



**Department
of Health**

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

April 28, 2016

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Daniel Guenzburger, Esq.
NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007

Benjamin Xue, Esq.
Xue & Associates, PC
1001 Avenue of the Americas - 11th Floor
New York, New York 10018

Fung Michael Ngan, M.D.
17 East Broadway
New York, New York 10002

RE: In the Matter of Fung Michael Ngan, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.16-136) 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. 2015) and §230-c subdivisions 1 through 5, (McKinney Supp. 2015), "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., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204**

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 solid black rectangular redaction box covering the signature of James F. Horan.

**James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication**

JFH: nm

Enclosure

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

**IN THE MATTER
OF
FUNG MICHAEL NGAN, M.D.**

COPY

DETERMINATION

AND

ORDER

BPMC-16-136

This case was brought by the New York State Department of Health, Bureau of Professional Medical Conduct ("the Department"). A Notice of Hearing ("NOH") dated June 23, 2015 and Statement of Charges ("SOC") were served on Fung Michael Ngan, M.D. ("Respondent"). A copy of the NOH and SOC is attached to this Determination and Order as Appendix 1. Hearings were held pursuant to N.Y. Public Health Law ("PHL") §230 and New York State Admin. Proc. Act §§301-307 and 401. The hearings were held at The Offices of the New York State Department of Health, at 90 Church Street, New York, New York. Steven M. Lapidus, M.D. - *Chair*, James R. Dickson, M.D., and Joan Martinez - McNicholas, duly designated members of the State Board for Professional Medical Conduct ("Board"), served as the Hearing Committee ("Committee") in this matter. Kimberly A. O'Brien, Administrative Law Judge ("ALJ"), served as the Administrative Officer. The Department appeared by Richard J. Zahnleuter, Esq., General Counsel, by Daniel Guenzburger, Associate Counsel. The Respondent

appeared by Benjamin Xue, Esq., of Xue and Associates, P.C. Evidence was received, including witnesses who were sworn or affirmed, and a transcript of this proceeding was made.

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

PROCEDURAL HISTORY

Notice of Hearing Statement of Charges	June 23, 2015
Pre-Hearing Conference:	September 8, 2015
Hearing Dates:	September 9, 2015 December 2, 2015
Submission of Briefs	January 19, 2016
Deliberations Dates:	February 25, 2016

STATEMENT OF THE CASE

The Department charged the Respondent with sixteen specifications of professional misconduct under N.Y. Educ. Law §6530 which included: practicing the profession of medicine fraudulently §6530(2), negligence on more than one occasion §6530(3), incompetence on more than one occasion §6530(5), willfully failing to comply with Federal law governing the practice of medicine §6530(16), and failure to maintain patient records §6530(32). The Respondent denied each of

the factual allegations and specifications.

FINDINGS OF FACT

The following Findings of Fact ("FOF") were made after a review of the entire record in this matter. Citations in brackets, which refer to transcript page numbers ["Tr."] and exhibits ["Ex"] that were accepted into evidence, represent 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 are unanimous unless otherwise stated.

1. Respondent was authorized to practice medicine in New York State on or about November 13, 1996, by the issuance of license number 204989 by the New York State Education Department [Ex.2] Respondent practices internal medicine at 17 East Broadway, NY, NY [Ex. 2; Tr. 163-169].
2. On June 9, 2000, Respondent was appointed to work as a civil surgeon for the United States Custom and Immigration Service ("USCIS"); and in 2015 he resigned from this position of his own accord [Ex. 3; Tr. 223-224].
3. In his role as a civil surgeon, Respondent conducted medical evaluations ("evaluations") for immigrant applicants ("patients") primarily screening for contagious diseases including tuberculosis ("TB"). Respondent's USCIS TB evaluations of twelve Chinese patients ("twelve patients") performed during

2012-2014 are the subject of these proceedings [Ex. 1; Tr. 26-28]. None of the twelve patients were shown to have had active TB [Tr. 74-75, 120-121, 127-128].

