



STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Karen Schimke
Executive Deputy Commissioner

October 31, 1995

RECEIVED

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

NOV 01 1995

Timothy J. Mahar, Esq.
NYS Department of Health
Corning Tower-Room 2438
Empire State Plaza
Albany, New York 12237

Charles Eugene Fontanier, D.O.
210 West Greens Road, Suite C
Houston, Texas 77067

OFFICE OF
MEDICAL CONDUCT

Effective Date: 11/07/95

RE: In the Matter of Charles Eugene Fontanier, D.O.

Dear Mr. Mahar and Dr. Fontanier:

Enclosed please find the Determination and Order (No. 95-252) 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.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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.

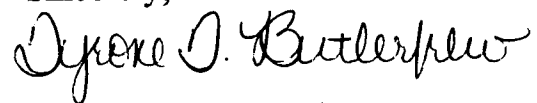
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

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,

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large, prominent initial "T".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

IN THE MATTER

-OF-

CHARLES EUGENE FONTANIER, D.O.

Respondent

DECISION
AND
ORDER
OF THE
HEARING
COMMITTEE
BPMC ORDER
NO. 95- 252

This matter was commenced by a Notice of Hearing and Statement of Charges, both dated August 22, 1995 which were served upon **CHARLES EUGENE FONTANIER, M.D.**, (hereinafter referred to as "Respondent"). **JOHN H. MORTON, M.D.**, Chairperson, **JOSEPH E. GEARY, M.D.**, and **MICHAEL WALKER**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **JONATHAN M. BRANDES, ESQ.**, Administrative Law Judge, served as the Administrative Officer. A hearing was held on September 20, 1995 at the Cultural Education Center, Empire State Plaza, Albany, New York. The State Board For Professional Medical Conduct (hereinafter referred to as "Petitioner") appeared by **JERRY JASINSKI, ESQ.**, Acting General Counsel, by **TIMOTHY J. MAHAR, ESQ.**, Assistant Counsel, Bureau of Professional Medical Conduct. Respondent did not appear in person, nor did he appear by counsel. However, Respondent did provide written submissions which were considered by the Committee. Evidence was received. A transcript of these proceedings was made.

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

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). This statute provides for an expedited hearing where 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 prior professional disciplinary action or criminal conviction. The scope of this 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, Respondent is charged with professional misconduct pursuant to two sections of the Education Law:

1. Section 6530(9)(b) having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another State
2. Section 6530 (9)(d) having been disciplined by the duly authorized professional disciplinary agency of another state.

The charges herein arise from a finding by the Texas State Board of Medical Examiners of professional misconduct. The Texas Board restricted Respondent's license to practice medicine for five years. The allegations in this proceeding and the underlying events are more particularly set forth in the Notice of Referral Proceeding and Statement of Charges, a copy of which is attached to this Decision and Order as Appendix One.

FINDINGS OF FACT

The Committee adopts the factual statement set forth on pages one through four of the Statement of Charges (Appendix One) as its findings of fact and incorporates them herein.

SIGNIFICANT LEGAL DECISIONS BY THE ADMINISTRATIVE LAW JUDGE

Respondent submitted an answer in which he asserts he withdrew his New York State license some years ago. Therefore, argued Respondent, Petitioner had no jurisdiction over him. Respondent's answer is attached hereto as Appendix Two.

In reply to Respondent's answer, Petitioner submitted an affidavit from Rita St. John, Senior Clerk in the Division of Professional Licensing Services. This affidavit was received in evidence as Exhibit 4. In her affidavit, Ms. St. John avers she has legal custody of the licensing records of physicians in this state. Ms. St. John also averred that Respondent is indeed presently licensed in this state. Subsequent to Petitioner's reply, Respondent provided further written comments critical of the St. John affidavit. Respondent's written comments are attached hereto as Appendix Three.

The affidavit executed by Ms. St. John and submitted by Petitioner establishes that Respondent is a licensed physician in this state. The affidavit refers to clear, straightforward records kept in the ordinary course of the business of this state. These records would be admitted in a court of record as an exception to the hearsay rule. Consequently, the evidence is reliable and convincing. The Administrative Law Judge considered the arguments asserted by Respondent in Appendixes Two and Three. These arguments were not sufficient to overcome the evidence submitted by Petitioner.

Based upon the affidavit submitted by Petitioner, it is the ruling of the Administrative Law Judge that Petitioner met its burden of proof that Respondent is licensed in this state. Therefore, this body has jurisdiction over Respondent's license to practice medicine in this state.

