APPENDIX

CLERK'S NOTICE	DOCKET NUMBER 1881CV03571	Trial Court of Massachusetts The Superior Court

CASE NAME:
Ramsaran, M.D., Eddison vs. Sloane,, M.D., Candace Lapidus et al

Michael A. Sullivan, Clerk of Court
Middlesex County

TO:
J Peter Kelley, Esq.
Bruce & Kelley, PC
20 Burlington Mall Rd Suite 225
Burlington, MA 01803

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

You are hereby notified that on 10/03/2019 the following entry was made on the above referenced docket:

Endorsement on Motion to dismiss the Amended Complaint (#10.0): ALLOWED
as I find that the Defendants are entitled to absolute immunity in the performance of their roles at the Board. I am not convinced that the Claims are barred by Claim preclusion or by qualified immunity. Final Judgment shall enter dismissing the Plaintiffs' Complaint. Dated: Oct.2, 2019 and notices mailed 10/3/19

Judge: Henry, Hon. Bruce R

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
10/03/2019	Hon. Bruce R Henry	(781)939-2781

JUDGMENT ON MOTION TO DISMISS 13

Trial Court of Massachusetts
The Superior Court

Michael A. Sullivan, Clerk of Court
Middlesex County

DOCKET NUMBER
1881CV03571

CASE NAME
Ramsaran, M.D., Eddison
vs.
Sloane,, M.D., Candace Lapidus et al

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Sloane,, M.D., Candace Lapidus
Carrozza, Jr., M.D., Joseph P.

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Ramsaran, M.D., Eddison

This action came on before the Court, Hon. Bruce R Henry, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),

It is **ORDERED AND ADJUDGED:**

That the Complaint be and hereby is DISMISSED with prejudice.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
10/03/2019	X Margaret Sullivan

Date/Time Printed: 10-03-2019 12:20:04

SCV083\ 03/2016

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1745

EDDISON RAMSARAN

vs.

CANDACE LAPIDUS SLOANE & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, a physician licensed in the Commonwealth of Massachusetts, brought this suit against Joseph P. Carrozza, Jr., M.D., a member of the Board of Registration in Medicine (board), and Candace Lapidus Sloane, M.D., the chair of the board. The first amended verified complaint included counts for tortious interference with advantageous relationships, malicious prosecution, and violations of 42 U.S.C. § 1983. The plaintiff alleged wrongdoing by defendant Carrozza, acquiesced to by defendant Sloane. The defendants filed a motion to dismiss, which was allowed by the motion judge on the ground of absolute immunity. The plaintiff has now appealed.

[1] Joseph P. Carrozza, Jr.

The plaintiff alleged that during board proceedings, defendant Carrozza acted as a "covert expert," bringing to bear his own expertise and "outside information which was not contained in the Board's investigatory files and which was not considered by the Board as a whole" in deciding as a member of the complaint committee (CC) that sufficient cause existed to issue a statement of allegations (SOA) against the plaintiff, proposing a consent order (CO) with onerous conditions in lieu of moving forward with the SOA, and ultimately recommending that the board issue an SOA when the plaintiff refused to agree to the CO. The plaintiff alleged that some or all of this was wrongful.

It is well established that when a member of the board acts in a prosecutorial or adjudicative capacity, he or she is absolutely immune from suit. See Bettencourt v. Board of Registration in Med., 904 F.2d 772, 782, 784 (1st Cir. 1990) (holding that board members acting in their "quasi-judicial" capacities enjoy absolute immunity and explaining that "the [Supreme] Court has recognized that there are some officials whose special functions require a full exemption from liability . . . . Such officials include . . . certain 'quasi-judicial' agency officials who, irrespective of their title, perform

functions essentially similar to those of judges or prosecutors" [quotation, citation, and emphasis omitted]).[2]

In evaluating the judge's ruling on the motion to dismiss, we take all the facts in the complaint and any reasonable inferences that may be drawn therefrom as true, viewing them in the light most favorable to the plaintiff. See Jacome v. Commonwealth, 56 Mass. App. Ct. 486, 487 (2002). The question before us is whether Carrozza was discharging a prosecutorial or adjudicative function when undertaking the allegedly wrongful acts.

The plaintiff alleged that an investigation of the plaintiff was undertaken by a board investigator between 2011 and 2014. Following the transmission to the CC of the evidence gathered by the investigator and the board expert's report containing recommended board actions, the complaint alleged that Carrozza used his "covert expertise" and information received outside of committee proceedings to propose a CO that exceeded

[2] In Bettencourt, 904 F.2d at 783-784 and n.13, the court also concluded that "enough checks on malicious action by Board members exist to warrant a grant of absolute immunity for the Board members' actions in their adjudicatory capacities," and that "[t]o the extent the claims relate to the Board members' roles as 'public' prosecutors, Werle v. Rhode Island Bar Ass'n, 755 F.2d 195, 198-99 (1st Cir. 1985), we agree with the district court that the Board members' actions were intimately connected with the advocacy phase of the judicial process. See id.; Horwitz v. Bd. of Med. Examiners of State of Colo., 822 F.2d 1508, 1515 (10th Cir.), cert. denied, 484 U.S. 964, 108 S. Ct. 453, 98 L.Ed.2d 394 (1987)." We agree with this analysis.

the recommendations made by the board's only recognized expert, and to recommend that the board issue an SOA that was unsupported by the findings of the board's investigation.

We conclude that all of the actions undertaken by Carrozza were undertaken in a prosecutorial, or quasi-judicial, capacity. Determining whether to bring a charge, and assessing and negotiating terms by which to settle a matter short of an adversarial proceeding, are all ordinary functions of a prosecutor within our legal system. The complaint alleged wrongdoing in the way in which Carrozza carried out these functions. We express no opinion about whether anything that Carrozza is alleged to have done would have been wrongful. But even if it were, the conduct alleged -- relying on his own expertise, making inquiry at a regulatorily authorized hearing of the plaintiff himself, obtaining information about the plaintiff from third parties following the completion of the investigator's investigation -- were all properly considered part of the exercise of Carrozza's prosecutorial function.

