

NEVADA STATE BOARD OF MEDICAL EXAMINERS



IN THE MATTER OF CHARGES AND COMPLAINT AGAINST

DAVID JAMES SMITH, M.D.

ADJUDICATION

Case No: 25-47823-1

Date: March 6, 2026

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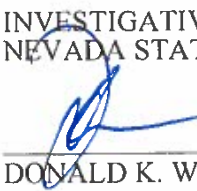
5. That the Board make, issue and serve on Respondent its findings of fact, conclusions of law and order, in writing, that includes the sanctions imposed; and

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: _____


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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

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

Case No. 800-2021-081615

Respondent.


DECISION

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

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

IT IS SO ORDERED: July 25, 2024.

MEDICAL BOARD OF CALIFORNIA



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, Virginia 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 spinal 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

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**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

JAN 14 2026

NEVADA STATE BOARD OF
MEDICAL EXAMINERS
By: 

SYNOPSIS OF RECORD/FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

This case involves a Nevada physician, Respondent David James Smith, M.D., (“Dr. Smith” or “Respondent”) who had his medical license in California *revoked* in 2024 by the Medical Board of California (“California Medical Board.”) The ultimate issue in this case is not whether Respondent is subject to a disciplinary action before the Nevada State Board of Medical Examiners (“NSBME”); rather, as stated by Respondent’s counsel in her opening statements, the ultimate issue is “what the appropriate discipline might be at the time of adjudication in this case.” Transcript (“TR”) 17:4-6. Respondent’s counsel also noted “that the context and the timeline of this case is germane and salient to the full decision that is going to be made in this case.” TR 17:7-9.

During the course of the formal hearing in this matter, the undersigned Hearing Officer received evidence (and argument) regarding Respondent’s disciplinary history with not only the California Medical Board, but also with this Board. This history is lengthy, convoluted and in California, contentious.

The California disciplinary history involves three (3) separate sets of accusations against Respondent that resulted in four (4) separate multi-day hearings and four (4) separate decisions from the California Medical Board, adopting four (4) separate Administrative Law Judge (“ALJ”) proposed decisions. It also resulted in Respondent filing three (3) separate Superior Court writ

1 applications challenging the California Medical Board’s decisions, one (1) of which was (partially)
2 successful on procedural grounds while the other two (2) were not.

3 The NSBME disciplinary history involves one (1) prior case. On June 9, 2022, the
4 Investigative Committee of the Nevada State Board of Medical Examiners (“IC”) filed its formal
5 charging document against Respondent in Case No. 22-47823-1. This charging document alleged
6 five (5) counts against Respondent including: (i) Obtaining a License by Fraud and
7 Misrepresentation; (ii) Disciplinary Action by Another State Medical Board; (iii) Failure to Report
8 Disciplinary Action by Another State Medical Board; (iv) Disciplinary Action by Another State
9 Medical Board; and (v) Failure to Report Disciplinary Action by Another State Medical Board. The
10 complaint included as exhibits two (2) of the California Medical Board’s disciplinary decisions
11 against Respondent, one (1) of which spanned **88 pages** and the other of which totaled **100 pages**.¹

12 As will become immediately clear, the focus of the California Medical Board’s disciplinary
13 actions against Respondent centered on his use of a specific pain management treatment modality
14 involving intrathecal (“IT”) pumps. Respondent’s IT pump therapy practice is the common
15 denominator binding together the various California disciplinary cases against Respondent.

16 **II. ALLEGATIONS and DEFENSES**

17 The formal charging document (“Complaint”) in this matter alleges one (1) count against
18 Respondent: **NRS 630.301(3)-Disciplinary Action by Another State Medical Board**. The
19 statutory authority for this count is NRS 630.301(3) which generally provides that discipline taken
20 against a Nevada licensee by another state’s medical licensing board “is grounds for initiating
21 disciplinary action against that licensee.” In turn, the decision revoking Respondent’s medical license
22 by the California Medical Board that is Exhibit 1 to the Complaint is the disciplinary action by
23 another state’s medical board statutorily justifying the IC’s Complaint under NRS 630.301(3). IC
24 formal hearing Exhibit 1 is a certified copy of that decision.

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28 ¹ To be clear, this prior Nevada disciplinary case is only relevant to this instant matter for history and context. The prior case resulted in a settlement agreement that was accepted and approved by this Board on June 7, 2024, and there is no evidence or argument that Respondent is not complying with the settlement terms thereunder.

1 In his Answer and Notice of Defense, Respondent admits the factual allegations of the
2 Complaint, which are again simple. Respondent therefore acknowledges, as he must, that his
3 California medical license was *revoked* effective August 23, 2024.

4 There is no question that the IC is legally and factually justified in bringing this case against
5 Respondent, and again as noted by Respondent’s counsel at the formal hearing, the ultimate issue is
6 what the appropriate discipline might be at the time of adjudication. This synopsis of the record will
7 detail Respondent’s California Medical Board disciplinary history based on the evidence presented,
8 including most prominently IC’s formal hearing Exhibit 1, which is the disciplinary action from the
9 California Medical Board that revoked Respondent’s medical license. Understanding the history is
10 key when considering what discipline might be appropriately dispensed by the NSBME adjudicating
11 members.

12 **III. FORMAL HEARING EVIDENCE, WITNESSES AND TESTIMONY**

13 The formal hearing in this matter occurred on November 13, 2025. Present in the Reno office
14 of the Nevada State Board of Medical Examiners were Donald K. White, Esq. on behalf of the IC,
15 Respondent David James Smith, M.D., Respondent’s attorney Lyn Beggs, Esq., and the undersigned
16 Hearing Officer, together with the certified court reporter.

17 IC witness Ernesto Diaz, Chief of Investigations for the Board, as well as Respondent
18 appeared and testified in person. Respondent’s witness Matthew Rifat, Esq., testified remotely by
19 video conferencing through a cloud-based application, Zoom. All witnesses were sworn in prior to
20 testifying and the rule of exclusion was invoked by both parties.

21 IC’s Exhibits 1 and 2 were offered and admitted into evidence prior to testimony, without
22 objection. Exhibit 1 is a *certified copy* of the July 25, 2024, **DECISION** from the California Medical
23 Board (the “**2024 California Medical Board Decision**”) revoking Respondent’s medical license and
24 Exhibit 2 is the transmittal of that decision to the IC’s counsel “in accordance with” NRS
25 630.306(1)(k).

26 The case before this Board is legally and factually simple. There is no dispute that
27 Respondent’s medical license in California was *revoked* by virtue of the 2024 California Medical
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1 Board Decision, IC Exhibit 1. Therefore, there is no dispute that the IC is statutorily authorized to
2 bring this case.

3 The testimony at the formal hearing will be summarized below. That said, such testimony
4 provides little insight into *why* Respondent found himself in disciplinary trouble with the California
5 Medical Board. IC's Exhibit 1 provides the answer to that question. As noted, Respondent's
6 disciplinary history with the California Medical Board is lengthy, convoluted and contentious.
7 Understanding that history addresses the relevant timeline of Respondent's California disciplinary
8 history and provides context for such discipline and license revocation.

9 Accordingly, IC Exhibit 1, the 2024 California Medical Board Decision, will be analyzed
10 initially, and then the hearing testimony will be summarized. The initial focus will be on the
11 procedural history of Respondent's various disciplinary cases before the California Medical Board, as
12 well as a summary of the reasoning and the conclusions found in the California Administrative Law
13 Judge's "Proposed Decision" that was adopted by the California Medical Board in the 2024
14 California Medical Board Decision. After that, attention will turn to the testimony at the formal
15 hearing, then to findings and recommendations.

16 **1. Analysis of the 2024 California Board Decision and the ALJ's findings and reasoning.**

17 IC's Exhibit 1, the 2024 California Medical Board Decision in Case No. 800-2021-081615,
18 adopted the "Proposed Decision" that was issued by ALJ Alan R. Alvord ("ALJ Alvord"), on July 2,
19 2024. NSBME 001-41. This followed a three (3) day administrative hearing in California with
20 subsequent written final arguments and rebuttal arguments.

21 The 2024 California Medical Board Decision, based upon ALJ Alvord's Proposed Decision,
22 was entered in Case No. 800-2021-081615, which are the "**2023 accusations**" against Respondent
23 that were filed on July 11, 2023. These 2023 accusations were styled: "Petition to Revoke
24 Probation." NSBME 004. The decision discusses in great detail the procedural and substantive
25 history of Respondent's prior disciplinary cases before the California Medical Board as well as
26 evidence supporting the 2023 accusations. Those 2023 accusations focused on Respondent's IT
27 pump treatment of three (3) patients in 2022, as well as certain disclosures Respondent made to
28 patients regarding his disciplinary status.

1 The 2024 California Medical Board Decision on the 2023 accusations was entered in the *third*
2 California disciplinary action against Respondent, all of which again dealt with IT pump therapy.
3 Understanding what transpired in those other two (2) disciplinary cases is essential to understanding
4 the basis of the 2024 California Medical Board Decision that revoked Respondent’s California
5 medical license, and what, if any, disciplinary action should be taken by this Board.

6 ***A. Disciplinary History: California Medical Board Case No. 800-2015-012651 and the***
7 ***2020 Board Decision resulting in Writ I***

8 The California Medical Board *first* issued disciplinary accusations against Respondent on
9 April 27, 2018, California case no. 800-2015-012651. These “**2018 accusations**” were based on
10 Respondent’s care and treatment of five (5) patients using IT pumps between 2004 and 2017. The
11 case went to formal hearing in September and October 2019 and January 2020.² On August 25,
12 2020, the California Medical Board adopted the ALJ’s proposed decision and found that Respondent
13 Dr. Smith committed gross negligence (as to four of five patients); repeated negligent acts (as to all
14 five patients); incompetence (as to one of five patients); prescribed excessive drugs (as to three of the
15 five patients); failed to maintain adequate and accurate records (as to all five patients); and engaged
16 in unprofessional conduct (as to all five patients.) Respondent’s “certificate” (i.e. medical license)
17 was *revoked*, with the revocation *stayed* subject to a probationary period of seven (7) years and
18 various other conditions, restrictions and requirements. NSBME 006-007. This will be referred to as
19 the “**2020 California Medical Board Decision**” and was effective on September 24, 2020. It is also
20 Exhibit 1 in the NSBME case no. 22-47823-1 (100 pages long, and extremely detailed).

21 On November 13, 2020, Respondent filed a writ petition in Superior Court challenging the
22 2020 Board Decision. (“**Writ I.**”) Well over a year later, on January 24, 2022, the Superior Court
23 partially granted Writ I, thereby overturning the 2020 California Medical Board’s Decision. NSBME
24 007. More on this below.

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² This consumed 12 days of hearing time: September 16, 17, 18, 23, 24, 25, 26, 27; October 2 and 3; January 3 and 30.

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***B. Disciplinary History: Medical Board of California case
No. 800-2018-042234 and 2022 Board Decision resulting in Writ II***

On December 22, 2020, shortly after Writ I was filed concerning the 2020 California Medical Board Decision in case No. 800-2015-012651, the California Medical Board filed its *second* disciplinary accusations against Respondent, which were assigned case No. 800-2018-042234. This case again involved IT pump treatment and three (3) additional patients. That case went to hearing in October 2021. NSBME 007. These will be referred to as the “**2020 accusations.**”

By the time the 2020 accusations went to hearing in October 2021 (still during the pendency of the Writ I proceedings on the 2020 California Medical Board Decision on the 2018 accusations), Respondent had completed certain terms of his discipline imposed under the 2020 California Medical Board Decision concerning a clinical competency assessment that was required before he resumed prescribing controlled substances and performing IT pump therapy. Accordingly, on October 19, 2021, the California Medical Board’s probation manager issued a letter to Respondent *lifting* the IT pump therapy restrictions that had been imposed in the 2020 Board Decision. NSBME 008.

The six (6) day hearing on the 2020 accusations occurred on October 4 through 8 and 11, 2021. As noted, that hearing occurred during the pendency of the Writ I California Superior Court case regarding the 2020 California Board Decision on the 2018 accusations. One of the factual findings by the ALJ regarding the 2020 accusations (factual finding 235) was that: *Respondent stated he has completed the clinical competency assessment course and can now perform the surgical procedures related to intrathecal pumps.* NSBME 009.³ Factual finding 235 was contained in the ALJ’s proposed decision on the 2020 accusations which was adopted by the California Medical Board on December 22, 2021, effective January 21, 2022 (“**2022 California Medical Board Decision.**”) It is also Exhibit 2 in Nevada Case No. 22-47823-1 (88 pages long, and again extremely detailed).

The 2022 California Medical Board Decision was also issued during the pendency of the Writ I Superior Court case regarding the 2020 California Medical Board Decision on the 2018 accusations.

³ Note that Respondent’s testimony giving rise to factual finding 235 occurred *prior to* the October 19, 2021, letter from Respondent’s probation manager lifting Respondent’s IT pump practice restriction under the 2020 California Board Decision. Thus, when this testimony was given by Respondent regarding his ability to perform IT treatment it was inaccurate and misstated his disciplinary status.

1 In the 2022 California Medical Board Decision, the California Medical Board found that
2 Respondent's misconduct with two (2) patients was serious and exposed them to harm. NSMBE
3 009. The Board's remedy took into account Respondent's two years of probation compliance and
4 completion of a required clinical competency assessment. The remedy again *revoked* Respondent's
5 physician's certificate, with the revocation *stayed* and probation from the 2020 California Medical
6 Board Decision reinstated together with an additional term *prohibiting* Respondent from engaging in
7 IT pump therapy for the duration of the probation. NSBME 010. This means that between October
8 19, 2021, and January 21, 2022, Respondent was permitted to engage in IT pump therapy. NSMBE
9 010-011.

10 It is the practice restrictions in the 2022 California Medical Board Decision that resulted in
11 the *third* set of accusations against Respondent that will be discussed below. These are the 2023
12 accusations, and form the basis for IC's Exhibit 1, the 2024 California Medical Board Decision.

13 On February 17, 2022, Respondent filed a writ petition in Superior Court challenging the
14 2022 California Medical Board Decision. ("**Writ II.**") Writ II was eventually *denied*, and the 2022
15 California Medical Board Decision was upheld in a judgment entered February 5, 2024. NSBME
16 011. The denial of Writ II will be discussed further below.

17 ***C. Disciplinary History: Respondent is partially successful in Writ I***

18 On January 22, 2022 (one (1) day after the effective date of the 2022 California Medical
19 Board Decision) the Superior Court *partially granted* Writ I in favor of Respondent, with a
20 subsequent judgment dated February 28, 2022. The Superior Court found that the ALJ's ruling in the
21 2020 California Medical Board Decision excluding Respondent's proposed expert witness testimony
22 regarding *three* (3) of the *five* (5) patients at issue was erroneous. The Court also noted that its ruling
23 *did not impact* the Board's decision regarding the two (2) other patients, identified as patients B and
24 E. Judgement was entered in favor of Respondent on February 28, 2022, setting aside the 2020
25 California Medical Board Decision. Accordingly, as of February 28, 2022, Respondent was no
26 longer under probation established by the 2020 California Medical Board Decision but was still under
27 the single probationary term under the 2022 California Medical Board Decision relating to the
28 *prohibition* on IT pump therapy. NSBME 011-013. The 2022 California Medical Board Decision

1 was under review in the Writ II proceeding at the time, with the same having been filed 11 days
2 before the Writ I judgment was entered.

3 ***D. Disciplinary History: California Medical Board Remand Decision in Case No. 800-***
4 ***2015-012651 and Writ III***

5 Following the Superior Court’s Writ I decision, on June 9, 2022, the California Medical
6 Board set aside its 2020 decision that was the subject of the Writ I case in Case No. 800-2015-
7 012651 and noticed oral argument for July 22, 2022, focusing on determining the level of discipline
8 related to the two (2) patients not covered by the writ decision (Patients B and E.) This hearing was
9 before a different ALJ, with Respondent testifying. Respondent testified that his probation officer
10 had told him that as far as she was concerned and the people in Sacramento are concerned, nothing
11 had changed. NSBME 013.

12 On August 11, 2022, the California Medical Board issued its decision after remand (“**2022**
13 **California Board Remand Decision**”) that was effective immediately and retroactive to September
14 24, 2020. In this decision, Respondent’s physician’s certificate was placed on probation for 5 years
15 retroactive to September 24, 2020, and further all probationary terms from the 2020 California
16 Medical Board Decision were reinstated except patient notification requirements. Respondent was
17 also given credit for the clinical competency assessment course and the October 19, 2021, letter
18 lifting the restriction on IT therapy. NSBME 014.

19 Respondent filed a writ petition as to the 2022 California Board Remand Decision on August
20 26, 2022. (“**Writ III**”). On January 2, 2024, the California Superior Court hearing Writ III denied
21 same, thereby *upholding* the 2022 California Medical Board Remand Decision. NSMBE 014.

22 ***E. History: Legal dispute over accuracy of disclosures and Respondent’s***
23 ***void ab initio argument regarding the 2022 California Board Decision***

24 The 2022 California Medical Board Remand Decision sparked a legal dispute between the
25 board and Respondent’s legal counsel in addition to the Writ III litigation (Writ II was still pending at
26 the time as well). Respondent’s counsel, Matthew Rifat, Esq., who did testify as a witness in this
27 NSBME matter and whose testimony will be discussed below, argued that the California Medical
28 Board’s proposed website disclosure regarding Respondent (that included language that Respondent

1 was prohibited from performing IT pump care or treatment) was “inadequate and incomplete” and
2 “false and misleading.” He also asserted that the 2022 California Board Decision (that included the
3 IT pump practice preclusion) was “void as a matter of law” and proposed different language for the
4 website disclosure that removed any mention of IT pump treatment. This legal argument was
5 *rejected* by the California Medical Board. NSBME 014-015.

6 As noted, Writ II was eventually denied, and the 2022 California Board Decision was upheld
7 in a judgment entered February 5, 2024. During the litigation of Writ II, Respondent argued that the
8 2022 California Medical Board Decision was “void” because it was tied to the 2020 California
9 Medical Board Decision that had been overturned in the Writ I proceeding. The Writ II Superior
10 Court *rejected* that argument, labeling it “defective” and determining that the 2022 California
11 Medical Board Decision was “stand alone” placing Respondent on probation with an IT pump
12 restriction despite the Writ I Superior Court having overturned the 2020 California Medical Board
13 Decision. NSBME 016.

14 During the time that the Writ II proceedings were pending, from August 25, 2022, to
15 November 22, 2022, Respondent started once again treating IT pump patients. It is the IT pump
16 treatment of three (3) patients during that time that was the focus of the 2023 accusations, and which
17 resulted in the 2024 California Medical Board Decision (revoking Respondent’s California medical
18 license) that is the subject of this proceeding. (IC’s Exhibit 1). NSBME 016.

19 ***F. Disciplinary History: Medical Board of California case No. 800-2021-081615, the***
20 ***2023 accusations and the California Decision that is the subject of this NSBME***
21 ***proceeding***

22 The 2024 California Medical Board Decision that is the subject of this Nevada disciplinary
23 proceeding was entered in case No. 800-2021-081615, following a three (3) day hearing and the
24 adoption of ALJ Alvord’s “proposed decision” dated July 2, 2024.

25 According to the 2024 California Medical Board Decision, Respondent’s treatment of three
26 (3) IT pump patients occurred between August 25, 2022, and November 22, 2022. ALJ Alvord then
27 detailed such treatment and the medical process of IT pump care. NSBME 017. This is described as
28 “an intensive pain management modality.” The California Medical Board’s expert witness and

1 Respondent’s expert witness in the case both went so far as to testify that “an IT pump physician
2 must be prepared to ‘marry the patient.’” Id.

3 On pages 15-18 of the 2024 California Medical Board Decision, NSBME 016-019, ALJ
4 Alvord detailed the treatment of the three (3) patients at issue in the case. This included: (i) IT pump
5 explant and follow up care with patient A that occurred in September, 2022 which was also the
6 subject of a civil suit against Respondent; (ii) surgical pump replacement, reprogram of IT pump and
7 medication refill as to Patient B that occurred in August-October, 2022; and (iii) pump surgical pump
8 access, aspiration, telemetry and analysis as to Patient C that occurred in October, 2022.

9 On page 19 of the 2024 California Medical Board Decision, NSBME 020, ALJ Alvord
10 discussed facts surrounding Respondent’s refusal to answer certain questions regarding his patient IT
11 pump treatment posed by his probation officer on September 9, 2022, based on 5th Amendment
12 grounds. According to ALJ Alvord, Respondent testified that he exercised his 5th Amendment
13 privilege on advice of counsel because there was a federal indictment against him pending at the
14 time. Respondent also testified that the federal charges against him were “later dismissed.” On
15 cross-examination, however, Respondent acknowledged that the charges were *not dismissed* but
16 rather that he pled guilty to one (1) misdemeanor charge. The ALJ made it clear that Respondent’s
17 federal charges were not grounds for discipline in the case; rather the discussion of the federal
18 charges was to provide context to Respondent’s exercise of his 5th Amendment rights.

19 Next, ALJ Alvord found that Respondent was prohibited from performing IT pump treatment
20 when he treated Patients A, B and C. In so finding, he noted that Respondent’s legal arguments that
21 there was no IT pump restriction in place at the time of the treatment (with such restriction being
22 “void as a matter of law”) had been *rejected* by the Superior Court in Writ II as “defective.”
23 According to ALJ Alvord: **“The 2022 Board Decision’s stand-alone IT pump prohibition was in
24 effect on August 25, 2022, when respondent began treating Patients A, B and C; the IT pump
25 prohibition remained effective throughout his treatment of the three patients in this case.”**
26 NSBME 022.

