome of that case is discussed below.

RESPONDENT COMPLETES CLINICAL COMPETENCE ASSESSMENT AND THE BOARD LIFTS RESPONDENT'S IT PUMP RESTRICTION ON OCTOBER 19, 2021

14. The 2020 Board Decision ordered respondent to complete a board-approved clinical competence assessment and education program before he could

resume prescribing controlled substances and IT pump therapy with patients. In the fall of 2021, respondent completed a clinical competence assessment program through Knowledge, Skills, Training, Assessment, and Research (KSTAR), affiliated with Texas A&M University.

15. On October 19, 2021, two months before the board adopted the 2022 Board Decision discussed in the next section, the board's probation monitor, Virginia Addis, issued a letter to respondent stating that respondent's restrictions against prescribing controlled substances and performing IT treatment imposed by the 2020 Board Decision were lifted because of his successful completion of the required clinical competence assessment and education program.

16. The board's letter lifting respondent's IT pump practice restriction was issued the same month that the hearing on the 2020 Accusation was held, but before the issues raised in that case were decided. The board correctly lifted respondent's IT pump practice restriction in October 2021, since he had complied with the 2020 Board Decision's clinical competence assessment requirement. The 2020 Board Decision, at the time, was the only discipline respondent was under. Although the board had grave concerns about respondent's IT pump practice, as expressed in the 2020 Accusation, that case had not yet been decided. It would have been inappropriate for the board to withhold the October 2021 letter releasing respondent from the IT pump practice restriction since the board's concerns expressed in the 2020 Accusation had not yet been adjudicated.

2022 Board Decision on the 2020 Accusation

17. The 2020 Accusation proceeded to hearing on October 4 through 8, and 11, 2021. At that hearing, respondent testified that he had completed the KSTAR clinical competence course. The ALJ's factual finding 235 was:

> Respondent stated he has completed the clinical competence assessment course and can now perform surgical procedures related to intrathecal pumps.

This ALJ finding shows that, before the board issued the letter to respondent dated October 19, 2021, which informed him his IT pump restriction was lifted, respondent asserted in testimony under penalty of perjury that he was already free from the IT pump probationary restriction.

18. On December 22, 2021, the board adopted the ALJ's proposed decision with an effective date of January 21, 2022 (2022 Board Decision). There was no indication in the 2022 Board Decision that the ALJ was aware of the board's October 19, 2021, letter lifting the IT pump practice restriction. Although respondent testified in that hearing he completed the KSTAR clinical competence course, it appears no KSTAR records were offered, or admitted into evidence in that case.

19. The 2022 Board Decision found that respondent's misconduct with two patients was serious and exposed the patients to actual harm. Respondent excessively administered fentanyl to the patients. He increased their dose of fentanyl, described as "haphazard," even when both patients reported their pain levels and functioning improved. The 2022 Board Decision specifically mentions respondent's completion of the clinical competence assessment as a factor in respondent's favor.

20. The 2022 Board Decision fashioned a remedy designed to protect the public but not to punish respondent in consideration of his, at that time, two years of probation compliance, including his completion of the clinical competence assessment.

21. The 2022 Board Decision imposed a new probationary practice restriction on respondent:

> Physician and Surgeon's Certificate No. G 66777 issued to David James Smith, M.D. is revoked. However, the revocation is stayed, and respondent is placed on probation for the duration of his probation in [the 2020 Board Decision], with the following additional term:
>
> Respondent is prohibited from performing any care or treatment with patients involving the use, management, or any surgical procedure related to intrathecal pumps, or advising any medical provider on the care or treatment of patients involving the use, management, or any surgical procedure related to intrathecal pumps, for the duration of his probation in [the 2020 Decision].

22. It is this 2022 Board Decision practice restriction that petitioner in the present case asserts respondent has violated.

23. The chronology thus far shows that the board's letter lifting respondent's IT pump practice restriction effectively removed the restriction beginning October 19, 2021, the date the letter was issued, until January 21, 2022, when the 2022 Board

Decision became effective. As of January 21, 2022, respondent was again prohibited from IT pump practice by the 2022 Board Decision.

24. On February 17, 2022, respondent filed a writ petition in the Superior Court (Case No. 22STCP00574) challenging the 2022 Board Decision (Writ II). The Superior Court in the Writ II case denied respondent's writ and upheld the 2022 Board Decision by judgment entered February 5, 2024. Details of the Writ II decision are discussed in their chronological position below.

FEBRUARY 28, 2022 – WRIT I SUPERIOR COURT OVERTURNS THE 2020 BOARD DECISION

25. In the hearing that led to the 2020 Board Decision, the ALJ excluded respondent's expert from testifying because respondent had not complied with the expert witness disclosure requirements of Business and Professions Code section 2334. Respondent argued in his writ petition challenging the 2020 Board Decision, among other things, that the ALJ erred by excluding respondent's expert witness from testifying. On January 24, 2022, the Superior Court issued an order granting respondent's petition for writ of administrative mandate. The court agreed with respondent's argument that the ALJ erred in excluding some of respondent's expert witness testimony. However, the court found that, as to two of the five patients, the ALJ did not commit legal error. The court expressed its reasoning:

> While the court agrees [Dr. Smith's] expert disclosures contained significant deficiencies, the expert disclosures did sufficiently express *some opinions* for some patients and identified facts upon which [Dr. Smith's] expert relied for foundation. Thus, the ALJ's wholesale preclusion of any and

> all testimony from [Dr. Smith's] expert was error depriving [Dr. Smith] of the ability to mount a full defense to the amended accusation. Based on [Dr. Smith's] expert disclosures, while exclusion of much of the proffered expert's testimony was warranted for [Dr. Smith's] failure to comply with Section 2334, the ALJ should have permitted [Dr. Smith's] expert to testify about several of his opinions.

