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Statement 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 about 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 two changes in particular, as to which I hope you are willing to listen to some frank criticism.

2.04(3) Good Moral Character at Renewal

My first objection is to the new requirement that when a physician renews his or her license, he or she has the burden to demonstrate "good moral character." I wrote recently in one of the Medical Society newsletters that this provision should be called a "Stealth Summary Suspension" provision. 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 now 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 fear that the provision is ripe for abuse is well-founded. Because in such a case, shouldn't the Board 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 25 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(12) Preliminary Denial of a License

The "Preliminary Denial of Licensure" section sounds fair enough to anybody who has no familiarity with the actual application procedure. But the main problems with this proposal are that there are several things missing from it:

It 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 what issues are going to be discussed, what legal arguments the staff has raised, and what factual assumptions have been made. Sometimes the issues are made clear in advance, but sometimes they are not. 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 influencing the decision, which with a career at stake, he or she should have every right to influence.

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.

There is another troubling change in this section. Under 2.04(12)(c), the new language says that the Board "may" grant a hearing request, rather than "will" grant such a request, where the applicant has specified a factual or legal basis for overturning a preliminary denial. One hopes that where an applicant has gotten so far as to show that there is a basis for overturning a preliminary denial, the Board *will* grant the hearing and that the Board will not want the wiggle room, relying on the word "may," to deny an adjudicatory hearing.

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.

Thank you for the opportunity to present this testimony.