



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Wendy E. Saunders
Chief of Staff

Public

May 12, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael D. Berger, M.D.
Redacted Address

Robert Bogan, Esq.
NYS Department of Health
Hedley Park Place
433 River Street – Suite 303
Troy, New York 12180

RE: In the Matter of Michael D. Berger, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 09-92) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,
Redacted Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

COPY

IN THE MATTER
OF
MICHAEL D. BERGER, M.D.

DETERMINATION

AND

ORDER

BPMC #09-92

A hearing was held on April 22, 2009, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated February 18, 2009, were served upon the Respondent, **Michael D. Berger, M.D.** Pursuant to Section 230(10)(e) of the Public Health Law, **Irving S. Caplan**, Chairperson, **Eleanor C. Kane, M.D.**, and **Fred S. Levinson, M.D.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **John Wiley, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **Thomas Conway, Esq.**, General Counsel, by **Robert Bogan, Esq.**, of Counsel. The Respondent appeared in person and represented himself at the hearing.

Evidence was received and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

BACKGROUND

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a

violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) and (d). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:

None

For the Respondent:

Michael D. Berger, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous.

1. Michael D. Berger, M.D., the Respondent, was authorized to practice medicine in New York State on October 8, 1976, by the issuance of license number 128896 by the New York State Education Department (Petitioner's Ex. 4).

2. On April 17, 2008, effective May 19, 2008, the Medical Board of California, Department of Consumer Affairs ("California Board"), by a Decision ("California Decision"), revoked the Respondent's license to practice medicine, stayed the revocation,

and placed him on probation for seven years, under terms and conditions, based on repeated negligent acts and failure to maintain adequate and accurate records (Petitioner's Ex. 5).

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the conduct of the Respondent would constitute professional misconduct under the laws of New York State, had the conduct occurred in New York State, pursuant to:

- New York Education Law Section 6530(4) - "Practicing the profession with gross negligence on a particular occasion;" and
- New York Education Law Section 6530(32) - "Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient..."

The Petitioner also charged the Respondent with a violation of New York Education Law Section 6530(3) – "Practicing the profession with negligence on more than one occasion..." The Hearing Committee does not sustain this allegation. The Respondent committed more than one negligent act. However, they all occurred during the treatment of one patient on one occasion. Committing multiple acts of negligence on one occasion is not the same as committing negligence on more than one occasion.

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

SECOND SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(d) by having his license to practice medicine revoked and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation and/or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The Respondent, while working in the emergency room at a hospital, examined a 66-year-old woman whose symptoms and medical history dictated that she receive immediate treatment, treatment that the Respondent did not provide. The Respondent also did not arrange for the provision of treatment by others. The patient had serious symptoms in her right leg and foot. The Respondent did not determine what the patient's baselines were for the various physical problems that he observed. He also did not arrange for any laboratory tests. He consulted with the general surgeon on call who advised the Respondent that the patient could safely be discharged to her home. The Respondent followed this advice, advice that was obviously wrong. Two days later, the patient returned to the hospital with more serious symptoms in her right leg. She had arterial occlusion of the right leg and the leg had to be amputated above the knee. For his failures in the treatment of the patient, the California Board placed the Respondent on probation for seven years.

At the New York state hearing, the Respondent took full responsibility for what he did wrong. The Hearing Committee was impressed with his honesty and sense of responsibility. We are convinced that this incident was an abnormal and isolated occurrence and we see no need for any penalty other than probation. The Respondent

will be placed on probation under the same terms as the California probation found in the California Decision. These terms of probation are attached to this Determination and Order as Appendix 2. The New York probation will be coterminous with the California probation.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent, Michael D. Berger, M.D., is placed on probation for a period coterminous with his California probation. The terms of probation are found in paragraphs 2 through 8 of this Order and in Appendix 2.
2. The Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
3. The Respondent shall submit to the Office of Professional Medical Conduct ("OPMC") (NYS Department of Health, Office of Professional Medical Conduct, Hedley Park Place, 433 River Street, Suite 303, Troy, New York 12180-2299), written notification of any change in employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
4. The Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of the Respondent's compliance with the terms of this Order and shall personally meet with a person designated by OPMC when so requested.
5. The period of probation shall be tolled during periods in which the Respondent is not engaged in the active practice of medicine in New York State. After the period of active probation begins, the Respondent shall notify OPMC, in writing, if the Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of 30 consecutive days or more. The Respondent shall

notify OPMC again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon the Respondent's return to practice in New York State.