The court then analyzed respondent's expert disclosure with regard to each of the patients (A, B, C, D, and E) in the amended accusation, concluding:

> The court finds the ALJ did not commit legal error when she excluded [Dr. Smith's expert's] witness testimony concerning Patients B and E based on [Dr. Smith's] failure to comply with Section 2334. Thus, [the board's] claims as to Patients B and E were (properly) not defended with expert testimony.

26. In a footnote, the court stated:

> [The board's] decision concerning Patients B and E is not impacted by the court's decision about the ALJ's wholesale exclusion of expert witness testimony. [The board's] decision as to Patients A, C and D, however, may have been impacted only to the extent the properly disclosed specific opinions about these patients were excluded by the ALJ.

27. On February 28, 2022, the Superior Court entered judgment granting the writ. The court set aside the 2020 Board Decision.

28. Because of this Superior Court judgment, as of February 28, 2022, respondent was no longer on the probation established in the 2020 Board Decision. However, respondent was still on probation from the 2022 Board Decision, which had created a separate probation with a single probationary condition: the prohibition on IT pump practice.

THE BOARD SETS ASIDE ITS 2020 BOARD DECISION, HOLDS ORAL ARGUMENT, ISSUES A NEW 2022 BOARD REMAND DECISION MODIFYING RESPONDENT'S PROBATION

29. On June 9, 2022, to comply with the Superior Court's order, the board issued an order setting aside the 2020 Board Decision. The board noticed oral arguments to be held on July 22, 2022. An ALJ presided over the oral arguments with a board panel. Respondent appeared and was represented by counsel.

30. At the oral argument, the ALJ sitting with the board panel did not allow any new evidence. The hearing was treated as a reconsideration of the 2020 Board Decision and was noticed for the purpose determining the level of discipline as it relates to Patients B and E in light of the Superior Court's ruling.

31. Respondent testified at that oral argument before the board. On page 39, line 9, of the transcript, respondent testified:

> I do want to make one other correction to Mr. McKenna's comments, though. My discipline – even though the judge set aside the order, my probation officer, Virgina Addis, has made it clear that as far as she's concerned and the people in Sacramento are concerned, nothing has changed.

32. On August 11, 2022, the board issued its decision after remand (2022 Board Remand Decision), effective immediately and retroactive to September 24, 2020.

33. The 2022 Board Remand Decision placed respondent's physician's certificate on probation for five years, retroactive to September 24, 2020. It included all probationary terms of the 2020 Board Decision except the requirement to give patient disclosures about respondent's probation status and practice restrictions. Although the 2022 Board Remand Decision retained the probationary term requiring respondent to complete a clinical competence assessment program, the board's order stated, "respondent is to receive full credit for all periods of probation already served and any term of probation already satisfied before the Superior Court remanded this matter back to the Board."

34. Thus, the 2022 Board Remand Decision did not re-establish the requirement for respondent to complete the clinical competence assessment program. Respondent was given credit for having already completed the KSTAR program and the board's October 2021 letter lifting the IT practice restriction.

35. Respondent filed a writ petition in Superior Court (Case No. 22STCP03155) challenging the 2022 Board Remand Decision on August 26, 2022, (Writ III). The Superior Court denied the writ and upheld the 2022 Board Remand Decision by judgment entered on January 2, 2024.

RESPONDENT'S ATTORNEY ARGUES THE 2022 BOARD DECISION IS VOID AS A MATTER OF LAW; THE BOARD REJECTS THE ARGUMENT

36. In August 2022, after the board issued the 2022 Board Remand Decision, the board sent respondent a notice about what it would list on the board's public website concerning respondent's disciplinary status. The board's disclosure, among

other things, stated that respondent was prohibited from performing IT pump care or treatment. The notice allowed respondent 10 working days to offer proposed corrections to the language of the disclosure.

37. On August 23, 2022, respondent's attorney, Mr. Rifat, sent a letter to the board arguing that the board's proposed website disclosure was "inaccurate and incomplete" and "false and misleading." Mr. Rifat asserted the 2022 Board Decision was "void as a matter of law." Mr. Rifat stated, "we expect that will be confirmed shortly by the Superior Court." Mr. Rifat proposed a different public disclosure that removed any mention of IT pump practice restrictions and, with regard to the 2022 Board Decision, stated,

> The Medical Board previously additionally imposed discipline on December 22, 2021. That disciplinary order relied on the order that was set aside by the Superior Court and the Medical Board and the licensee are litigating the validity of that order.

The board rejected Mr. Rifat's suggested changes to the public disclosure. The board retained the public disclosure language that respondent was:

> prohibited from performing any care or treatment with patients involving the use, management, or any surgical procedures related to intrathecal pumps, or advising any medical provider on the care or treatment of patients involving the use, management, or any surgical procedure related to intrathecal pumps, for the duration of Dr. Smith's probation.

FEBRUARY 5, 2024, WRIT II SUPERIOR COURT UPHOLDS THE 2022 BOARD DECISION

38. In the Writ II proceeding, respondent argued, among other things, that the 2022 Board Decision was "void" because it tied itself to the 2020 Board Decision that had been overturned in the Writ I proceeding. The Writ II Superior Court rejected that argument, describing it as "defective." The Superior Court found that the 2022 Board Decision was a "stand-alone" decision placing respondent on probation with an IT pump practice restriction despite the Writ I court having overturned the 2020 Board Decision.

