THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

April 12, 1990

Manuel Fajardo, Physician
South Fulton Medical Arts Center
1136 Cleveland Avenue - Suite 514
East Point, Georgia 30344

Re: License No. 101050

Dear Dr. Fajardo:

Enclosed please find Commissioner's Order No. 10287. This Order and any penalty contained therein goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order is a surrender, revocation or suspension of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. In such a case your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

Very truly yours,

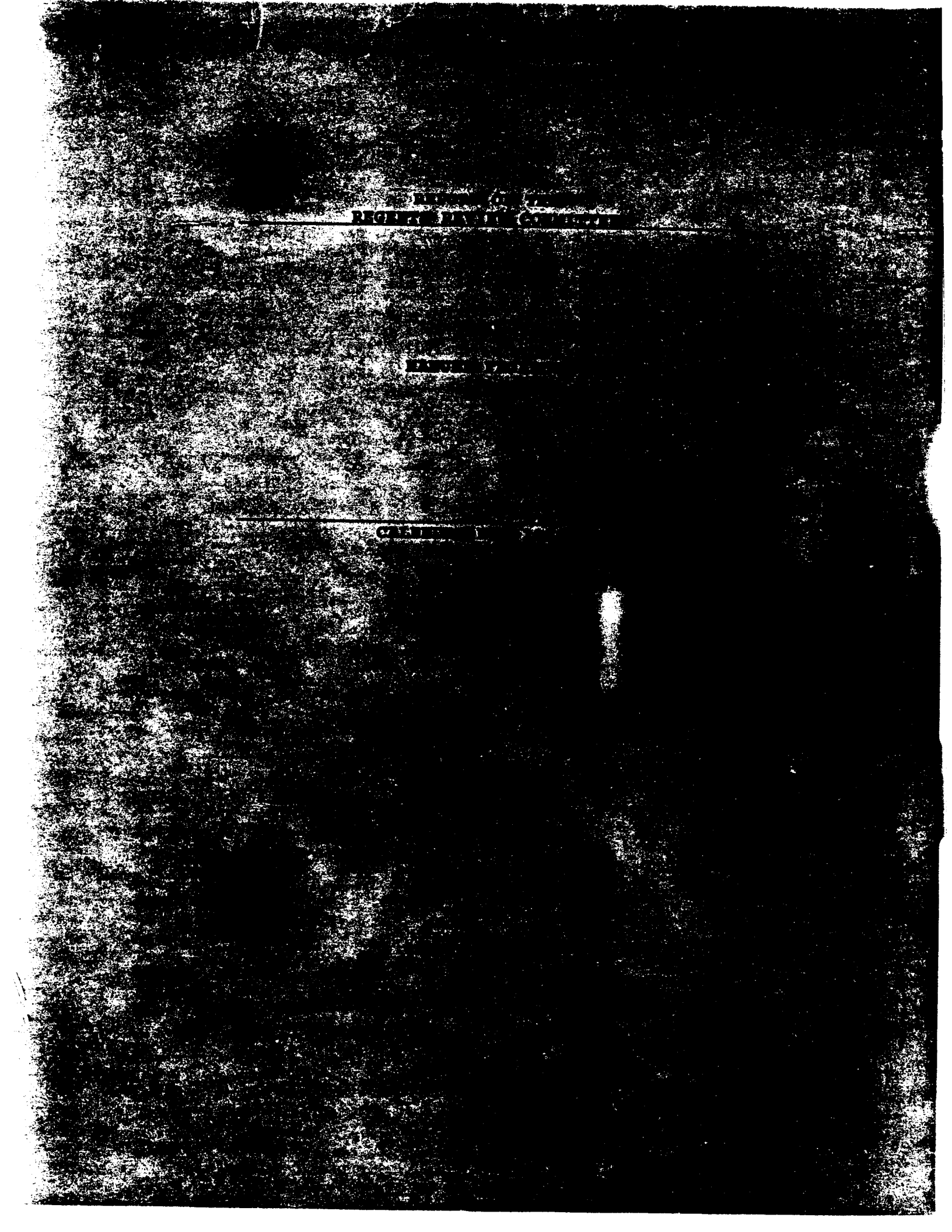
DANIEL J. KELLEHER
Director of Investigations
By:

Moira A. Doran

MOIRA A. DORAN
Supervisor

DJK/MAH/er
Enclosures

CERTIFIED MAIL- RRR
cc: Mr. H. Taub, Esq.
233 Broadway
The Woolworth Bldg. - Suite 3600
New York, N.Y. 10279



The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

MANUEL FAJARDO **No. 10287**

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

MANUEL FAJARDO, hereinafter referred to as respondent, was given due notice of this proceeding and informed that he could appear and be represented by an attorney.

On December 20, 1989, the scheduled date of our hearing, respondent appeared before us in person and was represented by his attorney, Herman Taub, Esq. Daniel J. Persing, Esq., represented the Department of Health.

Petitioner's recommendation as to the penalty to be imposed, should respondent be found guilty, was that respondent's license to practice as a physician in the State of New York be revoked.

Respondent's recommendation as to the penalty to be imposed, should respondent be found guilty, was probation for six months since offense if any is of a vicarious nature.

At the hearing we reserved decision on the admission into the record of respondent's Exhibit "A". We unanimously rule to accept respondent's Exhibit "A" into the record.

We have reviewed the record in this matter; and our unanimous findings of fact follow:

FINDINGS OF FACT

1. Respondent was licensed to practice as a physician in this State by the New York State Education Department.
2. On July 13, 1987 the Florida Department of Professional Regulation filed an administrative complaint against respondent alleging that respondent violated Florida Statutes §458.331(1)(k) by making deceptive, untrue, or fraudulent representations in the practice of medicine (Count One); violated Florida Statutes §458.331(1)(n) by exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain (Count Two); and violated Florida Statutes §458.331(1)(t) by gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances (Count Three).
3. On April 22, 1988 the Florida Division of Administrative Hearings held a public hearing on the July 13, 1987 administrative complaint filed against respondent. Respondent was not represented by an attorney at the

hearing and declined to represent himself after his motion for a continuance to obtain counsel was denied.

4. On May 26, 1988 the hearing officer for the Florida Division of Administrative Hearings issued a recommended order finding, by clear and convincing evidence, that respondent was guilty of Counts Two and Three of the administrative complaint, and recommending that respondent's license to practice medicine in Florida be revoked.

5. On August 6, 1988 the Florida Board of Medicine held a hearing to consider the hearing officer's May 26, 1988 recommended order. Respondent was represented by an attorney at the August 6, 1988 hearing. On the record during the hearing respondent's attorney conveyed respondent's offer to voluntarily relinquish his license to practice medicine in Florida.

6. On August 10, 1988 the Florida Board of Medicine issued a final order accepting respondent's voluntary relinquishment of his license to practice medicine in Florida with assurances and agreements that he will never reapply to practice medicine in Florida, that he will withdraw any complaints he has filed against the Department or its agents and will forego filing complaints in the future, and that he will not appeal this cause. On August 12, 1988 the final order was filed with the Clerk of the Florida Department of Professional

Regulation.

By a 2-1 vote, the undersigned and Patrick J. Picariello, Esq., make the following determination as to guilt and recommendation as to the penalty to be imposed:

DETERMINATION AS TO GUILT

The charge contained in the statement of charges, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "A", has been proven by a preponderance of the evidence and respondent is guilty thereof.

In our opinion, this case satisfies Education Law §6509(5)(d) because it contains an adjudicatory element in that a hearing was held by the Florida Division of Administrative Hearings. Although the Florida hearing resulted in a recommended order only, the subsequent voluntary surrender of respondent's Florida medical license has sufficient links to the recommended order to satisfy Education Law §6509(5)(d). We disagree with the dissenting view that we are contradicting prior decisions of the Board of Regents in Matter of Scott (Cal. No. 9957; September 15, 1989) and Matter of DeFazio (Cal. No. 9351; July 28, 1989). Those decisions are distinguishable by the fact that in neither Matter of Scott nor Matter of DeFazio was any hearing held by the sister state agencies therein. In our view, when the voluntary surrender of a license follows a full hearing that resulted in a recommended order, there is an adjudicatory element sufficient to conclude that respondent committed misconduct. We do not believe that the recommended order of the Florida Division of Administrative Hearings had to be