27 After determining that there was an IT pump treatment prohibition in place when Respondent
28 treated Patients A, B, and C, ALJ Alvord then turned to the question of whether such treatment

1 violated such prohibition. He first summarized the California Medical Board’s expert witness
2 testimony. Such testimony was that Respondent’s treatment of the three (3) patients “constituted care
3 or treatment with patients involving the use, management, or surgical procedure related to IT
4 pumps.” NSBME 022-023.

5 ALJ Alvord then summarized Respondent’s testimony at the hearing. Respondent testified
6 that he treated Patient A on September 1, 2022, because the 2020 California Medical Board Decision
7 had been set aside and that he believed that the 2022 Board Decision was “void as a matter of law.”
8 Respondent also testified that the treatment he rendered to Patients A, B, and C was not really IT
9 pump treatment for a variety of reasons. NSBME 023-024.

10 **ALJ Alvord specifically found that Respondent’s treatment of Patients A, B and C**
11 **violated the IT pump practice restriction, accepting the Board’s expert witness testimony and**
12 **rejecting Respondent’s testimony.** NSBME 024-025.

13 The focus of ALJ Alvord then turned to the issue of the “disclosures” that Respondent had
14 Patients A, B and C sign. Those disclosures, drafted by Respondent’s counsel Mr. Rifat, set forth a
15 history of Respondent’s discipline and also contained a reference to the Superior Court’s decision on
16 Writ I, stating that the Board’s disciplinary order of August 25, 2020, had been set aside, “concluding
17 that the Medical Board had violated my due process rights.” ALJ Alvord noted that these disclosures
18 were signed while Respondent was subject to a practice restriction prohibiting him from IT pump
19 treatment. NSBME 025-206.

20 ALJ Alvord determined that the disclosures contained *misleading information* and that the
21 “violation of my due process rights” language was inaccurate and gave patients the false impression
22 that Respondent had been completely exonerated by the Writ I decision, “when he was not.” He also
23 found that the disclosures misled patients into believing that Respondent’s IT pump treatment
24 restriction had been lifted. ALJ Alvord then focused on a dispute between counsel regarding the
25 scope of the Writ I decision, which included Respondent counsel’s contention that the 2022
26 California Medical Board Decision was “*de jure* void,” an argument that the ALJ noted the Writ II
27 Superior Court rejected as being “defective.” NSBME 026-027. *Ultimately, ALJ Alvord found that*
28 *the disclosure contained inaccurate, false and misleading statements to patients, and accordingly*

1 *constituted unprofessional conduct that was substantially related to the qualifications, functions or*
2 *duties of a physician. NSBME 028.*

3 Importantly, ALJ Alvord also detailed Respondent’s testimony and his compliance with
4 probation terms. He noted that Respondent’s probation manager indicated that Respondent was
5 compliant and cooperative with her, had submitted required reports and logs, and had completed the
6 required training and education including the clinical competency evaluation. Further, ALJ Alvord
7 noted that Respondent testified that he made changes to his practice based on his understanding of
8 criticisms found in the 2020 California Medical Board Decision, at one time sold his practice to
9 another physician (a transaction that apparently did not work out), used nurse practitioners and other
10 physicians to provide IT pump care to patients and did not “touch” controlled substances or IT pump
11 treatment until his right to do so was restored. NSBME 028-030.

12 ALJ Alvord addressed Respondent’s **credibility** at the hearing as follows:

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

20 NSBME 030.

21 ALJ Alvord then set forth his “Evaluation of Disciplinary Remedy.” The undersigned
22 Hearing Officer is summarizing a California ALJ’s findings below and defers to them since they have
23 not been challenged and are not the subject of any writ or other legal challenge. ALJ Alvord focused
24 on the following:

25 ■ Respondent acted on a “void as a matter of law” position that was *without*
26 *justification.*

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- 1 ■ Respondent *refused* to answer questions posed by his probation officer regarding
2 IT pump practice, adopting a legal position that had not been resolved and that the
3 board opposed.
- 4 ■ Respondent *violated* the IT therapy restriction on *multiple occasions* in *direct*
5 *violation* of the 2022 California Medical Board Decision.
- 6 ■ Respondent’s patient disclosure form given to patients was *false* and *misleading*.
- 7 ■ At the hearing, Respondent “took two inconsistent but equally untenable
8 positions” regarding the IT pump practice restriction.
- 9 ■ At no time did the California Medical Board mislead Respondent regarding the
10 effect of its 2022 decision. Respondent’s probation officer *did not corroborate*
11 Respondent’s testimony that she told Respondent that IT treatment was in a “gray
12 area” and that in any event, Respondent was *not justified* in relying on any such
13 purported statement given other case facts.
- 14 ■ The “void” issue was litigated in the Writ II proceeding and the Superior Court
15 ultimately characterized Respondent’s “void as a matter of law” position as
16 *defective* and confirmed the 2022 California Medical Board Decision was a
17 “stand-alone” disciplinary order that was still in effect.
- 18 ■ Respondent *never acknowledged his mistake* in treating patients based on his
19 mistaken “void as a matter of law” position or for misleading patients. He
20 showed “*no remorse*” for his conduct or empathy for his patients.
- 21 ■ *Respondent did not make an innocent mistake. He did not reasonably rely on*
22 *legal advice. He is a highly educated professional who made his own decisions*
23 *with full knowledge of the consequences. He made a conscious bad faith choice*
24 *to ignore a legitimate board order and treat patients in violation of the board’s*
25 *discipline. Despite complying with other probation terms, Respondent had been*
26 *“cavalier” and “recalcitrant” in complying with the one condition most*
27 *important to public protection—the restriction on IT pump treatment.*

28 NSBME 030-032 (Italics added for emphasis).

1 ALJ Alvord then set forth his various “**Legal Conclusions,**” which are found at Exhibit 1,
2 NSBME 033-036. Those include the conclusion that although the California Medical Board bore the
3 burden to prove its case by a preponderance of the evidence, the allegations against Respondent were
4 proven by *clear and convincing evidence*. He focused on the patient disclosure letter Respondent’s
5 attorney prepared, which he had previously determined to contain inaccurate, false and misleading
6 statements to patients, thereby constituting unprofessional conduct that was substantially related to
7 the qualifications, functions or duties of a physician. Among other things, he determined that a
8 professional is not immune from license discipline simply because he or she consulted an attorney,
9 received, and relied on legal advice. NSBME 035.

10 ALJ Alvord then determined that “**Cause to Revoke Probation**” was established. The
11 reasons were twofold. First, cause was established to revoke probation based on Respondent’s
12 **violation** of the 2022 California Medical Board Decision’s probationary restriction on providing care
13 or treatment involving the use, management, or surgical procedures regarding IT pumps. Second,
14 cause was established to revoke probation by Respondent **falsely misrepresenting** his disciplinary
15 status to patients in his written disclosures. Respondent’s conduct constituted **dishonesty** or
16 **corruption**. Respondent **falsely represented** the existence of a state of facts concerning his
17 disciplinary status. NSBME 038.

18 Finally, in light of the probation revocation determination, ALJ Alvord addressed the
19 **disciplinary remedy** to impose on Respondent under board guidelines.

20 ALJ Alvord did note that at the time Respondent had treated the three (3) patients at issue in
21 the case, he had: (i) completed two (2) years of a five year probation; (ii) had complied with many
22 probation requirements; (iii) had a practice monitor; (iv) submitted required reports; (v) refrained
23 from prescribing controlled substances and IT pump therapy until he completed the competency
24 assessment program; (vi) met with his probation monitor and was cooperative, transparent, and
25 honest; and (vii) had completed additional education hours.

26 That said, ALJ Alvord found Respondent’s position that he was “confused” about the IT
27 pump treatment restriction to be “*completely untrue.*” After asking some rhetorical questions
28 regarding why Respondent would act as he did given his long running history of discipline by the

1 board, he found that “Respondent’s testimony in this case was full of a lot of excuses, but no
2 explanation.” NSBME 039. His reliance on his attorney’s advice was “not credible.” He had “no
3 satisfactory answer” for the question of why he chose to go down the path of probation violation.
4 After defining the terms “recalcitrant” and “cavalier,” ALJ Alvord wrote: “*The only conclusion one
5 can reach from the evidence is that respondent was recalcitrant and cavalier in his dealings with the
6 board and with his professional duty to disclose accurate information to his patients when seeking
7 their informed consent to treat them.* NSBME 040.

8 Finally, ALJ Alvord determined that the only remedy that protects the public is the
9 **revocation** of respondent’s probation, removing the probationary stay of his revocation, and **the**
10 **revocation of** his certificate. NSBME 040.

11 Specifically, ALJ Alvord’s **ORDER** states:

12 The probation granted to respondent David James Smith in Case No. 800-
13 2028-042234, is hereby revoked. The stay of the disciplinary order is lifted.
14 Respondent’s Physician’s and Surgeon’s Certificate No. G 66777 is revoked.

15 DATE: July 2, 2024.

16 Alan R. Alvord
17 Administrative Law Judge
18 Office of Administrative Hearings

19 NSMBE 041

20 The California Medical Board’s **DECISION** adopting ALJ Alvord’s proposed decision
21 states:

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

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

26 **IT IS SO ORDERED: July 25, 2024.**

27 **MEDICAL BOARD OF CALIFORNIA**

28 **Richard E. Thorpe, M.D., Chair**
Panel B

NSBME 001.

1 **2. Formal Hearing Testimony Synopsis**

2 There were three (3) witnesses who testified at the formal hearing. All witnesses were sworn
3 in prior to testifying.

4 **A. IC's Witness Ernesto Diaz**

5 The IC's first witness was Ernesto Diaz. Mr. Diaz is the Chief of Investigations for the
6 Nevada State Board of Medical Examiners. TR 18:17. This witness explained that while generally,
7 an allegation letter is sent to a licensee, that was not done in this case because Respondent's attorney
8 indicated that one was not needed in order to expedite the process. TR 19:3-5. Mr. Diaz then
9 explained the process he undertook to obtain a certified copy of the 2024 California Medical Board
10 Decision (IC's Exhibit 1) and the background of IC's Exhibit 2, which is the letter from
11 Respondent's counsel Ms. Beggs notifying the Board of that decision. TR 20:18-22:22.

12 Mr. Diaz further testified on cross examination that he is not personally involved in
13 monitoring a licensee's probation. TR 23:3-7.

14 Following the testimony of Mr. Diaz, a discussion was held with counsel, off the record,
15 regarding how best to handle the rest of the hearing's witnesses and testimony. It was agreed that the
16 IC would rest and then Respondent could present his case with IC counsel having full opportunity to
17 question Respondent as if he was testifying on direct examination. TR 23:20-24:5.

18 **B. Respondent David James Smith, M.D.**

19 *Direct examination*

20 Respondent testified that he has been a physician since 1989 and currently works at "Las
21 Vegas Injury Pain Center" focusing on "interventional pain." TR 25:13-19. He acknowledged that
22 his California physician's license has been revoked. TR 25:24-25.

23 Respondent acknowledged as well that he is currently on probation with the Nevada State
24 Board of Medical Examiners and that he is "100 percent" in compliance with that probation. TR
25 26:3-9. He also testified that prior to 2018 he had never faced any disciplinary action. TR 26:15-17.

26 Respondent testified that in 2018, the California Medical Board initiated a disciplinary action
27 against him that was, at least in part, related to treatment of patients with IT pumps. TR 26:21-27:1.
28

1 He acknowledged that a hearing occurred on those accusations⁴ and that he was placed on probation
2 pursuant to the decision in that case. TR 27:6-13. There were a variety of conditions on his
3 probation including: (i) establishing with a probation officer; (ii) site visits to his clinics; (iii) having a
4 practice monitor; (iv) completing multiple CME's and courses in record keeping, ethics, prescribing
5 pain management and opiate prescribing; and (v) completion of a three (3) day KSTAR program
6 where his clinical skills were assessed. This program also assessed Respondent's cognitive abilities
7 and his psychological, mental and physical status. He completed the course and passed. TR 28:13-
8 29:17.

9 Respondent testified that while he was complying with the terms of probation, he was also
10 appealing (through a writ proceeding) the underlying 2020 California Medical Board Decision on the
11 2018 accusations. He further testified that on February 28, 2022, the Superior Court overturned that
12 decision, but acknowledged that while that writ case was pending, the California Medical Board filed
13 second accusations against him on December 2020.⁵ TR 29:18-30:19.

14 According to Respondent, the 2020 accusations were similar to the 2018 accusations, and that
15 the 2020 accusations went to hearing in October 2021. TR 31:1-7. He testified that by October
16 2021, he had completed the KSTAR program and the restrictions on him providing care and
17 treatment with IT pumps had been removed by the California Medical Board. TR 31:19-32:2. He
18 also stated that by October 2021, he was able to provide care and treatment to patients using IT
19 pumps and also that the other restrictions on his practice had been lifted. TR 32:3-8.

20 Respondent testified that the decision on the 2020 accusations was issued in late 2021 with an
21 effective date in January 2022. This 2022 California Medical Board Decision reapplied the previous
22 restriction on IT pump care. TR 32:9-19. This decision was also challenged on appeal (writ) and
23 initially Respondent testified that he could not recall the outcome of that writ but ultimately
24 acknowledged, after prompting, that "I think it was denied." TR 32:20-33:2.

25 Respondent then testified that after the court ruling in the 2020 California Medical Decision
26 writ case, California Medical Board held a second hearing in *that same case* in the summer of 2022.
27 TR 33:11-22. As a result of that hearing, another decision was rendered by the California Medical

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⁴ These would be the "2018 accusations."

⁵ These would be the "2020 accusations."

1 Board in August 2022 (months after the 2022 California Medical Board Decision) that according to
2 Respondent, made probation retroactive to 2020, cut the duration of probation from seven (7) years to
3 five (5) years, and reiterated that the IT pump restriction would be lifted if the KSTAR program was
4 completed. TR 33:24-34:8.⁶

5 Respondent testified that after the 2022 California Medical Decision had been rendered, he
6 provided IT pump care to three (3) patients in late 2022. Before doing that, Respondent explained
7 that he asked for his legal counsel's advice and was "told by my counsel that because of the
8 retroactive to 2020, as a matter of law, that the IT restriction was no longer in place." TR 34:18-35:2.

9 Finally, Respondent testified that in July 2023, the California Medical Board filed a petition
10 to revoke probation, taking the position that he was not in compliance with his probation terms,
11 which was surprising to him because he believed that he was in compliance with his probation terms
12 "as a matter of law...." TR 35:8-24. The decision in that case is the 2024 California Medical Board
13 Decision, IC Exhibit 1 in this matter that was rendered in July 2024, effective August 23, 2024. TR
14 36:13-14.

15 *Cross-examination*

16 Initially, IC counsel made it clear on the record that Respondent was not charged with the
17 failure to report the California discipline. (That reporting is IC Exhibit 2.)

18 Next, Respondent was asked about the California Medical Board hearing in the summer of
19 2022 which he believed was a rehearing of the writ that overturned the 2020 California Medical
20 Board Decision, together with the results of that hearing. TR 37:17-39:10.

21 Respondent was then asked about the "surprise" he felt when the California Medical Board
22 took steps to revoke his probation in 2023, and he reiterated that he felt he was in compliance with
23 probation terms as a matter of law based upon advice from his attorney, Mr. Rifat. TR 40:1-9.

24 Respondent was then asked about his interactions with his California probation officer,
25 Virginia Addis. He testified that he met with her quarterly, and that there were discussions about IT
26 pump therapy, which he stated was in a "gray matter" and uncertain, according to Ms. Addis.⁷

27
28 ⁶ This would be the "2022 California Medical Board Remand Decision."

⁷ Please note that ALJ Alvord found that Ms. Addis did not corroborate this "gray area" testimony regarding Respondent's IT pump practice. NSMBE 031.

1 Nevertheless, when Ms. Addis would ask: “Are you doing any IT care?” he would respond: “Well,
2 occasionally I’m helping out, yes.” He made it clear that this was “after the writ” and that: “So to be
3 clear, I didn’t do anything until I was—after the Superior Court issued their writ and overturned the
4 case.” TR 40:10-41:22.

5 Respondent acknowledged that his license to practice medicine in California has been
6 revoked. TR 42:8-9. Further, his California clinics are closed, and he is not working (in medicine) in
7 California. TR 42:15-43:4.

8 Respondent was then questioned about why he “took the Fifth” and refused to answer his
9 probation officer’s questions regarding IT pump treatment in September 2022 as referenced in IC
10 Exhibit 1, page 19, paragraph 56. NSBME 020. He responded that he was under federal indictment
11 with 64 felony counts against him and that “I was counseled by my counsel to take the Fifth so I
12 wouldn’t self-incriminate...” TR 45:13-16.

13 Respondent was then asked further questions about advice he had received from his legal
14 counsel, Mr. Rifat, who also told him that he could use IT pumps again as a matter of law. TR 46:19-
15 22. He was also referred to IC Exhibit 1, page 22, paragraph 68, NSBME 023, where ALJ Alvord
16 noted that Respondent testified he treated one patient with IT pump on September 1, 2022, because
17 he believed that after the ruling in Writ I, the 2022 California Medical Board Decision (with the IT
18 pump practice restriction) was void as a matter of law based on attorney Rifat’s advice. TR 47:2-10.

19 Next, Respondent was asked about the patient disclosure letter he provided to patients as it
20 was discussed by ALJ Alvord in IC Exhibit 1, NSBME 025-026. Respondent testified that the
21 disclosure letter was written by his lawyer, and that it stated that he had been advised by counsel that
22 as a matter of law the 2022 California Medical Board Decision was set aside and that this was true
23 and not misleading. TR 47:11-48:6.

24 ***Re-direct examination***

25 Respondent was again asked about the patient disclosure letter he provided to patients and
26 again testified that he thought the facts stated therein were accurate at the time it was written by Mr.
27 Rifat. TR 19:5-14.⁸

28

⁸ Obviously, the California Medical Board disagreed.

1 Respondent then read into the record a portion of ALJ Alvord’s paragraph 56 from the IC
2 Exhibit 1 (NSBME 020) where it was noted that Respondent’s probation officer, Ms. Addis, testified
3 that when Respondent “took the fifth” it was the only time she recalled that Respondent refused to
4 give her information that she requested. TR 50:4-14. Otherwise, his relationship with Ms. Addis was
5 “very good” and that this instance was an outlier. TR 50:15-23.

6 Finally, Respondent testified that he referred to legal counsel on legal matters and that the
7 procedural history of the California Medical Board cases was “extremely convoluted and confusing.”
8 TR 51:1-10.

9 ***Re-cross examination***

10 Respondent read into the record certain *findings* from ALJ Alvord including: (i) The duty of
11 a physician is to give patients all information relative to their treatment decisions; (ii) Respondent
12 violated that duty; (iii) Respondent’s reliance on advice of counsel does not insulate him; and (iv) that
13 a professional is not immune from license discipline simply because an attorney was consulted and
14 the advice was relied upon. TR 52: 6-24.

15 ***Further re-direct examination***

16 Respondent testified that he did not agree with the conclusions of the ALJ Alvord. TR 54:1-
17 8.⁹

18 ***Hearing officer questions***

19 The undersigned Hearing Officer asked Respondent several questions. First, Respondent
20 testified that there was no writ action regarding the 2024 California Medical Board Decision, which
21 is the basis of this matter. Next, Respondent acknowledged that the federal charges against him were
22 resolved by a misdemeanor plea deal. TR 54:14-56:3.¹⁰

23 **C. Respondent’s witness Matthew Rifat, Esq.**

24 ***Direct examination***

25 Mr. Rifat is a California attorney who represented Respondent in 2018 and thereafter
26 regarding the accusations brought by the California Medical Board, including the hearing that
27 occurred on the first (2018) accusations. TR 61:5-16. That hearing was a multi-day hearing that was
28

⁹ Again, Respondent did not challenge the 2024 California Medical Board Decision by a writ.

¹⁰ Respondent also clarified that the federal charges were fully adjudicated and resolved by April 2024. TR 57:13-14.

1 done in two (2) phases. TR 62:2-6. He described the substance of the ALJ's decision in that case, as
2 well as the terms of probation. TR 62:11-63:9. He also testified that such decision was challenged by
3 a writ proceeding with the Superior Court, and that during the pendency of the writ proceeding,
4 which was decided in January 2022, Respondent was compliant with the terms of probation. TR
5 64:3-65:9.

6 Mr. Rifat testified that between the 2020 California Medical Board Decision date and the date
7 that the writ order setting aside that decision in 2022, the California Medical Board filed its second
8 set of accusations (the 2020 accusations) against Respondent, which he referred to as the "backstop
9 accusation" that "basically stereotyped or mimicked the original accusation" and in his opinion
10 "served no proper regulatory purpose."¹¹ TR 66:6-24. Mr. Rifat represented Respondent in the
11 hearing on the 2020 allegations which occurred in early October 2021. TR 67:11-17. He also
12 testified that shortly after that hearing, the California Medical Board lifted the IT treatment and care
13 restriction for Respondent, so that he could then again provide such care to patients. TR 68:4-12.