6. The Respondent's professional performance may be reviewed by OPMC. This review may include, but shall not be limited to, a review of office records, patient records and hospital charts, interviews with or periodic visits with the Respondent and his staff at practice locations or OPMC offices.

7. The Respondent shall maintain legible and complete medical records that accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State regulations regarding controlled substances.

8. Upon receipt of evidence of noncompliance with the terms of probation, OPMC or the State Board for Professional Medical Conduct may initiate a violation of probation proceeding and/or any other proceeding against the Respondent as may be authorized by law.

9. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Malone, New York

5-7, 2009

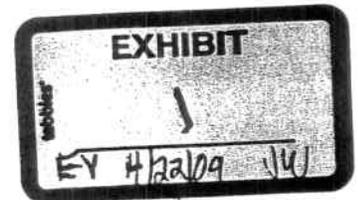
Redacted Signature

Irving S. Caplan
Chairperson

Eleanor C. Kane, M.D.
Fred S. Levinson, M.D.

APPENDIX I

STATE OF NEW YORK DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT



IN THE MATTER
OF
MICHAEL D. BERGER, M.D.
CO-08-05-3201-A

NOTICE OF
REFERRAL
PROCEEDING

TO: MICHAEL D. BERGER, M.D.
Redacted Address

MICHAEL D. BERGER, M.D.
Redacted Address

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law §§230(10)(p) and New York State Administrative Procedures Act §§301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 22nd day of April, 2009, at 10:00 a.m., at the offices of the New York State Department of Health, Hedley Park Place, 433 River Street, 5th Floor, Troy, NY 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel who shall be an attorney admitted to practice in New York state. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered which would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. SEAN D. O'BRIEN, DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than ten days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of New York Public Health Law §230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a written brief and affidavits with the Committee. Six copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of New York State Administrative Procedure Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

YOU ARE ADVISED, HEREBY, THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE BUSINESS DAYS AFTER THEY ARE SERVED.

Department attorney: Initial here Redacted Signature

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York

February 18, 2009

Redacted Signature

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street – Suite 303
Troy, New York 12180
(518) 402-0828

These charges are only allegations which may be contested by the licensee in an administrative hearing.

STATE OF NEW YORK DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
MICHAEL D. BERGER, M.D.
CO-08-05-3201-A

STATEMENT
OF
CHARGES

MICHAEL D. BERGER, M.D., Respondent, was authorized to practice medicine in New York State on October 8, 1976, by the issuance of license number 128896 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about April 17, 2008, effective May 19, 2008, Medical Board of California, Department of Consumer Affairs (hereinafter "California Board"), by a Decision (hereinafter "California Decision"), inter alia, revoked Respondent's license to practice medicine, stayed the revocation, and placed him on probation seven (7) years, under terms and conditions, based on repeated negligent acts and failure to maintain adequate and accurate records.

B. The conduct resulting in the California Board disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state law:

1. New York State Education Law §6530(3) (negligence on more than one occasion);
2. New York State Education Law §6530(4) (gross negligence);
3. New York State Education Law §6530(32) (failure to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient).