adopted by the Florida Board of Medicine in order to meet the adjudicatory test necessary to support this direct referral pursuant to Education Law §6509(5)(d). We note that, while it does not contain an outright admission of the misconduct charged, respondent's voluntary surrender of his Florida medical license, embodied in the final order of the Florida Board of Medicine, clearly indicates that respondent will never seek to practice medicine in Florida again. Because that surrender came after the issuance of the recommended order of the Florida Division of Administrative Hearings and was made during the final hearing held by the Florida Board of Medicine to consider the recommended order, we conclude that the record satisfies Education Law §6509(5)(d) in that respondent's conduct in Florida would be professional misconduct under the laws of New York State.

In upholding this direct referral, we do not accept petitioner's argument that Education Law §6509(5)(d) does not require any adjudicatory element; and, in our opinion, petitioner's argument reads the word "conduct" out of context. We discern no intent in the statute to authorize disciplining a physician merely because he or she surrendered a license. To fall within the statute, such surrender must be based upon conduct which would constitute professional misconduct under the laws of New York State. In the present case, we conclude that petitioner has referred to a hearing with findings and that respondent's surrender has sufficient ties to that hearing to satisfy the requirements of Education Law §6509(5)(d).

RECOMMENDATION AS TO THE PENALTY TO BE IMPOSED

Respondent's license to practice as a physician in the State of New York be suspended for two years upon the charge of which respondent has been found guilty, that execution of said suspension be stayed, and that respondent be placed on probation for two years under the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as Exhibit "B".

Jane M. Bolin, Esq., dissents as to the determination of guilt and recommendation as to the penalty to be imposed in the following opinion:

In my view, the majority's decision is contrary to previous decisions of the Board of Regents and is at odds with the meaning of Education Law §6509(5)(d). Since I do not believe the Board of Regents should now depart from its heretofore appropriate interpretation of Education Law §6509(5)(d), I respectfully dissent from the majority's determination as to guilt and would dismiss this charge without prejudice to the commencement of a hearing on the merits.

In my view, this case turns on the proper statutory construction to be given the word "conduct" as used in the following portion of Education Law §6509(5)(d): "... where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state." In my

opinion, "conduct" means behavior, involving an act or acts of commission or omission, that occurred. Whenever one seeks to prove behavior which occurred, it is necessary to have some adjudicatory element present. Absent such an adjudicatory element, it would violate due process to conclude that any conduct occurred. In the instant case, there is no adjudicatory element of any kind -- there is only a surrender of respondent's license to practice as a physician in Florida. It is merely speculation to say, as I believe the majority is saying, that respondent's surrender of his medical license in Florida proves that the conduct alleged to have occurred did in fact occur. I note in this regard that even the majority does not appear to take the position that mere allegations of conduct would satisfy Education Law §6509(5)(d). Rather, the majority has taken the position that there is an adjudicatory element present in this case that distinguishes it from previous decisions of the Board of Regents in Matter of Scott (Cal. No. 9957; September 15, 1989) and Matter of DeFazio (Cal. No. 9351; July 28, 1989). In my opinion, the majority has drawn a distinction without a difference. This case is materially indistinguishable from Matter of Scott. In Matter of Scott, the respondent voluntarily surrendered his New Jersey medical license without admitting to any conduct. No hearing was held as to any conduct having been committed by Dr. Scott and Dr. Scott made no plea as to any conduct. The New Jersey Board of Medical Examiners merely accepted the surrender. In the present case, Dr. Fajardo has also voluntarily surrendered his license and, despite the