14 Following this, Mr. Rifat explained his understanding of the 2023 California Medical Board's
15 decision on the 2020 accusations, acknowledging that it was a "procedurally convoluted case." TR
16 68:19-29. Mr. Rifat also testified that in his opinion, any IT pump restriction placed on Respondent
17 in the 2022 California Medical Board's decision on the 2020 accusations (effective January 2022)
18 was "ameliorated" by the earlier October 2021 restoration of such privileges. TR 69:10-70:8.

19 Mr. Rifat then gave a very long narrative on his understanding of what happened *after* the
20 Superior Court writ decision on the 2018 accusations. This included what he characterized as an
21 "invented" new proceeding that "excised" two (2) patients from the original accusations about whom
22 Respondent had been prevented from presenting expert testimony and essentially reconsidered the
23 other three (3) patients. He characterized the California Medical Board's decision on the
24 reconsideration issue "bizarre."¹² TR 70:16-73:2.

25 Mr. Rifat then went on to testify as to his understanding regarding the 2022 California Board
26 Remand Decision, and as far as he was concerned, there was no restriction on Respondent regarding

27
28 ¹¹ The California Medical Board obviously disagreed, and the writ challenge to these so-called "backstop accusations" failed, vindicating that board's ultimate decision.

¹² It is again noted that the writ challenge to this so-called "bizarre" action failed, again vindicating the California Medical Board's position and decision.

1 IT care and treatment.¹³ TR 73:7-22. He then acknowledged that in July 2023, the California
2 Medical Board filed a petition to revoke Respondent’s probation and that the reasons for such petition
3 included Respondent providing IT care to patients when he was prohibited from doing so, as well as
4 issues related to the patient disclosure letter and the accuracy of same. TR 74:5-75:2.

5 Mr. Rifat then testified that Respondent’s discipline was quite a “political case.” He also
6 testified that in his “legal assessment,” the patient disclosure “was sufficient.” He testified that in his
7 “legal opinion” Respondent was able to provide IT treatment to patients after the IT restriction was
8 lifted in October 2021. TR 75:5-76:6. According to Mr. Rifat, Respondent listened to Mr. Rifat’s
9 advice (that he could provide IT care) and indicated that while he (Mr. Rifat) might be “legally
10 correct,” he (Respondent) would “self-restrict” to avoid potential issues, and that he would only
11 provide IT pump treatment if necessary or under urgent emergent situations. TR 76:6-19. Mr. Rifat
12 then acknowledged that the hearing on the 2023 accusations resulted in the ALJ (Alvord) disagreeing
13 with his legal position and issuing a recommendation for revocation that the California Medical
14 Board adopted. TR 76:20-77:12. Therefore, Mr. Rifat testified that Respondent does not currently
15 hold a license to practice medicine in California but that “when the time comes around” he will apply
16 for restoration of his license. TR 77:13-17.

17 *Cross-examination*

18 The initial portion of the IC’s cross examination ended up being a legal argument regarding
19 the relevance of Mr. Rifat’s legal representation of Respondent when he first applied for licensure in
20 Nevada in 2018. Eventually, after the various arguments were made for the record, IC counsel was
21 asked to “move forward” onto relevant matters, with the record being clear that Mr. Rifat had
22 represented Respondent for a long period of time, not just in California but also in Nevada. TR 78:9-
23 83:18.

24 Next, Mr. Rifat was asked about his interactions with Respondent’s probation officer,
25 Virginia Addis. He stated that he regularly communicated with Ms. Addis, who “seemed to have
26 affection and respect for Dr. Smith.” TR 84:8-20. He also had constant contact with the Deputy
27 Attorney General (“DAG”) handling the case against Respondent, Joe McKenna. He does not recall

28 _____
¹³ The California Medical Board obviously disagreed, and its position ultimately prevailed when Respondent’s writ challenge (Writ III) failed.

1 DAG McKenna telling him that Respondent could treat patients with IT pumps in the latter part of
2 2022. TR 84:24-85:23.

3 Mr. Rifat then described the process of restoration of Respondent's California license and the
4 reconsideration proceedings that occurred in California. He continued to maintain that the
5 "reconsideration" hearing that occurred after the successful writ proceeding was "procedurally
6 improper and extralegal."¹⁴ TR 86:5-87:9.

7 ***Re-direct examination***

8 Mr. Rifat was again asked about the "reconsideration" process and hearing after the writ
9 decision. He maintained that the 2022 California Medical Board Remand Decision simply deleted
10 reference to two patients from the original order, which Mr. Rifat testified that this did not remedy
11 the fair trial issue because "you can't just redact out a couple of patients and cure the problem of
12 having excluded the expert." TR 88:7-89:5.¹⁵

13 **D. Witness credibility assessment**

14 There were no issues with the credibility of IC witness Ernesto Diaz, who mainly testified
15 about his efforts to obtain a certified copy of the California disciplinary order.

16 The veracity and credibility of Respondent Dr. Smith must be judged against the overall
17 backdrop of this case, and most importantly, his very long and contentious disciplinary history with
18 the California Medical Board.

19 Respondent's testimony at the formal hearing relatively straightforward, which makes sense
20 given the reality that this case is not a re-litigation of his prior California disciplinary cases. He
21 acknowledged his basic disciplinary history before the California Medical Board and acknowledged
22 (as he must) that his California medical license has been revoked. He was respectful and pleasant to
23 all participants at the formal hearing. Nothing he testified to leads this Hearing Officer to believe that
24 he was being less than candid; however, his testimony did show that he has trouble accepting the
25 adverse outcomes of his various California disciplinary cases as well as the reasons therefor.

26 It bears repeating that ALJ Alvord, who recommended the revocation of Respondent's
27 California medical license in IC Exhibit 1, assessed his credibility as follows:

28 _____
¹⁴ Once again, and not to unduly belabor the point, Mr. Rifat's legal position in this regard did not prevail.
¹⁵ The writ petition challenging the 2022 California Board Remand Decision was denied.

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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 the 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.

NSBME 030.

Since the 2024 California Medical Board Decision at issue in this Nevada matter incorporated ALJ Alvord’s recommendation for license revocation, the undersigned Hearing Officer submits that this Board should give **significant weight** to the credibility assessment found in ALJ Alvord’s analysis and findings quoted above.

The veracity and credibility of attorney Mr. Rifat must take into consideration the fact that this Nevada matter, and the formal hearing, is not a re-litigation of the substantive disciplinary issues that were before the California Medical Board in the various cases discussed in IC Exhibit 1. Similar to Respondent, Mr. Rifat appears to have a difficult time accepting the fact that with the exception of partial (procedural) success on Writ I, Respondent’s factual and legal position on matters in contention have been *rejected* by various ALJs, the California Medical Board and the California Superior Court judges considering the various writ applications.

Nevertheless, Mr. Rifat continued to characterize the California Medical Board’s disciplinary actions and processes as being invented, procedurally improper, extrajudicial and serving no regulatory purpose. Continuing to pound this drum is utterly irrelevant to whether Respondent had his medical license revoked in the 2024 California Medical Board Decision, which is the *only issue* that the IC must establish to prove its case that Respondent is subject to a Nevada disciplinary case through this Board.

IV. FINDINGS and RECOMMENDATION

1. Findings.

As noted previously, the case before the NSBME is not a re-litigation of the cases against Respondent brought by the California Medical Board. Additionally, it is important to again note the

1 comments of Respondent’s Nevada attorney, Ms. Beggs, at the beginning of the formal hearing that
2 the ultimate issue is “what the appropriate discipline might be at the time of adjudication in this
3 case.”

4 With this in mind, the complaint herein alleges a single count:

5 **Count I: NRS 630.301(3)—Disciplinary Action by Another State Medical Board.**

6 The single count in this matter is based upon NRS 630.301(3) which provides that any
7 disciplinary action, including, without limitation, the revocation, suspension, modification or
8 limitation of a license to practice any type of medicine, taken by another state, is grounds for
9 initiating disciplinary actions against a licensee.

10 The IC has obviously proven its case by a preponderance of the evidence by virtue of the
11 2024 California Medical Board Decision, IC Exhibit 1. That decision, unchallenged by any writ
12 proceeding, *revokes* Respondent’s California medical license, and is the disciplinary action by
13 another state medical board that is the basis of this Nevada disciplinary proceeding.

14 **2. Recommendations.**

15 As noted previously, the ultimate issue in this case is not whether Respondent is subject to a
16 disciplinary action before this Board; rather, as stated by Respondent’s counsel, the ultimate issue is
17 “what the appropriate discipline might be at the time of adjudication in this case.”

18 In that regard, this Hearing Officer notes that in the 2024 California Medical Board Decision,
19 ALJ Alvord found that the California Medical Board had proven its case against Respondent not just
20 by a preponderance of the evidence but that “[e]ven if the required standard of proof were clear and
21 convincing evidence, which it is not, the evidence in this case meets that higher standard.” NSBME
22 034.

23 There is no question that Respondent is a highly educated professional who has been a
24 licensed physician since the late 1980’s. There is no evidence that prior to 2018, Respondent had any
25 disciplinary issues with the California Medical Board. The evidence is clear (and convincing),
26 however, that beginning in 2018, Respondent and the California Medical Board engaged in numerous
27 disciplinary matters, **all of which centered on Respondent’s IT pump treatment practice.** These
28 matters ultimately culminated with the *revocation* of Respondent’s California medical license.

1 As noted, during his testimony at the formal hearing, Respondent had trouble accepting the
2 adverse outcomes of his various California disciplinary cases as well as the reasons therefor.
3 Specifically, he had a hard time accepting the findings of the ALJs in several of his California
4 disciplinary cases that he *violated probation restrictions* under the California Medical Board's
5 various orders regarding IT pump care and treatment. He continued to justify his actions based on
6 the advice he received from legal counsel Rifat, even though if he had read the actual ALJ orders he
7 would have learned that advice of legal counsel is *not a defense* to the disciplinary charges and would
8 have also learned that the Writ II California Superior Court judge labeled Mr. Rifat's legal arguments
9 "defective."

10 Based upon the foregoing, it is respectfully recommended that this Board determine the
11 appropriate discipline warranted under these circumstances, up to and including license *revocation*
12 which mirrors the 2024 California Medical Board Decision, taking into consideration Respondent's
13 long and contentious disciplinary history before the California Medical Board which led to the
14 *revocation* of his California medical license, together with the reasons for such revocation.

15 DATED this 13 day of January, 2026.

16
17 
18 CHARLES BURCHAM
19 Email: charlie@northernnevadaadr.com
20 Tel: (775) 750-2998
21 *Hearing Officer*

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the Nevada State Board of Medical Examiners and that on the 14th day of January, 2026, I served a file-stamped copy of the foregoing SYNOPSIS OF RECORD/FINDINGS AND RECOMMENDATIONS, via USPS Certified Mail, postage pre-paid, to the following parties:

DAVID JAMES SMITH, M.D.
c/o Lyn E. Beggs, Esq.
316 California Ave., #863
Reno, NV 89509
Attorney for Respondent

Tracking No.: 9489 0178 9820 3045 5242 77

With courtesy copy by email to:

Lyn E. Beggs, Esq., at [lyn@lbeegslaw.com]
Don K. White, Senior Deputy General Counsel [dwhite@medboard.nv.gov]

DATED this 14th day of January, 2026.



MEG BYRD
Legal Assistant
Nevada State Board of Medical Examiners

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Hearing; November 13, 2025

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BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NEVADA

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FILED

In the Matter of Charges :
and Complaint Against: :

DEC 15 2025

NEVADA STATE BOARD OF
MEDICAL EXAMINERS
By: 

Case No. 25-47823-1

DAVID JAMES SMITH, M.D., :
Respondent. :

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TRANSCRIPT OF PROCEEDINGS

HEARING

THURSDAY, NOVEMBER 13TH, 2025

Reno, Nevada

Reported By: ERIN T. FERRETTO, CCR #281

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A P P E A R A N C E S

HEARING OFFICER:

CHARLES BURCHAM, ESQ.

FOR THE BOARD OF MEDICAL EXAMINERS, STATE OF NEVADA:

DONALD K. WHITE, ESQ.

Senior Deputy General Counsel

Nevada State Board of Medical Examiners

9600 Gateway Drive

Reno, Nevada 89521

FOR THE RESPONDENT SMITH, M.D.:

LYNN BEGGS, ESQ.

316 California Avenue, #863

Reno, Nevada 89509

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RENO, NEVADA, THURSDAY, NOVEMBER 13TH, 2025, 9:00 A.M.

-oOo-

HEARING OFFICER BURCHAM: This is the time and place set for the formal hearing in the matter of David James Smith, M.D., charged in the complaints against that physician.

Today is the 13th of November, 2025. I'm Charlie Burcham. I'm the hearing officer present at the office of the Board of Medical Examiners on Gateway in Reno, Nevada.

I would like counsel to state their appearances for the record and who they represent.

MR. WHITE: Don White, Senior Deputy General Counsel for the Nevada State Board of Medical Examiners, Investigative Committee.

MS. BEGGS: Good morning.

Lynn Beggs on behalf of Dr. David Smith, who is present with me.

HEARING OFFICER BURCHAM: I will -- as I mentioned before we went on the record, I'll be swearing the witnesses in when they're called.

Procedurally, just very quickly for the record,

1 the complaint in this matter was filed on June 24th,
2 2025. Respondent's Answer and Notice of Defense was
3 filed on July 22nd, 2025. The early case conference was
4 held on July 30, 2025, and that set various dates. The
5 pre-hearing statements were timely filed by the parties.
6 The pre-hearing conference took place on October 13,
7 2025. That's the basic procedural background of the
8 case.

9 Are counsel ready to proceed?

10 MR. WHITE: Yes.

11 MS. BEGGS: Yes.

12 HEARING OFFICER BURCHAM: Counsel has requested
13 that the Rule of Exclusion of the witnesses be invoked;
14 correct?

15 MR. WHITE: Yes. Thank you.

16 HEARING OFFICER BURCHAM: There's only going to
17 be, as I understand, one Zoom witness, who is currently
18 doing other things. He'll be called in and he's silent
19 now. I think that's the only one we really have to worry
20 about.

21 MR. WHITE: And Mr. Diaz, our chief investigator,
22 one of our witnesses, he also will not be privy to what
23 is going on here otherwise.

24 HEARING OFFICER BURCHAM: Before we went on the
25 record, we discussed a little bit about the exhibits.

1 The IC has two exhibits, Exhibit 1 and 2. Exhibit 1, I
2 believe, is the operative current decision out of the
3 California board; correct?

4 MR. WHITE: Correct.

5 HEARING OFFICER BURCHAM: And Exhibit 2 appears to
6 be an email?

7 MR. WHITE: Correct.

8 HEARING OFFICER BURCHAM: That looks like it might
9 have transmitted Exhibit 1. Is that kind of what it was?

10 MR. WHITE: It was all around the same time,
11 correct. Yes, that was -- it's an email actually from
12 Lynn Beggs to me stating that this is a formal -- this is
13 the -- well, just look at it here.

14 HEARING OFFICER BURCHAM: I want to make sure,
15 because on Exhibit 2 it references, Please find attached,
16 and my Exhibit 2 has nothing attached.

17 MR. WHITE: Nothing attached?

18 HEARING OFFICER BURCHAM: Is something attached?

19 MR. WHITE: I can get it for you really easily.
20 It's just a letter from Ms. Beggs to me saying that
21 she's -- showing that there was -- there was a formal
22 action taken.

23 HEARING OFFICER BURCHAM: If you want -- if the
24 lawyers want that as an exhibit, the letter, the
25 attachment to Exhibit 2, let me know.

1 Do you, Lynn?

2 MR. WHITE: Would you like me to do that?

3 MS. BEGGS: I think just to make sure that we have
4 a full -- I've got a copy of it, it's all of a paragraph.
5 I think just to have a complete record --

6 MR. WHITE: I can print it out really quick.

7 HEARING OFFICER BURCHAM: Let's do that, print
8 that out. The reason is the official Exhibit 2
9 references an attachment and I think the attachment
10 should be on it.

11 MR. WHITE: All right. I can do that.

12 HEARING OFFICER BURCHAM: Let's take a two-minute
13 break.

14 (Off the record.)

15 HEARING OFFICER BURCHAM: We're back on the
16 record. We have now obtained the attached letter that
17 was referenced in Exhibit 2, and it's a letter from
18 attorney Beggs to attorney White dated July 31st, 2024.
19 That letter attached Exhibit 1, which was the decision
20 out of the California board.

21 Correct, counsel?

22 MR. WHITE: Correct.

23 MS. BEGGS: Correct.

24 HEARING OFFICER BURCHAM: So these exhibits are
25 admitted?

1 MS. BEGGS: No objection.

2 HEARING OFFICER BURCHAM: Admitted and can be used
3 for purposes -- for all purposes by the parties and
4 attorneys.

5 (Exhibits 1 and 2 were admitted.)

6 HEARING OFFICER BURCHAM: We've taken care of the
7 exhibits, the procedural history of the case, any other
8 preliminaries before openings?

9 MS. BEGGS: I don't believe so.

10 MR. WHITE: No.

11 HEARING OFFICER BURCHAM: Okay. Mr. White?

12 MR. WHITE: Thank you -- actually, you have one
13 preliminary. There's a copy.

14 HEARING OFFICER BURCHAM: Mr. White -- I'm sorry.

15 MR. WHITE: There is a copy of the letter in that
16 down there for the witnesses?

17 MS. FUENTES: Yes.

18 MR. WHITE: Thank you. Okay. I'm ready to do my
19 opening.

20 HEARING OFFICER BURCHAM: Mr. White?

21 MR. WHITE: Pursuant to what has been marked and
22 admitted now by stipulation of the parties as Exhibit 1,
23 the two cases that the California Medical Board brought
24 against Dr. Smith originated in 2020 and 2021 -- actually
25 they originated before that, but they went to hearing in

1 2020 and 2021. After much litigation, Dr. Smith ended up
2 on probation in both cases in California -- actually they
3 ran the probations concurrent, if I'm correct on that.
4 Even though one was an a year later, they ran it so that
5 he was going to be off probation on both cases at the
6 same time.

7 Based on those cases, the Nevada State Board of
8 Medical Examiners, where we are today, brought forth a
9 case in 2022. That matter was settled in 2024. Just
10 giving a little context -- it's not really relevant to
11 this but it gives a little bit better context.

12 Meanwhile, the California Medical Board found that
13 Dr. Smith had violated his probation; specifically, he
14 used intrathecal pumps on three patients. This is after
15 2024, after the settlement in Nevada. At that point, the
16 California Medical Board already had its hearing but they
17 had not put out the order, Exhibit 1. It was about a
18 month away. At that point, they determined that
19 Dr. Smith had violated his probation in California;
20 specifically, he used intrathecal pumps on three patients
21 or it involved -- he did treatment on three patients that
22 involved intrathecal pumps when he was prohibited from
23 doing so at that point.

24 And his disclosure to them -- to the three
25 patients, also he had to do a disclosure regarding his

1 legal status and they determined -- and it's in the order
2 that is attached as Exhibit -- as Exhibit 1 -- that
3 his -- he needed to disclose his legal status with his
4 patients, and that -- from the California Medical Board,
5 and it was inaccurate and misleading. So those two
6 things are the reason they revoked his probation,
7 ultimately revoked his license to practice medicine in
8 California, and that is --

9 HEARING OFFICER BURCHAM: Can you tell me, under
10 California parlance, revoked the license, is there a word
11 of art in that? I read the decision and I want to make
12 sure that I understand what California refers to.
13 Because if we look at the order, Exhibit 1 --

14 MR. WHITE: I think it's the very last page, 41.

15 HEARING OFFICER BURCHAM: So it says, "Respondent
16 is revoked" -- okay, "Surgeon Certificate is revoked," so
17 that is basically the medical license to practice
18 medicine in California; correct?

19 MR. WHITE: Correct. Yes.

20 HEARING OFFICER BURCHAM: I wanted to be sure on
21 that.

22 MR. WHITE: I think California just -- I'm not
23 positive about this, so my opening statement -- but they
24 do break it down into many more things than we do here.
25 We don't, here in Nevada, license by any specialty. It's

1 just get a licensed to practice and then you're within
2 the scope of your license.

3 HEARING OFFICER BURCHAM: When I was reading
4 through the documents and the exhibit, I wanted to make
5 sure that in California therefore, for Dr. Smith, there
6 is no current license; correct?

7 MR. WHITE: No.

8 HEARING OFFICER BURCHAM: Is that correct?

9 MS. BEGGS: That is correct.

10 HEARING OFFICER BURCHAM: Counsel, thank you. I
11 just needed that clarified because I didn't want to get
12 into semantic confusion about what happened in California
13 versus here. That clarified it. Thank you.

14 MR. WHITE: Thank you for the question. Good
15 question.

16 And I misspoke. In Nevada we don't -- we don't
17 license by specialty, we just -- they get a license to be
18 a medical doctor and then they have to be within the
19 scope of their practice, their training.

20 HEARING OFFICER BURCHAM: And certificate, the
21 word certificate just -- that's license -- essentially
22 license?

23 MR. WHITE: Yes.

24 HEARING OFFICER BURCHAM: Got it. Go ahead.

25 MR. WHITE: So just to back up a little bit, so

1 soon after the Nevada Medical Board settled its case with
2 Dr. Smith, which was on June 7, 2024, this order from
3 California, which is Exhibit 1, was dated July 2nd, 2024.
4 So you can see there was only about three weeks after
5 that that this -- this order came out -- this order was
6 issued.

