

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

In the Matter of the Petition for Termination
or Modification of Probation Regarding:

NATHAN KUEMMERLE, M.D.

Physician's and Surgeon's Certificate Number
A 89368

Petitioner.

Case No. 800-2015-012248

OAH No. 2012090468

DECISION AFTER RECONSIDERATION

Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, State of California, heard this matter in San Diego, California on October 19, 2015.

Deputy Attorney General Karolyn M. Westfall, Department of Justice, State of California, represented the Office of the Attorney General, as authorized by Government Code section 11522.

Petitioner, Nathan Kuemmerle, M.D., (Petitioner) represented himself. The matter was submitted on October 19, 2015.

The Deputy Attorney General's request for a protective order sealing confidential records was granted. Pursuant to the protective order exhibits four (4) and six (6), are sealed and shall be protected from public disclosure without further order.

A Proposed Decision was issued on November 9, 2015. On December 3, 2015, Panel A of the Medical Board of California (Board) adopted the Proposed Decision. This Decision was to become effective on December 31, 2015. Petitioner filed a timely Petition for Reconsideration. On January 8, 2016, Panel A granted the Petition for Reconsideration. Oral argument on the Petition for Reconsideration was heard on May 5, 2016. Petitioner represented himself, and Deputy Attorney General Karolyn M. Westfall, represented the Office of the Attorney General. Panel A, having read and considered the entire record, including the transcripts and exhibits, and having considered the written and oral arguments presented by Petitioner and the Attorney General's Office, hereby makes and enters this decision on the matter.

FACTUAL FINDINGS

1. On November 17, 2004, Physician's and Surgeon's Certificate number A 89368, was issued to Petitioner.

2. On January 27, 2011, in the United States District Court, Central District of California, Petitioner pled guilty, and was convicted, of one count of violating United States Code, title 21, section 841, subdivision (a)(1) (unlawful distribution of a controlled substance), a felony.

3. On July 24, 2012, an accusation, case number 17-2009-197899, was filed against Petitioner. The accusation alleged the following: Petitioner was convicted of a crime that was substantially related to the practice of medicine; Petitioner's conviction related to violations of federal drug laws; and, Petitioner engaged in gross negligence, repeated negligent acts, and committed corrupt and dishonest acts.

4. On December 5, 2012, Petitioner resolved the matter of the accusation in case number 17-2009-197899 by entering into an "Agreed Settlement and Disciplinary Order" with the Executive Director of the Medical Board. Pursuant to the settlement agreement Petitioner admitted the truth of "each and every charge and allegation" in the underlying accusation. Petitioner's admissions are summarized as follows: From August 18, 2009, through March 19, 2010, Petitioner sold fictitious prescriptions for Adderall¹, Xanax², and Norco³ to undercover law enforcement officers and civilian informants; the controlled substances were prescribed by Petitioner on numerous occasions without any medical needs or reasons and without any prior medical examinations or the taking of any medical histories; and, many of the fictitious prescriptions were post-dated and were issued in the names of individuals other than the individuals to whom the prescriptions were sold. In sum, Petitioner:

. . . issued more 30 mg. amphetamine salts (Adderall) prescriptions in the year 2009 than any other doctor in California. In 2009 [Petitioner] ranked first in the State of California for practitioners prescribing 30 mg. amphetamine salts. The highest dosage of amphetamine salts commercially available is 30 mg. According to CURES, [Petitioner] wrote 2,382 prescriptions for 30 mg. amphetamine salts combo in 2009, which is approximately three and a half times as much as the number two prescriber of 30 mg. amphetamine salts in California. In 2009, [Petitioner's] prescriptions

¹ Adderall is a combination of dextroamphetamine and amphetamine. It is a Schedule II controlled substance.

² Xanax is a Schedule IV controlled substance.

³ Norco, a combination of hydrocodone and acetaminophen, is a Schedule III controlled substance.

composed approximately 43% of all 30 mg. amphetamine salts prescribed by the top ten prescribers of Adderall in California, combined. (Exh. 5)

5. Based on his admissions, as summarized in Finding 4, above, Petitioner's certificate was revoked, the revocation was stayed and Petitioner was placed on probation for seven years under certain terms and conditions designed to protect the public and rehabilitate Petitioner.

6. On January 3, 2013, the Board adopted the Stipulated Settlement and Disciplinary Order. Petitioner's probation commenced on February 3, 2013.