SPECIFICATIONS
FIRST SPECIFICATION

Respondent violated New York Education Law §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

1. The facts in Paragraphs A and/or B.

SECOND SPECIFICATION

Respondent violated New York State Education Law §6530(9)(d) by having his license to practice medicine revoked and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation and/or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that the Petitioner charges:

2. The facts in Paragraphs A and/or B.

DATED: *Feb. 18*, 2009
Albany, New York

Redacted Signature

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

APPENDIX II

1 DISCIPLINARY ORDER

2 IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. G
3 21264 issued to Respondent MICHAEL DEAN BERGER, M.D. (Respondent) is revoked.
4 However, the revocation is stayed and Respondent is placed on probation for seven (7) years on
5 the following terms and conditions.

6 1. CONTROLLED SUBSTANCES - MAINTAIN RECORDS AND
7 ACCESS TO RECORDS AND INVENTORIES Respondent shall maintain a record of all
8 controlled substances ordered, prescribed, dispensed, administered or possessed by respondent,
9 and any recommendation or approval which enables a patient or patient's primary caregiver to
10 possess or cultivate marijuana for the personal medical purposes of the patient within the
11 meaning of Health and Safety Code section 11362.5, during probation, showing all the
12 following: 1) the name and address of the patient; 2) the date; 3) the character and quantity of
13 controlled substances involved; and 4) the indications and diagnoses for which the controlled
14 substance was furnished.

15 Respondent shall keep these records in a separate file or ledger, in chronological
16 order. All records and any inventories of controlled substances shall be available for immediate
17 inspection and copying on the premises by the Board or its designee at all times during business
18 hours and shall be retained for the entire term of probation.

19 Failure to maintain all records, to provide immediate access to the inventory, or to
20 make all records available for immediate inspection and copying on the premises, is a violation
21 of probation.

22 2. CONTROLLED SUBSTANCES - ABSTAIN FROM USE Respondent
23 shall abstain completely from the personal use or possession of controlled substances as defined
24 in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business
25 and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does
26 not apply to medications lawfully prescribed to respondent by another practitioner for a bona fide
27 illness or condition.

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1 Within 15 calendar days of receiving any lawful prescription medications,
2 respondent shall notify the Board or its designee of the: issuing practitioner's name, address, and
3 telephone number; medication name and strength; and issuing pharmacy name, address, and
4 telephone number.

5 3. BIOLOGICAL FLUID TESTING Respondent shall immediately submit
6 to biological fluid testing, at respondent's expense, upon the request of the Board or its designee.
7 A certified copy of any laboratory test results may be received in evidence in any proceedings
8 between the Board and the respondent. Failure to submit to, or failure to complete the required
9 biological fluid testing, is a violation of probation.

10 4. EDUCATION COURSE Within 60 calendar days of the effective date of
11 this Decision, and on an annual basis thereafter, respondent shall submit to the Board or its
12 designee for its prior approval educational program(s) or course(s) which shall not be less than
13 40 hours per year, for each year of probation. The educational program(s) or course(s) shall be
14 aimed at correcting any areas of deficient practice or knowledge and shall be Category I certified,
15 limited to classroom, conference, or seminar settings. The educational program(s) or course(s)
16 shall be at respondent's expense and shall be in addition to the Continuing Medical Education
17 (CME) requirements for renewal of licensure. Following the completion of each course, the
18 Board or its designee may administer an examination to test respondent's knowledge of the
19 course. Respondent shall provide proof of attendance for 65 hours of continuing medical
20 education of which 40 hours were in satisfaction of this condition.

21 5. PRESCRIBING PRACTICES COURSE Within 60 calendar days of the
22 effective date of this Decision, respondent shall enroll in a course in prescribing practices, at
23 respondent's expense, approved in advance by the Board or its designee. Failure to successfully
24 complete the course during the first 6 months of probation is a violation of probation.

25 A prescribing practices course taken after the acts that gave rise to the charges in
26 the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the
27 Board or its designee, be accepted towards the fulfillment of this condition if the course would

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1 have been approved by the Board or its designee had the course been taken after the effective
2 date of this Decision.

3 Respondent shall submit a certification of successful completion to the Board or
4 its designee not later than 15 calendar days after successfully completing the course, or not later
5 than 15 calendar days after the effective date of the Decision, whichever is later.