7 The formal hearing here today is to present
8 evidence to determine if Mr. Smith violated the Nevada
9 Medical Practice Act with regard to the formal complaint
10 filed in this matter on June 24th, 2025. And
11 specifically the complaint alleges one violation of the
12 Nevada Medical Practice Act, which is Count I, under NRS
13 630.301(3), disciplinary action by another state medical
14 board.

15 Respondent was originally licensed by this board,
16 Nevada Board, on April 16, 2018. With regard to Count I,
17 the evidence that we have here will show and any
18 testimony will show that respondent was disciplined by
19 the California Board, and pursuant to a final order
20 decision dated July 2nd, 2024, in Case No. 800 -- or
21 800-2021-081615, where respondent's probation in Case
22 No. 800-2018-042234 was revoked, thereby lifting the stay
23 of the disciplinary order and revoking respondent's
24 Physician's and Surgeon's Certificate No. G66777, which I
25 put in parentheses, his license to practice medicine in

1 California. And that decision is attached, as we've
2 stated, and admitted as -- in the complaint -- it's
3 attached in the complaint and also admitted as Exhibit 1.

4 The California Board found that respondent treated
5 patients, like I said, involving intrathecal pumps from
6 August 22nd -- excuse me -- August of 2022 through
7 October of 2022, at a time when he was prohibited from
8 doing so. And that is page three of the Decision Summary
9 in here for reference later on.

10 The California Board also found respondent
11 violated his informed consent duty to patients by
12 knowingly making false and misleading disclosures to
13 patients concerning his disciplinary status. It is also
14 in that same part on page three of the Decision Summary.

15 The testimony and evidence that will be presented
16 today will establish by a preponderance of the evidence
17 that Dr. Smith was indeed disciplined by another state
18 medical board; namely, California, as charged. Thank
19 you.

20 HEARING OFFICER BURCHAM: Ms. Beggs?

21 MS. BEGGS: Good morning.

22 HEARING OFFICER BURCHAM: Good morning.

23 MS. BEGGS: It is the position of Dr. Smith that
24 we certainly will not be contesting the fact that the
25 California Medical Board took action against his license

1 in 2024, and which was then duly and properly noticed to
2 the Nevada State Medical Examiners as evidenced by
3 Exhibit 2, which has been admitted through stipulation.
4 However, in regard to the information that is going to be
5 provided today and which I think is salient not only for
6 the purposes of this hearing but also the adjudication in
7 this matter, is the context and the background of these
8 cases, and confusion in regard to -- I shouldn't say
9 confusion, but vagueness in regard to the prohibition
10 against Dr. Smith doing any treatment or care related to
11 intrathecal pumps. I'm not going to say that correct
12 today. I just know it, I'm not going to do that.

13 As the evidence will show and through the
14 testimony provided today that there was an initial action
15 initiated by the California Board in 2018 related to
16 patients in 2012 and 2017. There was a hearing in that
17 case with an order that was eventually -- which was
18 adopted by the California Medical Board in August of 2020
19 placing Dr. Smith on probation with multiple terms and
20 conditions.

21 That order at the time had a restriction on his
22 ability -- and for the purposes of just not messing up
23 the names I'll call it IT pumps today, if that's fine for
24 the hearing -- there was a restriction on his ability to
25 perform IT care and treatment, that was part of that

1 initial probation. However, that restriction would be
2 removed after he completed a competency course, which he
3 did. That restriction was actually removed by the
4 California Medical Board in October of 2021, days after a
5 hearing was held in the second accusation that was filed
6 by the California Board in December of 2020. And I
7 apologize, this timeline is a bit confusing but through
8 the testimony I think it will become a little bit more
9 clear.

10 It is important to note that the original
11 decision -- and I'll call it the first accusation which
12 placed Dr. Smith on probation in August of 2025, was
13 overturned by the California Superior Court on
14 January 24th, 2022. The testimony today regarding the
15 fact that the California Board decided to have a
16 reconsideration hearing, although not allowed by the
17 Superior Court order, which placed Dr. Smith back on
18 probation on -- pardon me -- on August 2022 with
19 retroactive to September 2020.

20 What is important about that reconsideration order
21 is, again, the California Medical Board had the same
22 restriction on IT pumps, that that restriction would be
23 removed after Dr. Smith had completed the competency
24 course, which he had already done. To make matters more
25 confusing, however, is after this hearing on the second

1 accusation, which took place in October 2021, days before
2 the IT restriction was removed by the California Board,
3 that case was decided by the California Medical Board in
4 a decision which was effective in January 2022, which
5 prohibited Dr. Smith from performing and treating IT pump
6 patients. That decision was also challenged by a writ,
7 which was not decided until February 2024.

8 In the interim, Dr. Smith did provide -- and he
9 will testify to this, he did provide treatment to three
10 patients, three patients only between August and November
11 of 2022 in the understanding based on his legal counsel's
12 advice and the fact that IT restrictions had been removed
13 by the California Board in October 2021, that he was able
14 to do so. Dr. Smith complied with all terms and
15 conditions of the California Medical Board probation,
16 which you'll hear were very arduous and that there was
17 some confusion as far as the IT restriction.

18 It is the position of Dr. Smith and Mr. Rifat, who
19 will be testifying today, that part of the action taken
20 by the California Board in this case was, frankly,
21 retribution for Dr. Smith having the audacity to
22 challenge their decisions and that the revocation of his
23 medical license in California, or his registration for
24 purposes of California terminology, was inappropriate in
25 this case.

1 Again, the information to be provided today is not
2 necessarily salient to the fact that the California
3 Medical Board did take action against Dr. Smith's license
4 in July of -- pardon me -- June of 2024, but rather as
5 far as what the appropriate discipline might be at the
6 time of adjudication in this case. We believe that
7 context and the timeline of this case is germane and
8 salient to the full decision that is going to be made in
9 this case.

10 Thank you.

11 HEARING OFFICER BURCHAM: Thank you.

12 It's your turn.

13 MR. WHITE: First witness?

14 HEARING OFFICER BURCHAM: That's right.

15 MR. WHITE: At this point, I call Ernesto Diaz.

16 Good morning, Mr. Diaz.

17 MR. DIAZ: Good morning.

18 MR. WHITE: You need to be sworn in first.

19 HEARING OFFICER BURCHAM: Mr. Diaz, I'm Charlie
20 Burcham, the hearing officer. The court reporter is
21 going to swear you in. You probably know how to do that,
22 but raise your right hand.

23 (Witness sworn.)

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ERNESTO DIAZ

called as a witness on behalf of the Board,
having been duly sworn, testified as follows:

+++ DIRECT EXAMINATION +++

BY MR. WHITE:

Q Mr. Diaz, please tell the hearing officer and
court reporter your first and last names, and spell them
for the record.

A My name is Ernesto Diaz; E-R-N-E-S-T-O, D-I-A-Z.

Q Thank you.

Where do you work?

A I work for the Nevada State Board of Medical
Examiners.

Q In what capacity do you work for the Nevada State
Board of Medical Examiners?

A I'm the Chief of Investigations.

Q How long have you worked here at the Nevada State
Board of Medical Examiners?

A Approximately five years and six months.

Q Were you hired as the Chief of Investigations?

A I was.

Q You understand why we're here today, to present
evidence so that the Board can determine if Dr. Smith
violated the Medical Practice Act?

1 A Yes.

2 Q As Chief of Investigations, do you still maintain
3 a caseload -- your own caseload?

4 A I do.

5 Q Did you assign yourself to this matter?

6 A This one I did, yes.

7 Q Have you had the opportunity to review the
8 documents in the binder in front of you?

9 A Yes.

10 Q I will tell you -- I'll represent to you right now
11 we've stipulated to the admission of these exhibits so we
12 don't need to go through everything to establish any kind
13 of -- we don't need to authenticate them and get them
14 admitted. They've already been stipulated to.

15 A Understood.

16 Q Let me ask you a couple of questions and get you
17 out of here after Ms. Beggs has a chance to ask you, too.

18 A Sure.

19 Q So typically in a case, would you send out an
20 allegation letter?

21 A Yes. Normally when we receive a complaint and
22 open an investigation, we send the licensee or respondent
23 what we term an allegation letter. It just lays out the
24 allegations in the complaint the Board received.

25 Q And was that done in this matter?

1 A No, it was not.

2 Q Why wasn't it done, from your understanding?

3 A I was notified through Dr. Smith's attorney that
4 an allegation letter was not needed in this case in order
5 to hopefully expedite the process.

6 Q Okay. I'll just have you look to at least testify
7 as to whether you're familiar with those documents that
8 are in front of you. Exhibit 1, are you familiar with
9 that?

10 A Yes, I am.

11 Q Okay. Now, you -- I'll represent to you that we
12 received a copy from Ms. Beggs. It's already been
13 established this morning before you walked into the room
14 when she sent formal notice that he had been disciplined
15 in California, so it's attached. So we had that, and
16 that's where we ended up with the first copy. Then at
17 some point did you -- did you try and get a certified
18 copy?

19 A I did. On October 9, 2024 -- I'm sorry -- 2025, I
20 contacted the California State Medical Board through an
21 investigator I worked with before and requested certified
22 copies of the decision and order in this matter.

23 Q And if you look at the front page, I think -- very
24 front page NSBME001, does that have a stamp that shows
25 Custodian of Record?

1 A Yes, it does.

2 Q And what is that date?

3 A October 10, 2025.

4 Q Okay. So you did -- was this based on your -- was
5 this a result of your asking someone at the California
6 Medical Board to send this to you?

7 A Yes.

8 Q Is this the same -- is this the same thing we had
9 sent to us from Ms. Beggs?

10 A Yes, minus the certification on the bottom.

11 Q Thank you.

12 And do you see the next exhibit, which is page 42,
13 so one page -- now it's two, I'll explain to you in a
14 second?

15 A Yes, I do.

16 Q Okay. So the first one is -- you see it's an
17 email?

18 A Yes.

19 Q Okay. It looks like it was sent from -- who sent
20 that, to whom and from whom?

21 A This was sent from Lynn Beggs to Don White at the
22 Medical Board regarding Dr. David James Smith.

23 Q Regarding what exactly? What does it say there?

24 A This was notifying the Nevada State Board of
25 Medical Examiners, as required, to self-report any

1 disciplinary action; in this case, the California Medical
2 Board action.

3 Q Okay. And it actually has your name at the top,
4 the very top of the email?

5 A Yes, it does.

6 Q Okay. So did -- maybe I sent it to you so you'd
7 have it for your records?

8 A I believe you did send this to me. At that point,
9 I subsequently opened an investigation as well.

10 Q Then we added the letter that was attached for
11 clarification. It's just -- it just seemed more
12 streamlined, if you can see that? We didn't have it
13 there when you reviewed these documents earlier, but if
14 you can see that that is now just the letter that is
15 attached, do you want to review that for a moment?

16 A Sure. Okay.

17 Q It's two-sided, too.

18 A Okay.

19 Q Okay. Is that something you've seen prior to
20 sitting down here today?

21 A Yes. It was included in the email attachment as a
22 cover sheet.

23 MR. WHITE: I have no further questions for
24 Mr. Diaz.

25 HEARING OFFICER BURCHAM: Cross-examine?

1 +++ CROSS-EXAMINATION +++

2 BY MS. BEGGS:

3 Q Mr. Diaz, do you have anything to do with
4 monitoring of probation if a licensee is on probation?

5 A You mean as far as compliance?

6 Q Yes.

7 A I do not. That would be our Deputy Chief.

8 Q Thank you.

9 MS. BEGGS: Nothing further.

10 HEARING OFFICER BURCHAM: Thank you, Mr. Diaz.

11 THE WITNESS: Thank you, sir.

12 HEARING OFFICER BURCHAM: Short morning.

13 THE WITNESS: Probably the shortest in my career
14 in testimony. Have a good day.

15 HEARING OFFICER BURCHAM: Mr. White?

16 MR. WHITE: Can we go off the record a second for
17 housekeeping really quick?

18 HEARING OFFICER BURCHAM: Off the record.

19 (Off the record.)

20 HEARING OFFICER BURCHAM: Based upon the
21 discussion that we just had off the record with counsel,
22 the IC Counsel White has suggested and Ms. Beggs has
23 agreed to the concept that the IC will rest at the
24 current time, kick it over to Ms. Beggs, who can call
25 Dr. Smith to testify. On Cross-examination, Mr. White

1 will have the opportunity to ask whatever he would ask
2 otherwise on direct. Basically he's an adverse witness,
3 so you can do whatever he's going to do that on that.

4 Correct?

5 MS. BEGGS: That's correct.

6 HEARING OFFICER BURCHAM: All right.

7 Dr. Smith, we haven't sworn you in yet. You know
8 the rules, so raise your right hand.

9 (Witness sworn.)

10 MS. BEGGS: Is it easier for Dr. Smith to testify
11 here, or we can have him move?

12 HEARING OFFICER BURCHAM: This is nice because my
13 neck doesn't have to twist so hard.

14 MS. BEGGS: Perfect.

15 THE WITNESS: I'm hard of hearing so that helps me
16 as well. Thank you.

17 MR. WHITE: I'm comfortable.

18 HEARING OFFICER BURCHAM: As long as the court
19 reporter -- is that okay?

20 MS. BEGGS: Great. Perfect.

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DAVID JAMES SMITH, M.D.

called as a witness on behalf of the Respondent,
having been duly sworn, testified as follows:

+++ DIRECT EXAMINATION +++

BY MS. BEGGS:

Q Dr. Smith, good morning.

A Good morning.

Q Would you please state your full name and spell
your last name for the court reporter, please?

A David James Smith; S-M-I-T-H.

Q Dr. Smith, what is your current occupation?

A I'm a physician and surgeon.

Q Where are you currently working?

A Las Vegas Injury Pain Center in Las Vegas, Nevada.

Q How long have you been a physician?

A Since 1989.

Q What is your primary practice area?

A Interventional pain.

Q Dr. Smith, I'm going to walk you through -- well,
let me ask you this. Was your -- did you hold a license
to practice medicine in the state of California?

A I did.

Q Has that license subsequently been revoked?

A Yes, it has.

1 Q Was that in July of -- pardon me -- June of 2024?

2 A Yes, it was.

3 Q So just to ask a few more preliminary matters,
4 were you previously or are you currently on probation
5 with the Nevada State Board of Medical Examiners?

6 A Yes, I am.

7 Q Are you in compliance with the terms of that
8 probation?

9 A Yes, I am. Absolutely, 100 percent am.

10 Q I'm going to ask you some questions related to
11 your activities in California and if -- did the
12 California Board -- well, let me ask you this. When were
13 you first licensed in the state of California?

14 A 1989.

15 Q Did you have any disciplinary action taken against
16 you or initiated against you prior to 2018?

17 A No. Nothing.

18 Q In 2018, did the California Board initiate
19 disciplinary action against your license?

20 A Yes, they did.

21 Q And was that related to the treatment of patients
22 with IT pumps?

23 A Some were. Some of the accusations the patients
24 did not have any intrathecal pump management or implants.
25 I think there was one that had the pump and the other

1 three or four didn't have the pumps.

2 Q The patients at issue, were they seen by you
3 primarily between 2012 and 2017?

4 A Yes. And some of them continued to see me even
5 after 2017.

6 Q Was a hearing held regarding that case?

7 A Yes.

8 Q And ultimately was there a decision issued by the
9 California Board which was effective in August of 2020?

10 A Yes, it was.

11 Q Did that -- did that decision place you on
12 probation in California?

13 A Yes, it did.

14 Q Can you describe some of the terms that you were
15 required to comply with under those terms of probation?

16 A There was many different terms. I was required,
17 of course, to establish with the probation officer and
18 then -- of course, that happened -- that included site
19 visits to both the clinics, one in El Centro that I ran
20 and one in San Diego, as well as site visits of the
21 surgical center I worked at in the same building in San
22 Diego. Those were every quarter.

23 I had to have a practice monitor specifically to
24 go over patient charts, and to ensure that I maintained
25 compliance with my terms of probation, and that was due

1 with the probation manager every quarter, so I had a
2 practice monitor.

3 I also had terms of probation that included
4 multiple CMEs and courses in recordkeeping, in ethics,
5 in -- what were some of the others? -- recordkeeping,
6 ethics, prescribing pain management, opiate prescribing,
7 and there may have been two other additional courses that
8 I was required to pass.

9 Then I was required to go to Texas -- to Texas
10 A & M and complete a KSTAR program for the medical board,
11 and I had -- essentially I had to do all that within one
12 year.

13 Q Can you explain what a KSTAR program is?

14 A So the KSTAR program is similar to the California
15 PACE program, and I don't know what it's called in the
16 state of Nevada, but it's basically a three-day
17 assessment where they assess my clinical skills, they
18 give me different cases and actually several patients
19 that you have to see in a clinic setting. They're in the
20 field of pain medicine and you have to make the
21 appropriate diagnosis and treatment recommendations.

22 And then there is psychological assessment and
23 there are several cognitive assessments that have to be
24 taken over the period of time. There's a physical exam
25 and then there's also a mental health examination that

1 has to be done. So they basically go through everything
2 with your clinical skills, your ability to make
3 decisions. There's computer tests to make sure your
4 cognition is intact and you identify appropriate
5 patterns, as well psychological exam, physical exam, and
6 then the clinical cases.

7 Then in addition to that, there are interviews
8 with other physicians in the community where they give
9 you cases reports and then grill you on how you would
10 handle case and what you would do given certain variables
11 that they would approach you for during the middle of the
12 case and change it, and you had to respond. So all of
13 those things took about two-and-a-half days.

14 Q Did you complete that?

15 A I did.

16 Q Did you pass that?

17 A I did.

18 Q Now, while you were complying with the terms of
19 your probation, was the case appealed?

20 A Yes, it was.

21 Q And was that through a writ filed with the
22 California Superior Court?

23 A Yes. In Los Angeles, I believe.

24 Q Did you continue to comply with the terms of your
25 probation during the pendency of that appeal?

1 A Yes.

2 Q And so do you recall approximately when a decision
3 was rendered by the California Superior Court?

4 A I believe it was February 28, 2022.

5 Q And did that decision overturn or set aside the
6 decision -- the August 25th, 2020, decision?

7 A Yes, it did.

8 Q So, in the interim -- so there was about -- it
9 looks like about a two-year period of time or a little
10 less than that that the appeal was pending?

11 A Correct. About 18 to 20 months, I believe.

12 Q So in the interim, while that was pending and you
13 were complying with the terms of probation, did the
14 California Medical Board file a second accusation against
15 you?

16 A Yes, they did.

17 Q Was that approximately December of 2020?

18 A December of 2020? No. That was later, I thought.
19 Was it 2020? Okay. Yes, it was December of 2020.

20 Q And did that --

21 A That's when it was filed, yes.

22 Q That second accusation, did it have four causes of
23 action regarding patients that you saw approximately
24 between 2015 and 2018?

25 A Yes.

1 Q Were the allegations similar to the first
2 accusations?

3 A They were, yes -- in essence, yes.

4 Q Was a hearing held in that case?

5 A Yes, it was.

6 Q And was that in approximately October of 2021?

7 A Yes.

8 Q The California Medical Board, after the time of
9 the hearing, is a decision rendered as soon as the
10 hearing is done?

11 A No. There's several weeks that pass until the
12 administrative law judge renders a decision.

13 Q Then that's reviewed by the California Medical
14 Board itself?

15 A Correct.

16 Q So after the hearing in October of 2021, no
17 immediate decision was rendered in that case?

18 A Correct.

19 Q In October 2021, you had -- at that point you had
20 completed the KSTAR program?

21 A Yes.

22 Q And did the California Medical Board remove the
23 restriction on you providing care and treatment with IT
24 pumps?

25 A Yes, they did.

1 Q And that was -- that was October 2021?

2 A Correct.

3 Q So at that point in time, to your knowledge, you
4 were able to provide care and treatment through -- with
5 IT pumps to patients?

6 A Correct. And they also lifted my restrictions on
7 opioid prescribing, essentially lifted every restriction
8 on my practice.

9 Q So was -- did the California Medical Board issue a
10 decision on the second case in late 2021, which was
11 effective in January of 2022?

12 A Yes.

13 Q That decision, which was based on the hearing held
14 prior to the lifting of the restrictions, did that -- do
15 you recall what the decision of the California Board was
16 at that point in time?

17 A Yes. The administrative law judge said continue
18 with the probation but then reapplied the restriction on
19 IT pump care.

20 Q Was that decision appealed?

21 A Yes, it was.

22 Q Was that appeal successful?

23 A I don't recall.

24 Q Would it bring -- pardon me. Let me rephrase the
25 question.

1 Do you recall it being denied in February of 2024?

2 A I think it was denied.

3 Q And it was pending for quite some time then?

4 A Yeah, a couple of years, I believe.

5 Q And in -- just to make sure that we're on the same
6 page with the timeline, going back to the first case,
7 which was set aside by the court in February of 2022, so
8 this was after the California Board had rendered its
9 decision in the second case; correct?

10 A Yes.

11 Q After the court set aside the decision in the
12 first case, what did the California Medical Board do at
13 that point?

14 A They asked for a second hearing in the summer, I
15 think, of -- I can't remember exactly the year but there
16 was a telephonic hearing during the COVID time.

17 Q Would that have been 2022, the same year --

18 A Yes.

19 Q -- that the decision was rendered?

20 A Correct. Summer of 2022, with myself and my
21 attorney, Matt Rifat, and the Medical Board of
22 California.

23 Q What was the outcome of that hearing?

24 A They basically -- as I recall, that we're just
25 going to retroactive your probation to 2020, cut your

1 terms down from seven years -- I think come down to seven
2 to five years, they shaved off a couple of years, and
3 that was -- I was basically reset back to 2020.

