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Testimony of Andrew L. Hyams, Esq.
Concerning Proposed Regulations of the Board of Registration in Medicine
243 CMR 2.00
Governing Licensing Provisions and the Practice of Medicine
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I was the Board's General Counsel from 1985 to 1990. I left the Board to obtain a Master of Public Health degree, with a concentration in health policy and regulation. Since 2002, I have been representing physicians before the Board.

Having spent many years both inside and outside this important regulatory body, I hope you will consider my perspective on what regulatory tools this Board needs to do its job, and what regulatory protections physicians need so that they are treated fairly. Both the Board and physicians want to be confident that when the Board acts, it does so based on accurate facts and faithful adherence to its enabling legislation.

I am not in agreement with several of the changes proposed to 243 CMR 2.00, but there are three changes in particular, as to which I hope you are willing to listen to some frank but constructive criticism.

2.06(2) Good Moral Character at Renewal

When the Board last proposed revisions to these regulations in April, 2010, I voiced my concern about your inclusion of a new renewal requirement: that when a physician renews his or her license, he or she must demonstrate "good moral character," as is required for a initial license.

I am chagrined to see that the requirement is still in this new proposed revision, but this time it is hidden from plain sight, in a cross reference. The new language in Section 2.06(2) states, "In order to renew a full, administrative or volunteer license, a licensee must meet the prerequisite requirements in 243 CMR 2.02(1), except as otherwise provided…." The cross-referenced section 2.02(1) includes the "good moral character" requirement in sub-section (b). Through wholesale incorporation of the initial

license requirements into the renewal requirements, the Board gives itself authority to add a "good moral character" section to the renewal application.

You may ask what's wrong with requiring "good moral character" on a license renewal form?

I am simply going to repeat my testimony from a year ago. Then, I called the provision "Stealth Summary Suspension." Since the new iteration of the provision is even better hidden, I am at a loss to find an accurate label short of "Truly Invisible Stealth Summary Suspension" or "Super Stealth Summary Suspension." Whatever you want to call it, the proposal is alarming and raises serious due process issues.

This regulation could give rise to the following scenario. Dr. A is the subject of a pending Statement of Allegations for a garden variety offense; he is accused of failing to disclose on his license application that he had a DUI arrest – not a conviction. For the purposes of this example, assume that Dr. A "did it" – either out of embarrassment, poor legal advice, stupidity or venality, Dr. A lied on his license application. Maybe the underlying facts reflect poorly on Dr. A's moral character, maybe they don't. Nevertheless, while the charges are pending, Dr. A's license comes up for renewal on the two year cycle. The board prosecutor needs to merely highlight the allegation at the Board's Licensing Unit, and the licensing file now contains *prima facie* evidence that Dr. A lacks good moral character. According to the proposed regulation, Dr. A has the burden to demonstrate that he *has* good moral character, and he is now subject to a companion adjudicatory process before the Licensing Committee on this issue. If Dr. A fails to overcome the *prima facie* evidence of bad moral character (that he lied on his application) – and it is anyone's guess what quantum of evidence he needs to come up with – then separate and apart from the pending adjudicatory hearing based on the Statement of Allegations, the Board can refuse to renew Dr. A's license. According to the proposed regulation, this would all be perfectly legal.

I would ask, "*Whose license would you not renew for failure to meet the burden of showing good moral character, who you would not already have grounds to suspend under your existing summary suspension regulation?"*

If you can think of no example, then the regulation is not needed. But if you can name an example, then the provision is ripe for abuse, because the Board should be using the disciplinary process rather than the licensing renewal process to in effect summarily suspend a license.

It would be cold comfort for the Board and its staff to reassure physicians that it will never use the proposed regulation this way. Board and staff members change. *Boston Globe* headlines and the political environments change. You cannot observe the Board for 26 years as I have and not conclude that the Board goes through cycles of more and less fairness and respect for the rights of the accused physician. Those cycles will continue. The Board should not set the due process bar in its regulations so low that future Boards and staff can make short work of mincing the rights of the accused.