4. For each evaluation, Respondent was required to take a medical history focused on TB history and related illnesses, perform a physical and administer a TB screening test, and report these findings on a USCIS I-693 form ("USCIS form") [See Ex. 5c, 6c, 7c, 8c, 9b-14b, 15c, 16c – *USCIS Forms*, Ex. 18; Tr. 28-30].
5. The Mantoux Tuberculin Skin Test ("PPD TB test" or "TB test") is performed in a physician's/ civil surgeon's office by injecting a small amount of TB protein in a patient's arm. The patient must return to the office within 48-72 hours so the patient's "reaction" to the TB test can be evaluated [Tr. 30]. The TB reaction comes in the form of an induration ("TB reaction") which is a palpable, raised, hardened area on the skin which is measured with a ruler in millimeters ("mm"). The size of the reaction is used in determining whether the patient has the TB germ and whether the patient requires follow-up TB testing, chest x-ray [Tr. 29-31].
6. Respondent employed the PPD TB test for each of the twelve patients [Tr. 170-171, 202-205]. But he now uses a different TB test where a patient's blood

sample is sent to a laboratory to be tested ("blood test"). He believes the blood test is less subjective than the PPD TB test [Tr. 215-218].

7. The United States Center for Disease Control ("United States CDC") technical instructions require that a civil surgeon report the size of the TB reaction on the USCIS form. A reported TB reaction of 5mm or more is considered a positive reaction which requires a patient to undergo follow-up TB testing, chest x-rays [Tr. 32, 65; ALJ Ex.2, Ex.18].
8. A TB reaction of 10mm is considered a positive TB reaction by the United States CDC for non-immigrants and by countries where there is a high prevalence of TB ("International standard") [Tr. 65-68, 127-128, 177, 179 -182, 198; See Ex. BBB, Ex. DDD, Ex. EEE, Ex. FFF, Ex. GGG, Ex. III, Ex. QQQ, Ex. UUU].
9. TB is prevalent in China, and the Chinese government requires its citizens to receive the BCG vaccine [Tr. 28, 118-119]. The BCG vaccine contains an extract of a germ related to TB and after it is administered it can lead to a false positive TB reaction [Tr. 127-129, 205].
10. Respondent testified that he reported "0"mm on the USCIS form for each of his twelve Chinese patients because each of these patients had a TB reaction of less than 10mm, no relevant history was reported, and the physical examination revealed no active symptoms of TB [Tr. 179-184, 199, 205].

DISCUSSION

The Department's sole witness was Edward Eden, M.D., Chief of Pulmonary Medicine at Saint Luke's Roosevelt Hospital. Respondent testified on his own behalf. The Hearing Committee found that both witnesses provided credible testimony.

As required by PHL §230(10)(f), the Hearing Committee based its conclusions on whether the Department met its burden of establishing that the allegations contained in the Statement of Charges were more probable than not. When the evidence was equally balanced or left the Hearing Committee in such doubt as to be unable to decide a controversy either way, then the judgment went against the Department (*See Prince, Richardson on Evidence* § 3-206 [Farrell 11th ed]). The Committee unanimously concluded that the first, second, third, fourth, seventh and eighth specifications of misconduct were not sustained; and the fifth, sixth and ninth through sixteenth specifications of misconduct were sustained.

Testimony of Dr. Ngan

Respondent is fluent in both Chinese and English and many of his patients only speak Chinese. He himself immigrated to the United States from China, and his office is located in Chinatown where his children go to school. Respondent testified that he himself cared for these twelve patients including: obtaining a medical history, performing a medical examination and conducting the TB testing.

He admittedly used the International standard not the USCIS standard when performing his duties as a civil surgeon. While he acknowledged that the USCIS form indicated that patients having a TB reaction of 5mm or more should be referred for follow-up TB testing, it contradicted the International standard [Tr. 205-209]. He knew that many of his Chinese patients would have a false positive TB reaction of at least 5mm. In Respondent's professional opinion, reporting a TB reaction of less than 10mm on the USCIS form would lead his patients to endure unnecessary chest x-rays/exposure to radiation and incur unnecessary expenses.