4 Q And in that decision, did the Board reiterate the
5 original IT pump restriction, that it would be lifted if
6 you complied with the clinical competency exam, which is
7 the KSTAR?

8 A They did, yes.

9 Q And that was the order that was issued in --
10 pardon me -- that order was issued in approximately
11 August of 2022?

12 A Yes.

13 Q And that was after the decision was rendered in
14 the second case?

15 A Correct.

16 Q Which was effective in January 2022?

17 A Correct.

18 Q So after that decision, did you at some point
19 provide IT care to patients in late 2022?

20 A I did.

21 Q How many patients did you provide that care to?

22 A Three.

23 Q And did you do that on your own or did you seek
24 advice from your counsel before you provided that care?

25 A Yes. I was told by my counsel that because of the

1 retroactive to 2020, as a matter of law, that the IT
2 restriction was no longer in place.

3 Q Were you doing a lot of -- was it just the three
4 patients that you saw during that time?

5 A Just three patients, yes. I had other providers
6 at the time that handled the majority of the other IT
7 cases, P.A.s, P.A.s and other M.D.s.

8 Q Now, were you -- did the California Medical Board
9 file a petition to revoke your probation in July of 2023?

10 A Yes.

11 Q And what was the basis -- the primary basis for
12 that petition?

13 A Interestingly, it was not for cause, it was for a
14 violation of the terms of my probation.

15 Q So it was -- so they filed a petition to revoke
16 your probation basically saying that you weren't in
17 compliance with those terms?

18 A Yes.

19 Q Was that surprising to you?

20 A Yes.

21 Q Why so?

22 A Because I was in compliance with the terms as I
23 was led to believe, as I understood it as a matter of
24 law, and so that was a big shock.

25 Q So when -- was there a hearing held in that

1 matter?

2 A Yes.

3 Q And was that in April -- spring of 2024,
4 approximately?

5 A Yes.

6 Q And the decision, which has been marked and
7 admitted as Exhibit 1 in this case, is -- was rendered on
8 July 2nd and adopted by the California Medical Board in
9 July?

10 A Correct. That's correct.

11 Q And according --

12 A 2024.

13 Q And according to page one of the -- of Exhibit 1,
14 that decision was effective August 23rd, 2024?

15 A Yes, it was.

16 Q And as it's been established through Exhibit 2,
17 that decision was properly notified -- properly disclosed
18 to the Nevada Medical Board?

19 A Correct. It was.

20 Q And you remain in compliance with the terms of
21 your probation with Nevada?

22 A Yes, I do.

23 MS. BEGGS: Thank you. Nothing further.

24 MR. WHITE: Okay. Thank you.

25 Mr. White?

1 MR. WHITE: Yes. Thank you.

2

3 +++ CROSS-EXAMINATION +++

4 BY MR. WHITE:

5 Q It's been asked a couple of times and it's been --

6 Good morning, Dr. Smith.

7 A Good morning, Mr. White.

8 Q It's been asked a couple of times and it was just
9 one of the last questions here. I want to make sure this
10 is clear for the record. We did not charge you with
11 failure to report the California discipline, did we?

12 A No, you did not.

13 MR. WHITE: By we, I mean IC. We refer sometimes
14 to IC, the Investigative Committee. It's just easier.

15 HEARING OFFICER BURCHAM: Perfect.

16 BY MR. WHITE:

17 Q You had mentioned just now through questioning
18 with your attorney that you had a hearing in summer of
19 2022, I believe it was, on the second matter. I don't
20 want to confuse you, I'm trying to get the time clear in
21 my head, too. Was it on the second matter with the
22 California Board?

23 A No. I think that was the rehearing regarding the
24 writ that overturned the first hearing. There was a
25 second hearing in the summer of 2022 with the actual

1 California Medical Board.

2 Q Okay. That was my question. Was that who it was
3 with?

4 A Yes.

5 Q So it was following the writ that reversed their
6 decision, they had another hearing to --

7 A To evaluate.

8 Q -- to evaluate and maybe, I guess, reconsider what
9 their decision was at that point?

10 A I don't know -- I don't know how the -- that would
11 have worked. I mean, I'm not familiar with the
12 administrative or legal steps of that --

13 Q Okay.

14 A -- but --

15 Q They reconsidered what your old discipline was and
16 they gave you a new discipline; is that what you
17 understand?

18 A No.

19 Q Based on the writ?

20 A No, they didn't give me a new discipline. They
21 just said you go back -- they took two years off, as I
22 recall, acknowledged that I successfully completed all
23 terms of my restrictions. Because initially it was a
24 seven-year probation and then they said you go back, you
25 reset it back to December 2020, or whenever the first

1 disciplinary action was rendered by the California Board.

2 Q So it would have been your understanding you would
3 have been done with probation sometime around September
4 of 2025?

5 A Yes, that is correct. Yes, that is correct.

6 Q Is that --

7 A I had to do the math. I'm sorry.

8 Q And is that where it is? I mean, was that -- was
9 it 2025 or 2027?

10 A 2025. They carved off two years of probation.

11 Q Okay. You answered a question just moments ago
12 that after -- they filed -- when I say they, California
13 Medical Board -- in July 2023 they filed to revoke your
14 probation?

15 A Correct.

16 Q Okay. And you had stated your answer was --
17 paraphrase -- that wasn't for cause, it was because they
18 thought you were in violation of your probation?

19 A Correct. What I meant is it wasn't for cause. I
20 was referring to there was no new accusations brought
21 against me regarding negligence or breach of the standard
22 of care.

23 Q Okay. And you're sure of that, there was no new
24 complaint by a patient or anything like that?

25 A I am sure of that.

1 Q Then you had mentioned that you were surprised
2 because you were led to believe as a matter of law you
3 were compliant. Does that -- am I not putting words in
4 your mouth?

5 A That was my belief, yes.

6 Q Who led you to believe that?

7 A My attorney.

8 Q Is that Mr. Rifat?

9 A Yes, sir.

10 Q You had an investigator or a caseworker of some
11 sort that you talked to on a regular basis?

12 A It was my probation officer. I think it was
13 Virginia Addis. Every quarter.

14 Q Sorry. I didn't want to speak over you.

15 A Every quarter.

16 Q Every quarter did you meet with her?

17 A Yes.

18 Q Did you at any time ask her if you were allowed to
19 use IT pumps?

20 A Yes, we discussed it.

21 Q What was her answer?

22 A She acknowledged it was a gray matter.

23 Q A gray matter?

24 A She said it's uncertain, but she certainly did not
25 say that you are prohibited from doing that. But I don't

1 know if she was, you know, just speaking off the cuff or
2 beyond her scope of authority or knowledge in the matter,
3 but we did discuss it.

4 Q Was there anybody else you could have called to
5 discuss that, to get a firm answer, if you know?

6 A I mean, she was my contact, that would have been
7 my go-to person.

8 Q Okay. Did you only ask her once? Was it just
9 visited one time?

10 A No. Every quarter we went over that, and she
11 would ask me, "Are you doing any IT care?"

12 And I said, "Well, occasionally I'm helping out,
13 yes."

14 Q And --

15 A But that was after the writ. So to be clear, I
16 didn't do anything until I was -- after the Superior
17 Court issued their writ and overturned the case. And
18 then my hearing with the medical board that retroactively
19 placed me back on the 2020 terms of probation, that I was
20 involved with IT care, so I was trying to be extremely
21 cautious on observing the rules of probation during that
22 time period.

23 Q Let me ask some questions that I have already
24 written down for this -- in preparation for today.

25 Are you practicing medicine in California right

1 now?

2 A No.

3 Q And that is because -- I think you've already
4 established that with your own attorney -- you're revoked
5 to practice medicine in California; is that correct?

6 A That's correct, sir.

7 Q Your license is revoked?

8 A My license is revoked to practice medicine in
9 California.

10 Q I don't want to make it sound like I'm piling on
11 or anything. I want to make the record clear. I have to
12 say this a bunch of times today.

13 A It's okay. It doesn't bother me. It is what it
14 is. It's the reality I live in.

15 Q Are you still working in California at all?

16 A No. Not in medicine, no.

17 Q You did have a business in California also, didn't
18 you?

19 A I had what?

20 Q A business or practice in California?

21 A Correct, sir.

22 Q In San Diego?

23 A And El Centro.

24 Q Okay. So two of them?

25 A Those were surgical centers.

1 Q Those closed up or --

2 A Yes, they're closed.

3 Q -- actively running?

4 A Closed, yes, sir.

5 Q Now, the hearing that we're talking about today a
6 lot is the final hearing. You heard Mr. Burcham use the
7 term operative, this is the operative order now at this
8 point. This is the final determination by the California
9 Board at this point.

10 Do you understand that?

11 A Yes, sir.

12 Q I'm holding up Exhibit 1, which is the order,
13 41-page order.

14 That hearing took place, from what I can tell in
15 reading this, on April 24th, 2024, and then May 23rd and
16 24th, 2024, three-day hearing. Were you present at that?

17 A I was.

18 Q Were you present in person?

19 A No. Everything was done via Zoom. I think still
20 COVID kind of left over. There was no in-person hearing
21 allowed.

22 Q Did you -- don't tell me what he said or anything,
23 but did you have advice and representation of an attorney
24 at that hearing?

25 A Yes, I did.

1 Q Was that Mr. Rifat?

2 A Yes, it was. Matt Rifat.

3 Q Is that how you say his name?

4 A Yes, Rifat.

5 Q Thank you. I'll try and get it correct from now
6 on.

7 And was he present next to you or on a different
8 Zoom link?

9 A No. We were together in a conference room,
10 smaller but similar to this, on the Zoom screen together.

11 Q Okay. Dr. Smith, I want you to turn to page 20 --
12 and it's a little confusing. I want you to use the NSBME
13 number, 20. They're off by a page, if you notice there,
14 in Exhibit 1 --

15 MS. BEGGS: You're looking for the NSBME20?

16 MR. WHITE: NSBME20, yes.

17 HEARING OFFICER BURCHAM: Which is page 19 of
18 the -- I would like -- a lot of these dates are going to
19 be confusing in the record, I think, so we need to be
20 pretty careful on dates and numbers and stuff.

21 So if you could, as we're going through, also
22 identify the page number of the document itself. So in
23 other words, disclosed document 20 is 19. I want to make
24 that clear so that somebody doesn't get confused.

25 MR. WHITE: I'll certainly do that, yes. Yes.

1 BY MR. WHITE:

2 Q If you look at paragraph 56 in the middle of the
3 page there --

4 A Correct.

5 Q -- you were asked to attend a meeting, it looks
6 like, on September 9, 2022; is that correct?

7 A Yes.

8 Q With Ms. Addis?

9 A Correct.

10 Q If you take a look at the second sentence there,
11 could you possibly explain to us why you took the Fifth
12 and refused to answer her question?

13 A Yes, because I was under federal indictment that
14 was something like 64 felony counts charged against me,
15 and I was counseled by my counsel to take the Fifth so I
16 wouldn't self-incriminate.

17 Q And Ms. Addis testified this is the only time she
18 recalled you not answering any questions and discussing
19 things with her?

20 A That's what she said, yes. I was always very
21 forthright with Ms. Addis. She and I got along very
22 well.

23 Q Thank you for that.

24 So to clear it up, this was at the advice of
25 counsel since you were under indictment at that point to

1 not talk about using pain medication, IT pumps, that kind
2 of thing?

3 A I was told by my counsel to use the Fifth for
4 pretty much every question, not just that one.

5 Q Okay. If you can answer this, did you ever feel
6 like you needed to correct or override Mr. Rifat on his
7 decisions?

8 A No, I never did. He had been my attorney for many
9 years and he'd always represented me well, ethically and
10 honestly, as far as I was concerned.

11 Q That was my next question. So why didn't you? Is
12 it because you always had -- you thought you had good,
13 competent representation from Mr. Rifat?

14 A Yes, I thought I had good representation. But
15 also I was involved in these board hearings and I heard
16 the same thing that he did regarding the retroactive
17 setting of the probation to 2020, so in my mind and we
18 all were on the same page.

19 Q And is it -- was it Mr. Rifat who told you that as
20 a matter of law that you could use the IT pumps again and
21 was he the one, I guess, giving you that advice?

22 A Yes.

23 Q Okay. If you would turn to page NSBME23, which
24 is -- this is page 22 in the order -- do you see that
25 there, paragraph No. 68?

1 A Yes.

2 Q It says -- it's below Respondent's Testimony, do
3 you see there it says, Respondent testified that he
4 treated Patient A on September 1st, 2022, because the
5 2020 board decision had been set aside and he believed
6 the 2022 board decision was void as a matter of law?

7 A Correct.

8 Q Is that -- did that come from Mr. Rifat also?

9 A Well, that was what I had understood it to be at
10 the time as well, because Mr. Rifat had told me that.

11 Q I'd like you to turn to page NSBME25, which is 24
12 on the order. It's paragraph 73, which is kind of broken
13 up into some parts there. Is that your -- is that a good
14 depiction of your disclosure that went to the patients?

15 A Yes. That disclosure was written by my attorney,
16 Matt Rifat, and that's what we provided to the patients,
17 correct.

18 Q Okay. And as you can see, just in that middle
19 paragraph of it at the bottom, it says, I'm advised by
20 counsel that as a matter of law this also sets aside
21 December 2022 -- December 22nd, 2021, decision?

22 A Correct. Yes.

23 Q Did you -- did you check these disclosures -- or
24 this disclosure with him before making copies and handing
25 them out to your patients?

1 A Yes.

2 Q Okay. So in your -- in your mind, at that
3 point -- correct me if I'm wrong -- you felt like this
4 was true and not misleading to your patients; is that
5 correct?

6 A That is correct.

7 MR. WHITE: That's about all I have. We don't
8 have to go through the whole thing, it's part of the
9 record now. There will be a lot of things that I'm sure
10 everybody can read up on -- I guess I have one more
11 question.

12 BY MR. WHITE:

13 Q Again, I'm not beating up on you, Doctor, but as
14 you sit here, you don't dispute that you were disciplined
15 by the California Medical Board as has been charged in
16 our complaint?

17 A I do not dispute that.

18 Q Okay?

19 MR. WHITE: That's all I have.

20 HEARING OFFICER BURCHAM: Redirect?

21 MS. BEGGS: Yes.

22

23 +++ REDIRECT EXAMINATION +++

24 BY MS. BEGGS:

25 Q So, Dr. Smith, since we have this Exhibit 1 opened

1 to page 24, NSBME25, paragraph 73, is that, to the best
2 of your recollection, the disclosure that you were
3 providing to patients in February of 2022?

4 A Yes, it was.

5 Q That is referring to the fact that the California
6 Superior Court had set aside the decision you referenced,
7 the December 22nd -- pardon me -- the December 2020 --
8 strike that, redo you that again -- December 22nd, 2021,
9 decision, and that decision was rendered January 24th and
10 filed on February 28th; correct?

11 A That is correct.

12 Q So, to your knowledge, this is accurate at the
13 time this was written by Mr. Rifat?

14 A Yes, it is accurate.

15 Q Going back to page 19, NSBME20, I just want to go
16 back to the paragraph that Mr. White had referenced,
17 paragraph 56.

18 A Okay.

19 Q I think one more back the other way. There you
20 go.

21 So paragraph 56 --

22 A Yes.

23 Q -- you testified that you had been advised by
24 Mr. Rifat at that time to basically take the Fifth
25 because you were under criminal indictment at that time?

1 A Yes.

2 Q And that matter has been resolved; correct?

3 A Yes.

4 Q Can you read me the final sentence in that
5 paragraph starting with, Ms. Addis?

6 I'm sorry --

7 A Which paragraph, 56?

8 Q 56.

9 A The final paragraph or sentence?

10 Q Sentence, starting with Ms. Addis.

11 A

12 Ms. Addis testified this was the only
13 time she recalled respondent refusing to
14 give her information she requested.

15 Q So you testified earlier that you had a good
16 relationship with your probation officer, Ms. Addis?

17 A Very good.

18 Q And you did provide her information on all other
19 occasions?

20 A I did.

21 Q So this was an outlier due to the pending
22 indictment?

23 A Yes. Exactly.

24 Q Okay. And, Dr. Smith, are you an attorney?

25 A No.

1 Q Would you -- would you refer to your legal counsel
2 for guidance on legal matters?

3 A Yes, of course.

4 Q And that's what you did with Mr. Rifat -- pardon
5 me -- Rifat in this regard?

6 A Yes.

7 Q And does it suffice to say, in your opinion, that
8 the procedural history in your California Medical Board
9 cases is a bit convoluted and confusing?

10 A I think it's extremely convoluted and confusing.

11 MS. BEGGS: Thank you. I have nothing further.

12 HEARING OFFICER BURCHAM: Recross?

13 MR. WHITE: Yes.

14

15 +++ RECROSS-EXAMINATION +++

16 BY MR. WHITE:

17 Q Turn to page 34 -- NSBME34, 33 on the order. And
18 the very bottom there, second-to-the-last sentence, can
19 you read that for us?

20 A I'm sorry, which paragraph?

21 Q I'm sorry. Paragraph 4?

22 A

23 Under legal authority --

24 MS. BEGGS: It's page 33.

25 HEARING OFFICER BURCHAM: Page 33?

1 MR. WHITE: 33, 34.

2 THE WITNESS: Which paragraph would you like me to
3 read?

4 MR. WHITE: Paragraph 4, the second-to-the-last
5 sentence at the bottom.

6 THE WITNESS:

7 He had a duty as a physician to give
8 patients all information relevant to
9 their treatment decision. He violated
10 that duty. His reliance on the advice of
11 his attorneys did not insulate him.

12 BY MR. WHITE:

13 Q That's the one I wanted you to read, his reliance
14 on the advice of his attorney did not insulate him. Did
15 that -- did that surprise you?

16 A Yeah, of course it surprised me.

17 Q Did you -- if you -- I'm sorry, if you go to
18 page -- the next page, 34, which is also NSBME35, the
19 first sentence of paragraph 6?

20 A

21 A professional is not immune from
22 license discipline simply because he or
23 she consulted an attorney, received and
24 relied on legal advice.

25 Q And I do want to state there is under Legal

1 Conclusions, a new heading, which is page NSBME33, 32 on
2 the order. This is under Legal Conclusions so, again,
3 did anything occur as a result you have getting legal
4 advice from your attorney that got you into this mess?

5 A I don't understand your question.

6 Q Bad question.

7 Did -- well, again, were you surprised by the fact
8 that the California Board was not going to take that as
9 an excuse, that your attorney may have given you bad
10 advice?

11 MS. BEGGS: Objection; speculation.

12 HEARING OFFICER BURCHAM: The question asks, were
13 you surprised; correct? I don't think that calls for
14 speculation.

15 THE WITNESS: Was I surprised? Yes, I was
16 extremely surprised that they moved for revocation. It
17 was a shock.

18 MR. WHITE: I don't think I have anything else.
19 Thank you.

20 MS. BEGGS: Just briefly.

21

22 +++ FURTHER REDIRECT EXAMINATION +++

23 BY MS. BEGGS:

24 Q Dr. Smith, again, you're not an attorney; correct?

25 A No, I'm not.

1 Q And we were just looking at legal conclusions made
2 by an administrative law judge in California?

3 A Yes.

4 Q And that is the conclusions of the ALJ, not you?

5 A Correct, the administrative law judge.

6 Q Do you agree with the findings of the ALJ?

7 A No.

8 Q Okay. Thank you.

9 MS. BEGGS: Nothing further.

10 HEARING OFFICER BURCHAM: Do you find mind if I
11 ask a couple of questions?

12 MR. WHITE: You're totally entitled to by statute.
13 Yes, go ahead.

14 HEARING OFFICER BURCHAM: I wanted to say that.
15 There was no writ action, Superior Court action
16 taken with respect to the 2024 decision?

17 THE WITNESS: No, I did not file an appeal.

18 HEARING OFFICER BURCHAM: Can you tell me what the
19 status of the criminal case was as of September 9, 2022,
20 which was being discussed in paragraph 56 of Exhibit 1,
21 page 19, NSBME20.

22 THE WITNESS: Can I tell you what?

23 HEARING OFFICER BURCHAM: What your understanding
24 was, the status of the criminal case --

25 THE WITNESS: The status --

1 HEARING OFFICER BURCHAM: -- as of September of
2 2022, September 9th.

3 THE WITNESS: The status was there was discovery
4 and discussions with the U.S. Attorney for the Southern
5 District with my attorneys, and another group of
6 attorneys representing one of the nurses that they also
7 indicted along with me. And there was, I think,
8 discovery going on and at that point, it was right around
9 there that they tried to offer my nurse, I think,
10 immunity to testify against me. And, of course, she
11 said, I don't have anything to testify against because he
12 didn't do anything wrong, and shortly thereafter all the
13 felony charges were dropped.

14 HEARING OFFICER BURCHAM: Do you know when those
15 dropped?

16 THE WITNESS: Yeah, December of 2022, I believe --
17 or 2023. I'm not sure. One of those.

18 HEARING OFFICER BURCHAM: I was just confused.

19 THE WITNESS: They were all dropped when they did
20 a little bit more investigative work and found out that
21 none of the charges --

22 HEARING OFFICER BURCHAM: So everything was all
23 dropped?

24 THE WITNESS: Yes, all the felony charges were
25 dropped.

1 HEARING OFFICER BURCHAM: Did anything remain
2 after that?

3 THE WITNESS: I pled to a misdemeanor.

4 HEARING OFFICER BURCHAM: When did that happen?

5 THE WITNESS: The same time when my attorney
6 called me and said, "They want to drop all the felonies,
7 will you agree to a misdemeanor?"