6 6. MEDICAL RECORD KEEPING COURSE Within 60 calendar days of
7 the effective date of this decision, respondent shall enroll in a course in medical record keeping,
8 at respondent's expense, approved in advance by the Board or its designee. Failure to
9 successfully complete the course during the first 6 months of probation is a violation of
10 probation.

11 A medical record keeping course taken after the acts that gave rise to the charges
12 in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the
13 Board or its designee, be accepted towards the fulfillment of this condition if the course would
14 have been approved by the Board or its designee had the course been taken after the effective
15 date of this Decision.

16 Respondent shall submit a certification of successful completion to the Board or
17 its designee not later than 15 calendar days after successfully completing the course, or not later
18 than 15 calendar days after the effective date of the Decision, whichever is later.

19 7. CLINICAL TRAINING PROGRAM Within 60 calendar days of the
20 effective date of this Decision, respondent shall enroll in a clinical training or educational
21 program equivalent to the Physician Assessment and Clinical Education Program (PACE)
22 offered at the University of California - San Diego School of Medicine ("Program").

23 The Program shall consist of a Comprehensive Assessment program comprised of
24 a two-day assessment of respondent's physical and mental health; basic clinical and
25 communication skills common to all clinicians; and medical knowledge, skill and judgment
26 pertaining to respondent's specialty or sub-specialty, and at minimum, a 40 hour program of
27 clinical education in the area of practice in which respondent was alleged to be deficient and
28 which takes into account data obtained from the assessment, Decision(s), Accusation(s), and any

1 other information that the Board or its designee deems relevant. Respondent shall pay all
2 expenses associated with the clinical training program.

3 Based on respondent's performance and test results in the assessment and clinical
4 education, the Program will advise the Board or its designee of its recommendation(s) for the
5 scope and length of any additional educational or clinical training, treatment for any medical
6 condition, treatment for any psychological condition, or anything else affecting respondent's
7 practice of medicine. Respondent shall comply with Program recommendations.

8 At the completion of any additional educational or clinical training, respondent
9 shall submit to and pass an examination. The Program's determination whether or not
10 respondent passed the examination or successfully completed the Program shall be binding.

11 Respondent shall complete the Program not later than six months after
12 respondent's initial enrollment unless the Board or its designee agrees in writing to a later time
13 for completion.

14 Failure to participate in and complete successfully all phases of the clinical
15 training program outlined above is a violation of probation.

16 If respondent fails to complete the clinical training program within the designated
17 time period, respondent shall cease the practice of medicine within 72 hours after being notified
18 by the Board or its designee that respondent failed to complete the clinical training program.

19 Failure to participate in and complete successfully the professional enhancement
20 program outlined above is a violation of probation.

21 8. PROHIBITED PRACTICE During probation, respondent is prohibited
22 from prescribing any drugs (including, but not limited to, antibiotics, or scheduled drugs) to any
23 family members, relatives, friends, anyone living with or visiting at his residence, or anyone with
24 whom he has a business relationship, except while in the normal course of his professional
25 responsibilities as an emergency room physician while treating such individuals on an emergency
26 basis in a hospital emergency room and then only when properly documented and in accordance
27 with all of the other limitations listed in this Paragraph, below. After the effective date of this
28 Decision, Respondent shall maintain a log of all such patients treated under the exception to this

1 prohibited practice. The log shall contain the: 1) patient's name, address and phone number; 2)
2 patient's medical record number, if available; 3) the date the treatment given was; and 4) a
3 description of the drugs, amounts, and dosage given by respondent. Respondent shall keep this
4 log in a separate file or ledger, in chronological order, shall make the log available for immediate
5 inspection and copying on the premises at all times during business hours by the Board or its
6 designee, and shall retain the log for the entire term of probation. Failure to maintain a log as
7 defined in the section, or to make the log available for immediate inspection and copying on the
8 premises during business hours is a violation of probation.

