COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

January 9, 2018

Suffolk, ss.

Docket No. RM-17-840

BOARD OF REGISTRATION IN MEDICINE, Petitioner

v.

CHRISTOPHER D. OWENS, M.D., Respondent

ORDER OF DEFAULT
RECOMMENDED DECISION

Appearance for the Petitioner

Lisa L. Fuccione, Esq.
Complaint Counsel
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

(No appearance; no current address supplied;
no known viable address)

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

The Massachusetts Board of Registration in Medicine issued a statement of allegations alleging misconduct by a physician, including fraudulent prescribing, and an order to the physician to show cause why he should not be disciplined for this misconduct, and transferred the matter to DALA for recommended findings of fact and conclusions of law. The physician did not file an answer, and mailings by the Board and DALA to him at his last known addresses were returned without a forwarding address. Upon the Board's motion for an accelerated disposition based upon the physician's default:

(1) A default decision is granted pursuant to 801 C.M.R. § 1.01(7)(a)1 as not inconsistent with the Standard Adjudicatory Rules of Practice and Procedure or with law, but not pursuant to the standard rules governing dismissal, 801 C.M.R. § 1.01(7)(g), or summary decision, 801 C.M.R. § 1.01(7)(h), as neither rule provides for a default order specifically based upon the circumstances presented here; and

(2) It is recommended that the Board make final the default decision and its allegations against the physician without further notice to him, in view of the returned mailings to him by the Board and DALA, his failure to furnish a current address or otherwise make it possible to give him notice of this proceeding, the Board's unsuccessful attempt to give the physician notice of its allegations via his criminal defense counsel in California, and the futility of attempting further notice to the physician before granting the Board's motion.

Introduction

At issue is whether this physician discipline proceeding brought by the Massachusetts Board of Registration in Medicine should now terminate with a default decision in the Board's favor. I conclude that it should, without further attempts at giving notice to the physician, in view of returned, undeliverable mailings to him by both the Board and the Division of Administrative Law Appeals regarding this proceeding and the allegations of misconduct against him, and in the absence of any address at which he can be contacted by this forum successfully. For the reasons stated below, I recommend that the Board issue a decision making final the default decision and the allegations of misconduct against the physician and proceed to determine what discipline is

appropriate.

Background

Respondent Dr. Christopher D. Owens is a 1998 graduate of the Indiana University School of Medicine and is board-certified in general and vascular surgery. He was licensed to practice medicine in California until July 21, 2017, when the California Medical Board revoked his license. Dr. Owens was also licensed to practice medicine in Massachusetts in June 2003; that license lapsed on July 11, 2016. (*See* Bd. of Registration in Medicine Statement of Allegations, Sept. 14, 2017, at 1-2, paras. 1-3.)

On September 14, 2017, the Massachusetts Board of Registration in Medicine ("the Board") issued a Statement of Allegations, and an order directing Dr. Owens to show cause why it should not discipline him for the misconduct the Board alleged in the Statement. The alleged misconduct included:

> (1) "[P]rescribing controlled substance to non-patients who [Dr. Owens] knew suffered from a substance abuse disorder," and for engaging in "fraudulent prescribing," the grounds on which the California Medical Board revoked his license to practice medicine in that state on July 21, 2017; and, in doing so
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> (2) "[E]ngaging in dishonesty, fraud or deceit which is reasonably related to the practice of medicine," in violation of M.G.L. c. 112, § 61(5), by "[p]racticing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud, in violation of 243 C.M.R. § 1.03(5)(a)10, for "[m]isconduct in the practice of medicine," in violation of 243 C.M.R. § 1.03(5)(a)(18), and, as well, for engaging in "conduct that undermines the public confidence in the integrity of the medical profession," *citing Raymond v. Bd. of Registration in Medicine*, 387 Mass. 708, 443 N.E.2d 391 (1982), and *Levy v. Bd. of Registration*, 378 Mass. 519, 392 N.E.2d 1036 (1979).

(Statement of Allegations at 2-3, para. 5.)

On the same day, the Board referred its Statement of Allegations and Order to the Division of Administrative Law Appeals (DALA) for recommended findings of fact and conclusions of law, which commenced this proceeding. Dr. Owens was required to file an answer to the Board's allegations within 21 days of receiving notice of the adjudicatory proceeding. *See* 801 C.M.R. § 1.01(6)(d)2. He has filed no answer thus far.

DALA scheduled a prehearing conference for November 14, 2017 and mailed notice of the conference to Dr. Owens and to the Board on October 11, 2017. The mailing to Dr. Owens was addressed to him at the San Francisco Veterans' Affairs Medical Center at 4150 Clement St. 112 G, San Francisco, CA 94121, the address to which the Board mailed had mailed its Statement of Allegations and order to show cause, and the only address then shown by the record.

DALA's mailing to Dr. Owens appears to have reached the San Francisco VA Medical Center. At that point, apparently, a label was placed on DALA's mailing envelope so as to obscure the Medical Center address, leaving only Dr. Owens as the named addressee. The envelope was also marked in handwriting "Please forward, Christopher Owens, M.D., P.O. Box 3042052, Muncie, IN 47307." The United States Postal Service (USPS) attempted to deliver DALA's mailing to the Muncie, Indiana address, but was unable to do so, and it returned the mailing to DALA. The USPS label affixed to the envelope, dated October 31, 2017, stated: "RETURN TO SENDER TEMPORARILY AWAY UNABLE TO FORWARD." DALA received the returned envelope on or about November 7, 2017.

It was unclear why the mailing could not be delivered to Dr. Owens at the San Francisco VA Medical Center. One possibility was that the physician's employment there had been terminated

following his arrest by the University of California, San Francisco police in November 2016 for prescribing a controlled substance to his girlfriend, who had expired afterward.[1] It was not clear whether Dr. Owens remained incarcerated and, if so, whether he could receive mail where he was being held. If he was no longer incarcerated, it was also unclear whether he had returned to Indiana and was again receiving mail at the Muncie address (the USPS label listed his status there as "temporarily away" for mail forwarding purposes). If that were the case, a further attempt at sending notice to Dr. Owens at the Muncie, Indiana address might not be futile.

Taking all of this into account, I issued an order on October 9, 2017 cancelling the prehearing conference and directing the Board to supply by December 8, 2017 whatever information it had, or could find with reasonable effort, regarding Dr. Owens's current or last-known address. The order

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[1]/ *See "*SF surgeon jailed, accused of unlawful prescriptions*," http://www.ktvu.com/news/ sf-surgeon-jailed-accused-of-selling-narcotics-to-patients*, posted Nov. 4, 2016, updated Nov. 7, 2016. As far as I can tell, Dr. Owens was not charged by the State of California; however, the San Francisco VA Medical Center appears to have placed him on leave in June 2016 and, by late October or early November 2016, terminated Dr. Owens's privileges at the facility and fired him from its faculty. *See* "UCSF surgeon faces 99 felony counts in drug case," *http://www.kcra.com/article/ucsf-surgeon-faces-99-felony-counts-in-drug-case/8254977* . Apparently, as well, Dr. Owens was indicted on federal charges of prescribing opioids unlawfully, and he pled not guilty to those charges on July 31, 2017. *See* "Former UCSF surgeon pleads not guilty in deadly oxycodone case," posted and updated Jul. 31, 2017, http://www.ktvu.com/news/former-ucsf-surgeon-pleads-not-guilty-in-deadly-oxycodone-case .

These internet postings by the San Francisco news station are not reliable evidence on which I could find that Dr. Owens was, in fact, arrested or, if so, on what charges, or, subsequently, whether he was charged by state or federal authorities, or whether he was tried and convicted. I had (and still have) no reliable information regarding any of this. The information provided by the internet postings is material only to the extent they suggest that further mailings to Dr. Owens at the San Francisco VA Medical Center would be futile. The non-delivery of mailings to Dr. Owens at that address, and their attempted forwarding to the Muncie, Indiana address, confirm that further attempted mailings to Dr. Owens at the San Francisco VA Medical Center address would be futile. The futility of further mailings to the Muncie, Indiana address was not clear in early October 2017, but has since become evident as a result of DALA's subsequent mailing to that address (*see* below at 6).

also allowed the Board to file, by that date, a motion and memorandum regarding the address(es) to which notice to Dr. Owens of a rescheduled prehearing conference should be mailed. Because the record lacked any other mailing address for Dr. Owens, the order stated that it was being mailed to him at the San Francisco VA Medical Center and at the Muncie, Indiana address, and that this would be sufficient notice of the order and the prehearing conference cancellation.

DALA's mailing of the October 9, 2017 order to Dr. Owens at the San Francisco VA Medical Center was forwarded by the United States Postal Service to a post office box number in Muncie, Indiana. On January 2, 2018, the Postal Service returned the forwarded mailing to DALA with a label, dated December 22, 2017, that read: "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER."

On December 4, 2017, the Board filed a motion for "entry of default judgment and summary decision" against Dr. Owens. The motion included the affidavit of Board Investigator Robert Bouton, sworn-to December 4, 2017, which described his efforts to find other addresses for Dr. Owens, all without success.

In early June, 2017, Inspector Bouton mailed a Board notice to Dr. Owens at a residential address in San Francisco, but the mailing was returned to the Board as undeliverable. (Bouton Aff. at 1-2, para. 3.) He also learned that Dr. Owens had not updated his contact information with the California Medical Board, which had revoked his license to practice medicine in that state on other grounds. The only contact information the California Medical Board had for Dr. Owens was the San Francisco VA Medical Center address to which both the Massachusetts Board of Registration in Medicine and DALA had sent mailings to the physician, without success. (*Id*. at 2, para. 4.) The

California Medical Board's license revocation order had listed another Indiana mailing address at which it stated that Dr. Owens might be reached (in Indianapolis), but Inspector Bouton's mailings to that address were returned as undeliverable. (*Id*. at 2, paras. 5-6.) The federal courts' PACER system confirmed, on December 4, 2017, that Dr. Owens's federal criminal case (*see* n.1, above) was still pending. However, according to both PACER and the United States Bureau of Prison's publicly-accessible inmate database, which Inspector Bouton queried on December 1, 2017, Dr. Owens was not being held in federal custody at that time. (*Id*. at 2, para. 11, and at 3, para. 14.) On December 1, 2017, Inspector Bouton contacted the American Board of Surgery database, but it listed no contact information for Dr. Owens. (*Id*. at 2, para. 12.) He was unable to obtain contact information for Dr. Owens from the Indiana School of Medicine's alumni database; the database was not publicly accessible, however. (*Id*. at 3, para. 13.)

To these efforts the Board added one other; it located an address for Dr. Owens's criminal defense attorney in San Francisco via the PACER system, and it mailed a copy of its motion for entry of default and summary decision to Dr. Owens "care of his criminal attorney." (Motion at 3, first para.) Per the certificate of service accompanying the Board's motion, the date of that mailing was December 4, 2017. DALA has since received no filing by or on behalf of Dr. Owens. It is unclear whether that was because the Board's December 4, 2017 mailing did not reach Dr. Owens or his criminal defense counsel, or because counsel and/or Dr. Owens chose not to respond to the mailing.

Discussion

1. A default decision against the respondent cannot be granted here under the Standard Rules governing dismissal and summary decision

The Board seeks an accelerated disposition of this proceeding in its favor (meaning a disposition that does not require adjudication via a hearing) based upon Dr. Owens's conduct, which strongly suggests that he does not intend to defend against the Board's statement of allegations or do anything to facilitate their adjudication. The Board describes the outcome it seeks as the "entry of a default judgment and summary decision" in its favor. The Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01 *et seq*. (the Standard Rules) that govern proceedings such as this one[2] do not provide for a "default judgment" specifically, but provide several potential paths to this result— summary decision, 801 C.M.R. § 1.01(7)(h), which the Board proposes; dismissal for "failure to prosecute or defend," 801 C.M.R. § 1.01(7)g)(2); and, if neither of these rules applies, 801 C.M.R. § 1.01(7)(a)1, which allows the Administrative Magistrate to "issue any order or take any action not inconsistent with law" or with the Standard Rules.

Prior DALA decisions have granted an order of default in the Board's favor based upon the respondent physician's failure to answer or participate diligently in a proceeding such as this one, but, as best as I can determine, they have done so without identifying under which of the Standard Rules the default order was granted. *See, e.g.*, *Bd. of Registration in Medicine v. Downey*, Docket

[2]/ The Board's regulations governing physician discipline proceedings provide that following its issuance of a Statement of Allegations against a physician, it shall conduct all hearings in accordance with the Standard Rules. *See* 243 C.M.R. § 1.04.

No. RM-17-003, Order of Default Recommended Decision (Mass. Div. of Admin. Law App., Apr. 5, 2017)(physician against whom Board issued statement of allegations found to be default, and decision recommending that the Board proceed against her as proposed and discipline her as it sees fit, after physician failed to respond to the statement of allegations or to an order to show cause that the DALA Administrative Magistrate issued to her); *Bd. of Registration in Medicine v. Provow*, Docket No. RM-13-510, Order of Default Recommended Decision (Mass. Div. of Admin. Law App., Aug. 22, 2016)(recommending entry of default and "judgment" against respondent physician "as permitted by [M].G.L. c. 30A, § 10(2)," because, following a reported settlement on the day of the scheduled hearing, the physician did not file status reports as ordered by the Administrative Magistrate, and made it difficult for the Board and DALA to contact her regarding further proceedings such as telephone status conferences, among other things by directing further communications to her via an attorney who did not file an appearance or contact the Board's complaint counsel, and otherwise only showed up, appeared or responded at the last moment prior to the entry of a default that would resolve the matter).

To resolve which of the Standard Rules applies, I begin with a brief look at the civil practice approach to accelerated disposition where the defendant defaults or engages in conduct suggesting intent to default.

The rules governing civil actions in state and federal courts provide, typically, for default judgments where a defendant does not appear, does not answer the complaint or the claims asserted against him, or does either of these things but then fails to comply with deadlines or filing requirements, does not appear for scheduled conferences or for trial, or otherwise ceases to

participate in the process. Typically as well, civil practice rules that provide for default judgments do so specifically in a rule separate from those governing dismissal and summary judgment. *See, e.g.*, Mass. R. Civ. P. Rule 55 (Default) and Fed. R. Civ. P. Rule 55 (Default; Default Judgment) (both: court clerk "shall" (Massachusetts) or "must" (Federal) enter default "where party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ."); as to state court practice rules that do not command the court clerk to enter a default in such circumstances, but allow the non-defaulting party to move the court for a discretionary entry of a default judgment, *see, e.g.*, New York Civ. Prac. Laws and Rules, CPLR 3215(a) (party may apply to court for default judgment"[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed . . . .").

The grounds for default judgments made available by procedural rules governing court actions involve conduct on the defending party's part. These differ markedly from the grounds for dismissal under both Massachusetts and Federal R. Civ. P. Rule 12(b) (lack of jurisdiction, improper venue, insufficiency of process or service, failure to state a claim upon which relief can be granted, and failure to join a party) or the grounds for summary decision under both Federal and Massachusetts Rule 56—the absence of a genuine dispute as to any material fact, and the moving party's entitlement to judgment as a matter of law. *See* Mass. R. Civ. P. Rule 56(c); Fed. R. Civ. P. Rule 56(a).

With the civil practice rules approach in mind, I return to default orders against the respondent in proceedings governed by the Standard Rules, as this one is.

Provow, one of the two more recent DALA decisions cited above that granted a default order against a physician without referencing the Standard Rules; instead, it recommended that the Board "affirm the entry of default and that judgment be entered against the Respondent [physician] as permitted by M.G.L. c. 30A, § 10." That statute allows an agency conducting an adjudicatory proceeding to "make informal disposition" of the proceeding by "default," among other things.[3] The preceding section, M.G.L. c. 30A, § 9, requires that adjudicatory proceedings be conducted according to the standard rules or approved substitute rules of procedure. Reading the two sections together, section 10 unquestionably contemplates the disposition of an adjudicatory proceeding based upon a party's default, but, per section 9, any such default must be granted under the applicable procedural rules. Section 10, in other words, authorizes (more accurately, directs) the procedural rules to make this type of disposition available, but the applicable procedural rules govern how and when a proceeding may be resolved based upon a default. In the context of the Standard Rules governing proceedings such as this one, then, M.G.L. c. 30A, § 10 is part of the "law" with which a default allowed under the Standard Rules must harmonize.

The question I need to answer here is under which of the Standard Rules the Board's motion

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[3]/ M.G.L. c. 30A, § 10 provides in pertinent part that:

> In conducting adjudicatory proceedings . . . agencies shall afford all parties an opportunity for full and fair hearing. Unless otherwise provided by any law, agencies may (1) place on any party the responsibility of requesting a hearing if the agency notifies him in writing of his right to a hearing and of his responsibility to request the hearing; (2) make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement, consent order *or default*; (3) limit the issues to be heard or vary the procedures prescribed by section eleven, if the parties agree to such limitation or variation; and (4) allow any person showing that he may be substantially and specifically affected by the proceeding to intervene . . . . (emphasis added).

may be allowed on account of the respondent's default or default-suggesting conduct or inaction. In resolving the question, I identify, first, two of the standard rules, one governing dismissal on specified grounds, and the other governing summary decision, that do *not* make this type of accelerated disposition available here.

801 C.M.R. § 1.01(7)(g) makes dismissal available on several grounds. I address these next, and identify why none of them applies.

(1) *Dismissal for failure to sustain a direct case*. When the petitioner completes the presentation of his evidence, the respondent may move to dismiss the appeal based upon the petitioner's failure to establish his case (for a directed decision in the respondent's favor, in other words). *See* 801 C.M.R. §.01(7)(g)1). The rule's plain language makes this type of dismissal, when sought under Rule 7(g)1, a remedy available to the respondent only.[4] In this proceeding, the respondent is the physician, who has not appeared, let alone challenged the Board's case against him. The Board, which is the petitioner, cannot seek a decision in its favor based upon Rule 7(g)1, therefore, and even if it could do so, the proceeding has not progressed to the point at which either party has presented its direct case.

(2) *Dismissal for lack of prosecution.* 801 C.M.R. § 1.01(7)(g)2 provides that if a party fails to file documents required by statute or by the Standard Rules, respond to notices or correspondence, comply with the Administrative Magistrate's orders, "or otherwise indicates an intention not to continue with the prosecution of a claim," a party may request by motion, or the Administrative

[4]/ If a party other than the respondent were to move for a directed decision, the motion would need to be filed and decided under 801 C.M.R. § 1.01(7)(a)1 as one "not inconsistent" with applicable law and the Standard Rules.

Magistrate may issue on his or her own initiative, an order to show cause why *the claim* shall not be dismissed for lack of prosecution. If the party facing dismissal does not respond to the order to show cause within ten days, the Administrative Magistrate may "dismiss the *case*." (Emphases added.) Rule 7(g)2's title (Failure to Prosecute or Defend") suggests that the rule makes dismissal available based upon a party's failure to defend against a claim, but in this respect the title appears broader in scope than the rule's own language. The rule provides a narrower remedy (dismissal of the case, which would benefit the respondent against whom a proceeding such as this one is brought) for failure to prosecute a claim, which is the obligation of the petitioner (here, the Board), or of a party asserting a cross-claim if there is one to assert (something that has not occurred here, as Dr. Owens has filed no answer).

Without question, Dr. Owens did not file an answer to the Board's statement of allegations within the 21-day period for doing so, as 801 C.M.R. § 1.01(6)(d)1) required him to do. He has also not responded to notices or correspondence sent to him by DALA or by the Board. However, I need not decide whether this type of conduct on the respondent's part supports the issuance of a default order under Rule 7(g)2, for a practical reason. Through no fault of the Board or DALA, the record shows no current address at which Dr. Owens would receive the order to show cause required by the rule or, thus, at which he would receive notice giving him an opportunity to be heard before this proceeding is resolved in the Board's favor by default. If Rule 7(g)2 provided the sole path to a resolution, this proceeding's adjudication would be frustrated for an indeterminate time so long as Dr. Owens declined to supply the Board or DALA with a viable mailing address. The Standard Rules make no provision for any such adjudicatory oblivion, least of all when it would give a

respondent power to halt a proceeding simply by withholding contact information. Because the Standard Rules direct, instead, that they be "construed to secure a just and speedy disposition of every proceeding," *see* 801 C.M.R. § 1.01(2)(b), I decline reliance upon Rule 7(g)2 in view of the quandary its application would bring about here, and continue searching for another provision of the Standard Rules allowing the "just and speedy disposition" that both the rules and M.G.L. c. 30A, § 10 contemplate.

(3) *Dismissal "for Other Good Cause*." 801 C.M.R. § 1.01(7)(g)3 identifies these grounds as "lack of jurisdiction to decide the matter," "failure of the [p]etitioner to state a claim upon which relief can be granted," and "the pendency of a prior, related action in any tribunal that should be first decided." The Board asserts none of these as a ground for the accelerated disposition it seeks here, and none of the dismissal "for other good cause" grounds applies.

Turning next to summary decision, 801 C.M.R. § 1.01(7)(h) makes this type of accelerated disposition available where "there is no genuine issue of fact relating to all or part of a claim or defense" and the moving party "is entitled to prevail as a matter of law." A motion for summary decision prompts a search of the record for a genuine, material factual issue, *see Castellani v. Fair Labor Div.*, Docket No. LB-10-533, Partial Summary Decision at 12 (Mass. Div. of Admin. Law App., Aug. 12, 2013) and, if one is found and cannot be decided strictly as a matter of law, DALA must hold a factfinding hearing related to that claim. *See* 801 C.M.R. §1.01(7)(h), last sentence.

The Board reasons that Dr. Owens's failure to answer or respond to orders or correspondence reveals that its allegations against him are not genuinely disputed, and that summary decision is, therefore, an appropriate basis for an accelerated disposition in its favor. However, the basis for that

disposition is not the absence of a genuine or material factual dispute regarding the Board' allegations, which is speculative absent any answer or motion to dismiss the Board's claims in lieu of one. The basis for the disposition the Board seeks is, instead, a combination of conduct and inaction on Dr. Owens's part that suggests intent to default, but does not fall clearly within any of the specific dismissal grounds listed by Rule 7(g).[5]

2. A default decision may be, and is, granted against the respondent pursuant to 801 C.M.R. § 1.01(7)(a)1 as "not inconsistent with law" or the Standard Rules

There is, nonetheless, a remedy under the Standard Rules. 801 C.M.R. § 1.01(7)(a)1 provides that "[a]n Agency or Party may by motion request the Presiding Officer to issue any order or take any action not inconsistent with law or 801 CMR 1.00." This rule does not specify a decision by default as a ground for accelerated disposition by dismissal or summary decision, but that does not preclude the issuance of a default decision under Rule 7(a)1.

In fact, a default decision in the Board's favor based upon Dr. Owens's conduct or inaction is both an available and appropriate disposition under the rule.

First, this type of accelerated disposition is "not inconsistent" with the Standard Rules. Although the Standard Rules do not provide for dismissal or summary decision based upon a

[5]/ Summary decision might be plausible if the physician's failure to answer were treated as his admission of the allegations asserted against him, and the admission was considered, in turn, to show the absence of any genuine or material factual dispute. However, this would shift the emphasis here from default based upon the respondent's failure to supply any address at which he can receive notice effectively (and its potential for stalling adjudication indeterminately) to a search for a factual dispute. That would not resolve the adjudicatory problem the respondent's conduct or inaction poses. These potential problems are readily avoided here, because resort to summary decision under Rule 7(h) is unnecessary. As I conclude below, a default order is available under another subsection of the Standard Rules.

respondent's default, neither the dismissal rule (801 C.M.R. § 1.01(7)(g)), nor the summary decision rule (801 C.M.R. § 1.01(7)(h)),precludes a default-based decision, and neither does any other section of the Standard Rules.

Second, a default decision based upon Dr. Owens's failure to answer the Board's statement of allegations, and his failure to provide or maintain an address at which he can receive filings, orders or notices, would be consistent with the directive of 801 C.M.R. § 1.01(2)(b) that the Standard Rules be "construed to secure a just and speedy determination of every proceeding."

Although the Standard Rules do not define "just determination," a "just determination" is likely one that meets the statutory requirements for adjudicatory hearings set forth at M.G.L. c. 30A, § 11, including the requirement that the agency conducting the hearing give the parties "[r]easonable notice" that is sufficient "to afford them reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). More specifically, a "just determination" is likely one in which DALA gives a party the notice that the Standard Rules require. 801 C.M.R. § 1.01(4)(c) requires that DALA give "[n]otice of actions and other communications" by hand-delivery or regular mailing. As a matter of practice, DALA obtains the addresses to which it delivers or mails its notices, orders, decisions or other communications from a party's filings (including the envelope in which a party's filing is received), from a written appearance that a party may file at a prehearing conference, or from the notice of appearance filed by a party's authorized representative if it has one (*see* 801 C.M.R. § 1.01(3)(b)).

From a practical perspective, DALA can give no better notice than the address furnished by a party or its authorized representative, or otherwise shown by the record, allows. The Standard

Rules impose no obligation on DALA to search for a party's address if it has filed none, or if a party's address shown by the record proves to be non-viable, as occurred here when the United States Postal Service returned DALA's mailings to Dr. Owens as nondeliverable and non-forwardable.

Under the circumstances presented, DALA has given Dr. Owens the notice of this proceeding that M.G.L. c. 30A, § 11(1)requires and in the manner that 801 C.M.R. § 1.01(4)(c) directs. That notice was commensurate with both the address information that the Board supplied DALA as a result of a reasonably diligent search, and the mailing address information that Dr. Owens supplied—none to DALA, and no-longer-viable addresses to the Board. As did the Board, DALA made several efforts to mail notice of this proceeding to Dr. Owens at his last known addresses, all without success. The United States Postal Service returned DALA's mailings to Dr. Owens as undeliverable, and its latest return-to-sender label stated that Dr. Owens left no forwarding address.

There is no evidence that another address for Dr. Owens could be found with reasonable effort even if the Standard Rules imposed this obligation on DALA, which it does not do. My October 9, 2017 order directed the Board to supply whatever address information for Dr. Owens it had or could find with reasonable effort. The Board was unable to find any. Dr. Owens has failed to notify either the Massachusetts Board of Registration in Medicine or the California Medical Board that his mailing address changed, and he has furnished neither board with a current mailing address. The Board made a reasonable effort to attempt notification of this proceeding to Dr. Owens via his criminal defense counsel in California, but there was no response. Responding was likely beyond the scope of California defense counsel's engagement. It is possible, of course, that counsel notified Dr. Owens of the Board's attempt to communicate, and counsel and client elected not to respond.

Whatever the underlying reason was, the effect of not responding was to underscore that Dr. Owens could not be given notice of this proceeding through California defense counsel. The Board Investigator found no other current, address for Dr. Owens despite diligent efforts that included unsuccessful attempts to query the California Medical Board, the physician's medical school alumni association database, and the board that had previously certified Dr. Owens in general and vascular surgery.

In these circumstances, it would be futile to defer the outcome the Board seeks in order to attempt giving Dr. Owens notice of this proceeding yet one more time, for example by mailing to him an order to show cause why a default decision should not be issued in the Board's favor. In view of the returned mail history here, mailing further notice to Dr. Owens's last known addresses of record (the San Francisco VA Medical Center, and the Muncie, Indiana post office box number) would assure only that the additional notice would take "a round trip tour through the United States mail," and that Dr. Owens's failure to supply a current mailing address and allow DALA (or the Board) to communicate the status of this proceeding to him would continue to frustrate the "just and speedy determination" of this proceeding. *See Carey v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988) (similar conclusion reached in affirming, under local federal court rules, the District Court's dismissal of a plaintiff's action for lack of prosecution without further notice, following the return of court mailings to the plaintiff at the correctional facility where he was incarcerated (the address he listed in his civil rights complaint) as undeliverable, and the plaintiff's failure to apprise the court of any address changes).

Third, a default decision would be consistent with M.G.L. c. 30A, § 10's intent that

accelerated dispositions based upon factors such as default be available under the Standard Rules or other applicable procedural rules, although the statute does not state how this is to be done. The Standard Rules do so via Rule 7(a)1, which allows an Administrative Magistrate to allow "any" order or action sought by motion that is "not inconsistent with 801 C.M.R. § 1.00 or the law." Previous DALA decisions granting default decisions, including *Provow*, recognize the availability of this type of accelerated disposition based upon the respondent's conduct or inaction. Allowing the Board's motion for a default decision pursuant to Rule 7)(a)1 would be consistent with this caselaw, even though prior decisions did not identify 801 C.M.R. § 1.01(7)(a)1 specifically as the rule under which a default decision was granted.

Disposition

The Board's motion for the entry of a decision by default is granted, pursuant to 801 C.M.R. § 1.01(7)(a)1, for the reasons stated above. I recommend that the Board make final the default decision and its allegations of misconduct against Dr. Owens, and proceed to determine what discipline is appropriate.

In accordance with the provisions of 801 C.M.R. § 1.01(11)(c)(1), each of the parties has 30 days to file written objections to the Recommended Decision with the Board of Registration in Medicine.

In view of the returned mail history presented here, mailing a copy of this Recommended Decision to Dr. Owens at either of the last known addresses for him shown by the record (the San Francisco VA Medical Center and the Muncie, Indiana address) would be futile, and is being

omitted. Because Dr. Owens has not furnished DALA or the Board with a viable mailing address, I recommend that the Board maintain this Recommended Decision on file and, if it learns of a different address for Dr. Owens before or when it issues its final decision, that it mail to him at that address a copy of the Recommended Decision and/or a statement of its availability for review upon request to the Board.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: January 9, 2018