8 And I said, "Well, what do you think?"

9 And he said, "This is an unmitigated victory."

10 HEARING OFFICER BURCHAM: Okay. I really don't
11 wanting to go into that, I'm just looking for dates.

12 THE WITNESS: Oh. Dates?

13 HEARING OFFICER BURCHAM: Yeah, approximate dates.

14 THE WITNESS: That was in December, I think, of
15 2023 when everything was dropped.

16 HEARING OFFICER BURCHAM: That's all I'm looking
17 for.

18 THE WITNESS: Is to my -- yes, I believe so, sir.

19 HEARING OFFICER BURCHAM: That was a couple of
20 questions I had in my mind. If that opens up anything,
21 feel free to have at it.

22

23 +++ FURTHER REDIRECT EXAMINATION +++

24 BY MS. BEGGS:

25 Q For sake of clarity on the record, Dr. Smith,

1 would it refresh your recollection to look at the date
2 that the judgment in the case was filed?

3 A The final one when everything was dropped?

4 MR. WHITE: I've seen this too, but I don't have a
5 copy.

6 MS. BEGGS: Just for sake of timeline.

7 MR. WHITE: Oh, okay. Yeah.

8 BY MS. BEGGS:

9 Q So, sir, I'm -- can you -- I'm showing you the
10 judgment in the case. Can you just tell me what date
11 that was filed?

12 A April 3rd, 2024.

13 Q So the case was fully adjudicated and resolved by
14 April 2024?

15 A Correct. I mean, I know all the felony charges
16 were dropped back in December 2023. But then, of course,
17 there's hearings and proceedings that I'm not very smart,
18 well versed in or understand, but that's when I got the
19 call in December of 2023 by my attorney that they wanted
20 to drop all the felony charges.

21 MS. BEGGS: Okay. I don't know if that helped or
22 raised more questions.

23 HEARING OFFICER BURCHAM: No. It actually did
24 help. Thank you. I have no further questions.

25 MS. BEGGS: Nothing further.

1 HEARING OFFICER BURCHAM: All right. Thank you,
2 Doctor. Appreciate your testimony.

3 THE WITNESS: Absolutely.

4 MS. BEGGS: If we could take a brief recess, we
5 can contact Mr. Rifat to get on the Zoom call? So if we
6 may take like a 10-minute recess, that would be great.

7 MR. WHITE: Is this the right timing? I can't
8 remember what we agreed on.

9 MS. BEGGS: I told him around 10:30, so I think
10 he's available. So if we can just do that?

11 HEARING OFFICER BURCHAM: We'll be off the record
12 now. When the witness is ready to go, we'll get back on
13 the record.

14 (Off the record.)

15 (Witness sworn.)

16 MR. WHITE: Some housekeeping really before we get
17 started. He's only looking at what that laptop can show
18 him. How do you want -- do you want to sit in front of
19 it or --

20 MS. BEGGS: Can we slide it towards us just a
21 little bit?

22 MS. FUENTES: He can see on the screen.

23 MS. BEGGS: That will work. So can you see us
24 okay?

25 THE WITNESS: I can see you fine. I can hear you

1 fine.

2 MS. BEGGS: Perfect. I think that works. If we
3 need to change anything, we can, but I think that
4 probably -- so that we're not all moving around and we're
5 close to the speaker.

6 MR. WHITE: You're Mr. Rifat; right? There's me,
7 Don White. And you have Lynn Beggs. Of course you know
8 Dr. Smith. And you have the court reporter over there
9 with the white shirt on. And Charlie Burcham, our
10 hearing officer, kind of out of the picture.

11 THE WITNESS: Very good.

12 HEARING OFFICER BURCHAM: I put my white hair on
13 today for you.

14 MS. FUENTES: I think that works okay. We see a
15 little bit of everybody.

16 THE WITNESS: I very much appreciate the Board
17 accommodating my remote appearance.

18 MR. WHITE: Certainly.

19 MS. BEGGS: I would look at you, however, the
20 microphone is right here so you're going to see the side
21 of my head.

22 THE WITNESS: I can do it any way you like.

23 / / / /

24 / / / /

25 / / / /

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MATTHEW DAVID MURRAY RIFAT

called as a witness on behalf of the Respondent,
having been duly sworn, testified as follows:

+++ DIRECT EXAMINATION +++

BY MS. BEGGS:

Q Mr. Rifat. Thank you so much for joining us
today.

May I have you state your full name and spell your
last for the court reporter, please?

A Sure. It's Matthew David Murray Rifat; R I F, as
in Frank, A-T.

Q Thank you, Mr. Rifat.

Mr. Rifat, do you know the gentleman who is
actually to my right, Dr. David Smith?

A I do. I've been counsel for him in one way or
another for nearly 20 years.

Q Mr. Rifat, I'm going to be asking some questions
specific to the California Medical Board taking -- and
actions taken against Dr. Smith's medical license in
California.

Do you have any of the California orders available
to you? We can email you a copy of the final order if
needed.

A I can pull them up. You'll just have to direct me

1 to what you want me to look at and I'll let you know when
2 I have it pulled up.

3 Q We may not need that, but just in case we can
4 always email you a copy quickly as well.

5 Mr. Rifat, did you represent Dr. Smith back in
6 2018?

7 A Yes.

8 Q At that time, did the California Medical Board
9 file an accusation against Dr. Smith related to care of
10 patients between 2012 and 2017?

11 A That's correct. Although my memory would be
12 ending period more like 2016, but if you have the records
13 I'll rely on that.

14 Q Did you represent Dr. Smith during a hearing held
15 in regard to that accusation, which would have been --

16 A I did.

17 Q Was that approximately September and October of
18 2019?

19 A I don't recall exactly the date. I was co-counsel
20 with another attorney and his associate. Henry Fenton
21 was the attorney. I've forgotten the associate's name.
22 I believe, at least initially in the proceedings, I was
23 observing, and then I associated in probably on the first
24 day or second day.

25 Q Were you present for the entirety of the hearing?

1 A Yes.

2 Q It was a multi-day hearing. It does appear that
3 it was also continued into early 2020. Does that sound
4 correct?

5 A That's correct. It was done in two phases, and I
6 can't recall the reason why.

7 Q So there was a proposed decision issued by the ALJ
8 in June of 2020 which was adopted by the California
9 Medical Board in August 2020, do you recall what the
10 decision of the Board was as far as Dr. Smith?

11 A Yes. It was -- from a substantive standpoint, it
12 was revocation stayed, I believe five years probation
13 with various terms and conditions, obey all laws, that
14 sort of thing. There were probation monitoring
15 requirements. There was -- that included both a practice
16 monitor who audited charts, as well as a probation
17 officer from the Board handling quarterly meetings with
18 Dr. Smith and having obviously unfettered access to
19 whatever she wanted.

20 He had costs that he had to pay, and there was --
21 there were two other components. One was an evaluation
22 of his competency, both in terms of his ability to
23 practice as well as his mental and physical fitness.
24 That typically is done in California, a program called
25 PACE, P-A-C-E, it's an acronym, at the University of

1 California, San Diego. Unfortunately, there was a
2 conflict of interest on the part of UCSD because one of
3 their faculty had testified against Dr. Smith, so he
4 ultimately found a program in Texas called KSTAR, which
5 the Board authorized and he completed.

6 I'm trying to think if there were other
7 conditions. They're in the order. But my recollection
8 is that we sort of bent over backwards with me assisting
9 him to ensure he complied.

10 Q I have a couple of questions for you there. As
11 far as the participation and passage of the KSTAR
12 program, was there a prohibition -- I shouldn't say
13 prohibition, but restriction on Dr. Smith's ability to
14 provide IT treatment and care until he passed that KSTAR
15 program?

16 A Yeah. My memory was there was a requirement that
17 he forebear, if you will, from providing intrathecal care
18 until his competency was assessed. That competency
19 evaluation resulted in a restoration of that particular
20 faculty.

21 Q So part of the testimony today has been about the
22 timeline here, so I'm going to walk you through some of
23 this.

24 Going back to the issuance of the Board order or
25 the effective date of the Board order in August of 2020,

1 did you or the other attorneys involved in the case file
2 an appeal or writ in the action?

3 A Yes. The challenge of a medical board decision is
4 by writ to the Superior Court. I filed that. I took
5 over the case for Mr. Fenton. I filed a request for writ
6 review in Los Angeles County Superior Court and
7 challenged the decision on a number of grounds, including
8 due process grounds.

9 Q And was that filed in approximately September of
10 2020?

11 A That's probably right. I believe so.

12 Q Shortly after the issuance of the order?

13 A Yes. We were fairly quick.

14 Q So part of -- part of what we're trying to do
15 today is make a clear record regarding the procedural
16 history, so we're going to jump around just a little bit
17 and I apologize for that.

18 Did the writ that you filed in 2020, was that
19 pending for some time?

20 A You know, Ms. Beggs, I'm sorry, I can't recall. I
21 know we filed it, there was a briefing schedule that was
22 set by the court, and ultimately the decision issued. It
23 may have taken as long as six months but I don't have a
24 specific recollection.

25 Q Would it -- if I said that the Superior Court

1 issued its decision in January of 2022, would that sound
2 accurate to you?

3 A I have no reason to dispute that. Obviously we
4 have the order so -- but I have no independent
5 recollection.

6 Q Okay. So while the writ was pending, was
7 Dr. Smith compliant with the terms of probation under the
8 order?

9 A Yes. It was -- I'm sorry, to interrupt. There
10 was a long duration of probation under the original order
11 that we were challenging, and I recall his probation
12 monitor quite well, I can't remember her name, very nice
13 lady. She retired just before Dr. Smith's last
14 disciplinary proceeding, and he was in full compliance.

15 Q Did that include the participation in and passage
16 of the KSTAR program?

17 A It included that, as well as chart review for not
18 just his overall care but specifically intrathecal care
19 once that faculty was restored.

20 Q And there was no concerns during this period of
21 time with Dr. Smith not being in compliance with the
22 terms of probation?

23 A Nobody from the Board communicated to me that
24 there were concerns, and neither of the two subsequent
25 accusations expressed any such concern, at least for this

1 period of time.

2 Q So --

3 A When I say "this period of time," I mean the
4 period of time between the 2020 decision and the 2022
5 setting aside of the order.

6 Q So in that interim period, did the California
7 Board file a second accusation against Dr. Smith in
8 approximately December of the 2020?

9 A They did. It's what I referred to as the backstop
10 accusation.

11 Q And was that accusation, did it also address care
12 provided to patients in that kind of 2015/2018 realm?

13 A It did. It basically stereotyped or mimicked the
14 original accusation. That was one of the procedural
15 challenges that we brought to both the ALJ's attention as
16 well as to the Superior Court when we challenged that.

17 Q And in your opinion as a professional attorney,
18 did the allegation -- the allegations in the second
19 accusation seem to mirror the first accusation?

20 A I've been defending physicians and LA health
21 professionals before the Board in California for almost
22 30 years, and in my view the second accusation was what I
23 would refer to as a backstop accusation, meaning it
24 served no proper regulatory purpose. The medical board
25 in California, and I'm sure it's the same in Nevada, the

1 primary purpose is protection of the public and you do
2 that by ensuring -- to a certain degree ensuring
3 competency of a professional. This covered exactly the
4 same conduct that was addressed in the original
5 accusation that had been the subject of significant
6 remedial and rehabilitation measures, if you will, during
7 Dr. Smith's term of probation. So I viewed it as a
8 backstop, excuse me, with the medical board prosecutors
9 in the Attorney General's Office concerned about whether
10 the original order might be set aside.

11 Q So was there a hearing held on that second
12 accusation?

13 A Yes, there was.

14 Q So would it sound correct to you that that hearing
15 took place in early October of 2021?

16 A Yes. We appeared in front of Judge Levy, L-E-V-Y,
17 one of the administrative law judges.

18 Q And this has been previously asked of Dr. Smith
19 but as his attorney, would it be common to have a
20 decision rendered immediately after the conclusion of the
21 hearing or would a period of time pass before a decision
22 was issued?

23 A It's very uncommon. It's an ISO, an interim
24 suspension order, it's very uncommon to have a quick
25 decision. In fact, that's one of the issues that I

1 brought to the attention both of the Board and the
2 legislature, that there needs to be some strict adherence
3 to a timeline.

4 Q So after the conclusion of the hearing in October
5 of 2021, shortly thereafter did the California Medical
6 Board lift the IT treatment and care restriction on Dr.
7 Smith because of his completion of the KSTAR program?

8 A Yes.

9 Q So as of the end of October 2021, he was able to
10 again provide treatment and care to IT pump patients?

11 A Yes. That faculty was expressly restored by the
12 Board itself after assessment of his competency.

13 Q So in regard to the second accusation, the Board
14 issued a decision that was -- pardon me -- the Board
15 issued a decision in December of 2021 after the
16 restoration of that restriction effective in January of
17 2022. Do you recall what the decision of the California
18 Board was on that second case?

19 A Ms. Beggs, I can't recall exactly. It certainly
20 wasn't revocation. It was probably a duplication or --
21 actually, I do recall. It was an incorporation, as I
22 understand it, of the prior imposed discipline.

23 Q Was there an additional restriction on Dr. Smith's
24 care and treatment of IT patients in that order?

25 A No. That was omitted --

1 Q Okay.

2 A -- if I recall correctly. It's a procedurally
3 convoluted case. As I recall, there was a restoration --
4 well, there was a restoration of privilege. There was a
5 subsequent disciplinary order that was issued, and I
6 don't have an independent recollection of whether it
7 included the IT restriction or not. My recall is that it
8 did not, but my recall is probably not reliable on that
9 issue.

10 Q So if I said that there was an IT restriction in
11 that order issued January -- that was effective
12 January 2022, in your legal opinion, did the restoration
13 of the IT privileges in October of 2021 basically
14 ameliorate that restriction?

15 A Yes. That's why I'm having difficulty discerning
16 whether there was an independent IT restriction in the
17 second decision. The medical board had already assessed
18 Dr. Smith's competency to provide IT care by thorough
19 evaluation of his competency in the KSTAR program and by
20 their intrusive monitoring, which included review of the
21 IT charts. So, in my view, he had satisfied that
22 condition, the medical board was satisfied that he was
23 competent to render IT care, and since the second
24 accusation did not deal with any sort of subsequent
25 conduct; in other words, the conduct they evaluated was

1 concurrent with the time frame that was considered in the
2 original decision, so, in my legal opinion and, frankly,
3 the logical conclusion was that the Board said, Okay,
4 we've evaluated your care during this time period, we
5 have imposed discipline that is to protect the public to
6 require assurance that you're competent to provide this
7 care, we're satisfied that you're competent, so here you
8 go. Here are your privileges back.

9 Q Right around this same time, did the California
10 Superior Court issue its decision setting aside the
11 decision in the first California Medical Board case?

12 A Yes.

13 Q And what was the effect of that decision by the
14 Superior Court? What did California -- pardon me -- what
15 did the California Board do subsequent to that?

16 A There are two steps. So as a matter of law, once
17 the writ was issued, it rendered the original
18 disciplinary decision void. Dr. Smith still had the
19 benefit of what he had accomplished through the
20 disciplinary process in terms of the assessment of his
21 competency, etcetera.

22 The -- there was a little bit of wrangling with
23 the judge by the Board, the Superior Court judge. The
24 Attorney General handling the case filed a motion for
25 reconsideration, and then filed another motion which was

1 sort of akin to motion for reconsideration which the
2 court wasn't happy about. It seemed like the Attorney
3 General didn't know quite what to do next.

4 The court ultimately instructed him to -- the
5 Board had to comply with the mandate, which it hadn't
6 done, and it's a very simple process and similar to an
7 appeal where you receive a remittitur and there's an
8 acknowledgment on the part of the lower court that you've
9 accomplished what the trial court has directed.

10 So the Board ultimately did that, however, what
11 they did was they initiated a proceeding that in my
12 30 years of experience I've never seen, and it's not part
13 of the administrative rules for the Board. They held a
14 hearing with a panel of the Board, members of the Board,
15 for the reconsideration of the original disciplinary
16 order. At that proceeding, which was held obviously some
17 years after the conduct that was at issue in the original
18 disciplinary proceeding, but at this proceeding we were
19 on a Zoom call with a panel of the Medical Board at which
20 we were specifically instructed that no evidence of
21 Dr. Smith's then competency to practice medicine or any
22 new evidence outside the old record could be provided.
23 And basically what it was, was a procedurally improper,
24 in my legal opinion, redo of the original proceeding.

25 And it probably helps for the court here to

1 understand the reason why the original order was set
2 aside was because Dr. Smith was denied the opportunity to
3 present expert testimony relative to his care and
4 treatment of two patients. The Superior Court determined
5 that that was a due process violation, it violated
6 Dr. Smith's right to a fair trial. And so what the Board
7 did in this new proceeding that it invented, it excised
8 those two patients about whom Dr. Smith was not allowed
9 to present expert testimony and only essentially
10 reconsider the first three.

11 I objected to that in that proceeding and in a
12 subsequent challenge of the order that came out of that
13 proceeding explaining to the Board that the --
14 Dr. Smith's ability to present expert testimony is not --
15 can't be surgically excised. My expert witness certainly
16 testified about care and treatment of particular
17 patients -- or can, but also has opinions relative to the
18 competency of the practitioner to practice.

19 The Board was uninterested in that argument. And
20 so ultimately what it did after that proceeding, the oral
21 argument, with no evidence gathered on -- without even an
22 accusation having been filed, which is even more bizarre,
23 the Board issued a decision ultimately that was identical
24 to the original decision that it issued, even including
25 the same type of typographical errors. It was basically

1 cut-and-paste where they excised the two patients about
2 whom Dr. Smith's expert was not permitted to testified.

3 Q So with the decision issued by the California
4 Medical Board -- and I believe that was issued in August
5 of 2022; does that sound about right?

6 A Yeah.

7 Q So they placed Dr. Smith back on probation that
8 was retroactive to September of 2020, the initial -- I'm
9 sorry -- they retroactive -- pardon me. I'm going
10 rephrase that.

11 The probation was retroactive to September 2020;
12 is that accurate?

13 A That's correct. With credit for the terms he had
14 satisfied --

15 Q So that --

16 A -- including --

17 Q Please go ahead.

18 A -- restoration of the IT privileges.

19 Q So as far as you were concerned, at that point in
20 time, there was no prohibitions on Dr. Smith providing
21 care -- IT care and treatment?

22 A That's correct.

23 Q So there was also at issue in the -- well, let
24 me -- I'll take a step back.

25 Subsequent to that, in July of 2023, did Dr. Smith

1 receive a petition to revoke his probation issued by the
2 California Medical Board?

3 A He did.

4 Q Do you remember the basis for that petition?

5 A The claim was he had provided IT care during a
6 period of time when he was prohibited from doing so, and
7 I believe it related to four patients, if I remember
8 correctly.

9 Q Was that between August and November of 2022?

10 A Yes.

11 Q In your legal opinion -- well, part of the
12 petition -- let me rephrase that.

13 Part of the petition also raised the issue that
14 Dr. Smith had not properly disclosed to patients his
15 restriction in providing that care; do you recall that?

16 A Yes.

17 Q That disclosure that was at issue and referenced
18 in the order that ultimately came from the California
19 Board in July of 2024, states that there was a disclosure
20 made that you assisted in drafting from February 2022
21 that indicated that the previous decision had been
22 overturned; does that sound -- does that ring a bell?

23 A Yes. That's correct. We drafted a disclosure to
24 the patients that identified the prior discipline,
25 identified that there had been discipline by the Board,

1 and then gave the then accurate accounting of what was
2 going on.

3 Q The California Board, however, were they arguing
4 that that was somehow being dishonest to patients?

5 A Here's the thing, is that ultimately the -- this,
6 unfortunately, was quite a political case -- the Board --
7 so we drafted this disclosure and disclosed to patients
8 that there had been a medical board action. The
9 discipline was imposed but that discipline was set aside
10 and that the matter was still being litigated. And in
11 the Board's view, what Dr. Smith should have done, as I
12 understand the Board's decision, was provide sort of a
13 running commentary on what was going on procedurally with
14 the disciplinary proceedings.

15 In my view, in my legal assessment, it was
16 sufficient for him to put the patients on notice that
17 there were medical board proceedings. All of our -- as I
18 think in Nevada, all of our proceedings in terms of
19 ultimate orders and restrictions on practice are easily
20 searchable on the medical board's website, or there is a
21 system called Breeze, B-R-E-E-Z-E, that the State has.
22 So the Board's position was that Dr. Smith should have
23 provided a continuous update on what was going on with
24 his disciplinary proceedings.

25 Q Let me ask you this. So Dr. Smith's IT

1 restriction was lifted in October 2021; correct?

2 A Correct.

3 Q So after that, regardless of the reconsideration,
4 the rehearing, in your legal opinion, was he able to
5 provide IT treatment and care at that point in time?

6 A Yes. So there was a legal side to it and
7 practical side to it. The legal side was I was very
8 clear with Dr. Smith that the medical board has assessed
9 and concluded that he was competent to provide IT care
10 and had expressly in writing restored those privileges --
11 or those faculties. There was also the pragmatic side,
12 which was the feedback I got from Dr. Smith in particular
13 which was, Yeah, you may be legally correct but I'm going
14 to self-restrict to avoid any potential issues. And I'm
15 only going to deal with IT patients if necessary, if it's
16 really an urgent emergent situation.