CONCLUSIONS

Petitioner has proven by a preponderance of the evidence that Respondent was found guilty of misconduct in the State of Texas. This establishes the facts as well as the specifications alleged. Having so found, the issue becomes one of penalty. Texas placed Respondent on probation and limited his license for a period of five years. The penalty imposed by the Texas authorities is consistent with a significant violation of accepted standards of medicine, as modified by a sense of Respondent's potential for remediation. Since Texas is the state in which Respondent practices, Texas has the opportunity to monitor Respondent closely, protect its citizens and establish that remediation is indeed taking place. New York does not have the same opportunity to monitor Respondent. Given the serious nature of Respondent's infractions and the practical limitations on this state's ability to protect its people by monitoring Respondent, revocation of Respondent's license to practice medicine in this state is the only appropriate outcome.

ORDER

WHEREFORE, Based upon the foregoing facts and conclusions,

It is hereby **ORDERED** that:

1. The Factual allegations in the Statement of Charges are **SUSTAINED**.

Furthermore, it is hereby **ORDERED** that;

2. The Specifications of Misconduct contained within the Statement of Charges (Appendix One) are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that;

3. The license of Respondent to practice medicine in the State of New York is **REVOKED**;

Furthermore, it is hereby **ORDERED** that;

4. This order shall take effect **UPON RECEIPT** or **SEVEN (7) DAYS** after mailing of this Order by Certified Mail.

Dated:
Rochester, New York

October 30 1995



JOHN H. MORTON, M.D., Chairperson

JOSEPH E. GEARY, M.D.
MICHAEL WALKER



TO:

TIMOTHY J. MAHAR, ESQ.
Assistant Counsel
Bureau of Professional Medical Conduct
New York State Department of Health
Corning Tower Building
Empire State Plaza
Albany, N.Y. 12237

CHARLES EUGENE FONTANIER, D.O.
210 West Greens Road, Suite C
Houston, Texas 77067

APPENDIX ONE

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

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IN THE MATTER : NOTICE OF
OF : REFERRAL
CHARLES EUGENE FONTANIER, D.O. : PROCEEDING

-----x

TO: CHARLES EUGENE FONTANIER, D.O.
210 West Greens Road, Suite C
Houston, Texas 77067

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(p) (McKinney Supp. 1995) and N.Y. State Admin. Proc. Act Sections 301-307 and 401 (McKinney 1984 and Supp. 1995). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 20th day of September, 1995 at 10:00 a.m. in the forenoon of that day at Empire State Plaza, Cultural Education Center, Meeting Room E, Albany, New York 12237.

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. 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, Corning Tower Building, 25th Floor, Empire State Plaza, Albany, New York 12237, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before - September 11, 1995.

You may file a written answer, brief, and affidavits with the Committee. Six copies of all papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before September 11, 1995 and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 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.

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
August 22, 1995



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

Inquiries should be addressed to:

Timothy J. Mahar
Assistant Counsel
NYS Department of Health
Division of Legal Affairs
Corning Tower Building
Room 2429
Empire State Plaza
Albany, New York 12237
(518) 473-4282

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

-----X

IN THE MATTER : STATEMENT
OF : OF
CHARLES EUGENE FONTANIER, D.O. : CHARGES

-----X

CHARLES EUGENE FONTANIER, D.O., the Respondent, was authorized to practice medicine in New York State on March 28, 1980 by the issuance of license number 141552 by the New York State Education Department.

FACTUAL ALLEGATIONS

1. On or about April 15, 1994, the Texas State Board of Medical Examiners (Texas Board) found Respondent to have violated §3.08(4)(E) of Article 4495b of the Medical Practice Act of Texas [prescribing or administering a drug or treatment that is non-therapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed] and §5.09 (a) of the same statute [a physician *** may supply patients with any drugs, remedies, or clinical supplies as are necessary to meet the patient's immediate needs but may not operate a retail pharmacy without first complying with the Texas Pharmacy Act].

2. The conduct underlying the Texas Board's finding of professional misconduct against Respondent consisted of the following:

- a. Respondent regularly dispensed to patients at his office quantities of Fastin for weight control which exceeded the amounts necessary to meet the patients' immediate needs.
- b. Respondent regularly prescribed to patients quantities of Fastin for weight control for periods of time which exceeded those recommended by the manufacture of the medication.