various trappings surrounding this surrender, the Florida Board of Medicine did nothing more than accept this surrender. Neither in this case, nor in the controlling precedent of Matter of Scott, is there any adjudicatory element that one can point to as proof the respondent committed conduct, let alone misconduct. Matter of DeFazio reinforces the need for some genuine adjudicatory element under Education Law §6509(5)(d). The majority makes much of the fact that a hearing was held in this case by the Florida Division of Administrative Hearings. However, the Florida hearing process was never completed. The final hearing before the Florida Board of Medicine was aborted by respondent's voluntary surrender of his Florida medical license. The hearing held by the Florida Division of Administrative Hearings was only an intermediate step resulting in a recommended order. The recommendation lacked any finality and could have been either accepted or rejected by the Florida Board of Medicine. The Florida Board of Medicine did not accept the recommended order; it instead accepted a surrender of respondent's Florida medical license. This, in my opinion, does not establish that respondent committed any conduct for purposes of Education Law §6509(5)(d).

It should be stressed that, in recommending the dismissal of this case, I am not saying that the surrender of a medical license can never be a ground for discipline under Education Law §6509(5)(d). If such surrender were accompanied by an admission of misconduct or even by a plea of no contest as to allegations of misconduct, then such surrender could satisfy Education Law

§6509(5)(d) provided that the conduct had an equivalent under the laws of New York State. These circumstances are not present herein where we have only a bare surrender of a license without more. Respondent's promise in his surrender to never again seek to practice medicine in Florida is irrelevant as far as constituting proof that he actually committed any misconduct. I would further note that this Florida license surrender would not satisfy New York's own surrender provisions contained in 8 NYCRR §17.6(b). In my opinion, New York's own surrender provisions should at least be satisfied in order to maintain a direct referral proceeding.

Finally, the petitioner is not foreclosed from bringing this case before a hearing committee. My view is simply that this case cannot be brought as a direct referral. A direct referral is a proceeding in which the evidence is limited by statute to "evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee." New York Public Health Law §230(10)(m)(iv). Where, as in this case, the very issue as to whether or not the respondent actually committed any conduct is left unanswered by the sister state action, a direct referral is a wholly inappropriate proceeding and denies the respondent due process. See, Halyalkar v. Board of Regents, 72 N.Y.2d 261 (1988). I would determine that the charge contained in the statement of charges has not been proven by a preponderance of the evidence and that respondent is not guilty thereof. I would recommend that

the charge be dismissed without prejudice to the commencement of an appropriate proceeding.

Respectfully submitted,

EMLYN I. GRIFFITH

JANE M. BOLIN

PATRICK J. PICARIELLO

Emlyn I. Griffith
Chairperson

Dated: 2/27/90

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

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IN THE MATTER	:	STATEMENT
OF	:	OF
MANUEL FAJARDO, M.D.	:	CHARGES

----------X

The State Board for Professional Medical Conduct, upon information and belief, charges and alleges as follows:

1. MANUEL FAJARDO, M.D., the Respondent, was authorized to practice medicine in New York State on August 7, 1969 by the issuance of license number 101050 by the New York State Education Department.

2. The Respondent is not currently registered with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991. His last known address was c/o Dr. Albert Rossi, 1100 Cleveland Avenue Suite 201, East Point, Georgia 30344.

3. The Respondent is charged with professional misconduct within the purview of N.Y. Educ. Law §6509 (McKinney 1985 and Supp. 1989) as set forth in the attached Specification.

EXHIBIT "A"

SPECIFICATION

4. The Respondent is charged with professional misconduct by reason of having his license to practice medicine revoked, suspended or having other disciplinary action taken or having voluntarily or otherwise surrendered his license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension, or other disciplinary action involving the license or surrender of license would, if committed in New York state, constitute professional misconduct under the laws of New York state, within the meaning of N.Y. Educ. Law §6509(5)(d) (McKinney Supp. 1989), in that:

On July 13, 1987, the State of Florida Department of Professional Regulation Board of Medicine filed a complaint against the Respondent. The conduct alleged in the administrative complaint arose out of the care of two patients at a HMO controlled or supervised by Respondent. Said complaint alleged three counts:

a. Violation of §458.331(1)(l), Florida Statutes (1985) [now 458.331(1)(k)] by making deceptive, untrue, or fraudulent representations in the practice of medicine;

b. Violation of §458.331(1)(o), Florida Statutes [now §458.331(1)(n)], by

exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain; and,

c. Violation of §458.331(1)(t), Florida Statutes, by gross or repeated malpractice or the failure to practice medicine with that level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

A Recommended Order found violations of the latter two counts. By Final Order, dated and entered August 10, 1988, the State of Florida Department of Regulation, Board of Medicine, accepted the Respondent's Voluntary Relinquishment of License, which had been proferred during the course of the hearing.