17 Q To your knowledge, is that what happened with the
18 three patients at issue in late 2022, or between that
19 August/November 2022 period?

20 A Yeah, that's what happened. Although, honestly,
21 apparently the administrative law judge disagreed with
22 me. At least two of those patients didn't receive what I
23 would term or what a physician I think would term IT
24 care. One was an explant, which is not rendering
25 intrathecal care or at least wasn't rendering care in

1 such a way that was of concern to the Board. I've
2 forgotten what the other one is now, but -- I think it
3 was either turning it off or emptying it, which is the
4 opposite of care -- or just the opposite of intrathecal
5 delivery.

6 Q So after the petition to revoke was filed in 2023,
7 was a hearing held in that matter?

8 A On the petition to revoke, yes.

9 Q What was the ultimate outcome of that?

10 A The Board issued a -- well, the ALJ issued a
11 recommendation for revocation and the Board affirmed or
12 adopted it.

13 Q So currently, Dr. Smith does not hold a license to
14 practice in California?

15 A That's correct. The expectation is whenever the
16 time comes around, he will apply for restoration of his
17 license.

18 MS. BEGGS: Thank you. I have nothing further.
19 I'm going to turn it over to Mr. White, who is on my
20 left, which is -- he'll have some questions for you.

21 THE WITNESS: I see him.

22 HEARING OFFICER BURCHAM: Cross-examine?

23 MR. WHITE: Yes. Thank you. Give me one moment.

24 I'm sorry, I have to look something up real quick.

25 / / / /

1 +++ CROSS-EXAMINATION +++

2 BY MR. WHITE:

3 Q Mr. Rifat, you're an attorney in California?

4 A I'm licensed in California, Arizona and
5 Mississippi.

6 Q Okay. Not in Nevada; right?

7 A No, although I've appeared pro hoc from time to
8 time.

9 Q Who are you associated with -- well, you handled
10 Mr. -- excuse me -- Dr. Smith's application in 2018; did
11 you not?

12 A I assisted him with it, yes.

13 Q Did you help him appear before the Board?

14 A Yes, we had an appearance. I can't recall when.

15 Q That was to get his medical license in Nevada;
16 right?

17 A I think it was part of the process. I think it
18 may have been to answer any -- some particular question
19 the Board had.

20 Q Do you recall any of those particular questions?

21 MS. BEGGS: I'm going to object; relevance to
22 this.

23 HEARING OFFICER BURCHAM: I'm a bit lost. Can you
24 provide me a little bit of background of where this is
25 going -- well, background, then where this is going?

1 MR. WHITE: Sure. So when Dr. Smith was
2 originally licensed, I think in May of 2018 --

3 HEARING OFFICER BURCHAM: In Nevada --

4 MR. WHITE: In Nevada. What -- yeah, in Nevada,
5 correct. And that -- and for some reason that board
6 occurred in May instead of March or June, because I think
7 we had snow in March or something like that -- excuse
8 me -- March of 2018. So it was scheduled, continued
9 until May, and I think Mr. Rifat represented Dr. Smith in
10 obtaining his license because they had some questioning.

11 I guess for some background, and I'm not in
12 licensing, but sometimes people just get licenses when
13 they apply, other times there are things that maybe
14 licensing wants to know more and the Board has some
15 questions, so they appear -- they're asked to appear and
16 they get their license.

17 MS. BEGGS: So we're not litigating the prior
18 complaint against Dr. Smith --

19 MR. WHITE: No.

20 MS. BEGGS: -- so none this has any relevance.

21 HEARING OFFICER BURCHAM: You say the prior Nevada
22 complaint?

23 MS. BEGGS: The prior Nevada complaint, that's
24 been adjudicated, it's been resolved. Dr. Smith has
25 already testified that he's on probation. The underlying

1 facts of that are not relevant to the actual allegation
2 within the complaint.

3 HEARING OFFICER BURCHAM: I would ask Mr. White
4 what --

5 MR. WHITE: So the relevance of this is going to
6 be that Mr. Rifat was answering -- and Dr. Smith were
7 answering some questions from the Board. I believe
8 they're not the original complaint -- and I'm going to
9 get to that in a minute because Mercedes is going to
10 print it out for me -- but in that original complaint,
11 written by Aaron Fricke, actually, who used to work for
12 our Board here, I did not write that, there's parts in
13 there that discuss how Dr. Smith was not quite answering
14 the questions that the Board was asking. Then Mr. Rifat
15 was kind of taking the hit saying, "I'm going -- that's
16 my fault, I didn't instruct Dr. Smith correctly," or
17 something. I'm paraphrasing right now, that was in the
18 complaint. It's really just a matter of saying, Mr.
19 Rifat, also he has some mistakes here in this California
20 thing that, in his view, as a matter of law, he could do
21 the IT treatment and he advised Dr. Smith that way, but
22 he also advised him in Nevada incorrectly.

23 MS. BEGGS: I'm going to object. I think it's
24 inflammatory. This is going to go to the Board for
25 adjudication. We don't need to re-litigate the prior

1 case and it's not relevant to the fact that California
2 took action.

3 MR. WHITE: I think it's relevant in terms of we
4 all make mistakes as lawyers and so it's just showing
5 that there were some mistakes made in Nevada too, not
6 just the --

7 MS. BEGGS: I'm going to object to that because
8 he's implying that there were mistakes made and I would
9 take objection to that.

10 HEARING OFFICER BURCHAM: That is an issue in the
11 case, mistakes being made; however, I'm not worried about
12 that right now during this discussion with counsel. I
13 think this is getting a bit far afield.

14 I am interested and I would take notice of the
15 fact that Mr. Rifat was involved in 2018 as the doctor's
16 legal counsel. Okay? We've already heard there's a
17 20-year track record of representation. That's fine. I
18 don't believe, respectfully, that the attorney's
19 opinions -- they're not -- they're not in the filing,
20 that's a different issue as to good, bad or indifferent
21 on them.

22 Do you have any clue of what I'm saying? I'm
23 rambling a bit, but I do not want this to get into a
24 discussion about matters of historical history. That's
25 really what it is.

1 MR. WHITE: I think I read you right and I'm fine
2 with this, your decision at this point. Mistakes were
3 made, it's not --

4 HEARING OFFICER BURCHAM: You can argue mistakes
5 were made, there's no problem with that, but going back
6 to relitigating issues that might have happened seven
7 years ago I think is a bit far afield.

8 MR. WHITE: Okay.

9 HEARING OFFICER BURCHAM: Okay.

10 MR. WHITE: And understanding my side, I was just
11 going to point out that mistakes were made and mistakes
12 made back then.

13 HEARING OFFICER BURCHAM: We can all understand,
14 that could be your position, and I suspect Ms. Beggs has
15 a different take on that, which we can discuss in a
16 little bit.

17 MS. BEGGS: I just want to make sure we're clear
18 on the record. A complaint filed by the medical board is
19 not something that you can impeach a witness on. There's
20 no testimony there. Unless they want to provide a
21 transcript from that particular board hearing, which is
22 not an issue in this case, the fact that an allegation
23 was made in the complaint in no way, shape or form proves
24 that issue. And there were no allegations related to
25 Mr. Rifat, so I think this is just wholly inflammatory, I

1 think that if he's trying to impeach Mr. Rifat there's
2 other ways to do that, but not to relitigate something
3 that's already been litigated, that Dr. Smith is on
4 probation and complying with, and to make assumptions
5 that there were quote/unquote "mistakes made" because of
6 accusations in the complaint, it's an accusation. It's
7 not factual. And there was not a hearing held in that
8 matter. It was resolved via settlement.

9 HEARING OFFICER BURCHAM: I understand the
10 position of the parties -- the arguments. I would ask
11 you to move forward.

12 MR. WHITE: I will.

13 HEARING OFFICER BURCHAM: We understand, and the
14 record is clear that this witness was an attorney for
15 respondent for a long period of time, and apparently
16 including not just California matters but at least to a
17 little bit over here during licensing. I get that.
18 That's clear on the record. Thank you.

19 MR. WHITE: I will move forward.

20 BY MR. WHITE:

21 Q Mr. Rifat, did you ever contact Ms. Addis -- I
22 think you couldn't recall her name -- I believe -- I
23 would like some help from the other party -- is it
24 Virginia Addis who was the probation officer for the
25 California Board?

1 A Yes, Mr. White. Thanks for refreshing my
2 recollection.

3 Q I just learned it from reading the order, which
4 you probably don't have in front of you.

5 So anyway, did you ever contact Ms. Addis?

6 A Well, yes.

7 Q On behalf of Dr. Smith, I should say?

8 A Yes, absolutely. She testified at the revocation
9 proceeding, a witness for the respondent, for Dr. Smith,
10 as contact and context. And I also had relatively
11 regular communication with her during the time period of
12 her monitoring of his probation to ensure that he was
13 compliant.

14 Q Okay. And that would be my next question. Did
15 you ask her about his compliance? Was he -- as far as
16 you knew from talking with her, was he in compliance?

17 A Yes. In fact, she kind of surprised me because
18 the probation folks are usually not very cordial and they
19 can be confrontational, but she seemed to have affection
20 and respect for Dr. Smith.

21 Q Maybe you didn't feel a need to, but did you ever
22 contact anyone else or do you feel like you had the
23 answers you needed from Ms. Addis?

24 A There was a -- we call them DAG, a deputy attorney
25 general who was handling all of Dr. Smith's matters, Joe

1 McKenna -- M-C-K-E-N-N-A, first name Joe. I spoke with
2 him consistently over the several years that these
3 matters were being litigated about Dr. Smith and about
4 the compliance in terms of his probation and never
5 mentioned any issues or problems with probation.

6 Q Including --

7 A Well, until the petition to revoke was filed.

8 Q Sure. Exactly.

9 Did you guys, you and Joe McKenna, talk about IT
10 pumps specifically?

11 A Yes.

12 Q Okay.

13 A And with -- yeah, with -- both with Ms. Addis and
14 with Mr. McKenna. With Ms. Addis, I was more direct with
15 her in terms of what does this letter from the Board
16 mean? Does it mean he's got his faculties restored as
17 far as IT is concerned? With Mr. McKenna it was more of
18 an informal dialog, attorney to attorney.

19 Q But then he surely wouldn't have said that IT
20 pumps -- that he was able to treat patients A, B and C
21 in -- let's see, was it August through November 2022 with
22 IT pumps?

23 A I don't recall him saying that, no.

24 Q If you can tell us, what is the status -- I think
25 you might have mentioned it at the end of your

1 questioning from Ms. Beggs, but is it just to kind of
2 wait and see until he's done with the terms of the
3 revocation to go back and get his license? What is the
4 status right now?

5 A Sure. There is a time period for reapplication
6 for restoration of the license in California. It's not
7 something I do regularly so I don't have that time period
8 in mind. It could be two to three years but I don't
9 know. But my -- but if -- it's a decision for Dr. Smith,
10 he's the client. So if Dr. Smith decides he wants to
11 reapply for licensure -- not reapply for licensure but
12 apply rather for restoration of his license in
13 California, he can do so. There's a procedure for doing
14 that. Obviously, any discipline in this case would be a
15 potential problem for him in that procedure, but it's
16 really a practical decision that the client needs to make
17 in terms of what he wants to do next.

18 Q Okay. I think I have a couple more questions,
19 maybe just one.

20 When you talked about before on direct,
21 reconsideration of the original proceeding, that there
22 was a hearing for that, it was just on three of the five
23 patients; right? Two of the patients were -- they did
24 not find a due process violation; is that correct?

25 A So there were several different types of

1 reconsideration. There was the reconsideration I
2 referenced with what the DAG did in Superior Court, there
3 was reconsideration proceedings with the panel of the
4 Board where they basically did a do-over of the 2020
5 discipline, as I had testified what they did was they
6 excised the two patients about whom the expert was not
7 allowed to testify, believing that they could remedy the
8 fair trial/due process problem by doing that. In my
9 view, it was procedurally improper and extralegal.

10 MR. WHITE: Thank you. That's all I have.

11 HEARING OFFICER BURCHAM: Redirect?

12 MS. BEGGS: Just briefly, so I make sure that the
13 record is clear on that issue, Mr. Rifat.

14

15 +++ REDIRECT EXAMINATION +++

16 BY MS. BEGGS:

17 Q As far as the order of the California Superior
18 Court setting aside the decision, if I'm understanding
19 your testimony correctly, that decision was made in part
20 due to Dr. Smith being precluded from bringing expert
21 testimony during the original proceedings on two
22 patients; is that correct?

23 A That's right. Judge Beckloff presented -- our
24 statute is very clear, it requires an expert
25 designation -- very robust expert designation. That

1 expert designation was largely complete but, nonetheless,
2 the ALJ denied our expert the opportunity to testify.
3 Judge Becklof concluded that was a due process and fair
4 trial violation. Technically, it was a violation of the
5 Administrative Procedures Act, but his view was it was in
6 accord with the result.

7 Q Okay. So if I'm understanding then correctly, the
8 California Board, when they did their reconsideration,
9 rather than including those two patients that Dr. Smith
10 was not allowed to have expert testimony on, they just
11 simply took them out of the consideration of the case
12 totally so they didn't -- so, in essence, they didn't
13 have to allow him to bring in extra testimony regarding
14 those two patients?

15 A Exactly. And in the ultimate decision they
16 excised those two patients and, as I said, they took --
17 effectively what they did was they took the original
18 disciplinary order and just deleted any reference to
19 those two patients.

20 Q Okay.

21 A And as I said, I don't think that remedied the
22 fair trial issue because an expert invited to testify --
23 our expert was precluded from testifying. So if the
24 expert would have been invited to testify about the care
25 and treatment of those patients, he certainly also would

1 have been invited to offer evidence about -- and expert
2 testimony about Dr. Smith's competence as exhibited by
3 his care and treatment of those patients. So you can't
4 just redact out a couple of patients and cure the problem
5 of having excluded the expert.

6 Q Okay.

7 MS. BEGGS: Thank you. That's all I have.

8 HEARING OFFICER BURCHAM: Mr. White?

9 MR. WHITE: No.

10 HEARING OFFICER BURCHAM: I have one question,
11 sir.

12 I'm a Nevada lawyer. Okay? So I'm familiar with
13 Nevada procedures and those sorts of things. In
14 California, could the what we call Exhibit 1, the
15 decision of the California Board, July 25th, 2024, that
16 could have been writted; correct?

17 THE WITNESS: The original decision?

18 HEARING OFFICER BURCHAM: No.

19 THE WITNESS: I'm sorry, the revocation?

20 HEARING OFFICER BURCHAM: The 2024, correct. The
21 revocation could have been writted in California; is that
22 correct?

23 THE WITNESS: It could have, your Honor.

24 HEARING OFFICER BURCHAM: And it was not?

25 THE WITNESS: It was not for economic reasons.

1 HEARING OFFICER BURCHAM: Okay. If that prompted
2 anything, free for all?

3 MS. BEGGS: No.

4 MR. WHITE: Nothing.

5 HEARING OFFICER BURCHAM: Anything more for this
6 witness?

7 MR. WHITE: No.

8 HEARING OFFICER BURCHAM: Thank you so much.

9 MR. WHITE: Thank you, Mr. Rifat.

10 MS. BEGGS: Thank you.

11 THE WITNESS: Thank you, your Honor.

12 Thank you, Mr. White.

13 Thank you, Ms. Beggs.

14 Thank you, Dr. Smith.

15 HEARING OFFICER BURCHAM: Is there any other
16 evidence?

17 MS. BEGGS: Respondent would rest.

18 MR. WHITE: I think we're done. Before closing
19 you wanted to do something?

20 HEARING OFFICER BURCHAM: Let's go off the record
21 for a moment.

22 (Off the record.)

23 HEARING OFFICER BURCHAM: So just to make clear, I
24 see you've presented your case, ready to argue?

25 MR. WHITE: Yes.

1 HEARING OFFICER BURCHAM: Ms. Beggs, the same?

2 MS. BEGGS: Yes.

3 HEARING OFFICER BURCHAM: Let's do this, start --
4 I'll try not to interrupt but I have a tendency to
5 interrupt, hopefully I won't -- the way we'll do it, you
6 do it, bang, bang, you get the last word.

7 MR. WHITE: On the closing?

8 HEARING OFFICER BURCHAM: Closing, correct.

9 MR. WHITE: Thank you.

10 So thank you, Hearing Officer Burcham.

11 On behalf of the Investigative Committee, I'd like
12 to thank you, Mr. Burcham, Ms. Court Reporter, Dr. Smith
13 for attending, and Ms. Beggs and the witnesses for their
14 time and consideration.

15 As I mentioned in my opening statement, we're here
16 to determine if Dr. Smith violated the Nevada Medical
17 Practice Act, and particularly if he violated NRS
18 630.301(3), disciplinary action by another state medical
19 board.

20 You heard Ernesto Diaz, our chief board
21 investigator. He was -- he assigned himself to this
22 matter, coordinated with somebody in -- at the California
23 Medical Board to acquire the certified copy of the
24 decision and order, which is Exhibit 1, and obviously he
25 was -- we stipulated to the exhibit so he didn't really

1 have to do much authentication. But he was available for
2 cross-examination and answered everyone's questions
3 satisfactorily.

4 Evidence admitted in this matter shows that the
5 California Medical Board did discipline Dr. Smith by
6 revoking his probation, which revoked his license to
7 practice medicine in California. You heard Dr. Smith
8 himself, he attended the hearing on April 23rd, 2024, and
9 May 23rd and 24th, 2024, with his attorney. He has
10 admitted he's not practicing medicine in California at
11 the moment, since he's been revoked, understands that the
12 California Medical Board did not allow him to use -- in
13 fact he said he was surprised -- used the advice of his
14 attorney as a shield against any disciplinary action,
15 fortunately for him. He also admits the California
16 Medical Board disciplined him by revoking his license.

17 I will state that since we do have the certified
18 copy of the -- under 630.346, which is the part of the
19 Nevada Medical Practices Act, a certified copy of the
20 record of a court order or licensing agency showing a
21 conviction or a plea of nolo contendere, or the
22 suspension, revocation, limitation, modification, denial
23 or surrender of a license to practice medicine, perfusion
24 or respiratory care is conclusive evidence of its
25 occurrence. Not that I think that there was a dispute, I

1 wanted to make sure that the record is clear.

2 So on behalf of the Investigative Committee, I
3 will submit we have met the burden and have proven the
4 sole count of disciplinary action by another state agency
5 contained in the formal complaint, and it was proven by a
6 preponderance of the evidence.

7 HEARING OFFICER BURCHAM: Thank you.

8 MR. WHITE: Thank you.

9 MS. BEGGS: On behalf of Dr. Smith we would not --
10 we would not dispute the fact that the California Medical
11 Board did take action against Dr. Smith's license in July
12 of 2024, revoking the probationary period he was on
13 there. And we would submit that the Board has made a
14 showing through the admission of Exhibit 1 as far as the
15 California Board's action.

16 As discussed during the proceedings today, the
17 issue primarily for Dr. Smith in this case is to ensure
18 that the Board has a full and comprehensive
19 understanding, to the extent that we can during a period
20 of this nature, to explain to the Board some of the
21 background that led up to the California Board's
22 decision, that Dr. Smith still disagrees with but for
23 various reasons did not appeal in July of 2024.

24 So with that we would submit the underlying cause
25 of action and would respectfully request the ability to

1 comply with the provisions of NRS 630.352 as far as
2 providing additional argument to the Board at the time of
3 adjudication in the matter -- in regard to appropriate
4 discipline, I should add.

5 HEARING OFFICER BURCHAM: Anything else?

6 MR. WHITE: Nothing else. Thank you.

7 HEARING OFFICER BURCHAM: Well, with that -- by
8 the way, I do want to put on the record that we had a
9 discussion about -- prior to closing, about whether I
10 would need to be provided copies of the various orders,
11 writ on decisions out of California, the prior Nevada
12 disciplinary matters. Basically the consensus of the
13 group -- and I want to make sure -- the group of lawyers,
14 is that Exhibit 1, which is the 2024 decision out of
15 California, basically has a lot of that history in it,
16 and so I don't need that other information; correct?

17 MS. BEGGS: Yes.

18 MR. WHITE: Correct.

19 HEARING OFFICER BURCHAM: Got it. All right we're
20 off the record. Thank you.

21 (At 11:40 a.m., the hearing concluded.)

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STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, ERIN T. FERRETTO, an Official Reporter
of the Second Judicial District Court of the State of
Nevada, in and for the County of Washoe, DO HEREBY
CERTIFY:

That I was present for the above-entitled
proceedings on THURSDAY, NOVEMBER 13TH, 2025, and took
verbatim stenotype notes of the proceedings had upon the
matter captioned within, and thereafter transcribed them
into typewriting as herein appears;

That the foregoing transcript is a full,
true and correct transcription of my stenotype notes of
said proceedings.

That I am not related to or employed by any
parties or attorneys herein, nor financially interested
in the outcome of these proceedings.

DATED: This 30th day of November, 2025.

/s/ Erin T. Ferretto

ERIN T. FERRETTO, CCR #281

4

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.

Case No. 800-2021-081615

Physician's & Surgeon's
Certificate No. G 66777

Respondent.

DECISION

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

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


IT IS SO ORDERED: July 25, 2024.

MEDICAL BOARD OF CALIFORNIA



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

MEDICAL BOARD OF CALIFORNIA
I do hereby certify that this document is a true
and correct copy of the original on file in this
office.