Consequently, we see no error in the motion judge's conclusion that the defendants are protected by absolute quasi-judicial immunity. See Johnson v. Board of Bar Overseers, 324 F. Supp. 2d 276, 287 (D. Mass. 2004) (holding that officials at Massachusetts Office of Bar Counsel and Massachusetts Board of Bar Overseers enjoyed absolute quasi-judicial immunity from

§ 1983 actions). See also LaLonde v. Eissner, 405 Mass. 207, 211-212 (1989) (holding that psychiatrist appointed by Probate Court to perform psychiatric evaluation enjoyed absolute quasi-judicial immunity from negligence action).[3]

Judgment affirmed.[4]

By the Court (Rubin, Neyman & Ditkoff, JJ.[5]),

Clerk

Entered: December 31, 2020.

[3] To the extent the judge relied on materials attached to the complaint, or materials of which he could properly take judicial notice, he was not required to convert the 12 (b) (6) motion into one for summary judgment. See Mass. R. Civ. P. 56, 365 Mass. 824 (1974). See also Reliance Ins. Co. v. Boston, 71 Mass. App. Ct. 550, 555 (2008) ("while the allegations of the complaint generally control in evaluating a motion under rule 12(b)(6), matters of public record . . . and exhibits attached to the complaint, also may be taken into account" [quotation and citation omitted]).

[4] Given the conclusion articulated in the text, we need not address the alternative grounds for affirmance urged by the defendants.

[5] The panelists are listed in order of seniority.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 19-P-1745

EDDISON RAMSARAN

vs.

CANDACE LAPIDUS SLOANE & another.

Pending in the Superior Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date December 31, 2020.

From: SJCCommClerk@sjc.state.ma.us
To: Alex Volpe
Subject: FAR-28053 - Notice: FAR denied
Date: Thursday, March 11, 2021 6:03:44 PM

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-28053

EDDISON RAMSARAN
vs.
CANDACE LAPIDUS SLOANE & another

Middlesex Superior Court No. 1881CV03571
A.C. No. 2019-P-1745

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on March 11, 2021, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: March 11, 2021

To: J. Peter Kelley, Esquire
Alexander Palmer Volpe, Esquire
Jesse Mohan Boodoo, A.A.G.

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

EDDISON RAMSARAN vs. CANDACE LAPIDUS SLOANE & another
FAR-28053

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CASE HEADER

Case Status	FAR denied
Status Date	03/11/2021
Nature	Tort: General
Entry Date	01/21/2021
Appeals Ct Number	2019-P-1745
Response Date	02/01/2021
Appellant	Plaintiff
Applicant	Plaintiff
Citation	487 Mass. 1102
Case Type	Civil
Full Ct Number	
TC Number	1881CV03571
Lower Court	Middlesex Superior Court
Lower Ct Judge	Bruce R. Henry, J.

INVOLVED PARTY

ATTORNEY APPEARANCE

Eddison Ramsaran

Plaintiff/Appellant
J. Peter Kelley, Esquire
Alexander Palmer Volpe, Esquire

Candace Lapidus Sloane
Defendant/Appellee
Jesse Mohan Boodoo, A.A.G.

Joseph P. Carrozza Jr.
Defendant/Appellee
Jesse Mohan Boodoo, A.A.G.

DOCKET ENTRIES

Entry Date	Paper	Entry Text
01/21/2021		Docket opened.
01/21/2021	#1	FAR APPLICATION filed for Eddison Ramsaran by Attorney J Peter Kelley, Alexander Palmer Volpe.
02/01/2021	#2	LETTER in Response filed for Candace Lapidus Sloane and Joseph P. Carrozza Jr. by Jesse Boodoo, A.A.G..
03/11/2021	#3	DENIAL of FAR application.

As of 03/19/2021 12:20pm

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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
1 Congress Street, 11th Floor
Boston, MA 02114
(617) 626-7200
Fax: (617) 626-7220

Board of Registration in Medicine,
Petitioner

Docket No: RM-15-672

v.

Eddison Ramsaran, M.D.
Respondent

Appearance for Petitioner:

Gloria Brooks, Esq.
Complaint Counsel
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

J. Peter Kelley, Esq.
Mary A. Azzarito, Esq.
Bruce & Kelley, P.C.
20 Mall Road, Suite 225
Burlington, MA 01803

Administrative Magistrate:

Edward B. McGrath, Esq.
Chief Administrative Magistrate

Summary of Recommended Decision

At the close of the Petitioner's case, I find that the Petitioner failed to meet its burden of proof because, based upon the Petitioner's expert's testimony and my observations of the expert witness testifying, I find that he did not know the applicable standard of care and I give his testimony no weight. I, therefore, ALLOW the Respondent's Motion to Dismiss at the close of the Petitioner's case and recommend that the Statement of Allegations be DISMISSED.

Recommended Decision

I. Procedural history

The Board of Registration in Medicine ("BORIM") served a Statement of Allegations on the Respondent and referred this matter to the Division of Administrative Law Appeals ("DALA") on December 18, 2015. The Statement of Allegations alleged that the Respondent's care of patients A to I failed to meet the Standard of Care and alleged that he failed to maintain proper medical records. On January 11, 2016, the Respondent filed his Response to the Statement of Allegations, denying the allegations contained in the Statement of Allegations.