Testimony of Dr. Eden

Dr. Eden has been a USCIS Civil Surgeon for ten years or more and testified that the USCIS standard requires patients with a TB reaction of 5mm or more to undergo additional TB testing "irrespective of where that person comes from" [Tr. 32]. He opined that for immigration purposes the USCIS wants to "capture everybody who may have tuberculosis when they come to this country, so that is why five (5) is the standard" [Tr. 93]. On cross examination, Dr. Eden acknowledged that the United States CDC considers a TB reaction of 10mm as positive for the general population and that this standard is also applied in countries where TB is prevalent; and that TB is prevalent in China and the Chinese government requires its citizens to have the BCG vaccine which can lead to a false positive TB reaction [Tr. 127-129, 149].

First through Fourth Specifications

The Department alleged in its first through fourth specifications of misconduct that Respondent is guilty of fraudulent practice, "intentional misrepresentation or concealment of a known fact which is made with the intent to deceive" (first and second specifications); and "willfully making or filing" a false report (third and fourth specifications).¹ Both categories of misconduct require that the Department show that Respondent knowingly and intentionally misrepresented the content of the TB evaluations he performed and the size of the TB reaction he reported on the USCIS form. The Hearing Committee concluded that Respondent truly believed that he was exercising his professional judgement when he put a TB reaction of "0" on the CSCIS form, and that he also believed that he was following the appropriate standard of care because additional TB testing was not necessary. The Department failed to show that under the circumstances Respondent had any intent or motive, monetary or otherwise, to commit fraud or falsify documents. Accordingly, the Committee did not sustain the first through fourth specifications of misconduct.

¹ The Committee used the explanations contained in the "Definitions of Professional Misconduct under the New York State Education Law" ("memorandum") in reaching its determination [ALJ Ex. 3]. The parties were provided with a copy of the memorandum at the September 8, 2015 prehearing conference. At the outset of the hearing on September 15, 2016, Dr. Lapidus, *Chair* advised the parties that the Committee may use the memorandum to assist them in making a determination and the parties were invited to "comment or dispute" the definitions contained in the memorandum before the last day of hearing; neither party made a submission [Tr. 6; ALJ Ex. 3].

Fifth & Sixth Specifications

The Department alleged in its fifth and sixth specifications of misconduct that Respondent failed to comply with Federal law, 42 CFR 34.3. Specifically the law requires a physician to report the actual size of the TB reaction on the CSCIS form and to refer a patient for additional TB testing if the patient's TB reaction measures 5mm or more. While the Committee believes that Respondent's reasons for his actions have merit, Respondent admitted that his patients had a measurable TB reaction, and despite this he reported a TB reaction of "0" mm on the CSCIS forms. Respondent also admitted that he did not refer patients with a TB reaction of less than 10mm for follow-up TB testing. Accordingly, the Committee sustained the fifth and sixth specifications of misconduct.

Seventh & Eighth Specifications

The Department alleged in its seventh specification of misconduct that Respondent practiced the profession of medicine with negligence on more than one occasion, and in its eighth specification of misconduct that the Respondent practiced medicine with incompetence on more than one occasion. Negligence is defined as "the failure to exercise the care that would be exercised by another physician" and a "deviation from acceptable medical standards in the treatment of a patient" [ALJ Ex. 3]. Incompetence is defined as "a lack of skill or knowledge necessary to practice medicine" [ALJ Ex. 3].

The Committee found that Respondent provided cogent and credible testimony about his professional practice and his reasons for following the International standard including that he did so to protect his patients from being subjected to unnecessary tests and incurring the additional expenses associated with these tests. The Department's allegations of negligence and incompetence were simply not supported by the record. Accordingly, the Committee did not sustain the seventh and eighth specifications of misconduct.