3. The Texas Board imposed a penalty upon Respondent which restricted his medical license for a period of five years with the following conditions, among others:

- a. Required Respondent to attend fifty hours of continuing medical education each year during the five year period.
- b. Required Respondent to maintain a file consisting of a copy of every prescription written by Respondent for controlled substances and the date issued.
- c. Prohibited Respondent from treating any patient for weight control with controlled substances, dangerous drugs or over-the-counter drugs.
- d. Required Respondent to attend "mini-residencies" in pharmacology and family practice.

4. The conduct upon the Texas Board found Respondent guilty of professional misconduct would, if committed in New York State, constitute professional misconduct under N.Y. Educ. Law §6530(3) [practicing the profession with gross negligence on a particular occasion]; §6530(6) [practicing the profession with gross incompetence]; §6530(3) [practicing the profession with negligence on more than one occasion]; and/or §6530(5) [practicing the profession with incompetence on more than one occasion].

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9)(b) (McKinney Supp. 1995) by reason of 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 1 through 4.

SECOND SPECIFICATION

Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9)(d) (McKinney Supp. 1995) by reason of having disciplinary action taken against his license to practice medicine by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State, in that Petitioner charges:

2. The facts in paragraphs 1 through 4.

DATED: *August 22*, 1995
Albany, New York

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

APPENDIX TWO

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EXHIBIT A
IN EU
9/20/95
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STATE OF NEW YORK:DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER OF CHARLES EUGENE FONTANIER, D.O.

ANSWER AND RESPONSE OF CHARLES FONTANIER, D.O.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Charles Fontanier, D.O.(hereinafter referred to as "Respondent"), and makes the following Answer and Response to the Charges of the Bureau of Professional Conduct, and would show the Court as follows:

I.

At the time of the incident made the basis of the Texas State Board's actions, Respondent was not holding a New York State medical license nor practicing medicine in the State of New York. Because he does not hold a license to practice in New York, this action is moot and the New York has no interest in the professional status of Respondent. Specifically, the affidavit of Respondent is attached as Exhibit "A". As set forth in his affidavit, Respondent practiced for one year in New York, as part of his internship training, **fifteen (15) year ago**. Since 1980, Respondent has never practiced medicine in New York. Additionally, Respondent's affidavit establishes that he formally resigned his New York licensure in 1982. The Bureau has produced no evidence rebutting this fact, and even admits that no license fees have been paid to New York since 1981, and that no communications have been had between any New York Licensing authority and Respondent since that date either. Bureau now asserts, without

even a scintilla of evidence, that Respondent's license is current and therefore this action must proceed. Respondent does not desire to have a New York medical license, as has not desired such for the last thirteen years.

Because he is not licensed in New York, and therefore not under the authority of the State Board for Professional Conduct or the Department of Health, Respondent requests that the State Board find that his license was effectively resigned in 1982, and dismiss the current charges, which were brought in Texas ten years after that date.

II.

In the event that the Board finds that Respondent's license is current, Respondent would show that the findings of the Texas State Board of Medical Examiners are not findings of conduct which support any of the alleged acts of professional misconduct made by the Bureau of Professional Conduct, N.Y. Educ Laws §6530(3),(6) and (5).

As stated in his affidavit, Respondent was dispensing Fastin as part of a weight loss program for his patients, which made up less than 1% of his practice. These patients were examined and counseled in behavior modification every two weeks, and prescriptions of Fastin, were given for fifteen days (1 pill per day: 15 pills per prescription). No patient was ever given a prescription for more than 15 days at one time. No patient ever suffered adverse effects as a result of their participation in the weight loss program. The longest that any patient was continuously part of the program was less than one year.

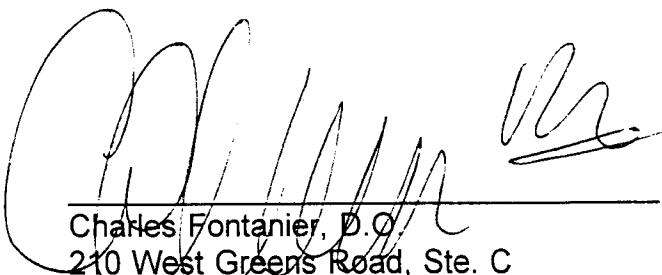
Respondent attaches and incorporates into his response as Exhibit "B" a true and correct copy of *Clinical Pharmacology & Therapeutics Journal*, Volume 51, Number 5, May, 1992, (hereinafter referred to as "CPTJ"). Pages 581-646 contain multiple studies

done by Dr. Weintraub, et al, done at the Department of Community and Preventive Medicine, Pharmacology and Biostatistics, University of Rochester School of Medicine and Dentistry. Dr. Weintraub's conclusions, The study was performed to determine the long term effects of Phentermine (a pharmacological equivalent of Fastin), and included keeping patients on that drug for **several years**. CPTJ, page 608 begins "Study IV" reporting the effects of patients who had been on the drug for three years. As reported on page 608, the prescription of Phentermine for that period of years was found to be an effective means of appetite control without significant adverse effects. Given these results in a New York study, it is clear that Respondent's giving a similar medication, under a similar protocol, for less time, does not rise to the level of incompetence, much less gross incompetence.