On December 12, 2016, the Respondent moved for summary decision arguing that based upon the Petitioner's expert opinion disclosure the Petitioner was unable to meet its burden of proof as a matter of law. The Petitioner opposed the motion to dismiss. Confusion over the status of the Petitioner's expert disclosure and other discovery disputes delayed the matter. I denied the motion to dismiss, because I found that the expert disclosure met basic disclosure requirements. *See Kace v. Liang*, 472 Mass. 630, 632 (2015) (expert disclosure sufficient although not as clear or as complete as it could have been); *See Resendes v. Boston Edison Co.*, 38 Mass App. Ct. 344, 352, 648 N.E.2d 757, 763 (1995); *Beuapre v. Cliff Smith Associates,* 50 Mass. App. Ct. 480, 484-85, 738 N.E.2d 753, 761 (2000).[1]

The matter went to an evidentiary hearing, which began on September 25, 2018. The Petitioner called the Respondent and its expert witness to testify. The Petitioner introduced and I entered into evidence: medical records of Patients A to I (Ex. 1) and two reports drafted by the Petitioner's

[1] The Respondent raised and stated that he was ready to offer evidence as to unfair prejudice he alleges that he suffered because of late and incomplete expert witness disclosures and other discovery responses of the Petitioner. As a result of this decision, he did not have an opportunity to offer that evidence and I have not considered those issues in reaching this decision.

medical expert (Exs. 2 and 2A). I admitted a third report authored by the Petitioner's expert witness and offered by the Respondent (Ex. 2C).[2] I also admitted the Petitioner's medical expert's curriculum vitae (Ex. 3). The Petitioner rested its case on September 28, 2018.

Concerned that the Petitioner's expert testimony was insufficient on the issue of the applicable standard of care, I ordered an expedited copy of the transcript and gave the parties until the close of business on October 2, 2018 to brief the issue. The parties took advantage of that opportunity and the Respondent filed a motion to dismiss pursuant to 801 CMR 1.01 (7)(g)1 and the Petitioner filed an Opposition to that motion on October 2, 2018. The Petitioner asked for an additional week to respond further to the Motion to Dismiss and I granted that request. On October 9, 2018, the Petitioner filed its Opposition to the Respondent's Motion to Dismiss. On October 10, 2018, the Respondent filed a motion for leave to file a reply brief accompanied by the reply brief. I allowed that motion and the reply brief was filed. On October 17, 2018, the Petitioner filed its Opposition to the Respondent's Reply Brief.

II. Findings of fact

Based upon the evidence presented, including the witnesses' testimony, my assessment of their credibility, and reasonable inferences drawn from the evidence, I make the following findings of fact:

1. On direct examination, the Petitioner's attorney asked the Petitioner's expert to define the standard of care. The Petitioner's expert responded:

   > When you Google it there's many different definitions, but the standard of care, basically, is a consensus opinion among experts based on guidelines that have been agreed upon on how to best care for patients. And it's a consensus opinion of local experts as to what is the best treatment algorithm for patients.

[2] There is no Ex. 2B.

(Tr. v. II p. 24 ll. 6-12.)

2. Two days later, on redirect, the Petitioner's expert witness defined the standard of care as follows:

> It's the type and level of care that a reasonably competent, skilled, health care physician with a similar background in a community, a similar community would provide under those circumstances.

(Tr. v. IV p. 7 ll. 5-8.)

3. The Petitioner's expert reviewed Patients A to I's cases several times over the last seven years.

(Tr. v. III p. 9 ll. 16-19.)

4. He reviewed medical literature during that period and factored it into his opinion as to the standard of care.

(Tr. V. III p. 10 ll. 4-13 p. 14 ll. 1-4.)

5. The Petitioner's expert had all the materials he needed to reach his opinions in 2012 when he issued his first report.

(Tr. v. III p. 11 l. 21- p.12 l.1.)

6. The Petitioner's expert changed some of his opinions several times and as recently as two weeks before the hearing.

(Tr. v. III p. 14 ll. 4-11.)

7. In 2013, the Petitioner's expert opined that IVUS (intravascular ultrasound) was not indicated in Patient A's case, but in 2016 he opined that it was indicated.

(Tr. v. III p. 43 ll. 9-17.)

8. He testified at hearing on cross-examination that it was in the "grey area."

(Tr. v. III p. 43 l. 9-p. 44 l. 7.)

9. In 2013, the Petitioner's expert opined that a high risk PCI (percutaneous coronary intervention) could be entertained in Patient A's case, but he testified at the hearing it was below the standard of care to perform it. When confronted with his 2013 opinion, he testified: "I would not have done it. I would not have done it. It could be entertained. I would not have done it."

   (Tr. v. III p. 53 ll. 9-16.)

10. The Petitioner's expert's opinion concerning the use of a coronary stent in the common femoral artery in Patient B's case has changed.

    (Tr. v. III p. 57 ll. 13-20 and p. 58 ll. 13- p. 60 l. 12.)

11. The Petitioner's expert witness opined in his reports dated October 15, 2012, December 16, 2013 and September 19, 2016 that the PCI procedure performed on Patient I "was indicated."

    (Exs. 2 and 2A.)

12. In his report dated September 10, 2018, he opined that "The PCI procedure was not clearly indicated."

    (Ex. 2C.)

13. On direct examination, the Petitioner's expert witness testified that intervention was not necessary for Patient I.

    (Tr. v. II p. 175 ll. 6-14).

14. On cross-examination, the Petitioner's expert witness testified that the changes to his reports were not substantial and then admitted that changing his opinion as to whether a procedure was indicated or not indicated was substantial.

    (Tr. v. III p. 20 ll. 1-8.)

III. Analysis

Pursuant to G.L. c. 112, § 5, eighth para. (h) and 243 CMR 1.03(5)(a) 3, BORIM may discipline a physician upon proof satisfactory to a majority of the Board, that he engaged in conduct that places into question his competence to practice medicine, including, but not limited to gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions. *See Board of Registration in Medicine v. Ronald Nasif, M.D.*, RM-16-163 at *12 (Div. Adm. Law App. Dec., May 11, 2017).