Ninth through Sixteenth Specifications

The Department alleged in its ninth through sixteenth specifications of misconduct that Respondent failed to "maintain a record that accurately reflects the evaluation and treatment" for a period of six years, for eight out of the twelve patients including patient: B, E, F, G, H, I, J. At hearing, the Respondent admitted that on at least one occasion he failed to note relevant patient history and that he kept the UCSIS patient records for only one year [Tr. 218-219, 244-245]. Accordingly, the Committee sustained the ninth through sixteenth specifications of misconduct.

DETERMINATION AS TO PENALTY

Respondent violated Federal law and he failed to maintain a complete medical record for eight of the twelve patients. While the Department proposed that Respondent's license to practice medicine in New York State be revoked, the

Committee believes that the severity of the proposed penalty was not commensurate with the findings of misconduct.

After due and careful consideration of the penalties available pursuant to Public Health Law Section 230-a, the Hearing Committee has determined that the Respondent shall not be a USCIS civil surgeon in the future. The Committee also determined that Respondent can better serve his patients by successfully completing a continuing medical education course in the area of recordkeeping.


ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The first through fourth, seventh and eighth specifications of professional misconduct set forth in the Statement of Charges are **DISMISSED**;
2. The fifth, sixth and ninth through sixteenth specifications of professional misconduct set forth in the Statement of Charges are **SUSTAINED**;
3. Respondent's license to practice is limited to prohibit him from participating in the USCIS Civil Surgeon Program;
4. Within Ninety (90) days of the effective date of this Determination and Order Respondent shall successfully complete a course of continuing medical education in the area of recordkeeping ("course"). The course shall be pre-approved by the Board for Professional Medical Conduct;

5. This Determination and Order shall be effective upon service on the Respondent pursuant to Public Health Law Section 230(10)(h).

DATED: *Carmel, New York*
April 25, 2016

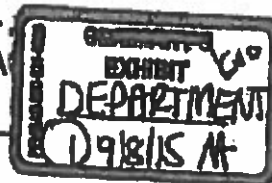

STEVEN M. LAPIDUS, M.D. (CHAIR)
JAMES R. DICKSON, M.D.
JOAN MARTINEZ-MCNICHOLAS

To: Daniel Guenzburger
Associate Counsel
New York State Department of Health
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90 Church Street, 4th Floor
New York, New York 10007

Benjamin Xue, Esq.
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1001 Avenue of the Americas, 11th Floor
New York, New York 10018

Fung Michael Ngan, M.D.
17 East Broadway
New York, New York 10002

APPENDIX I



IN THE MATTER
OF
FUNG MICHAEL NGAN, M.D.

NOTICE
OF
HEARING

TO: FUNG MICHAEL NGAN, M.D.
c/o Benjamin Xue, Esq.
Xue & Associates, P.C.
1001 Avenue of the Americas
New York, New York 10018

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 and N.Y. State Admin. Proc. Act §§301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on September 9, at 10:00 a.m., at the Offices of the New York State Department of Health, 90 Church Street, New York, New York, Fourth Floor, and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel who shall be an attorney admitted to practice in New York state. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents, and you may cross-examine witnesses

and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

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

Department attorney: Initial here

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Riverview Center, 150 Broadway - Suite 510, Albany, NY 12204-2719, ATTENTION: HON. JAMES HORAN, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication"), (Telephone: (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), 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. 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 N.Y. State Admin. Proc. 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.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

**THESE PROCEEDINGS MAY RESULT IN A DETERMINATION
THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW
YORK STATE BE REVOKED OR SUSPENDED, AND/OR
THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS
SET OUT IN NEW YORK PUBLIC HEALTH LAW §§230-a.
YOU ARE URGED TO OBTAIN AN ATTORNEY TO
REPRESENT YOU IN THIS MATTER.**

DATE: June 23, 2015

New York, NY


Roy Nemerson
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be directed to:
Daniel Guenzburger

**Associate Counsel
Bureau of Professional Medical Conduct
212-417-4450**

IN THE MATTER
OF
FUNG MICHAEL NGAN, M.D.

STATEMENT
OF
CHARGES

FUNG MICHAEL NGAN, M.D., the Respondent, was authorized to practice medicine in New York State on or about November 13, 1998, by the issuance of license number 204989 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. Respondent is a Civil Surgeon designated by the United States Customs and Immigration Service ("USCIS") to perform immigration related medical evaluations. Respondent performed such evaluations on Patients A through J at his office, 17 East Broadway, New York, New York on various dates between July, 2011 and October, 2013. Respondent reported the results of these evaluations to the USCIS on form I-693.

On each report Respondent certified that the medical information was "true and accurate to the best of his knowledge" and that he performed the required components of the evaluation, including tuberculin testing, "in accordance with the Centers of Disease Control and Prevention's Technical Instructions." (Patients A through J are identified on the annexed Appendix). With regards respectively to USCIS I-693 reports Respondent prepared for Patients A through J:

1. Respondent knowingly and falsely represented that the tuberculin skin test reaction ("TST") was zero ("0") millimeters, when, in fact, he knew that the size of the TST was significantly larger. Respondent intended to deceive.
2. Respondent knowingly and falsely represented that he had performed the evaluations in accordance with the Center for Disease Control and Prevention's Technical Instructions ("Technical Instructions"), when, in fact, he knew that he had not complied with the Technical Instructions. Respondent intended to deceive.

B. Respondent willfully and/or gross negligently failed to comply with 42 C.F.R § 34.3 (f), including but not limited to:

1. Failing to record on USCIS form I-693 the size in millimeters of the TST reaction.
2. Failing to order chest radiographs on Patients with a TST reaction of 5 mm or greater of induration.

C. Respondent deviated from medically accepted standards in his evaluation of Patients A through J and L in that he:

1. Failed to take and/or note an adequate history.
2. Failed to take and/or note an adequate physical examination.
3. Failing to order chest radiographs on the following patients with a TST reaction of 5 mm or greater of induration: Patients A-J and L.

D. Respondent failed to maintain a record that accurately reflects the evaluation and treatment of the patient, with regards respectively to the following:

1. Patient B.

2. Patient E.
3. Patient F.
4. Patient G.
5. Patient H.
6. Patient I.
7. Patient J.
8. Patient K.

SPECIFICATION OF CHARGES

FIRST and SECOND SPECIFICATIONS **FRAUDULENT PRACTICE**

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law § 6530(2) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

1. Paragraphs A and A1.
2. Paragraphs A and A2.

THIRD AND FOURTH SPECIFICATIONS

FALSE REPORT

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(21) by willfully making or filing a false report, or failing to file a report

required by law or by the department of health or the education department, as alleged in the facts of:

3. Paragraphs A and A1.
4. Paragraphs A and A2.

FIFTH AND SIXTH SPECIFICATIONS

FAILING TO COMPLY WITH FEDERAL LAW

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(16) by willfully and/or grossly negligently failing to comply with Federal law governing the practice of medicine, specifically 42 C.F.R § 34.3 (h), as alleged in the facts of:

5. Paragraphs B and B1.
6. Paragraphs B and B2.

SEVENTH SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of:

7. Paragraphs C, C1, C2 and/or C3.

EIGHTH SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of:

8. Paragraphs C, C1, C2 and/or C3.

NINETH THROUGH SIXTEENTH SPECIFICATIONS

FAILURE TO MAINTAIN RECORDS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(32) by failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient, as alleged in the facts of:

9. Paragraphs D and D1.
10. Paragraphs D and D2.
11. Paragraphs D and D3.
12. Paragraphs D and D4.
13. Paragraphs D and D5.

14. Paragraphs D and D6.
15. Paragraphs D and D7,
16. Paragraphs D and D8.

DATE: ^{June 23} May , 2015 New
York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional Medical Conduct