7. On February 27, 2015, Petitioner signed, and thereafter submitted to the Board, the instant Petition for Penalty Relief. Petitioner is petitioning for the following relief:

I, Nathan Kuemmerle, M.D., desire to be considered for Early Termination of Probation. If not possible, then I request modification of probation to allow reduced drug testing and cessation of the Practice Monitor (including Charting and Billing) Requirements. I also request being allowed to practice in a solo group practice alone. (Exh. 1)

Petitioner's Testimony and Evidence

8. The documents included with Petitioner's Petition in conjunction with his testimony established that Petitioner is currently in compliance with all the terms and conditions of his probation. Petitioner completed a Drug Rehabilitation program at the Allen House. The program lasted six and one-half months. Petitioner successfully completed his criminal probation. While on criminal probation Petitioner was regularly, randomly tested for drugs and had no positive test results. Petitioner attended several years of Alcoholic Anonymous (AA) and Narcotics Anonymous (NA) meetings and completed 150 service hours, as required by his criminal probation. Petitioner is undergoing biological fluid testing with FirstLab.com as part of his current, board-monitored probation. Petitioner has not tested positive for any controlled/prohibited substances and Petitioner testified that he has completely abstained from using any such substances. Petitioner completed the required ethics course, clinical training program, psychiatric evaluation, medical evaluation, and, he is undergoing psychotherapy.

9. Petitioner testified that he had been using illegal drugs since his "early 30's,"⁴ he is currently 43 years old and has been clean and sober since April 11, 2010. Petitioner had no positive drug tests while on criminal probation and he asked the Board to take that into consideration in evaluating his Petition. Petitioner testified that his probation costs, especially the costs of drug testing, are burdensome and oppressive. He is living with his parents and is financially destitute. According to Petitioner, "I have basically been broke and on Medi-Cal" due to the costs of drug testing, the job limitations resulting from not being allowed to engage in

⁴ He became addicted to methamphetamine.

the solo practice of medicine, the costs of psychotherapy, and the probation monitoring costs. Accordingly, Petitioner is seeking either termination or modification of his probation.

10. Petitioner's parents testified on his behalf. Both parents are very supportive of Petitioner and believe that Petitioner has changed and that he is not likely to relapse. According to Petitioner's father, Petitioner has been drug testing with FirstLab on an average of seven and one-half days per month over the past year and the costs are in the neighborhood of \$13,000 per year. Petitioner's father testified that he just wants the probation requirements and costs to be reasonable.

11. None of Petitioner's colleagues, supervisors, monitors, psychotherapists, or friends testified during the petition hearing. Petitioner did provide character reference letters from Mark Melden, DO/DABPN, dated February 17, 2015; and two letters from Anne L. Cox, M.D., one dated February 24, 2015, and the other dated September 25, 2015. Dr. Melden, a psychiatrist and the CEO/President of Crownview Medical Group, wrote, in part:

[¶] . . . [¶]

Dr. Nathan Kuemmerle has been working full time with Crownview Medical Group, Inc. since the beginning of October 2014. While he has been employed, I have not witnessed any evidence that he has a desire to return to past addictions. It is my understanding that he has finished probation with the Federal Government. I am aware of the events which occurred that put him on probation with the Medical Board of California.

. . . He has been compliant with charting and has followed the guidelines in agreement with the California Medical Board. It is my opinion that he has matured and has no desire to return to past illegal drug addiction. He appears to have genuinely moved on and is now geared towards a successful future life as a Psychiatrist. He is passionate about continuing the important guidelines that UCSD PACE has [sic] reviewed with respect to charting and appropriate patient management. I strongly believe Dr. Nathan Kuemmerle will not return to drug addiction and will continue to comply with important charting and patient management in accordance with Medical Board of California guidelines.

I recommend that Dr. Nathan Kuemmerle should be considered for Early Termination of Probation and if not possible, the modification of probation to allow reduced drug testing and cessation of Practice Monitor requirement (Exh. 1)

In her February 24, 2015 letter, Dr. Cox, a psychiatrist working at Crownview, who is Petitioner's practice monitor, wrote, in part:

[¶] . . . [¶]

I have been personally reviewing Dr. Nathan Kuemmerle's charts as the designated practice monitor. He has been diligent in charting while employed since October 2014 to present and has been listening to important suggestions from my careful review . . .

From my interviews with Dr. Nathan Kuemmerle, I do not see any behaviors that would indicate that he would relapse in addiction . . . According to my understanding, he will be 5 years sober from illegal drugs in April 2015. I do not see any reason to continue drug testing. He seems to have clearly left that past behind and I do not see how continued drug testing would be necessary at this point. He is appropriate to continue charting without a practice monitor. I also recommend that Early Termination of Probation be allowed. He feels very remorseful of [sic] the events of 2008-2010. He is motivated at this time in not returning to substance abuse.