Further, the findings of the consent order in Texas not include findings of "incompetence" or "gross incompetence" as alleged by the Bureau, who noticeably fails to allege any misconduct in violation of New York law similar to the violations of the Texas Medical Practice Act found in Texas.

IV.

Respondent requests that the Board find he does not maintain a New York medical license, and alternatively, that he did not act in any manner which, if performed in New York, would have constituted professional misconduct.



Charles Fontanier, D.O.
210 West Greens Road, Ste. C
Houston, Texas 77067

AFFIDAVIT

THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day appeared Charles Fontanier, D.O., who, personally known to me and first being duly sworn according to law, upon oath, deposed and said:

"My name is Charles Fontanier, D.O. I am over the age of eighteen years, am competent to make this affidavit and have personal knowledge of the facts contained therein. I currently practice medicine in Houston, Texas, at 210 W. Greens Road, Ste. C, Houston, Texas 77067

From July, 1979, through June 30, 1980, I performed an internship at Baptist Medical Center of New York, Brooklyn, New York, as part of my medical training. During that time period, I had a medical license from the State of New York. On July 1, 1980, I left New York, and subsequently went to Oklahoma to complete my residency training.

After completing my residency training in Oklahoma, I moved Houston, Texas and began private practice in 1982. I have been in private practice in Houston, Texas ever since 1982. I have not practiced medicine in the State of New York since June 30, 1980.

In 1982, I sent my New York medical license to the New York State Department of Health, along with a letter resigning my license. I did this because I was certain I was not going to practice medicine in New York ever again. I do not know whether the Department received my resignation, I do know that between 1980 and 1995, I never received any communications, oral, written or otherwise, from any person or entity connected with the New York Department of Health.

The first time I was advised that New York considered my license to be active was in August, 1995, when I received notice of the Bureau's charges.

During the years 1983 through 1993, I offered a weight loss

EXHIBIT "A"^{cl}

program as part of the health care services to my patients. The average number of patients participating in the program monthly was approximately twenty, and the program consisted 1% of my practice. The program included counseling on behavior modification, physical exams and prescription of weight loss medication. All patients received a physical exam prior to entering the program, and then were examined and counseled every two weeks. Prescription of weight loss medication was limited to fifteen days at a time, to ensure that the patients would return for examination and counseling. I never prescribed more than fifteen days of medication for any patient.

During the period that the weight loss program was being used, I had no patients complain of or suffer adverse effects as a result of the medications prescribed. Additionally, no patients were on the program continuously for more than one year.

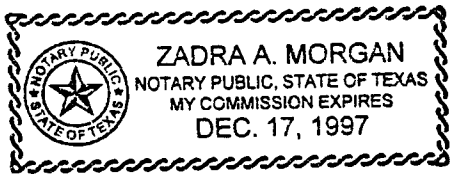
[Handwritten Signature]

Charles Fontamer, D.O.

SWORN TO AND SUBSCRIBED BEFORE ME on this the 8 day of September, 1995.

[Handwritten Signature]

Notary Public in and for
the State of Texas

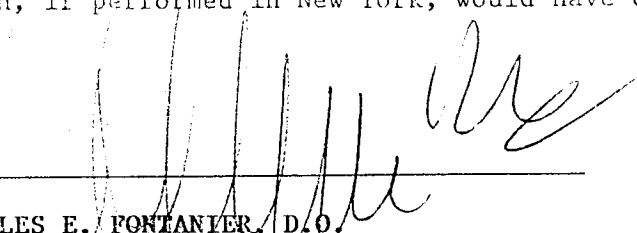


APPENDIX TWO

C.E.Fontanier to New York State

thirteen years, that no communications took place between 1981 and 1995, or that Dr. Fontanier has not practiced in New York since 1981.

Respondent reiterates his request that the Board find he does not maintain a New York medical license, and alternatively, that he did not act in any manner which, if performed in New York, would have constituted professional misconduct.



CHARLES E. FONTANIER, D.O.
210 West Greens Road, Ste C
Houston, Tx. 77067