Respondent's conduct in Florida would be misconduct in this State under N.Y. Educ. Law §6509(9) by the definition found at 8 N.Y.C.R.R. §29.1(b)(2) [unprofessional conduct by exercising undue influence on the patient or client, including the promotion of sale of services, goods, appliances or drugs in such manner as to exploit the patient or client for the financial gain of the practitioner or of a third party] and under N.Y. Educ. Law §6509(2) [practicing with gross negligence, gross incompetence, or negligence, or incompetence on more than one occasion].

DATED: Albany, New York
June 30, 1989

Peter D. Van Buren

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

EXHIBIT "B"

TERMS OF PROBATION
OF THE REGENTS REVIEW COMMITTEE

MANUEL FAJARDO

CALENDAR NO. 10287

1. That respondent shall make quarterly visits to an employee of and selected by the Office of Professional Medical Conduct of the New York State Department of Health, unless said employee agrees otherwise as to said visits, for the purpose of determining whether respondent is in compliance with the following:

   a. That respondent, during the period of probation, shall act in all ways in a manner befitting respondent's professional status, and shall conform fully to the moral and professional standards of conduct imposed by law and by respondent's profession;

   b. That respondent shall submit written notification to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Albany, NY 12234 of any employment and/or practice, respondent's residence, telephone number, or mailing address, and of any change in respondent's employment, practice, residence, telephone number, or mailing address within or without the State of New York;

   c. That respondent shall submit written proof from the Division of Professional Licensing Services (DPLS), New York State Education Department (NYSED), that respondent has paid all registration fees due and owing to the NYSED and respondent shall cooperate with and submit whatever papers are requested by DPLS in regard to said registration fees, said proof from DPLS to be submitted by respondent to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, no later than the first three months of the period of probation; and

   d. That respondent shall submit written proof to the New York State Department of Health, addressed to the Director, Office of

Professional Medical Conduct, as aforesaid, that 1) respondent is currently registered with the NYSED, unless respondent submits written proof to the New York State Department of Health, that respondent has advised DPLS, NYSED, that respondent is not engaging in the practice of respondent's profession in the State of New York and does not desire to register, and that 2) respondent has paid any fines which may have previously been imposed upon respondent by the Board of Regents; said proof of the above to be submitted no later than the first two months of the period of probation;

2. If the Director of the Office of Professional Medical Conduct determines that respondent may have violated probation, the Department of Health may initiate a violation of probation proceeding and/or such other proceedings pursuant to the Public Health Law, Education Law, and/or Rules of the Board of Regents.

ORDER OF THE COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK

MANUEL FAJARDO

CALENDAR NO. 10287

The University of the State of New York

IN THE MATTER

OF

MANUEL FAJARDO
(Physician)

DUPLICATE ORIGINAL
VOTE AND ORDER
NO. 10287

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 10287, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (March 23, 1990): That the record herein be accepted; that the unanimous findings of fact, majority (2-1) determination as to guilt, and majority (2-1) recommendation as to the penalty to be imposed rendered by the Regents Review Committee in the matter of MANUEL FAJARDO, respondent, be accepted; that respondent is guilty of the charge by a preponderance of the evidence; that respondent's license and registration to practice as a physician in the State of New York be suspended for two years upon the charge of which respondent has been found guilty; that execution of said suspension be stayed; that respondent be placed on probation for two years under the terms prescribed by the Regents Review Committee; and that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

MANUEL FAJARDO (10287)

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 30th day of March, 1990.

Thomas Sobol

Commissioner of Education