Signature
Forthright Custodian of Records
Title

October 10, 2025
Date

**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, Virginia 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 spinal 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

EXHIBIT 2

EXHIBIT 2

Ernesto Diaz

Subject: FW: David James Smith, M.D.
Attachments: Disclosure to D. White_Smith_7.31.24.pdf

-----Original Message-----

From: Lyn Beggs <lyn@lbeggslaw.com>
Sent: Wednesday, July 31, 2024 1:24 PM
To: Donald K. White <dwhite@medboard.nv.gov>
Subject: David James Smith, M.D.

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Don,

Please find attached the formal disclosure of the recent action taken by California against Dr. Smith's medical license. The effective date of the decision as noted in the letter is August 23, 2024.

Let me know if you need anything else regarding the matter at the moment.

Thanks,

Lyn

Lyn E. Beggs, Esq.

Law Offices of Lyn E. Beggs, PLLC

T: 775-432-1918

F: 775-473-3801

Mailing Address: 316 California Ave. #863, Reno, NV 89509 Physical Address: 328 California Ave. Ste. 3,
Reno, NV 89509 lyn@lbeggslaw.com www.lbeggslaw.com

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LAW OFFICES OF

LYN E. BEGGS
PLLC

July 31, 2024

Via Electronic Mail

Don White, Senior Deputy General Counsel
Nevada State Board of Medical Examiners
9600 Gateway Drive
Reno, Nevada 89521
dwhite@medboard.nv.gov

Re: David James Smith, M.D.

Dear Mr. White:

I am writing on behalf of Dr. David Smith to report recent action taken by the Medical Board of California (“MBC”) in accordance with NRS 630.306(1)(k).

On July 25, 2024, the MBC adopted a proposed Decision and Order issued on July 2, 2024, by an administrative law judge, revoking Dr. Smith’s probation on his California license and thereby revoking Dr. Smith’s California license. The effective date of the Decision is August 23, 2024, a copy of the Decision is attached hereto.

Should you need anything further at this time, please do not hesitate to contact me.

Very truly yours,



Lyn E. Beggs, Esq.

cc: David Smith, M.D.

5

OFFICE OF THE GENERAL COUNSEL

Nevada State Board of Medical Examiners
9600 Gateway Drive
Reno, Nevada 89521
(775) 688-2559

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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: _____

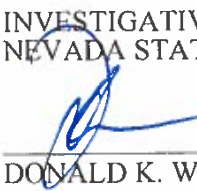

DONALD K. WHITE
Senior Deputy General Counsel
9600 Gateway Drive
Reno, NV 89521
Tel: (775) 688-2559
Email: dwhite@medboard.nv.gov
Attorney for the Investigative Committee

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

Case No. 800-2021-081615

Respondent.


DECISION

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

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

IT IS SO ORDERED: July 25, 2024.

MEDICAL BOARD OF CALIFORNIA



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, Virginia 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 spinal 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, TELEMTRY 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

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

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**BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NEVADA**

In the Matter of Charges and Complaint

Case No. 25-47823-1

Against:

DAVID JAMES SMITH, M.D.,

Respondent.

FILED

JUN 26 2025

**NEVADA STATE BOARD OF
MEDICAL EXAMINERS**


By: 

ACCEPTANCE OF SERVICE

Lyn E. Beggs, Esq., counsel for, David James Smith, M.D., Respondent, hereby acknowledges that she received a filed-stamped copy of the formal Complaint by the Investigative Committee of the Nevada State Board of Medical Examiners in this matter by electronic mail, and in doing so, accepts service of the same and specifically waives formal service of process by mail or by other means.

DATED this  day of June, 2025

LAW OFFICES OF LYN E. BEGGS

By: 

LYN E. BEGGS, ESQ.
316 California Ave., # 863
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Attorney for Respondent

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BEFORE THE BOARD OF MEDICAL EXAMINERS
OF THE STATE OF NEVADA

In the Matter of Charges and Complaint)
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Against:)
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)
DAVID JAMES SMITH, M.D.)
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)
Respondent.)

Complaint No. 25-47823-1

FILED

JUL 22 2025

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

By: W. Hall

ANSWER AND NOTICE OF DEFENSE

Respondent David James Smith., hereby files with the Nevada State Board of Medical
Examiners ("Board"), his Answer to the Compliant filed June 24, 2025, in accordance with NRS
630.339(2).

Jurisdiction: Paragraph 1

Dr. Smith acknowledges that he held an active license to practice in Nevada during the
times relevant to the instant matter and accordingly the Board has jurisdiction in this matter.

Factual Allegations: Paragraphs 2-6

Paragraph 2: Dr. Smith acknowledges that he held a medical license issued by the Medical
Board of California, originally issued in August 1989, however Dr. Smith submits that the license
number was G 66777, not F66777 as set forth in the Complaint. Additionally, the license did not
expire in January 2025 but rather was revoked with an effective date of August 23, 2024.

1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**
2 **OF THE STATE OF NEVADA**

3 * * * * *

4
5 **In the Matter of Charges and Complaint**

Case No. 25-47823-1

6 **Against:**

7 **DAVID JAMES SMITH, M.D.,**

Early Case Conference:

8 **Respondent.**

July 30, 2025 at 10 a.m..

9
10
11 **ORDER SETTING EARLY CASE CONFERENCE**

12 **TO: Donald K. White, Esq.**
13 **Senior Deputy General Counsel**
14 **Nevada State Board of Medical Examiners**
15 **9600 Gateway Drive**
16 **Reno, NV 89521**

FILED

JUL 28 2025

**NEVADA STATE BOARD OF
MEDICAL EXAMINERS**

By: 

17 ~and~

18 **David James Smith, M.D.**
19 **c/o Respondent's Attorney**
20 **Lyn Beggs, Esq.**
21 **316 California Ave., #863**
22 **Reno, NV 89509**

23 **NOTICE IS HEREBY GIVEN** in compliance with NRS 630.339(3)¹, an Early Case
24 **Conference will be conducted on July 30, 2025, beginning at the hour of 10:00 a.m. The Early**

25 ¹ Within 20 days after the filing of an answer or 20 days after the date on which an answer is due, whichever
26 is earlier, the parties shall hold an early case conference at which the parties and a hearing officer appointed by the
27 Board or a member of the Board must preside. At the early case conference, the parties shall in good faith:

28 (a) Set the earliest possible hearing date agreeable to the parties and the hearing officer, panel of the Board or the
Board, including the estimated duration of the hearing;

(b) Set dates:

- (1) By which all documents must be exchanged;
- (2) By which all prehearing motions and responses thereto must be filed;
- (3) On which to hold the prehearing conference; and
- (4) For any other foreseeable actions that may be required for the matter;

(c) Discuss or attempt to resolve all or any portion of the evidentiary or legal issues in the matter;

(d) Discuss the potential for settlement of the matter on terms agreeable to the parties; and

(e) Discuss and deliberate any other issues that may facilitate the timely and fair conduct of the matter.

1 Case Conference will be held via conference call. Counsel for the IC, Donald K. White, Esq. will
2 initiate the conference call and add the parties to the line.

3 The scheduled Early Case Conference shall be attended by the parties in person or by any
4 party's legal counsel of record and will be conducted by the undersigned Hearing Officer to
5 discuss designate the dates for the Pre-Hearing Conference and Hearing and other procedural
6 matters established in NRS 630.339.

7 At the Pre-Hearing Conference, in accordance with NAC 630.465², each party shall
8 provide the other party with a copy of the list of witnesses they intend to call to testify, including
9 therewith, the qualifications of each witness so identified, and a summary of the testimony of each
10 witness. If a witness is not on the list of witnesses, that witness may subsequently not be allowed
11 to testify at the Hearing unless good cause is shown for omitting the witness from said list³.
12 Likewise, all evidence, except rebuttal evidence, that is not provided to each party at the Pre-
13 Hearing Conference may also not be introduced or admitted at the Hearing unless good cause is
14 shown.

15 ///

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19 ² 1. At least 30 days before a hearing but not earlier than 30 days after the date of service upon the physician
20 or physician assistant of a formal complaint that has been filed with the Board pursuant to NRS 630.311, unless a
21 different time is agreed to by the parties, the presiding member of the Board or panel of members of the Board or the
22 hearing officer shall conduct a prehearing conference with the parties and their attorneys. All documents presented at
23 the prehearing conference are not evidence, are not part of the record and may not be filed with the Board.

24 2. Each party shall provide to every other party a copy of the list of proposed witnesses and their qualifications
25 and a summary of the testimony of each proposed witness. A witness whose name does not appear on the list of
26 proposed witnesses may not testify at the hearing unless good cause is shown.

27 3. All evidence, except rebuttal evidence, which is not provided to each party at the prehearing conference may
28 not be introduced or admitted at the hearing unless good cause is shown.

29 4. Each party shall submit to the presiding member of the Board or panel or to the hearing officer conducting the
30 conference each issue which has been resolved by negotiation or stipulation and an estimate, to the nearest hour, of
31 the time required for presentation of its oral argument.

(Added to NAC by Bd. of Medical Exam'rs, eff. 1-13-94; A by R149-97, 3-30-98; R167-99, 1-19-2000; R108-01,
11-29-2001)


³In identifying a patient as a witness, parties are cautioned to omit from any pleadings filed with
undersigned Hearing Officer any addresses, telephone numbers, social security numbers or other personal
information regarding that individual and to confine their submissions in this regard to the name of witness, the
relevancy of any testimony sought to be elicited from that witness and a summary of their anticipated testimony.

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IT IS FURTHER ORDERED that legal counsel for the Nevada State Board of Medical Examiners and the Respondent shall keep undersigned Hearing Officer advised of each issue which has been resolved by negotiation or stipulation, if any. At the Early Case Conference, the parties must also provide an estimate, to the nearest hour, of time required for presentation of their respective cases.

IT IS SO ORDERED.

DATED this 24 day of July, 2025.



Charles Burcham, Esq.
Tel: (775) 750-2998
Email: charlie@northernnevadaadr.com
Hearing Officer

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the Nevada State Board of Medical Examiners and that on the 28th day of July, 2025, I served a file-stamped copy of the foregoing ORDER SETTING EARLY CASE CONFERENCE, via USPS Certified Mail, postage pre-paid, to the following parties:

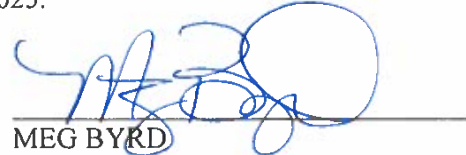
DAVID JAMES SMITH, M.D.
c/o Lyn E. Beggs, Esq.
316 California Ave., #863
Reno, NV 89509
Attorney for Respondent

Tracking No.: 9171 9690 0935 0255 6842 12

With courtesy copy by email to:

Lyn E. Beggs, Esq., at [lyn@lbeegslaw.com]
Don K. White, Senior Deputy General Counsel [dwhite@medboard.nv.gov]
Charles Burcham, Esq., Hearing Officer [charlie@northernnevadaadr.com]

DATED this 28th day of July, 2025.



MEG BYRD
Legal Assistant
Nevada State Board of Medical Examiners



August 5, 2025

Dear Meg Byrd:

The following is in response to your request for proof of delivery on your item with the tracking number:
9171 9690 0935 0255 6842 12.

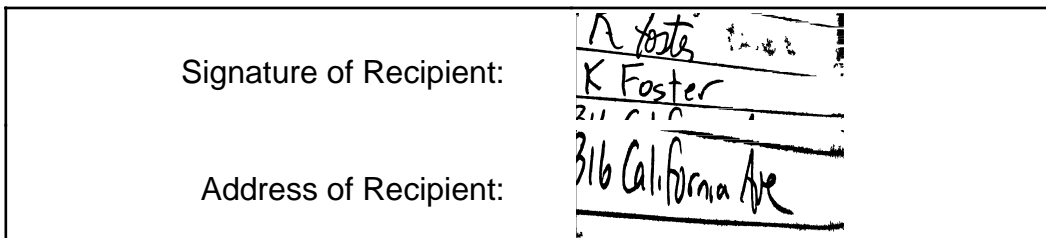
Item Details

Status:	Delivered, Front Desk/Reception/Mail Room
Status Date / Time:	July 30, 2025, 9:28 am
Location:	RENO, NV 89509
Postal Product:	First-Class Mail®
Extra Services:	Certified Mail™ Return Receipt Electronic

Shipment Details

Weight:	0.1oz
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Recipient Signature



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1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**
2 **OF THE STATE OF NEVADA**

3 * * * * *

4
5 **In the Matter of Charges and**
6 **Complaint Against:**
7 **DAVID JAMES SMITH, M.D.,**
8 **Respondent.**

Case No. 25-47823-1

FILED

AUG - 6 2025

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

By: _____

9
10
11 **SCHEDULING ORDER**

12 **TO: Donald K. White, ESQ.**
13 **Senior Deputy General Counsel**
14 **Nevada State Board of Medical Examiners**
15 **9600 Gateway Drive**
16 **Reno, NV 89521**

17 ~and~

18 **David James Smith, M.D.**
19 **c/o Respondent's Attorney**
20 **Lynn Beggs, Esq.**
21 **316 California Ave., #863**
22 **Reno, NV 89509**

23 On July 30, 2025, an Early Case Conference was held via conference call. The parties
24 appeared via their counsel: Donald K. White, Esq. on behalf of the Investigative Committee of the
25 Nevada State Board of Medical Examiners and Lyn Beggs, Esq. on behalf of Respondent David
26 James Smith, M.D. along with this Hearing Officer.

27 In compliance with 630.465, a prehearing conference will be conducted on **October 13,**
28 **2025,** telephonically beginning at the hour of **10:00 a.m.** Pacific Daylight Time. Counsel for the IC,
Donald K. White, Esq., will initiate the call and add the parties to the line.

 All parties shall exchange witness and documents intended for use at the hearing on or before
the pre-hearing conference. This list shall include the qualifications and anticipated testimony of the
witness and the Bates stamp numbers on each of the exhibits. If a witness is not included on the list,

1 that witness may not be allowed to testify at the hearing unless good cause is shown for their
2 testimony. Likewise, if a document has not been listed in a prehearing conference statement, it may
3 not be admitted into evidence unless good cause is shown for its admittance.

4 All prehearing motions (other than discovery motions) shall be served on all parties and this
5 hearing officer by **October 16, 2025**. Responses and Oppositions to pre-hearing motions shall be
6 served on or before **October 23, 2025**, at which time the motions shall be deemed submitted for
7 decision. Service of prehearing motions, responses and oppositions may be effectuated by U.S. Mail
8 or by electronic mail (e-mail) to all parties known email addresses and this hearing officer. Service
9 on the Hearing Officer must be by e-mail.

10 Discovery motions: All discovery motions supported by points and authorities shall be
11 served on all parties and the Hearing Officer by e-mail by **August 29, 2025**. Oppositions supported
12 by points and authorities to such discovery motions shall be served on all parties and the Hearing
13 Officer by e-mail by **September 3, 2025**. Replies (if any) with points and authorities shall be served
14 on all parties and the Hearing Officer by **September 8, 2025**. All discovery motions must contain a
15 certificate of the moving party/counsel that after consultation with the opposing party/counsel, they
16 have not been able to resolve the matter.

17 The formal hearing in this matter is hereby scheduled for **November 13, 2025**, commencing
18 at the hour of **9 a.m.** Pacific Time and will be held at the office of the Board of Medical Examiners at
19 9600 Gateway Drive, Reno, Nevada 89521. A court reporter will take sworn testimony during
20 the formal hearing and will produce a transcript to the hearing officer and all parties at their request
21 and at their expense. (Any e-mail request to utilize video-conferencing through the Las Vegas office
22 of the Nevada State Board of Medical Examiners should be made as soon as practicable, and no later
23 than **November 7, 2025**.)

24 Once the formal hearing is concluded the hearing officer will submit to the Board a synopsis
25 of the testimony recorded by the court reporter and will make a recommendation on the veracity of
26 witnesses, if there is conflicting evidence or if credibility of witnesses is a determining factor, and
27 thereafter the Board will render its decision. *See* NAC 630.470.

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the Nevada State Board of Medical Examiners and that on the 6th day of August, 2025, I served a file-stamped copy of the foregoing SCHEDULING ORDER, via USPS Certified Mail, postage pre-paid, to the following parties:


DAVID JAMES SMITH, M.D.
c/o Lyn E. Beggs, Esq.
316 California Ave., #863
Reno, NV 89509
Attorney for Respondent

Tracking No.: 9171 9690 0935 0255 6842 81

With courtesy copy by email to:

Lyn E. Beggs, Esq., at [lyn@lbeggslaw.com]
Don K. White, Senior Deputy General Counsel [dwhite@medboard.nv.gov]
Charles Burcham, Esq., Hearing Officer [charlie@northernnevadaadr.com]

DATED this 6th day of August, 2025.



MEG BYRD
Legal Assistant
Nevada State Board of Medical Examiners



August 12, 2025

Dear Meg Byrd:

The following is in response to your request for proof of delivery on your item with the tracking number:
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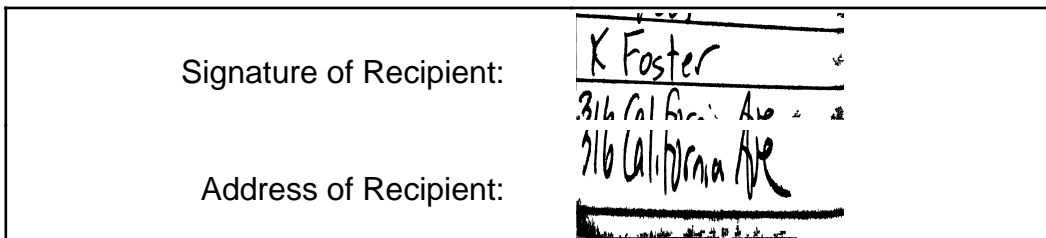
Item Details

Status:	Delivered, Left with Individual
Status Date / Time:	August 8, 2025, 10:18 am
Location:	RENO, NV 89509
Postal Product:	First-Class Mail®
Extra Services:	Certified Mail™ Return Receipt Electronic

Shipment Details

Weight:	0.1oz
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Recipient Signature



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List of Proposed Exhibits

Dr. Smith does not currently anticipate offering any documentary exhibits in this matter.

DATED this 9th day of October 2025.

By: 
Lyn E. Beggs, Esq., NV Bar No. 6248
328 California Ave. Ste 3
Reno, NV 89509
775-432-1918
Attorney for Petitioner

1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**
2 **OF THE STATE OF NEVADA**

3 *****

4
5 **In the Matter of Charges and Complaint**

Case No. 25-47823-1

6 **Against:**

FILED

7 **DAVID JAMES SMITH, M.D.,**

OCT 09 2025

8 **Respondent.**

NEVADA STATE BOARD OF
MEDICAL EXAMINERS

By: 

9
10 **PREHEARING CONFERENCE STATEMENT OF THE INVESTIGATIVE**
11 **COMMITTEE OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS**

12 The Investigative Committee (IC) of the Nevada State Board of Medical Examiners (Board)
13 submits the following Prehearing Conference Statement in accordance with
14 NAC 630.465 and the Hearing Officer's Scheduling Order filed on August 6, 2025.

15 **I. LIST OF WITNESSES**

16 The IC of the Board lists the following witnesses whom it may call at the hearing on the
17 charges in the Complaint against Respondent filed herein:

- 18 a. Ernesto Diaz, Chief of Investigations or his designee
19 Nevada State Board of Medical Examiners
20 9600 Gateway Drive
21 Reno, NV 89521

22 Mr. Diaz is expected to verify documentary evidence obtained during the investigation of this case
23 and testify regarding the investigation of this matter.

- 24 b. David James Smith, M.D.
25 c/o Lyn E. Beggs, Esq.
26 Law Offices of Lyn E. Beggs
27 316 California Ave., Suite 863
28 Reno, NV 89509

Dr. Smith is expected to testify regarding the facts and circumstances surrounding the formal
Complaint in this case.

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The IC reserves the right to use any exhibits relied upon or identified by Respondent and reserves the right to amend and supplement this list of exhibits as required prior to the Prehearing Conference.

DATED this 9th day of October, 2025.

INVESTIGATIVE COMMITTEE OF THE
NEVADA STATE BOARD OF MEDICAL EXAMINERS

By: 

DONALD K. WHITE
Senior Deputy General Counsel
9600 Gateway Drive
Reno, NV 89521
Tel: (775) 688-2559
Email: dwhite@medboard.nv.gov
Attorney for the Investigative Committee

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the Nevada State Board of Medical Examiners and that on the 9th day of October, 2025, I served a file-stamped copy of the foregoing PREHEARING CONFERENCE STATEMENT OF THE INVESTIGATIVE COMMITTEE OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS, via USPS Certified Mail, postage pre-paid, to the following parties:

DAVID JAMES SMITH, M.D.
c/o Lyn E. Beggs, Esq.
316 California Ave., #863
Reno, NV 89509
Attorney for Respondent

Tracking No.: 9489 0178 9820 3045 5226 55

With courtesy copy by email to:

Lyn E. Beggs, Esq., at [lyn@beggsllaw.com]
Don K. White, Senior Deputy General Counsel [dwhite@medboard.nv.gov]
Charles Burcham, Esq., Hearing Officer [charlie@northernnevadaadr.com]

DATED this 9th day of October, 2025.



MEG BYRD
Legal Assistant
Nevada State Board of Medical Examiners