Physicians must meet the standard of care, which is "the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession." *Brune v. Belinkoff*, 354 Mass. 102, 109, 235 N.E.2d 793, 798 (1968). The standard of care is the level of care and skill that physicians in the same specialty commonly possess. *Palandijan v. Foster*, 446 Mass. 100, 104-05, 842 N.E.2d 916, 920-21 (2006); *McCarthy v. Boston City Hospital*, 358 Mass. 639, 643, 266 N.E.2d 292, 295 (1971).

The Supreme Judicial Court has held that: "Due process rights are implicated in administrative proceedings that may affect the right to practice medicine." *Ingalls v. Board of Registration in Medicine*, 445 Mass. 291, 296, 837 N.E.2d 232, 236 (2005). The Legislature has mandated that DALA shall provide the forum for the impartial evidentiary hearings in which BORIM seeks to discipline physicians. Acts. 1989, c. 653, § 233. BORIM's regulations provide, "After the Board issues a Statement of Allegations, the Board shall conduct all hearings in accordance with 801 CMR 1.00: Standard Adjudicatory Rules of Practice and Procedure." 243 CMR 1.04. I note that "243 Code Mass. Regs. § 1.00 'is based on the principle of fundamental fairness to physicians and patients and shall be construed to secure a speedy and just disposition.'" *Arnoff v. Board of*

Registration In Medicine, 420 Mass. 830, 835, N.E.2d 594, 598 (1995).

One provision of the Standard Adjudicatory Rules of Practice and Procedure which governs the conduct of BORIM hearings at DALA is 801 CMR 1.01(7)(g)1. That regulation provides:

> Upon completion by the Petitioner of the presentation of his evidence, the Respondent may move to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his case. The Presiding Officer may act upon the dismissal motion when presented, or during a stay or continuance of proceedings, or may wait until the close of all the evidence.

Since the Petitioner in this case has the burden of proof, it had to establish, by a preponderance of the evidence, the standard of care and that the Respondent failed to meet that standard. *See Craven v. State Ethics Commission*, 390 Mass. 191, 200, 454 N.E.2d 471, 476 (1983) (preponderance of evidence is generally standard at administrative proceedings). In order to meet this burden, the Petitioner must produce sufficient evidence that "it is made to appear more likely or probable - in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal, notwithstanding any doubt that may linger there." *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, 250, 29 N.E.2d 825, 827 (1940). A fact is proved by a preponderance of the evidence if the tribunal has "a firm and abiding conviction in the truth of" the proposition advanced by the Petitioner. *Stepakoff v. Kantar*, 393 Mass. 836, 843, 473 N.E.2d 1131, 1136 (1985). It is well settled that to establish the standard of care and a deviation from it expert medical testimony is required. *Palandijan, supra* at 105-06, 842 N.E.2d at 921.

In a jury case, when deciding whether to let an offered expert witness testify, a judge has broad discretion but a "crucial issue is whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." *Letch v. Daniels*, 401 Mass. 65, 68, 514 N.E.2d 675, 677 (1987). The question whether the basis of the doctor's opinion is sound goes to the weight of the evidence, not its admissibility." *Baker v. Commercial Union Ins. Co.*, 382 Mass. 347,

351, 416 N.E.2d 187, 190 (1987). In the instant case, however, as the finder of fact, I have to decide how much weight to give the testimony of the Plaintiff's expert witness. *Western Massachusetts Lifecare Corp. v. Assessors of Springfield,* 434 Mass 96, 107-08, 747 N.E.2d 97, 106-07 (2001); *Simmons v. Monarch Mach. Tool Co.,* 413 Mass. 205, 213-14, 596 N.E.2d 318, 323 (1992); *see Anastasi v. Anastasi,* 79 Mass. App. Ct. 1101 at * 1 (Rule 1:28 Dec., Mar. 8, 2011) (fact finder decides weight and credibility of expert testimony); *45 Rice Street Realty Trust v. Board of Assessors City of Cambridge,* 2007 WL 4157669 * 21 (App. Tax Bd. Nov. 20, 2007) (analogizing 801 CMR 1.01(7)(g)1 to a motion for directed finding). "In granting a motion to dismiss at the close of evidence in a nonjury trial, a [finder of fact] is entitled to 'weigh the evidence and resolve all questions of credibility, ambiguity, and contradiction in reaching a decision.'" *Delano Growers' Coop. Winery v. Supreme Wine Co.,* 393 Mass. 666, 676, 473 N.E.2d 1066, 1073 (1985) *citing Ryan, Elliott & Co. v. Leggat, McCall & Werner, Inc.,* 8 Mass. App. Ct. 686, 689, 396 N.E.2d 1009 (1979). In this case, I will not give the Petitioner's expert testimony any weight.

In rejecting uncontradicted expert medical testimony, I provide explicit findings why I do so. *See Robinson v. Contributory Retirement Appeal Bd.,* 20 Mass. App. Ct. 634, 639, 482 N.E.2d 514, 518 (1985). Based upon the Petitioner's expert's testimony and my observations of him when he testified and was cross-examined, I find that the Petitioner's expert witness did not understand the standard of care. There is no dispute that the Petitioner's expert provided two definitions of the standard of care when he testified. (Findings 1 and 2); *see* Respondent's Opposition to the Respondent's Motion to Dismiss dated October 2, 2018 p. 2.

I am not persuaded by the Petitioner's arguments that its expert's opining as to two different standards of care should be ignored as a misstatement or because he had never testified as an expert before. I note that there was no testimony to explain the alleged misstatement. There is only

counsel's unsupported argument. I also note that the first time the expert testified as to the definition of standard of care he mentioned googling it. The Petitioner's expert had years to consider the definition of standard of care in this case. In fact, the quality of the expert's opinion was raised in a motion to dismiss. There is no excuse that justifies ignoring portions of the Petitioner's expert's testimony during the evidentiary hearing

There was other evidence that convinced me the Petitioner's expert witness did not understand the standard of care. The fact he wrote several different reports, based upon the same information but containing different opinions undercut his credibility. In addition, during cross-examination, when confronted with inconsistencies in his reports, he became defensive and appeared evasive. At one point, testifying that a procedure he had opined on direct examination fell below the standard of care "could be entertained. I would not have done it." (Finding # 8). At another point, he testified that changes of his opinion were not substantial, even though the changes included whether a procedure was indicated or not. (Finding # 13).