[redacted] . . . [redacted] (Exh. 1)

In her September 25, 2015 letter, Dr. Cox wrote, in part:

I met with Dr. Kuemmerle on 9/25/15 . . . to discuss the review of charts.

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His use of the clinic electronic record formats is accurate and detailed. He continues to be appropriate in the prescribing of psychostimulants for attention deficit disorders . . . His schedule is busy with a more challenging and chronic mentally ill patient population which further contributes to his on-going passion in practicing psychiatry.

[redacted] . . . [redacted] (Exh. 1)

Testimony of David J. Sheffner, M.D.

12. Dr. Sheffner is board certified psychiatrist. He conducted the Board ordered psychiatric evaluation of Petitioner on April 25 and 30, 2013. Dr. Sheffner's testimony is summarized as follows: Petitioner was very evasive when answering questions during the psychiatric evaluation; Petitioner "beat around the bush" and Dr. Sheffner had to "pull" relevant information from him; Petitioner minimized his criminal history⁵; and, he blamed his use of

⁵ Petitioner did the same thing in connection with the instant proceedings. In the Narrative Statement Petitioner included with his petition, he described his criminal conviction as follows: ". . . On January 27, 2011, I admitted I knowingly and intentionally distributed a controlled substance (through writing a prescription) that was outside the usual course of professional practice and without a legitimate medical purpose. This resulted in 1 felony count of writing a Xanax prescription without a medical purpose. I also was charged

methamphetamine for causing him to sell false prescriptions to people.⁶

LEGAL CONCLUSIONS

1. Petitioner is primarily seeking full reinstatement of his license through early termination of probation

2. California Code of Regulations, title 16, section 1360.2, provides in part:

When considering a petition for reinstatement of a license, certificate or permit holder pursuant to the provisions of Section 11522 of the Government Code, the division or panel shall evaluate evidence of rehabilitation submitted by the Petitioner considering the following criteria:

- (a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.
- (b) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration
- (c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections (a) or (b).

[¶] . . . [¶]

(e) Evidence, if any, of rehabilitation submitted by the applicant.

3. In a proceeding for the restoration of a revoked license, the burden at all times rests on Petitioner to prove that he has rehabilitated himself and that he is entitled to have his license restored, and not on the Board to prove to the contrary. (*Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315; *Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.)

4. A person seeking reinstatement must adduce stronger proof of his present honesty and integrity than one seeking admission the first time. He must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful. (*In re*

with writing other prescription drugs [sic] to informant/undercover detectives in which [sic] felony charges were later dropped but reviewed by the California Medical Board.” (Exh.1)

⁶ Dr. Sheffner testified that Petitioner’s use of methamphetamine did not “cause” Petitioner to engage in inappropriate prescribing practices. Petitioner’s inappropriate prescribing practices required “intact cognitive abilities and intent” that would not exist while Petitioner was under the influence of methamphetamine.

Menna (1995) 11 Cal.4th 975, 986.)

5. Business and Professions Code section 2229 provides in part:
 - (a) Protection of the public shall be the highest priority for the Division of Medical Quality . . . and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.
 - (b) In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, [or] the division . . . shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.
 - (c) . . . Where rehabilitation and protection are inconsistent, protection shall be paramount.

6. Rehabilitation is a “state of mind.” The law looks with favor upon rewarding with the opportunity to serve, one who has achieved “reformation and regeneration.” (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.)

7. Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented when an applicant for readmission to a professional practice can demonstrate by sustained conduct over an extended period of time that he or she is once again fit to practice. (*In re Menna* (1995) 11 Cal.4th 975, 991.)

Analysis

8. Considering the nature and severity of the acts and crimes underlying Petitioner’s discipline, as set forth in Findings 3 and 4, Petitioner failed to show by clear and convincing evidence that he is entitled to have his license fully restored; therefore, to the extent his Petition seeks early termination of probation, it is denied.

9. Although Petitioner asserted that he has been clean and sober for over five Years since his felony conviction on January 27, 2011, the Board has only monitored Petitioner for less than three years, because his Board probation started on February 3, 2013. Consequently, although Petitioner is commended for his sobriety, it is too soon to eliminate any of the terms and conditions of his probation. It is also too soon to significantly reduce the number of times per month Petitioner undergoes biological fluid testing. The Board has determined, however, that a limit on the average number of tests per month can be imposed in this case. In the decision placing Petitioner on probation, there is no limit on the average number of times per month Petitioner can be tested. Pursuant to the order below, the number of random biological fluid tests shall not exceed an average of four times per month. This frequency of testing, along with all of the other terms and conditions of probation, will ensure public protection.