9 During probation, respondent shall not:

10 a) prescribe or dispense to any patient of any single patient visit or encounter more than a
11 total of thirty (30) tablets containing any narcotic analgesic;

12 b) prescribe or dispense to any patient for any single patient visit or encounter more than
13 a total of thirty (30) tablets containing any combination of sedative/hypnotic, muscle relaxant or
14 barbiturate;

15 c) prescribe or dispense to any patient more than one (1) narcotic prescription within any
16 seven (7)-day period, including weekends and holidays; and

17 d) prescribe or dispense to any patient more than three (3) narcotic or sedative hypnotic
18 prescriptions within any ninety (90)-day period.

19 9. NOTIFICATION Prior to engaging in the practice of medicine, the
20 respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or
21 the Chief Executive Officer at every hospital where privileges or membership are extended to
22 respondent, at any other facility where respondent engages in the practice of medicine, including
23 all physician and locum tenens registries or other similar agencies, and to the Chief Executive
24 Officer at every insurance carrier which extends malpractice insurance coverage to respondent.
25 Respondent shall submit proof of compliance to the Board or its designee within 15 calendar
26 days.

27 This condition shall apply to any change(s) in hospitals, other facilities or
28 insurance carrier.

1 10. SUPERVISION OF PHYSICIAN ASSISTANTS During probation,
2 respondent is prohibited from supervising physician assistants, except that he may supervise
3 physician assistants in a hospital emergency room setting.

4 11. OBEY ALL LAWS Respondent shall obey all federal, state and local
5 laws, all rules governing the practice of medicine in California, and remain in full compliance
6 with any court ordered criminal probation, payments and other orders.

7 12. QUARTERLY DECLARATIONS Respondent shall submit quarterly
8 declarations under penalty of perjury on forms provided by the Board, stating whether there has
9 been compliance with all the conditions of probation. Respondent shall submit quarterly
10 declarations not later than 10 calendar days after the end of the preceding quarter.

11 13. PROBATION UNIT COMPLIANCE Respondent shall comply with the
12 Board's probation unit. Respondent shall, at all times, keep the Board informed of respondent's
13 business and residence addresses. Changes of such addresses shall be immediately
14 communicated in writing to the Board or its designee. Under no circumstances shall a post office
15 box serve as an address of record, except as allowed by Business and Professions Code section
16 2021(b).

17 Respondent shall not engage in the practice of medicine in respondent's place of
18 residence. Respondent shall maintain a current and renewed California physician's and
19 surgeon's license.

20 Respondent shall immediately inform the Board, or its designee, in writing, of
21 travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last,
22 more than 30 calendar days.

23 14. INTERVIEW WITH THE BOARD, OR ITS DESIGNEE Respondent
24 shall be available in person for interviews either at respondent's place of business or at the
25 probation unit office, with the Board or its designee, upon request at various intervals, and either
26 with or without prior notice throughout the term of probation.

27 15. RESIDING OR PRACTICING OUT-OF-STATE In the event respondent
28 should leave the State of California to reside or to practice, respondent shall notify the Board or

1 its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice
2 is defined as any period of time exceeding 30 calendar days in which respondent is not engaging
3 in any activities defined in Sections 2051 and 2052 of the Business and Professions Code.

4 All time spent in an intensive training program outside the State of California
5 which has been approved by the Board or its designee shall be considered as time spent in the
6 practice of medicine within the State. A Board-ordered suspension of practice shall not be
7 considered as a period of non-practice. Periods of temporary or permanent residence or practice
8 outside California will not apply to the reduction of the probationary term. Periods of temporary
9 or permanent residence or practice outside California will relieve respondent of the responsibility
10 to comply with the probationary terms and conditions with the exception of this condition and
11 the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance;
12 and Cost Recovery.

13 Respondent's license shall be automatically cancelled if respondent's periods of
14 temporary or permanent residence or practice outside California total two years. However,
15 respondent's license shall not be cancelled as long as respondent is residing and practicing
16 medicine in another state of the United States and is on active probation with the medical
17 licensing authority of that state, in which case the two year period shall begin on the date
18 probation is completed or terminated in that state.