I am not persuaded by the Petitioner's argument that "the Petitioner, as the non-moving party, is entitled to have the magistrate view the evidence in the light most favorable to it." Petitioner's Opposition to Respondent's Reply Brief p. 3. The Petitioner cites a case dealing with a motion for summary judgment pursuant to M.R.C.P. 56 and which is, therefore, inapposite to the instant case. *Joshua Bardige v. Performance Specialists, Inc.*, 74 Mass. App. Ct. 99, 101, 904 N.E.2d 464, 466 (2009). In addition, to the extent *Bardige* has a bearing on this case, I note that the Appeals Court affirmed the granting of summary judgment, ruling that defects in the Plaintiff's expert evidence warranted summary judgment. *Id.* at 104, 904 N.E.2d at 467-68.

In the Opposition to the Respondent's Motion to Dismiss filed on October 9, 2018, the Petitioner asserts that it has the right to a full and fair hearing. The Petitioner has had three years to

prepare its case and several days to present it. It would be unfair to the Respondent to force him to present his case under these facts. Moreover, it would be unfair to litigants in other cases and a waste of DALA's resources to allow the evidentiary hearing to go forward.

In the instant case, the Petitioner has not established its case, because of the failure of the Petitioner's expert testimony, and I, therefore, ALLOW the Respondent's Motion to Dismiss at the close of the Petitioner's case, pursuant to 801 CMR 1.01(7)(g)1.

Conclusion

For the reasons set out above, I recommend that the statement of allegations be DISMISSED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Edward B. McGrath
Chief Administrative Magistrate

Dated: October 22, 2018

COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION IN MEDICINE

Middlesex, ss.

Adjudicatory Case
No. 2015-040

In the Matter of Eddison Ramsaran, M.D.	**Order of Remand to the Division of Administrative Law Appeals**

This matter came before the Board, on the basis of the Administrative Magistrate's (Magistrate's) Recommended Decision on Respondent's Motion to Dismiss (Recommended Decision), dated October 22, 2018. At its January 10, 2019 meeting, the Board heard from the Parties. After full consideration of the Respondent's Motion to Strike Petitioner's Objections to the Recommended Decision (Motion to Strike), and after acknowledging that the Objections were submitted approximately fifteen minutes after the deadline for submission, the Board denied the Motion to Strike at its January 24, 2019 meeting.

At the January 10, 2019 and January 24, 2019 meetings, the Board fully considered the Recommended Decision, Petitioner's Objections to the Recommended Decision (Objections), the Respondent's Response to Petitioner's Objections to the Recommended Decision (Response), and the Parties' Memoranda on Disposition, the Board determined that the Recommended Decision does not adequately address the allegations, in the December 17, 2015 Statement of Allegations that the Respondent has:

- violated 243 CMR 2.07 (13)(a), by failing to maintain a medical record for each patient, which is adequate to enable the licensee to provide proper diagnosis and treatment;
- violated 243 CMR 1.03(5)(a)18, by committing misconduct in the practice of medicine; and
- engaged in conduct that undermines the public confidence in the integrity of the medical profession, pursuant to *Sugarman v. Board of Registration in Medicine*,

422 Mass. 338 (1996), *Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979) and *Raymond v. Board of Registration in Medicine*, 387 Mass. 708 (1982).

The Board REMANDS the matter to the Division of Administrative Law Appeals for whatever further proceedings are necessary in order for the Administrate Magistrate to elaborate on his findings regarding the aforementioned allegations.

Dated: January 24, 2019

Candace Lapidus Sloane, MD
Candace Lapidus Sloane, M.D.
Board Chair

The Commonwealth of Massachusetts
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
JOHN ADAMS COURTHOUSE
ONE PEMBERTON SQUARE, SUITE 1300
BOSTON, MASSACHUSETTS 02108-1707
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MAURA S. DOYLE
CLERK

CASE INFORMATION (617) 557-1100
FACSIMILE (617) 557-1117
ATTORNEY SERVICES (617) 557-1050
FACSIMILE (617) 557-1055

March 22, 2019

Mary A. Azzarito, Esquire
Bruce & Kelley, PC
20 Mall Road, Suite 225
Burlington, MA 01803

RE: No. SJ-2017-0349

EDDISON RAMSARAN, M.D.
v.
BOARD OF REGISTRATION IN MEDICINE

No.DIVISION OF ADMINISTRATIVE LAW APPEALS: RM-15-672 CHIEF ADMINISTRATIVE MAGISTRATE: EDWARD B. MCGRATH

NOTICE OF DOCKET ENTRY

You are hereby notified that on March 22, 2019, the following was entered on the docket of the above referenced case:

FOURTH INTERIM ORDER: as on file. (Gaziano, J.)

Maura S. Doyle, Clerk

To: J. Peter Kelley, Esquire
Mary A. Azzarito, Esquire
Gloria Brooks, Esquire
Amy Spector, Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2017-0349

EDDISON RAMSARAN, M.D.

v.

BOARD OF REGISTRATION IN MEDICINE

FOURTH INTERIM ORDER

This matter came before the Court, Gaziano, J., presiding, on the petitioner Eddison Ramsaran, M.D.'s motion for writ of mandamus pursuant to c. 249, § 5, and written request for hearing filed on January 18, 2019.

Previously in this matter, the Court issued interim orders, which among other things stayed this matter pending the petitioner's hearing before the Division of Administrative Law Appeals (DALA) and the respondent Board of Registration in Medicine's consideration and final determination of the administrative proceedings, including the DALA Chief Administrative Magistrate's recommended decision. In February, 2019, the parties filed updated status reports advising that the respondent remanded the matter back to DALA "for whatever further proceedings are necessary in order for the Chief

Administrative Magistrate to elaborate on his findings" in regards to certain allegations set forth in the Statement of Allegations.