ORDER

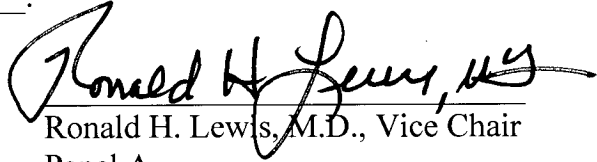
1. The Petition for Penalty Relief, filed by Petitioner, Nathan Kuemmerle, M.D., to the extent it seeks early termination of probation, is denied.

2. The Petition for Penalty Relief, filed by Petitioner, Nathan Kuemmerle, M.D., to the extent it seeks elimination of the Practice Monitor condition and the condition prohibiting solo practice, is denied.

3. The Petition for Penalty Relief, filed by Petitioner, Nathan Kuemmerle, M.D., to the extent it seeks modification of the random biological fluid testing requirement is granted. The number of Petitioner's random biological fluid tests shall not exceed an average of four times per month.

This Decision shall become effective at 5:00 p.m. on July 13, 2016.

IT IS SO ORDERED June 13, 2016.


Ronald H. Lewis, M.D., Vice Chair
Panel A

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

In the Matter of the Petition for Termination)
or Modification of Probation Regarding:)

NATHAN BRIAN KUEMMERLE, M.D.)

MBC File No. 800-2015-012248

Physician's and Surgeon's)
Certificate No. A 89368)

OAH No: 2012090468

Petitioner.)

ORDER GRANTING RECONSIDERATION

The proposed decision of the administrative law judge in the above captioned matter was adopted by the Board on December 3, 2015, and was to become effective on December 31, 2015. A Petition for Reconsideration under Government Code Section 11521 was filed in a timely manner by respondent. An Order Granting Stay was issued until January 8, 2016.

The petition for reconsideration having been read and considered, the Board hereby orders reconsideration. The Board itself will reconsider the case based upon the entire record of the proceeding, including the transcript. Both complainant and respondent will be afforded the opportunity to present written argument to the Board. You will be notified of the time for submitting written argument. **In addition to written argument, oral argument may be scheduled if any party files with the Board, a written request for oral argument within 20 days from the date of this notice.** If a timely request is filed, the Board will serve all parties with written notice of the time, date and place of oral arguments. The Board directs the parties attention to Title 16 of the California Code of Regulations, Sections 1364.30 and 1364.32 for additional requirements regarding the submission of oral and written argument.

Your right to argue any matter is not limited, however, no new evidence will be heard. The Board is particularly interested in the reconsideration of the penalty order.

The decision with an effective date of January 8, 2016 is stayed. This stay shall remain in effect until the Board issues its decision after reconsideration. For its own use, the Board has ordered a copy of the hearing transcript and exhibits. At your own expense, you may order a copy of the transcript by contacting the transcript clerk at:

Kennedy Court Reporters
920 W. 17th Street
Santa Ana, CA 92706
(714) 835-0366

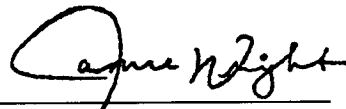
To order a copy of the exhibits, please submit a written request to this Board.

The address for serving written argument on the Board is:

Richard M. Acosta, Discipline Coordination Unit
Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815-3831

Please submit an original and 1 copy.

IT IS SO ORDERED: January 8, 2016

A handwritten signature in black ink, appearing to read "Jamie Wright". The signature is written in a cursive style with a large initial "J".

Jamie Wright, JD, Chair
Panel A
Medical Board of California

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

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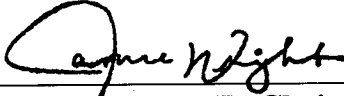
DECISION

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

This Decision shall become effective at 5:00 p.m. on December 31, 2015.

IT IS SO ORDERED December 3, 2015.

MEDICAL BOARD OF CALIFORNIA

By: 
**Jamie Wright, JD, Chair
Panel A**

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MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Termination
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PROPOSED DECISION

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Deputy Attorney General Karolyn M. Westfall, Department of Justice, State of California, represented the Office of the Attorney General, as authorized by Government Code section 11522.

Petitioner, Nathan Kuemmerle, M.D., represented himself.