39. During the one and one-half years the Writ II proceeding was pending, respondent started treating IT pump patients again. That treatment is discussed in the next section.

Respondent Treats Patients A, B, and C, Giving Rise to This Petition to Revoke Probation

40. Respondent's treatment of the three patients at issue in this case occurred between August 25, 2022, and November 22, 2022.

41. The first alleged violation of the IT pump restriction occurred when respondent treated Patient B on August 25, 2022, two weeks after the board issued the 2022 Board Remand Decision, and one day before respondent filed his Writ III petition challenging the 2022 Board Remand Decision.

IT PUMP TREATMENT

42. An IT pump is a medical device that delivers drugs directly into the fluid-filled (intrathecal) space between the spinal cord and the protective sheath around it. When implanting an IT pump, the patient is placed under general anesthesia. A C-arm fluoroscope is placed around the patient to provide x-ray images to assist the surgeon in locating and placing the devices. The surgeon makes two incisions: one in the abdomen and one near the spine. The IT pump is placed in a pocket under the skin in the abdomen. A catheter is tunneled under the skin between the pump and the spine. One end of the catheter is connected to the pump. The other end of the catheter is inserted into the intrathecal space and anchored. The pump's reservoir contains the medication and is programmed to deliver the correct dosage and timing of medication to the intrathecal space, delivering pain relief.

43. A physician uses a telemetry device to remotely access the pump and can read information about the pump's function and adjust the pump's operation.

44. IT pump therapy is an intensive pain management modality. It requires a long-term, trusting relationship between patient and physician. Patients must be carefully selected. Psychological testing of the patient is recommended. Before choosing IT pump treatment, a test is performed using either an external catheter or a syringe to inject pain medication into the intrathecal space to determine if the patient experiences pain relief. Respondent and petitioner's expert both testified that an IT pump physician must be prepared to "marry the patient."

PATIENT A: IT PUMP EXPLANT AND FOLLOW UP CARE

45. On September 1, 2022, respondent performed an explant of Patient A's existing IT pump. The explant procedure, also done under general anesthesia, involves

incisions at the abdomen and spine, removing the pump, removing the intrathecal catheter and anchor, and closing the incision sites. Respondent saw Patient A for follow up care on September 6 and 8, 2022, for wound checks and staple removal.

46. Patient A testified at this hearing. Respondent was Patient A's pain management doctor from 2018 until September 2022. He wanted the pain pump removed for several reasons, including that respondent was "charging a lot for refills," and he was getting tired of all the medical trips. He had been using a pain pump for years and was hoping to get away from the situation. Patient A also testified he is a frequent user of methamphetamine, which he believes helps with his chronic pain.

47. Patient A testified that on the way home from respondent's office after the September 8, 2022, office visit, he began to leak cerebral spial fluid. His shirt and pants were wet when he got home. He went to the emergency room the next day, September 9, but they were unable to help him. He left on his own that day and went back to the emergency room several times between September 9 and 17. He testified he had a tear to the protective layer of tissue that covers the spinal cord (dura) that had to be repaired.

48. Respondent's office records show that, on September 13, 2022, Patient A called respondent's clinic complaining that cerebrospinal fluid was leaking from the spinal incision site. Respondent's office told Patient A to go to the emergency room.

49. Patient A testified he has filed a civil lawsuit against respondent.

PATIENT B: SURGICAL PUMP REPLACEMENT; REPROGRAM OF IT PUMP AND MEDICATION REFILL

50. Patient B testified at this hearing that she has been a patient of respondent for over 17 years. On August 25, 2022, respondent reprogrammed Patient B's IT pump using telemetry, and performed a medication refill. Respondent met with Patient B on September 23, 2022, for a pre-operative consult. On September 29, 2022, respondent performed an IT pump replacement procedure that involved general anesthesia, explanting the patient's IT pump, and implanting a new IT pump device.

51. On October 5, 2022, respondent performed telemetry and analysis of Patient B's IT pump and programmed a medication rate increase.

52. Respondent performed telemetry and analysis of Patient B's IT pump and refilled the pump's medication reservoir on October 7 and 14, and November 22, 2022.

53. Patient B testified very emotionally that it was difficult for her to see respondent at the hearing. She testified it breaks her heart that she trusted him with her life. In November 2022 she went through drug withdrawals because respondent's office had supply problems. She testified she "felt like a heroin addict." She felt respondent had lied to her about getting her medication refilled. She testified her pump is "off now" because she does not trust any doctor to fill it.

PATIENT C: PUMP SURGICAL PUMP ACCESS, ASPIRATION, TELEMETRY AND ANALYSIS

54. On October 7, 2022, respondent performed a surgical procedure on Patient C, in which he accessed the patient's IT pump side port and aspirated fluid from the pump and catheter and performed telemetry and analysis of the pump.

Respondent Refuses to Answer Probation Monitor's Question About Compliance with the IT Pump Practice Restriction in September 2022

55. On September 9, 2022, respondent met with his probation monitor, Ms. Addis, at respondent's offices, for the fourth quarterly probation meeting. Respondent called Ms. Addis as a witness. Ms. Addis retired from state service in May 2024 as an Inspector II. She testified that respondent was cooperative, transparent, and she believed he was honest with her. Respondent submitted his required probation reports timely and completed education requirements. He submitted his required controlled substance logs each quarter. She also received his practice monitor reports.