A hearing was held before the Court on March 12, 2019, attended by the parties. During the hearing, the parties reported that the DALA Chief Administrative Magistrate held a "post-remand conference" with the parties on March 4, 2019 and the remand presently is under advisement. Both parties reported that additional hearings before the DALA Chief Administrative Magistrate are not necessary for purposes of the remand. Both parties also reported that no timeline was articulated by the DALA Chief Administrative Magistrate for when he would elaborate on the findings contained in his recommended decision.

Upon consideration thereof, it is ORDERED that the respondent shall file a status report within ten (10) days of the issuance of the DALA Chief Administrative Magistrate's revised recommended decision, or any additional findings, with the Court. Said status report shall attach a copy of the revised recommended decision or any additional findings and specify the timeline for the respondent's consideration and final determination of the proceedings. In view of the protracted nature of the disciplinary proceedings, the Court strongly encourages the respondent to prioritize its consideration and final determination of the proceedings. See Padmanabhan v. Board of Registration in Medicine, 477 Mass. 1026, 1028 (2017). In the event that the respondent's consideration and final determination of

the proceedings are scheduled for a meeting more than thirty days from the issuance of the recommendation by the DALA Chief Administrative Magistrate, the respondent shall articulate explicitly the reasons for the additional time. The petitioner may file his own status report but is not required to do so.

The stay of this matter per the Court's March 23, 2018 interim order remains in effect.

By the Court,

Frank M. Gaziano
Associate Justice

ENTERED: March 22, 2019

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
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Board of Registration in Medicine,
Petitioner

Docket No: RM-15-672

v.

Eddison Ramsaran, M.D.
Respondent

Appearance for Petitioner:

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Administrative Magistrate:

Edward B. McGrath, Esq.
Chief Administrative Magistrate

Response to Order of Remand

I. Introduction

In response to the Board of Registration in Medicine's ("Board") Order of Remand dated January 24, 2019, I say as follows:

On October 22, 2018, after several days of hearing, pursuant to 801 CMR 1.01 (7)(g)1, I allowed the Respondent's Motion to Dismiss at the close of the Petitioner's

case and issued my decision recommending that the Statement of Allegations in this matter be dismissed, because I did not find the Petitioner's expert testimony credible. In writing the recommended decision, I determined not to address the Respondent's testimony. Although the Respondent was called to testify by the Petitioner, he did not provide any testimony supporting the Petitioner's position that he violated the applicable standard of care and, therefore, his testimony was not part of my analysis. In the recommended decision, I set out the facts that I found that resulted in my decision to recommend dismissal. They were Findings 1-14 below. In response to the Order of Remand, I state that I found the Respondent's testimony to be credible and persuasive and I provide findings of fact that address the Respondent's testimony below, Findings 15-141.

The Board's Order of Remand directed me to elaborate on my recommended decision and stated that:

> [T]he Board had determined that the Recommended Decision does not adequately address the allegations in the Statement of Allegations that the Respondent has:
> - violated 243 CMR 2.07(13)(a) by failing to maintain a medical record for each patient which is adequate to enable the licensee to provide proper diagnosis and treatment;
> - violated 243 CMR 1.03(5)(a)18, by committing misconduct in the practice of medicine; and
> - engaged in conduct that undermines the public confidence in the integrity of the medical profession, pursuant to *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338 (1996), *Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979) and *Raymond v. Board of Registration in Medicine*, 387 Mass. 708 (1982).

On March 4, 2019, I held a Post-Remand conference.

Elaborating on the Recommended Decision, I say that the Petitioner failed to persuade me that the Respondent committed the violations referred to above. To meet its burden of proof, the Petitioner had to produce reliable expert medical testimony and,

since it failed to do so, I recommended dismissal.

II. Findings of fact

Based upon the evidence presented, including the witnesses' testimony, my assessment of their credibility, and reasonable inferences drawn from the evidence, I make the following findings of fact:

1. On direct examination, the Petitioner's attorney asked the Petitioner's expert to define the standard of care. The Petitioner's expert responded:

> When you Google it there's many different definitions, but the standard of care, basically, is a consensus opinion among experts based on guidelines that have been agreed upon on how to best care for patients. And it's a consensus opinion of local experts as to what is the best treatment algorithm for patients.

(Tr. v. II p. 24 ll. 6-12)

2. Two days later, on redirect, the Petitioner's expert witness defined the standard of care as follows:

> It's the type and level of care that a reasonably competent, skilled, health care physician with a similar background in a community, a similar community would provide under those circumstances.

(Tr. v. IV p. 7 ll. 5-8)

3. The Petitioner's expert reviewed Patients A to I's cases several times over the last seven years. (Tr. v. III p. 9 ll. 16-19)

4. He reviewed medical literature during that period and factored it into his opinion as to the standard of care. (Tr. V. III p. 10 ll. 4-13 p. 14 ll. 1-4)

5. The Petitioner's expert had all the materials he needed to reach his opinions in 2012 when he issued his first report. (Tr. v. III p. 11 l. 21- p.12 l.1)

6. The Petitioner's expert changed some of his opinions several times and as recently as two

weeks before the hearing. (Tr. v. III p. 14 ll. 4-11)

7. In 2013, the Petitioner's expert opined that IVUS (intravascular ultrasound) was not indicated in Patient A's case, but in 2016 he opined that it was indicated. (Tr. v. III p. 43 ll. 9-17)

8. He testified at hearing on cross-examination that it was in the "grey area."(Tr. v. III p. 43 l. 9-p. 44 l. 7)

9. In 2013, the Petitioner's expert opined that a high risk PCI (percutaneous coronary intervention) could be entertained in Patient A's case, but he testified at the hearing it was below the standard of care to perform it. When confronted with his 2013 opinion, he testified: "I would not have done it. I would not have done it. It could be entertained. I would not have done it." (Tr. v. III p. 53 ll. 9-16)

10. The Petitioner's expert's opinion concerning the use of a coronary stent in the common femoral artery in Patient B's case has changed. (Tr. v. III p. 57 ll. 13-20 and p. 58 ll. 13- p. 60 l. 12)

11. The Petitioner's expert witness opined in his reports dated October 15, 2012, December 16, 2013 and September 19, 2016 that the PCI procedure performed on Patient I "was indicated." (Exs. 2 and 2A)

12. In his report dated September 10, 2018, he opined that "The PCI procedure was not clearly indicated." (Ex. 2C)

13. On direct examination, the Petitioner's expert witness testified that intervention was not necessary for Patient I. (Tr. v. II p. 175 ll. 6-14)

14. On cross-examination, the Petitioner's expert witness testified that the changes to his reports were not substantial and then admitted that changing his opinion as to whether a procedure was indicated or not indicated was substantial. (Tr. v. III p. 20 ll. 1-8)

15. The Respondent, Eddison Ramsaran, is an interventional cardiologist at UMass Medical Center. He became Board certified in 1995 and has been practicing that specialty since then. (Tr. v. I p. 16 l. 10 - p. 17 l. 16)

16. He performs interventional cardiology procedures 1 day a week and sees patients, conducts hospital rounds and visits an outpatient clinic the rest of the week. (Tr. p. v. I p. 18 ll. 9-19)

17. He performs 3-4 interventional cardiology procedures a day. Presently he is doing non-interventional cardiology at UMass Medical Center (Tr. v. I p. 18 l. 23 and p. 16 l. 10)

18. He performs coronary interventions including fixing coronary arteries, peripheral vascular interventions and fixes heart valves. (Tr. v. I p. 16 l. 13 and 19)

19. From 2000-2011, he was the director of the cardiac catheterization lab at St. Vincent's Hospital. (Tr. v. I p. 21 ll. 6-16)

20. He was responsible for the functioning, daily running, maintenance, and continued accreditation of the cardiac cath lab. (Tr. v. I p. 21 ll. 18-22)

21. The Respondent was responsible for the quality of work of the other cardiologists and interventional cardiologists who worked in the lab. (Tr. v. I p. 22 l. 20- p. 23 l. 15)

22. The Respondent was responsible for data collection by the lab for several regulatory agencies, including the American College of Cardiology's National Cardiovascular Data Registry and the Massachusetts Data Collection Agency, MASS-DAC. (Tr. v. I p. 27 ll. 5-13)

23. The cath lab had a data collection manager who was responsible for collecting data concerning complications. (Tr. v. I p. 28 l. 19 - p. 29 l.1)

24. Cases that resulted in complications would be reviewed by a conference that the

Respondent ran. He reported to the chief of cardiology. (Tr. v. I p. 29 ll. 1- 24)

25. Reports back from regulatory agencies were generally excellent. However, one particular year it was reported that there was a high mortality rate in the cath lab. (Tr. v. I p. 21 l. 15)

26. The hospital was informed by MASS-DAC that the cardiac cath lab had a high mortality rate. (Tr. v. I p. 31 ll. 11-12)

27. The hospital took several steps following that report. (Tr. v. I p. 33 l. 8)

28. Stenosis is a blockage of an artery and a PCI is performed to open up the blockage. (Tr. v. I p. 25 ll. 4-18)

Patient A

29. Patient A was an 83-year-old with a history of cardiac issues. She had a history of renal insufficiency, chronic anemia, coronary artery disease with stents and lung cancer. She had been hospitalized several times. (Tr. v. I p. 55 ll. 10-23)

30. She was referred from Marlborough Hospital where she presented with substernal chest discomfort and left arm discomfort. She had taken three sublingual nitroglycerin tablets and aspirin before going to the hospital. At Marlborough Hospital, she was given two units of packed red blood cells. (Tr. v. I p. 56 ll. 10-23)

31. The physicians at Marlborough Hospital believed that Patient A's chest pain was due to coronary artery blockages. She had unstable angina, which is pain caused by blockages of the arteries. (Tr. v. I p. 57 ll. 8-22)

32. Blood tests revealed that patient A had anemia and that is why she had the 2 units of packed red blood cells. (Tr. v. I p. 58 l. 3)

33. A cardiologist at Marlborough Hospital transferred Patient A to another

cardiologist at St. Vincent's Hospital. It was clear that patient A's chest discomfort was cardiac in nature. (Tr. v. I p. 59 ll. 10-24)

34. When she arrived at St. Vincent's Hospital, she had a diagnostic angiogram by an invasive cardiologist, Dr. Shah. (Tr. v. I p. 59 ll. 11-16)

35. It was determined that Patient A needed further treatment. It was determined that she was not a good candidate for cardiac surgery and a cardiac surgeon, Dr. Robert Bojar, turned her down for surgery. (Tr. v. I p. 60 l. 12 and p. 61 ll. 7-23).

36. The Respondent discussed Patient A with the cardiologists, who had seen her, and he decided to perform a procedure on her. (Tr. v. I p. 55 ll. 15-23)

37. Patient A was not complaining of chest pain at the time he performed the procedure. Her blood pressure was high. (Tr. v. I p. 63 ll. 10-23)

38. The Respondent performed a rotational atherectomy and stent on Patient A. (Tr. v. I p. 72 ll. 9-12)

39. Rotational atherectomy is performed using a diamond tipped burr in the artery to ablate the calcified portion of the vessel so a stent can be placed and expanded. (Tr. v. I p. 73 ll. 21-23)

40. Patient A's left main artery was heavily calcified. The Respondent tried to drill out the inside of the artery and place a stent. A balloon was used to try to expand the stent. (Tr. v. I p. 64 ll. 9-17)

41. The procedure the Respondent performed was indicated. During the procedure, Patient A suffered a coronary perforation. (Tr. v. I p. 63 ll. 17-24)

