**Public Comment of Board Defense Attorneys**

Proposed Regulations of the Board of Registration in Medicine, 243 CMR 2.00

Public Hearing on May 18, 2017

**Introduction**

The undersigned 16 physician defense attorneys, including a former Board Chair and a former Board Vice-Chair, appreciate the opportunity to comment on the Board’s proposed revisions to 243 CMR 2.00.

We support the Board’s mission: to protect the public. Our concern at the March hearing on the proposed amendments to the disciplinary regulations was that the Board measures disciplinary success only in terms of the number of physicians disciplined, not by measures of due process and arriving at correct factual results. The similar theme today is that these regulations appear to measure the mission’s success largely in terms of the number of license applications the Board can deny, through shifting burdens of proof and systematic elimination of the Board’s ability to recognize unique circumstances through its exercise of discretion.

The overall tenor of the Board’s proposed amendments to 243 CMR 2.00 repeats the theme of the proposed amendments to the disciplinary regulations: to be harsher on physicians in general, and to eliminate the possibility of accommodating exceptional circumstances while fully protecting the public. Perhaps most troubling, and which would be an unwarranted snub to any profession, is the Board’s re-jiggering the “good moral character” element of an application: the new language might be intended and interpreted as presuming an applicant lacks good moral character unless he or she can prove otherwise. We hope that is not what the Board is thinking, but if it is, then as explained below the Public Notice for this hearing is inadequate.

There are many proposed amendments which we are aware have been well-addressed by the Massachusetts Medical Society, the Massachusetts Health & Hospital Association, Physicians Health Services and the Professional Liability Foundation. We are not repeating their concerns here.

The following are our specific objections to the proposed regulations.

**1. Failure to Provide Legally Required Public Notice of the Proposed Regulations**

The Public Notice for this hearing was issued pursuant to M.G.L. c. 30A, § 2, which states (emphasis supplied):

The notice **shall** refer to the statutory authority under which the action is proposed; give the time and place of the public hearing; **either state the express terms or describe the substance of the proposed regulation**; and include any additional matter required by any law.

The Board’s Notice for this hearing does not comply with M.G.L. c. 30A, § 2. The Notice does not state the express terms of the regulation, and the sum total of its description of the “substance of the proposed regulations” is this:

These amendments will add provisions requiring domestic violence and sexual violence training and child abuse and neglect training. They will update provisions on the seven-year rule and substantial equivalency. In addition, the proposed amendments will update the APRN, the Data Repository and the Physician Profiles regulations, among other provisions.

The Board’s Notice omits any mention of many major proposed changes, too numerous to list here, and probably comprising 80% of the proposed amendments. These proposed changes, if finalized by the Board, should not be enforceable and will be subject to legal challenge, because the Board failed to comply with the notice requirements in M.G.L. c. 30A, § 2.

**2. Good Moral Character**

We are opposed to the Board’s use of the phrase “good moral character” anywhere in these proposed regulations. The introduction of this new term is not mentioned in the Notice of Public Hearing nor is it defined anywhere in the regulations. And yet, the insertion of this phrase constitutes a substantive change enabling - in fact, *requiring* - the Board to determine as a prerequisite for licensure that a person is of “good moral character.”

We assume that the Board’s motivation is to import the “good moral character” requirement from its licensing statute, M.G.L. c. 112, § 2. But the purpose of a regulation is to provide bright line rules for the application of a fuzzy statutory standard, and the Board’s proposed regulation does not attempt to accomplish that. We believe the interpretation of “good moral character” is subjective by nature and thus would necessitate case-by-case determinations with no future application. The placement of such a vague, broad term into a regulation without providing any guidance as to what it means would give rise to inconsistent interpretations - not only by the Board, but by hospitals, clinics, and physicians alike. This complete lack of clarity becomes particularly problematic when the situation is unrelated to the practice of medicine. In any case, the “good moral character” standard is so ambiguous that it provides no expected clarity for a licensure regulation that is intended to determine the skills, education, experience, and ability to provide quality medical care.

By requiring an applicant to provide “satisfactory evidence of good moral character” without any explanation as to what that means, the Board is essentially requiring the applicant to attest to the fact that he or she meets an unknown and subjective moral code which the Board itself has not – and cannot – define. As a result, the applicants bind themselves to a subjective review without any knowledge of the issues or concerns that the Board may consider relevant to their application. In any case, the burden should not be placed on the applicant to prove that he or she is of “good moral character.”

Finally, we are concerned that this change may be an attempt by the Board to shift the burden of proof if a “good moral character” issue becomes the subject of an adjudicatory hearing. If that is indeed the case, the Board should not only say so, but it should provide the required notice pursuant to Chapter 30A that it wants to make this change.

**3. Malpractice Disclosure**

Section 2.04 (9) adds to the licensure application requirements the disclosure of information regarding “any malpractice claim in which he or she was involved.” This factor is poorly worded. “Involved” can mean that the physician was merely a witness or was the subject of a demand which was meritless and went nowhere. In any event, even if worded with more precision, the regulation seeks to elevate the importance of malpractice history where there are few metrics to support a correlation between quality of care and the tendency or lack thereof to be sued. (Instead, studies show that lawsuits tend to result from poor physician-patient communications rather than physician incompetence.) The Board licensing staff, and applicant physicians, spend enormous amounts of time collecting and analyzing the facts surrounding past malpractice cases in which applicants were defendants. It would be easy and useful for the Board to engage in institutional research to determine how often the extensive analysis changes the outcome, before the Board enshrines “malpractice history” in its regulations as currently proposed.

**4. New 243 CMR 2.03(10) Criminal History. To the extent the Board requires that physicians provide criminal history records expunged in other states, this regulation is unconstitutional.**

When a criminal record is expunged in another state, the legal effect is to treat the case as if it never existed. Nevertheless, the Board’s practice, which it is attempting to enshrine in this proposed regulation, is to “resurrect” the criminal record as an element of the Massachusetts license application.

As a matter of law, Massachusetts’ mandatory resurrection of a criminal record violates the Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1: “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.” The Full Faith and Credit Clause, as well as U.S. Supreme Court cases interpreting the clause, dictate the states must recognize and give effect to valid public acts and judgments rendered by other courts in the United States, including all state and federal courts. *See*, 18-130 *Moore’s Federal Practice* - Civil § 130.01.

Exclusion of an expunged criminal record from a Massachusetts license application is the correct result, as a matter of Massachusetts law. The case *Wing v. Commissioner of Probation*, 473 Mass. 368 (2015) shows the high value the SJC accords a sealed record. The Court balanced a criminal defendant’s statutory right to compel production of a complaining witness’s sealed criminal record, versus the state’s “compelling interest in providing privacy protections for former criminal defendants” (citing *Commonwealth v. Pon*, 469 Mass. 296, 300 (2014)). In *Wing*, the SJC ruled in favor of the complaining witness: “We are persuaded that the more compelling policy interest is in the Legislature’s concern that persons convicted of crimes have some opportunity to become productive members of their communities once they have paid their debt to society.”

Respect for another state’s expungement order is the correct result, as a matter of public policy. The harm an individual physician may suffer greatly outweighs any public protection that might be achieved by the Board’s un-doing an expungement granted by another jurisdiction. Our society places a value on allowing expungement; otherwise, its possibility would not exist. Expungement is a deliberate procedure which gauges an individual’s ability to earn the community’s trust typically after a youthful incident involving a lapse in judgment. The expungement process takes into account an appreciable period of time, during which the individual has shown unimpeachably good behavior. The original jurisdiction allows the court to deliberate and make a “judgment.” An out of state licensing Board such as the Board of Registration in Medicine has no independent basis on which to question the original decision to expunge. And even if the Board thought it had negative information which might question the decision to expunge, it could simply use that negative information to deny the license application and fully protect the Massachusetts public.

In any event, even if the Board had a “public policy” argument in its favor that might arguably overcome the SJC’s clear statement favoring privacy protections for a former criminal defendant, “the Supreme Court has frequently held that there is no general public policy exception to the requirements of full faith and credit; full faith and credit cannot be refused on the ground that the judgment of the rendering court is contrary to the public policy of the recognizing jurisdiction” (emphasis supplied).18-130 *Moore's Federal Practice* - Civil § 130.05, citing*Baker v. GMC*, 522 U.S. 222, 233-234, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (“A court may be guided by the forum State's ‘public policy’ in determining the law applicable to a controversy. But our decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.” (citation and footnote omitted)); *Baker v. GMC*, 522 U.S. 222, 243, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (Kennedy, J., concurring) (“We have often recognized the second State’s obligation to give effect to another State’s judgments even when the law underlying those judgments contravenes the public policy of the second State”).

In sum, the Board’s proposed regulation which would allow resurrection of a criminal record ordered expunged by another state is ill-advised as a matter of constitutional law, Massachusetts law and sound public policy.

**5. 243 CMR 2.03(15), Prohibition on application withdrawal.**

The current regulation allows the physician to withdraw a complete application prior to review by the Licensing Committee. After review by the Licensing Committee, the physician may withdraw the application upon approval of either the Licensing Committee or the Board; as a practical matter, the Licensing Committee and the Board always refuse permission, no matter what the ground. While the Board is not amending this regulation, its re-enactment and the Board’s application of the regulation deserves comment.

In refusing application withdrawals, the Board has cited the need for “transparency” and its perceived duty to other state Boards.

There certainly are cases in which the Board application process has uncovered serious concerns which would not be apparent or readily detectable by another state if the applicant were to withdraw a Massachusetts application and seek licensure elsewhere. For example, if it is clear that the applicant **[made an intentional and substantive misrepresentation of his or her qualifications]** on the Massachusetts application, that is important for another state to know.

However, where the Board bases a preliminary denial on information which is clearly disclosed in ACGME records and/or the FCVS, such as a repeated year of training, probation, or another negative event, then refusing to allow an application withdrawal provides no service to another state. With no withdrawal possible, the physician is well-advised to fight for the license in Massachusetts, to avoid a denial reported in the National Practitioner Data Bank. The physician might have to go through an expensive adjudicatory hearing, wasting the Board’s resources also, to fight for a license he or she no longer wants.

There are circumstances where there are many months of delays in the licensing process, while the physician legitimately disputes the Board’s grounds for denial. During that time, the job or fellowship, that attracted the physician to Massachusetts in the first place, is withdrawn. Since the Board refuses to allow withdrawal of the application, the physician is forced to pay attorneys to fight for a license that the physician doesn’t even need, and at the same time this could all be about real or supposed negative information which is readily available to any other state Board to obtain and assess.

A few years ago, one of the signators below represented a physician who received a preliminary denial because she had repeated a year of residency. The repeat-year was reported in her ACGME record and by the FCVS. While the Board was considering her application, she was licensed in another state and found a job. Both the other state and the new employer of course knew of the repeat year. She asked to withdraw her Massachusetts license application, and was refused. She could not afford a hearing and had to take the MA license denial, which was duly reported to the NPDB. The employer saw the NPDB report, was spooked and withdrew the job offer. Since then, the NPDB report of the denied license application has been like a constant wrecking ball to her career.

The Board can meet all of its “transparency” concerns, fully protect the public, and fulfill any obligations to other state Boards, without imposing unjustified hardships on physicians, as well as wasting both its and physicians resources.

**6. 7-Year Rule for Completion of Examinations.**

The Board proposes setting a concrete prohibition so that it can no longer waive the rule after 4 attempts. Nonetheless, there are doctors with language issues, extreme personal circumstances (military service, accidents, sickness), program directors who were inflexible about letting them have time to study, etc., that may result in passing on the 5th attempt. The Board offers no rationale for this amendment. If a disabled veteran offers a disability-related reason for failure to comply with the 7-year rule, surely the Board will at that point regret that it gave up its discretion to grant a waiver. The Board can follow a policy of being stricter in granting waivers and fully retain its ability to fully protect the public.

**7. 243 CMR 2.04(2), New requirement that the Board retain all original documents.**

It can be unfairly strict to prohibit return of original documents, after the Board examines the originals and retains an identical copy. There are refugee doctors who fled oppressive regimes, and all they have is the original document. They cannot obtain “a certified copy from the primary source.” Such doctors should be permitted to bring in the original, have the Board examine it, subject the original to every forensic type of examination that the Board desires, and have the Board retain a certified copy.

**8. 242 CMR 2.07(23), Reporting impaired physicians.**

We are in complete agreement with PHS’s response to this major change. We note that there is no proper notice of this change in the Notice of Public Hearing. The “impairment in the workplace” addition will consume the rule’s supposed exception for reporting. Anyone suspected of workplace impairment is sent directly to the BORIM, not PHS. We will face a return to 1985: elevating punishment of impairment first and foremost, which we learned long ago drives problems deeper underground and has an effect opposite to protecting the public.

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Thank you for this opportunity to comment on the proposed regulations.

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