The matter was submitted on October 19, 2015.

PROTECTIVE ORDER

The Deputy Attorney General's request for a protective order sealing confidential records was granted. Pursuant to the protective order exhibits four (4) and six (6), are sealed and shall be protected from public disclosure without further order.

FACTUAL FINDINGS

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¹ Adderall is a combination of dextroamphetamine and amphetamine. It is a Schedule II controlled substance.

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5. Based on his admissions, as summarized in Finding 4, above, petitioner's certificate was revoked, the revocation was stayed and petitioner was placed on probation for seven years under certain terms and conditions designed to protect the public and rehabilitate petitioner.

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7. On February 27, 2015, petitioner signed, and thereafter submitted to the board, the instant Petition for Penalty Relief. Petitioner is petitioning for the following relief:

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[¶] . . . [¶]

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In her February 24, 2015, letter, Dr. Cox, a psychiatrist working at Crownview, who is petitioner's practice monitor, wrote, in part:

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information from him; petitioner minimized his criminal history⁵; and, he blamed his use of methamphetamine for causing him to sell false prescriptions to people.⁶

LEGAL CONCLUSIONS

1. Petitioner is primarily seeking full reinstatement of his license through early termination of probation

2. California Code of Regulations, title 16, section 1360.2, provides in part:

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[¶] . . . [¶]

(e) Evidence, if any, of rehabilitation submitted by the applicant.

⁵ Petitioner did the same thing in connection with the instant proceedings. In the Narrative Statement petitioner included with his petition, he described his criminal conviction as follows: “. . . On January 27, 2011, I admitted I knowingly and intentionally distributed a controlled substance (through writing a prescription) that was outside the usual course of professional practice and without a legitimate medical purpose. This resulted in 1 felony count of writing a Xanax prescription without a medical purpose. I also was charged with writing other prescription drugs [sic] to informant/undercover detectives in which [sic] felony charges were later dropped but reviewed by the California Medical Board.” (Exh.1)

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4. A person seeking reinstatement must adduce stronger proof of his present honesty and integrity than one seeking admission the first time. He must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful. (*In re Menna* (1995) 11 Cal.4th 975, 986.)

5. Business and Professions Code section 2229 provides in part:

(a) Protection of the public shall be the highest priority for the Division of Medical Quality . . . and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.

(b) In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel . . . shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.

(c) . . . Where rehabilitation and protection are inconsistent, protection shall be paramount.

6. Rehabilitation is a “state of mind.” The law looks with favor upon rewarding with the opportunity to serve, one who has achieved “reformation and regeneration.” (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.)

7. Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented when an applicant for readmission to a professional practice can demonstrate by sustained conduct over an extended period of time that he or she is once again fit to practice. (*In re Menna* (1995) 11 Cal.4th 975, 991.)

Analysis

8. Considering the nature and severity of the acts and crimes underlying petitioner’s discipline, as set forth in Findings 3 and 4, petitioner failed to show by clear and convincing evidence that he is entitled to have his license fully restored; therefore, to the extent his petition seeks early termination of probation, it is denied.

9. Although petitioner asserted that he has been clean and sober for almost five years; since his felony conviction on January 27, 2011, the board has only monitored petitioner for less than three years because his board probation started on February 3, 2013. Consequently, although petitioner is commended for his sobriety, it is too soon to eliminate the random biological fluid testing condition of his board probation. However, the number of random biological fluid tests shall be reduced, and not exceed an average of four times per month. That frequency of testing, along with the fact that petitioner's requests for elimination of the solo practice prohibition and practice monitor requirement are being denied, will ensure public protection while reducing the adverse economic impact on petitioner.

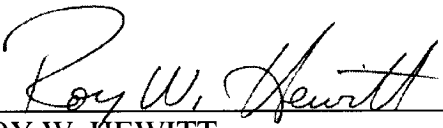
ORDERS

1. The Petition for Penalty Relief, filed by Petitioner, Nathan Kuemmerle, M.D., to the extent it seeks early termination of probation, is denied.

2. The Petition for Penalty Relief, filed by Petitioner, Nathan Kuemmerle, M.D., to the extent it seeks elimination of the Practice Monitor condition and the condition prohibiting solo practice, is denied.

3. The Petition for Penalty Relief, filed by Petitioner, Nathan Kuemmerle, M.D., to the extent it seeks modification of the random biological fluid testing requirement is granted. The number of petitioner's random biological fluid tests shall not exceed an average of four times per month.

DATED: November 9, 2015



ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings