March 1, 2017

Board of Registration in Medicine

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| Re: | Comments to the Proposed Regulatory Amendments at 243 CMR 1.00 *et. seq.* |

Dear Members of the Board:

First, thank you for your service. Anyone who has appeared before this agency with any regularity is aware of the long hours each of you devote to the Board’s business, both at and between meetings. That uncompensated time away from your careers and your families is in the best tradition of public service, and must be commended.

Thank you, too, for the opportunity to comment on the proposed changes to the regulations that govern this Board’s fulfillment of its statutory authority. As attorneys who regularly appear before you on behalf of licensees facing investigation and possible discipline we will confine our comments to the regulations which appear at 243 CMR Section 1, which is entitled “Disciplinary Proceedings for Physicians.”

We begin with the Preamble to those regulations which appears at 243 CMR 1.01(1) and which establishes the process by which all investigations and prosecutions are conducted. As drafted by your forbearer members – and now re-proposed by you, without change – the governing procedure for all disciplinary investigations and prosecutions:

. . . is based on the principle of fundamental fairness to physicians and patients, and shall be construed to secure a speedy and just disposition.

*Id.* The Preamble establishes that your obligation is not just to the general public but also to the licensees who appear before you. As embodied in your own regulations, fundamental fairness demands that your investigations and prosecutions interfere no more than is absolutely necessary with the careers, the lives and the families of physicians you oversee. The Board also must aim toward “speedy” resolutions, as all delay can create substantial unwarranted burdens on those being investigated or prosecuted.

For the reasons that follow, we respectfully submit that some of the proposed amendments that are now before you are inconsistent with these overarching governing principles of the Board’s regulations, and we urge that you reconsider them. In addition, we have taken the liberty of proposing additional amendments to these regulations which we believe are necessary to ensure that all Board dispositions are, as required, both speedy and just.

1. **Definitions – Disciplinary Action**

The proposal to add “Remediation” to the definition of “Disciplinary Action” (at 243 CMR 1.01 (2)(c)15) would place the Board’s regulation in direct conflict with its enabling statute, and the proposed amendment would therefore be unenforceable as a matter of law.

G.L. c. 112 § 5, which defines the powers and duties of the Board, includes the following provision: “The Board shall offer a *remediation* program to physicians on a voluntary basis, *as an alternative to disciplinary* *action*.” (emphasis added). It is self-evident that a program of remediation cannot simultaneously be both a “disciplinary action” (as per the proposed regulations) and “an alternative to disciplinary action” (as per the Board’s enabling statute). The well settled Massachusetts law is that whenever there is such an irreconcilable conflict between a statute and a regulation, the regulation is invalid. *Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare*, 326 Mass. 560 (1991); *Greater Boston Real Estate Board v. Dep’t of Telecommunications and Energy*, 438 Mass. 197 (2002).

In addition to being invalid, we also respectfully suggest that the spirit of the proposed regulation is contrary to the fundamental fairness and just disposition requirements that guide all of your regulations. In effect, it would remove as a potential disposition, the very specific and non-disciplinary alternative that the legislature has directed you to have available in appropriate circumstances.

The removal of “Remediation” also makes sound policy sense. At times a situation may warrant some form of intervention without that leading to a permanent mark of “discipline” on a physician’s record. Allowing a zone of “remediation” that does not rise to the level of “discipline” is a safe harbor for both institutions and physicians to fairly and cooperatively address an issue before it escalates to a disciplinary matter.

1. **Grounds for Complaint**

The proposed amendment to 243 CMR 1.03(5)(a)3 presents an even more direct conflict with the Board’s enabling statute. In its current form, the regulation authorizes the Board to discipline a physician based on:

Conduct which places into question the physician’s competence to practice medicine, including but not limited to gross misconduct in the practice of medicine or of practicing medicine fraudulently, or beyond its authorized scope, or with gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions.

This current language tracks precisely the language of G.L. c. 112 § 5 which establishes the Board’s disciplinary authority. However, the proposed amendment would strike the reference to “gross negligence on a particular occasion or negligence on repeated occasions” and, instead, replace both with “or negligence”.

This proposed amendment would improperly enlarge the Board’s disciplinary authority beyond the more limiting language of the enabling statute. Thus, the proposed amendment is *ultra vires* the Board’s authority and it is therefore both invalid and unenforceable. *See, Greater Boston Real Estate Board*, supra at 198, In addition, this proposed amendment is entirely inconsistent with the terms of the public notice which brings us here today. This proposed amendment is not just an “update of terminology” and it is certainly not the removal of “outdated language”. To the contrary it is the removal of the statutorily prescribed language that establishes limits on the Board’s ability to act. The legislature has not empowered the Board to discipline a physician for a single act of negligence; instead, that legislative grant of authority requires negligence on repeated occasions. As a result, the proposal – if adopted – would impermissibly exceed the authority conferred on the Board by the legislature and therefore would be invalid as a matter of law.

Here again, it is also the better policy to keep the current language. Over the course of any physician’s career, it is almost inevitable that he or she will have a case that could – or even should – have been done better. However, as the legislature clearly recognized, an isolated incident of negligence should not serve as the basis for discipline.

1. **Access to Complaints by Physicians Under Investigation**

For those of us who appear before the Board with regularity we frequently hear references to “transparency”. Unfortunately, the efforts to achieve that transparency remain incomplete in a way that is both fundamentally *un*fair to the physicians who appear before you, and which impedes your ability to achieve a just result.

There have been many times when we have appeared with a physician before either the Complaint Committee or the full Board, only to be asked about a case, an event or a patient that we had never before been told was even an issue or a factor in the investigation. Those appearances (before the Complaint Committee or the Board) are generally the one and only opportunity that a physician has to address the Board members when they are considering whether to recommend or to bring career threatening charges against him or her. Fundamental fairness – and transparency – demand that the physician not be ambushed by those questions but, instead, be as prepared to answer those questions as the Board members were prepared to ask them. However, we are often unable to achieve that level of preparation because – despite our requests – we are routinely denied access to the complaint that initiated the investigation.

The Board’s denials of those requests not only offend the regulations’ guiding principle of fundamental fairness, they also violate the language of the Board’s own statute. G.L. c. 112 § 5 expressly provides that:

. . . nor shall the requirement that investigative records be kept confidential at any time apply to requests from the person under investigation . . .

In fact, as the Board should well know, both the SJC and the Secretary of State – in separate cases – have confirmed the Board’s obligation to honor such requests.

Accordingly, we propose that you rectify whatever confusion may exist within the Board’s various units concerning this obligation, by codifying that right of access in the Board’s regulations. Specifically, we propose that 243 CMR 1.02 (8) – which is entitled “Availability of Board Records to the Public” and which, in subsections (a) through (d), confirm the confidentiality of certain Board investigative and other records – be amended to add a subsection (e) to provide as follows:

(e) Notwithstanding any of the foregoing provisions regarding the confidentiality of Board records, the Board’s investigative records shall be made available within seven (7) calendar days upon the written request of any licensee under investigation by the Board.

1. **Time Standards**

The Board’s codified commitment to speedy and just dispositions should work to affirm the time-honored legal maxim that “justice delayed is justice denied.” Unfortunately, it does not. Delays in the course of the Board’s investigations, prosecutions and final decisions have become all too frequent. While we recognize that many of the matters that come before the Board are complex – often requiring expert analysis and testimony – we are also mindful that many of those same matters include Voluntary Agreements Not to Practice (VANP’s) and/or Summary Suspensions; both of which put careers, and the ability to earn a living on hold. In the past year we have seen a number of summary suspensions overturned, including one in which the physician endured an unwarranted suspension for over three years. We have seen a failed investigation and prosecution extend almost four years during which time the physician remained out of practice. Most recently, we have seen a Recommended Decision rendered by DALA five years after the close of the hearing, during which time the physician remained in a VANP. Justice delayed is justice denied.

We believe that the Board can and should correct at least some of these delays by prioritizing cases involving VANP’s and summary suspensions and imposing time standards on the investigation and prosecution of those cases. Indeed, the current regulations at 243 CMR 1.03 (12) have “Reserved” a section for “Classification of Complaints.” We therefore propose that section be unreserved and amended as follows; to establish priorities and time standards for cases involving summary suspensions and VANP’s:

(12.) Prioritization of Investigations and Dispositions

 (a) Cases involving Summary Suspensions. If a licensee has been summarily suspended, the Board must, in addition to providing a hearing on the necessity for the summary suspension within seven days, provide the licensee with a Final Decision and Order on the necessity for summary Suspension within ninety days of the hearing.

 (b) Cases involving Voluntary Agreements Not to Practice. If a licensee has entered into a VANP, the Board shall issue a Statement of Allegations or dismiss the complaint within sixty days, unless the Board and the licensee otherwise resolve the complaint by a Consent Order. Any time spent by a licensee seeking or obtaining medical evaluation or treatment shall be excluded from this sixty day computation. If the Board does issue a Statement of Allegations, the Board shall issue a Final Decision and Order within 120 days, or the VANP shall automatically dissolve.

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These proposed time standards are consistent with the Board’s obligation to provide speedy and just dispositions, without prejudicing the Board’s ability to fairly investigate and prosecute its cases. The proposed Summary Suspension time frame is founded on the requirement for a “prompt disposition” of the summary suspension of professional licenses imposed by the United States Supreme Court. *See Barry v. Bardin,* 443 U.S. 55 (1979). The proposed time standards for VANP’s derives from the practical reality that VANP’s are typically offered as an alternative to Summary Suspension. Since the Board must necessarily be prepared to issue a Statement of Allegations if it is prepared to initiate a Summary Suspension, the additional sixty days provides ample time for the Board to more deliberately complete its investigation while, at the same time, ensuring that the VANP does not morph into a *de facto* suspension. The proposed amendment also takes into account the fact that some VANP’s are intended to address issues of potential impairment, by excluding any time devoted to evaluation or treatment, from the sixty day limit.

Thank you again for this opportunity to comment on the Board’s proposed regulations.

Respectfully submitted,

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