2.04(14) Preliminary Denial of a License

This year's iteration of the "Preliminary Denial of Licensure" section is almost exactly the same as last year's proposal. The new version removes the likely unconstitutional portion which purported to allow the Board to refuse a hearing even after a physician specified a factual or legal basis for overturning a preliminary license denial. But none of the other problems I identified last year has been remedied, so I can only reiterate what I said last year.

This provision assures that the opacity problems of the past can continue. Again, these problems have cycled better and worse, depending on the Board's leadership. A physician with an application can be summoned to the Licensing Committee, and there is no requirement that the physician be told in advance precisely or even generally what issues are going to be discussed, what legal arguments the staff has raised, and what factual assumptions have been made. Without advance knowledge of the issues and the specific facts assumed or suspected by the staff and Licensing Committee, the opportunity to respond can be for naught.

The proposed regulation does not distinguish amongst the roles of the Licensing Staff versus the Licensing Committee versus the full Board, leaving the likelihood of muddying up these roles and responsibilities, and making it difficult for the physician to know in advance what procedures will be followed. By obscuring where decisions are made, the regulation makes it hard for the physician to know how to have a fair shot at addressing any concerns, which with a career at stake, he or she should have every right to do.

There is no provision for compliance with the Open Meeting Law, which should allow the physician to be present when the Licensing Committee and the Board are discussing the physician's application, or the Public Records Law and Fair Information Practices Act, which should allow a physician access to staff memoranda concerning the application well in advance of Committee or Board deliberations so that the physician can respond to any factual and legal errors. The Board staff might view the idea of sharing their memoranda with the physician as something in the category of heretical, but nobody has ever explained to me how letting the physician see and respond to the staff recommendation will lead the Board to make a less informed decision. The Board ignores the genius of Anglo-American law, that putting opposing views in the crucible of the adversary system produces more, not less, intellectually honest decisions.

Finally, if the Board agrees that the applicant is entitled to a hearing, then the hearing, to have practical meaning in many cases, should take place within two to four weeks. The Board can conduct the hearing itself and does not have to send this type of case to DALA. For a physician awaiting a license, there is often a great danger that a job offer will be withdrawn and the Board will in effect deny the license simply through delay.

2.13(4) Review of Mandated Reports by the DRC

This proposed regulation sounds fair enough on the surface, but someone unfamiliar with the Data Repository Committee would be surprised to find out the degree to which the DRC's business is kept secret not only from the public, but from any physician the Data Repository Committee discusses.

Assume that the DRC has received a mandated report, but the contents of the report are disputed, or the physician wants to challenge the DRC's legal interpretation of the Board regulation that resulted in the report being filed.

Under the proposed regulation, the DRC's starting point is that its review is not a Chapter 30A "adjudicatory proceeding." Thus, the physician has no right to present facts or law in the context of 30A hearing, with its attendant due process rights. The next logical step for the physician is to ask to be present at the DRC meeting and to have whatever rights might be available under the Open Meeting Law, normally to speak on one's behalf and to make a transcript. But the DRC's answer is that it will go into Executive Session under the Open Meeting Law, and it will exclude the physician from the Executive Session. Never mind that there is a provision under the Executive Session exception which seems to expressly allow an individual about whom there has been a "complaint" to be present – the DRC and its staff make every legal argument they can, no matter how strained, to keep the physician out of the room. The rationale for keeping the physician out of the room is troubling: the mandated report must be kept secret from the physician, even if the physician already has a copy of the mandated report.

I would ask the Board to look at this proposed regulation and take a step back. You want the Board's and its committee's decisions to garner respect and to earn legitimacy. Denying a 30A hearing and then going into Executive Session for the sole purpose of keeping the physician out and denying the physician the right to present his or her side of the story works to squander legal legitimacy.

The Board should strike a balance and not be perceived as prosecution oriented. If the Board is going to deny a physician a 30A hearing at the DRC, then at the very least Section 2.13(4) should provide that if the DRC or the Board goes into Executive Session to discuss a mandated report, then the physician who is the subject of the mandated report has the right to be present during the Executive Session under Chapter 30A, § 21(a)(1).

Thank you for the opportunity to present this testimony.