19 16. FAILURE TO PRACTICE MEDICINE - CALIFORNIA RESIDENT

20 In the event respondent resides in the State of California and for any reason
21 respondent stops practicing medicine in California, respondent shall notify the Board or its
22 designee in writing within 30 calendar days prior to the dates of non-practice and return to
23 practice. Any period of non-practice within California, as defined in this condition, will not
24 apply to the reduction of the probationary term and does not relieve respondent of the
25 responsibility to comply with the terms and conditions of probation. Non-practice is defined as
26 any period of time exceeding 30 calendar days in which respondent is not engaging in any
27 activities defined in sections 2051 and 2052 of the Business and Professions Code.

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1 All time spent in an intensive training program which has been approved by the
2 Board or its designee shall be considered time spent in the practice of medicine. For purposes of
3 this condition, non-practice due to a Board-ordered suspension or in compliance with any other
4 condition of probation, shall not be considered a period of non-practice.

5 Respondent's license shall be automatically cancelled if respondent resides in
6 California and for a total of two years, fails to engage in California in any of the activities
7 described in Business and Professions Code sections 2051 and 2052.

8 17. COMPLETION OF PROBATION Respondent shall comply with all
9 financial obligations (e.g., probation costs) not later than 120 calendar days prior to the
10 completion of probation. Upon successful completion of probation, respondent's certificate shall
11 be fully restored.

12 18. VIOLATION OF PROBATION Failure to fully comply with any term or
13 condition of probation is a violation of probation. If respondent violates probation in any respect,
14 the Board, after giving respondent notice and the opportunity to be heard, may revoke probation
15 and carry out the disciplinary order that was stayed. If an Accusation, Petition to Revoke
16 Probation, or an Interim Suspension Order is filed against respondent during probation, the Board
17 shall have continuing jurisdiction until the matter is final, and the period of probation shall be
18 extended until the matter is final.

19 19. LICENSE SURRENDER Following the effective date of this Decision, if
20 respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy
21 the terms and conditions of probation, respondent may request the voluntary surrender of
22 respondent's license. The Board reserves the right to evaluate respondent's request and to
23 exercise its discretion whether or not to grant the request, or to take any other action deemed
24 appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender,
25 respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the
26 Board or its designee and respondent shall no longer practice medicine. Respondent will no
27 longer be subject to the terms and conditions of probation and the surrender of respondent's
28 license shall be deemed disciplinary action. If respondent re-applies for a medical license, the

1 application shall be treated as a petition for reinstatement of a revoked certificate.

2 20. PROBATION MONITORING COSTS Respondent shall pay the costs
3 associated with probation monitoring each and every year of probation, as designated by the
4 Board. Such costs shall be payable to the Medical Board of California and delivered to the Board
5 of its designee no later than January 31 of each calendar year. Failure to pay costs within 30
6 calendar days of the due date is a violation of probation.

7 ACCEPTANCE

8 I have carefully read the above Stipulated Settlement and Disciplinary Order and
9 have had an opportunity to fully discuss it with my attorney, Patrick L. Hosey, Esq. I understand
10 the stipulation and the effect it will have on my Physician's and Surgeon's Certificate No. G
11 21264. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and
12 intelligently, and agree to be bound by the Decision and Order of the Medical Board of
13 California.

14 DATED: 1-24-08

15 _____
16 Redacted Signature

17 MICHAEL DEAN BERGER, M.D.
18 Respondent

19 I have read and had an opportunity to fully discuss with Respondent
20 MICHAEL DEAN BERGER, M.D., the terms and conditions and other matters contained in the
21 above Stipulated Settlement and Disciplinary Order. I approve its form and content.

22 DATED: 1/24/08

23 _____
24 Redacted Signature

25 PATRICK L. HOSEY, Esq.
26 Attorney for Respondent

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