56. At the September 9, 2022, probation meeting, respondent signed a document acknowledging that he received a copy of the 2022 Board Remand Decision. Respondent's attorney, Mr. Rifat, attended the meeting with him. Respondent "took the Fifth" and refused to answer Ms. Addis's question when she asked him the last time he did any treatment with IT pumps. Ms. Addis testified this was the only time she recalled respondent refusing to give her information she requested.

57. Respondent testified in this case that he exercised his Fifth Amendment privilege at that meeting on the advice of his attorney because at the time he was under a federal indictment. He testified on direct examination the federal charges against him were later dismissed. On cross examination, respondent admitted the charges were not dismissed; he pled guilty to one misdemeanor federal charge of adulteration of controlled substances in December 2023. The federal grand jury indictment dated December 13, 2022, alleged conspiracy to manufacture and distribute controlled substances, healthcare fraud, false Medicare claims, unlawful manufacture of controlled substances, and causing the adulteration of a drug, against respondent and one of his employees. The information about respondent's indictment

and guilty plea is discussed here to provide context for respondent's testimony at the hearing that he exercised his Fifth Amendment right in his meeting with Ms. Addis. The federal criminal conviction is not charged as a basis for discipline and is not considered in this case for that purpose.

Finding: Respondent was Prohibited from IT Pump Treatment When He Treated Patients A, B, and C.

58. Respondent treated Patients A, B, and C, from August 2022, through the end of November 2022. During that time, respondent was under two disciplinary orders from the board: the 2022 Board Decision which was effective on January 21, 2022, and the 2022 Remand Decision, which became effective immediately when it was issued on August 11, 2022.

59. Respondent, and his attorney, took the legal position in this case that the 2022 Board Decision and its IT pump practice prohibition were void as a matter of law because the 2022 Board Decision referred to the timeframe of the 2020 Board Decision that had been set aside by the Writ I Superior Court.

60. Respondent made various legal arguments in the Writ II case challenging the 2022 Board Decision. The Writ II Superior Court did not accept these arguments and they are not accepted in this case. The Superior Court clearly held that the 2022 Board Decision was a "stand-alone" decision and that respondent's arguments to the contrary were "defective." That is the correct decision based on the record in this case.

61. Respondent's IT therapy practice restriction was briefly lifted effective October 19, 2021, when the board acknowledged that he had satisfied the clinical competency assessment requirement in the 2020 Board Decision. There was a pending 2020 Accusation against respondent at that time raising serious concerns about

respondent's IT treatment. Three months later, on January 21, 2022, the 2022 Board Decision became effective, and he was again prohibited from practicing IT pump therapy. The 2022 Board Decision's stand-alone IT pump practice prohibition was in effect on August 25, 2022, when respondent began treating Patients A, B, and C; the IT pump prohibition remained effective throughout his treatment of the three patients in this case.

Did Respondent's Treatment of Patients A, B, and C Violate the IT Therapy Practice Prohibition?

Petitioner's Expert Witness Mark Steven Wallace, M.D. Testimony

62. Petitioner called Mark Steven Wallace, M.D., as an expert witness. Dr. Wallace is a Professor of Anesthesiology and Chief of the Division of Pain Medicine in the Department of Anesthesiology at the University of California, San Diego. He has extensive clinical and research experience in pain management and treatment of patients with IT pumps and has been widely published on many subjects involving pain management treatment modalities, including the use of IT pumps.

63. Petitioner asked Dr. Wallace to review the medical records and provide his opinion whether the treatment of any patients was care or treatment involving the use, management, or any surgical procedures related to IT pumps. Dr. Wallace reviewed the medical records for Patients A, B, and C. He testified that respondent's treatment of Patients A, B, and C constituted care or treatment with patients involving the use, management, or surgical procedure related to IT pumps.

64. Performing an IT pump refill involves using a fluoroscope to locate the reservoir access point on the pump, inserting a needle and using a syringe to fill the medication into the pump reservoir. This is the use or management of IT pumps.

Performing a telemetry analysis of the pump likewise is a procedure involving the use or management of an IT pump. The physician must access the pump data with a telemetry unit, make clinical judgments about whether the pump's settings need to be changed, then make any necessary changes.

65. Performing an aspiration of the pump and catheter requires locating a side port on the pump using a fluoroscope, and then inserting a syringe needle into the side port and drawing fluid from the pump and catheter to see if cerebrospinal fluid can be drawn and sometimes using contrasting dye. This is a procedure involving the use, management, or a surgical procedure related to IT pumps.

66. Dr. Wallace also testified that explanting an IT pump is a surgical procedure related to IT pumps. The procedure involves general anesthesia, using a fluoroscope to locate the pump and catheter, making incisions in two places to access the pump and the catheter connection at the spinal cord, surgically removing the pump, removing the catheter, and closing the incision sites.

RESPONDENT'S TESTIMONY

67. Respondent did not call an expert to give opinion testimony about whether respondent's patient treatment constituted IT use, management, or surgical procedures. He gave his own percipient testimony as a physician.

68. Respondent testified that he treated Patient A on September 1, 2022, because the 2020 Board Decision had been set aside and he believed the 2022 Board Decision was void as a matter of law. He also testified that removing an IT pump is "not really pump treatment" because he was not dealing with any medication dosage or rates or any decisions about the medications. He was "only removing a piece of

durable medical equipment." Any qualified surgeon could remove the pump from a patient; they do not have to be trained in IT pump management.

69. Respondent testified that refilling an IT pump is not IT pump treatment because a nurse practitioner could perform the procedure.

70. Respondent also testified that aspirating Patient C's catheter on October 7, 2022, was not pump management because all he did was use a 25-gauge needle to access the side port on the pump and attempt to draw back fluid from the catheter. The purpose was to diagnose if the catheter was kinked or occluded. No return of cerebrospinal fluid means the catheter has a blockage. He testified this is not pump management, it is a simple diagnostic test.

FINDING: RESPONDENT'S TREATMENT OF PATIENTS A, B, AND C VIOLATED THE IT PUMP PRACTICE RESTRICTION

71. Dr. Wallace's expert testimony was persuasive that IT pump explant surgery, IT pump telemetry and analysis, IT pump refills, and IT pump catheter aspiration are all care or treatment involving the use, management, or surgical procedures related to IT pumps. Dr. Wallace explained the procedures and detailed how they are related to IT pump care or treatment.

72. Respondent's testimony that these procedures were not IT pump treatment was not persuasive. Respondent's testimony minimized and oversimplified the procedures and their important relationship to IT pump care or treatment. When removing an IT pump, respondent was doing more than just removing a piece of durable medical equipment. Although any surgeon could legally explant an IT pump, when respondent performs the procedure on a patient with whom he has an existing pain management relationship that included IT pump treatment, the explant is part of

that treatment. Similarly, the other procedures, refills, telemetry and analysis, catheter aspiration, that respondent performed with Patients A, B, and C, were part of his IT pump care and treatment as their pain management provider.

Respondent's Disclosures to Patients were False and Misleading

73. On February 25, 2022, Patient A signed a "SB 1448 Disclosure to Patients," which stated:

> February 10, 2022
>
> Dear Patient _____,
>
> I, David J. Smith, M.D., was disciplined by the California Medical Board on August 25, 2020, and additionally on December 22, 2021, the Medical Board issued another disciplinary decision.
>
> On January 24, 2022, the Superior Court of California in and for the County of Los Angeles, set aside the Medical Board's disciplinary order of August 25, 2020, concluding that the Medical Board had violated my due process rights. Attached is a copy of the Court's Order. I am advised by counsel that, as a matter of law, this also sets aside the December 22, 2021 decision.
>
> I am awaiting entry of judgment in my favor in Superior Court and further legal proceedings may be necessary. I am advised that as a result of these legal proceedings, I am not presently under discipline by the Medical Board and that

there are no practice restrictions on my license as a matter of law. I nevertheless continue to work cooperatively with the Board and its monitor.

For more information regarding the orders, including a copy of the Medical Board's decisions and/or Accusations, please contact the Medical Board of California.

74. Patient B signed the same disclosure on September 29, 2022. Patient C signed the same disclosure on October 7, 2022.

75. At the time the patients signed the disclosure, respondent was subject to the 2022 Board Decision's practice restriction prohibiting him from IT pump treatment.

76. The disclosure contained misleading information. The statement that the Superior Court (Writ I) "set aside the Medical Board's disciplinary order of August 25, 2020, concluding that the Medical Board had violated my due process rights," was inaccurate. The Writ I Superior Court found that the ALJ erred in excluding respondent's expert testimony, but that error only affected the discipline based on respondent's treatment of three of the five patients in that case. The Writ I Superior Court made it clear that its decision did not affect the discipline concerning the other two patients. Respondent's disclosure inaccurately overstated the Superior Court's Writ I ruling, giving patients the false impression respondent was completely exonerated in the Writ I decision when he was not.

77. The disclosure also misled patients into believing that respondent's IT treatment practice restriction had been lifted. The language "I am advised by counsel that, as a matter of law, this also sets aside the December 22, 2021," (2022 Board Decision) had the effect of confusing respondent's disciplinary status. Patient A

testified that he would not have gone forward with his procedure with respondent on September 1, 2022, if he had known respondent was still on probation. Patient B testified that she believed respondent's probation was cleared and she was able to start seeing him again for pump treatment, a false impression of respondent's status. Respondent's cross examination of these patients did not undermine their credibility on this issue.

78. On January 24, 2022, the day the Writ I Superior Court's order granting respondent's writ was entered, respondent's attorney, Mr. Rifat, wrote an email to petitioner's attorney, Mr. McKenna. The email stated,

> With respect to the second disciplinary matter whose decision became effective on Friday [the 2022 Board Decision], we will need to discuss the impact of the Superior Court's decision. In my view and despite my warning to the judge, because he made his decision dependent upon the original discipline [the 2020 Board Decision], the latest MBC order of discipline is *de jure* void. I'd prefer to conserve resources and not take that up on writ as well. Let me know if we can reach some sort of stipulation or alternative resolution.

79. The attorneys did not reach an alternative resolution or stipulation about the 2022 Board Decision being "*de jure* void." Respondent filed Writ II, the parties litigated for 18 months, and the Writ II Superior Court rejected as "defective" respondent's argument in its February 5, 2024, order denying respondent's writ.

80. In addition to being false and misleading as of February 10, 2022, the date listed on the patient disclosure, the disclosure became more false and misleading over time because it was not updated with current information about respondent's disciplinary status. The disclosure did not mention that the board reinstated respondent's probation after remand on August 11, 2022, in the 2022 Board Remand Decision. Patient A signed the disclosure on February 25, 2022, and was not presented with an updated disclosure at the time of his surgical procedure on September 1, 2022. Patients B and C signed the disclosures in September and October 2022, when the disclosures failed to mention respondent's probation from the 2022 Board Remand Decision.

81. Although neither the 2022 Board Decision nor the 2022 Board Remand Decision specifically required respondent to make any disclosure about his probationary status, since that term was removed from the probation conditions in the 2022 Board Remand Decision, if respondent elected to give a disclosure about his probation status, it was his duty as a physician to ensure the disclosure was not false and misleading.

82. Respondent's inaccurate, false, and misleading statements to patients constituted unprofessional conduct that was substantially related to the qualifications, functions, or duties of a physician.

Respondent's Additional Testimony and Compliance with Probation Terms

83. According to probation monitor Ms. Addis, respondent was compliant and cooperative with the board's probation monitor. He submitted his required reports and controlled substance logs, retained a practice monitor who also submitted

required reports, completed and passed the required training and education, including the clinical competence evaluation. Respondent testified that he wanted to show the board his good faith and willingness to cooperate and comply by keeping the practice monitor and following other probation terms even after the Superior Court set aside the 2020 Board Decision.

84. Respondent testified he made changes to his practice after the 2020 Board Decision based on his understanding of the criticisms in that case. He decreased the opiate oral dosing of IT pump patients, changed the pump medications he used, stopped using an Excel "flow sheet" for dosing records and used the telemetry system directly to record dosing changes.

85. Respondent testified he sold his practice to another physician, Dr. Thompson, in December 2021 to ensure continuity of care to the patients after the probationary orders. Dr. Thompson was required to assume all practice employees, get her own billing numbers, and her own electronic medical record system with her as the attending physician. Respondent also testified that Dr. Thompson was unable to continue under the obligations of their agreement. She left the practice and respondent has "taken back" the practice.

86. Respondent testified the transition to other practitioners for IT pump care was difficult for some patients because he had long standing relationships with them. He continued to provide non-pump related care for patients in order to keep some continuity. The practice used nurse practitioners and other physicians to perform IT pump treatments with his pump patients. He transferred all of his pump patients to the other physicians. Each patient had a care plan in place, but respondent did not direct their care. He expected that the physicians would use their own clinical

judgment about treating the patients. Respondent did not "touch" controlled substances or IT pump treatment until his right to do so was restored.

Respondent's Credibility

87. Respondent's testimony that he was confused by the complex procedural history of his disciplinary cases and was misled by the board was not credible. His answers to questions were evasive and self-serving. He misrepresented the status of his federal criminal conviction. On one hand, he testified that he was trying to comply with his probation. On the other hand, he chose to treat the 2022 Board Decision's IT pump practice prohibition as if it was void while he knew the board did not agree with that position.

Evaluation of Disciplinary Remedy

88. The evidence showed that respondent acted on the legal position that the 2022 Board Decision was "void as a matter of law" without justification. He refused to answer the question about IT pump practice in the meeting with Ms. Addis on September 9, 2022, adopting the legal position that had not yet been resolved and that the board opposed. Respondent violated the IT therapy practice restriction with three patients on multiple occasions in September, October, and November 2022 in direct violation of the 2022 Board Decision. He drafted and maintained a falsely misleading patient disclosure document that induced patients to believe that he was not under any disciplinary order when, in fact, he was under two different stand-alone disciplinary probations, the 2022 Board Decision and the 2022 Board Remand Decision.

89. In this hearing, respondent took two inconsistent but equally untenable positions. On one hand, he maintained that the 2022 Board Decision and its IT pump

practice restriction was clearly void as a matter of law. On the other hand, he claimed that it was confusing and unclear, and he should not have his probation revoked for being confused and not understanding the impact of the complex procedural history.

90. At no time did the board mislead respondent about the effect of the 2022 Board Decision. Respondent testified that Ms. Addis told him his IT practice restriction was a "gray area." Ms. Addis, called by respondent as a witness, did not corroborate that testimony; she did not recall saying those words to respondent. At the oral argument before the board on July 22, 2022, respondent testified to the board that Ms. Addis made it clear that despite the Superior Court Writ I order, nothing about his probation has changed.

91. Even if Ms. Addis had told respondent at one time that his IT pump practice restriction was a "gray area," respondent was not justified in relying on that purported statement in light of other facts: Mr. Rifat had proposed alternative language for the board's public website disclosure which the board rejected; the board retained the public website disclosure language that respondent was prohibited from IT pump practice; Mr. Rifat proposed a stipulation to Mr. McKenna to avoid having to litigate the issue of the "void" restriction in a writ proceeding, but Mr. McKenna refused. The parties did litigate the "void" issue in the Writ II proceeding. The Writ II Superior Court ultimately characterized respondent's "void as a matter of law" position as defective and confirmed the 2022 Board Decision was a "stand-alone" disciplinary order that was still in effect.

92. Respondent has not, at any time in this case, acknowledged his mistake in treating patients based on the incorrect "void as a matter of law" position or in giving a misleading disclosure to his patients. Respondent showed no remorse for his conduct. There was no evidence of respondent's rehabilitation despite being on

probation since 2020. In his testimony, respondent showed no empathy for Patient A, who suffered a cerebrospinal fluid leak and multiple emergency room visits, or Patient B, who testified about her difficulty getting medication refills and her withdrawal symptoms.

93. Respondent did not make an innocent mistake by misunderstanding the complex procedural history of several different disciplinary cases and terms of his probation. He did not reasonably rely on the advice of his attorney. He is a highly educated professional who made his own decisions with full knowledge of the potential consequences to his license. He made a conscious, bad faith choice to ignore a legitimate order from the board and treat patients in violation of the board's discipline. Despite having complied with other probation terms in many ways, respondent has been cavalier and recalcitrant in complying with the one probation condition that is most important to public protection – the restriction on his ability to perform IT pump treatment.

Costs of Investigation and Enforcement

94. Petitioner submitted a declaration of Charles Shartle, associate governmental program analyst, showing that the board incurred expert reviewer costs for Dr. Wallace's evaluation and report totaling $787.50.

95. Petitioner submitted a declaration of Joseph A. McKenna III supporting the Department of Justice's costs of enforcement. Attached to the declaration was a detailed statement with description of the tasks undertaken, the amount of time billed for the activity, and the billing rate for each professional through April 23, 2024. The cost amount reflected in the detailed statement through April 23, 2024, was $64,897.50.

96. Mr. McKenna's declaration also included cost billing information updated to include an estimate of additional time from April 23, 2024, up to the first day of hearing. The estimate of 8 hours for Mr. McKenna and one hour for a Senior Legal Analyst (costs of $1,965) did not provide detail about what the additional work would entail. Mr. McKenna's declaration was dated April 23, 2024. Although the hearing extended beyond the April hearing dates originally scheduled, Mr. McKenna did not update his pre-hearing estimate with information about the actual time spent or the tasks performed. As such, petitioner's claim of $1,965 was speculative and unsupported by sufficient detail and is not approved.

97. Respondent did not present any evidence suggesting that the claimed costs were not reasonable. Respondent did not present any evidence concerning his ability or inability to pay the claimed costs.

98. Based on the evidence in this case, and the complexity of the issues and defenses raised, investigation costs of $787.50, and enforcement costs of $64,897.50, are reasonable. Total costs of $65,685 are reasonable and are awarded.

LEGAL CONCLUSIONS

Legal Authority

1. A licensee whose matter has been heard by an administrative law judge may have his or her license revoked, suspended, placed on probation, or may have other action taken in relation to discipline as part of an order of probation, as the administrative law judge or board may deem proper. (Bus. & Prof. Code § 2227.)

2. Petitioner bears the burden of proof. The standard of proof in a petition to revoke probation is a preponderance of the evidence, even though clear and convincing evidence is the standard to revoke a license. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441.)

3. Respondent contended that revoking his probation based on unprofessional conduct is akin to an accusation to discipline the license and that, therefore, the correct standard of proof to apply is clear and convincing evidence, as would be required in an accusation. Petitioner argued it is sufficient in this matter to prove respondent's unprofessional conduct by a preponderance of the evidence because that is the standard for a petition to revoke probation and because his original probation in the 2022 Board Decision was based, in part, on respondent's unprofessional conduct. Respondent's argument is rejected. Preponderance of the evidence is the correct standard of proof for this case, including for deciding the issue of respondent's unprofessional conduct.

4. Even if the required standard of proof were clear and convincing evidence, which it is not, the evidence in this case meets that higher standard. There is no dispute that respondent gave the written disclosure to his patients; the evidence was clear and convincing that respondent was on probation when he made the disclosure. Respondent knowingly made the misleading disclosures to his patients – he made a voluntary choice to accept the legal argument that the 2022 Board Decision was "void as a matter of law" fully understanding that the legal issue was pending in the Writ II case and taking that position would mislead patients about his probation status. He had a duty as a physician to give patients all information relevant to their treatment decision. He violated that duty. His reliance on the advice of his attorney does not insulate him. Although only a preponderance of evidence is required, the

finding that respondent committed unprofessional conduct is supported by clear and convincing evidence.

5. The board shall take action against a licensee who is charged with unprofessional conduct, which is defined to include violating, directly or indirectly, any provision of the Medical Practices Act, and the commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician. (Bus. & Prof. Code § 2234, subds. (a) and (e)). Knowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine which falsely represents the existence or nonexistence of a state of facts constitutes unprofessional conduct. (Bus. & Prof. Code § 2261.) Unprofessional conduct is conduct that breaches the rules or ethical code of the medical profession or conduct that is unbecoming to a member in good standing of the medical profession and which demonstrates an unfitness to practice medicine. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575.)

6. A professional is not immune from license discipline simply because he or she consulted an attorney, received, and relied on legal advice. (*Davis v. Physician Assistant Board* (2021) 66 Cal.App.5th 227, 237; *Norman v. Department of Real Estate* (1993) Cal.App.3d 768, 778.)

7. A physician's duty is to disclose to the patient all material information to enable the patient to make an informed decision regarding the proposed treatment. Material information is information that the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended procedure. (*Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 115; *Davis, supra*, 66 Cal.App.5th at 246.) The physician's failure to disclose may properly be characterized as a breach of fiduciary duty or a lack of

informed consent. (*Moore v. Regents of the University of California* (1990) 51 Cal.3d 120, 129.)

8. The purpose of license discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable, or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

9. Rehabilitation is a "state of mind," and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.)

Costs of Investigation and Enforcement

10. In any order issued in resolution of a disciplinary proceeding before any board, upon the request of the entity bringing the proceeding, the administrative law judge may direct a licensee found to have committed violations of the licensing act to pay a sum not to exceed the reasonable cost of the investigation and enforcement of the case. A certified copy of the actual costs, or a good faith estimate, signed by the entity bringing the proceeding or its representative is prima facie evidence of reasonable costs of investigation and prosecution of the case. (Bus. & Prof. Code § 125.3.)

11. Section 125.3 limits recoverable costs to cases where a licensee has been found to have committed a violation or violations of the licensing act. The Medical Practices Act is contained in Division 2, Chapter 5 of the Business and Professions Code, sections 2000 to 2528.3. Since respondent's probation was established based on his violations of the Medical Practices Act, his violation of probationary terms is also a

violation of the licensing act. In addition, respondent's conduct in this case violated Business and Professions Code section 2234 (unprofessional conduct), and section 2261 (knowingly making false statements).

12. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the court held that cost recovery administrative statutes do not violate due process. The court identified factors to consider in evaluating cost recovery: (1) whether the licensee used the hearing process to obtain dismissal or a reduction in the severity of the discipline imposed; (2) whether the licensee had a "subjective good faith" belief in the merits of his/her position; (3) whether the licensee raised a colorable challenge to the proposed discipline; (4) whether the licensee had the financial ability to make payments; and (5) whether the scope of the investigation was appropriate to the alleged misconduct.

13. Respondent did not present any defense that resulted in dismissal or reduction in the severity of the discipline. Respondent, or his attorney, may have had a "subjective good faith belief" in the merits of his legal position, but that belief was not justified. Respondent's "void as a matter of law" argument was adjudicated and rejected by the Superior Court in Writ II, and yet respondent pursued the same invalid argument in this case as if it had never been addressed before. Respondent's efforts resulted in increased costs for both sides of the case. Respondent did not offer any evidence of his financial ability to pay the costs. Based on the seriousness of respondent's conduct, the scope of the board's investigation and prosecution was appropriate to the alleged misconduct. Costs of $65,685 are reasonable and are approved.

Cause to Revoke Probation Was Established

14. Cause was established under, Business and Professions Code sections 2227 and 2234, to revoke respondent's probation based on his violation of the 2022 Board Decision's probationary restriction prohibiting care or treatment involving the use, management, or surgical procedures related to IT pumps.

15. Cause was established, under Business and Professions Code sections 2227, 2234, and 2261, to revoke respondent's probation based on his unprofessional conduct in falsely misrepresenting his disciplinary status to patients in his written disclosures. Respondent's conduct constituted dishonesty or corruption. Respondent falsely represented the existence of a state of facts concerning his disciplinary status.

Disciplinary Remedy

16. Having found a basis for revoking probation, the question becomes what disciplinary remedy is appropriate under these circumstances, keeping in mind the purpose of license discipline to protect the public but not punish respondent.

17. The board's Disciplinary Guidelines, 12th Edition, 2016, state that the minimum penalty for a violation of probation is a 30-day suspension. The maximum penalty is revocation. The guidelines also state, "the maximum penalty should be given for repeated similar offenses or for probation violations revealing a cavalier or recalcitrant attitude."

18. At the time respondent treated Patients A, B, and C in violation of his probation, he had completed two years of a five-year probation. He complied with many of the probation requirements: he had a practice monitor who inspected the practice, randomly reviewed charts, and submitted required reports; he refrained from

prescribing controlled substances and IT therapy until after he completed the physician competence assessment program; he submitted quarterly reports; he met regularly with the board's probation monitor and, from her point of view, was cooperative, transparent, and honest; he completed additional education hours.

19. Respondent's two-year anniversary of his probation in the 2020 Board Decision, as modified in the 2022 Board Remand Decision, was August 25, 2022. He could have filed a petition for early termination or modification of probation at the same time that he began violating his probation by treating Patients A, B, and C. (Bus. & Prof. Code §§ 2221; 2307.)

20. Respondent took the position in this case that the board "confused" him about his probation status and whether the IT pump treatment prohibition was still effective. That is completely untrue. Although the situation was complicated because of the many disciplinary orders and writs, it was not confusing. The board's position that respondent remained subject to the IT treatment practice restriction was clear. The board rejected respondent's attorney's attempt to remove the IT pump restriction from the public website disclosure in August 2022. Respondent and the board were involved in litigating whether the 2022 Board Decision was "void" in Writ II, which respondent's attorney filed in February 2022.

21. Why would a physician with a two-year history of discipline by the board, who knew that the board considered the IT pump practice restriction to be ongoing, choose to violate probation rather than comply with probation and petition the board for early probation relief? Why does a physician who is actively litigating a legal issue about his probation status begin acting as if that legal issue has already been resolved? Respondent's testimony in this case was full of a lot of excuses, but no explanation. His supposed reliance on his attorney's advice in the face of his long

disciplinary history is not credible and, even if believed, is not legally sufficient to protect him from discipline.

22. Respondent had no satisfactory answer for the question why he chose the path of probation violation. Webster's Dictionary Online defines "recalcitrant" as obstinately defiant of authority or restraint. "Cavalier" is marked by or given to offhand and often disdainful dismissal of important matters. The only conclusion one can reach from the evidence is that respondent was recalcitrant and cavalier in his dealings with the board and with his professional duty to disclose accurate information to his patients when seeking their informed consent to treat them.

23. The evidence showed that respondent learned nothing as of 2022, from two years on probation, or since 2022 to the present date. There was no evidence in this case of his rehabilitation. If anything, license probation has made respondent more cavalier and recalcitrant toward the rehabilitation that probation was designed to foster.

24. Given respondent's recalcitrant and cavalier attitude that was evident throughout this case, a term of suspension or an extension of additional probation is not likely to result in any further rehabilitation of respondent and will not adequately protect the public. The only remedy that protects the public is revocation of respondent's probation, removal of the probationary stay of his revocation, and revoking his certificate.

ORDER

The probation granted to respondent David James Smith in Case No. 800-2018-042234, is revoked. The stay of the disciplinary order is lifted. Respondent's Physician's and Surgeon's Certificate No. G 66777 is revoked.

DATE: July 2, 2024

Alan R. Alvord

ALAN R. ALVORD
Administrative Law Judge
Office of Administrative Hearings