42. The perforation was a complete tear in all three linings of the vessel wall. (Tr. v. I p. 79 ll.13 -23)

43. The perforation was not caused by the size of the burr. It was caused by pressures exerted by the post dilation balloon on the third attempt. The balloon was used, because the stent was under-expanded and the balloon pushes against the stent to push it open. It is very dangerous to leave an under-expanded stent, because of the risk of the stent closing down. The first balloon was taken to 18 atmospheres, but the stent did not expand. 18 atmospheres was tried a second time without success. The balloon was then taken to 20 atmospheres and the perforation occurred. (Tr. v. I p. 77 ll. 3-11, p. 76 ll. 8-9 and p. 78 l. 1- p. 79 l. 20)

44. After the perforation, attempts were made to save Patient A, but she passed away. (Tr. v. I p. 81 l. 9 and p. 83 l. 14)

45. After the perforation, the Respondent attempted to place a covered stent to prevent leakage. (Tr. v. I p. 85 ll. 11-15)

46. The Respondent relied on the 2005 and 2007American College of Cardiology guidelines when deciding to fix the vessel. (Tr. v. I p. 91 ll. 9-24)

Patient B

47. The Respondent began treating Patient B when she was 56 years old. Patient B complained of pain while walking. (Tr. v. I p. 93 ll. 16-23)

48. The Respondent performed peripheral vascular studies. He used blood pressure cuffs and ultrasound to look at Patient B's lower extremities to assess for blockages. (Tr. v. I p. 95 ll.16-19)

49. Patient B had disease in the iliac and femoral arterial system; these are vessels in the legs and abdomen. (Tr. v. I p. 95 l. 16- p. 96 l. 1)

50. The Respondent performed a peripheral angiogram to take pictures of the arteries in Patient B's legs. (Tr. v. I p. 97 ll. 9-16)

51. The Respondent determined that Patient B's anatomy was amenable to a stent. (Tr. v. I p. 93 ll. 16-23)

52. The target was the proximal aortic iliac region. Everything else below that in the legs was okay. (Tr. v. I p. 100 ll. 15-19)

53. The diagnostic angiogram of the entire leg did not show any disease. (Tr. v. I p. 101 ll. 8-13)

54. The Respondent placed a self-expanding stent in the proximal left common iliac artery. (Tr. v. I p. 102 l. 12)

55. Balloon expanding stents and self-expanding stents are both indicated for use in the iliac arteries. (Tr. v. I p. 105 ll. 15-16)

56. The Respondent used a perclose closure device to close the artery. It allows the patient early ambulation and discharge. (Tr. v. I p. 107 l. 10-23)

57. On December 23, 2010, Patient B complained to her cardiologist of severe leg pain. (Tr. v. I p. 109 ll. 10-12)

58. A vascular study performed at that time showed a significant diminished flow of blood to her left lower extremity at the site of the Perclose. (Tr. v. I p. 109 ll. 18-24)

59. A device failure within 2 weeks is a known complication, but not common. (Tr. v. I p. 110 ll. 18-24)

60. High puncture is when access is obtained in an artery at higher than the ideal location. (Tr. v. I p. 110 l. 24 – p. 111 l.1)

61. A high puncture does not affect the procedure itself. (Tr. v. I p. 112 ll. 6-11)

62. Patient B's issue was the Perclose not the high stick. (Tr. v. I p. 113 ll. 12-14)

63. The angiogram showed the common femoral artery was occluded. The Perclose

acutely closed down the artery. It is a rare problem. (Tr. v. I p. 114 l. 3 - p. 115 l. 1)

64. Patient B was suitable for surgery and percutaneous procedure. (Tr. v. I p. 117 ll. 15-21)

65. It was standard of care to fix the problem percutaneously. (Tr. v. I p. 118 ll. 6-9)

66. After the procedure, Patient B's pain went away and her pulse returned to normal. Repeating unnecessary fluoroscopy and contrast would not have been consistent with the standard of care. (Tr. v. I p. 120 l.9- p. 121 l. 1)

67. Patient B was given Integrilin, for maximum antithrombotic, antiplatelet therapy. It can prevent the development of clots in the stent. (Tr. v. I p. 128 ll. 13-19 and p. 131 l. 9 - 12)

68. On April 15, 2011, Patient B had a third procedure, because she was having leg pain. She had another blockage in the stent. (Tr. v. I p. 133 l. 9)

69. The Respondent placed a drug-eluting stent into the common femoral artery and a balloon expandable stent at the origin of the left common iliac artery. (Tr. v. I p. 134 l. 4- 6)

70. The left common femoral artery had re-stenosed due to intimal hyperplasia, aggressive development of fibrous tissue at the site of the prior placed stent. (Tr. v. I p. 134 ll. 11-14)

71. Patient B has done extremely well since the surgery. (Tr. v. I p. 134)

Patient C

72. Patient C was a 76 year old male with a history of coronary artery disease and had undergone multiple stent procedures to his coronary arteries. (Tr. v. I p. 135 ll. 16-22)

73. Patient C was referred to the Respondent by his cardiologist, because of recurring substernal chest discomfort on maximum medical therapy. (Tr. v. I p. 136 ll. 18-19)

74. Patient C had the option of cardiac bypass surgery or coronary intervention. (Tr.

v. I p. 138 ll. 13-15)

75. Patient C is a retired surgeon that the Respondent has known for 10 years. Patient C has known his cardiologist for 10 years. Patient C told the Respondent and his cardiologist that he did not want a surgical procedure. This was documented in notes, the patient log, the nursing log and reports (Tr. v. I p. 143 l. 23- p. 144 l. 1)

76. Patient C was not referred to cardiac surgery, because he declined to consider a cardiac-thoracic option. (Tr. v. I p. 137 ll. 23-24, Ex. 1 pp. 2207, 2210)

77. On September 7, 2011, Patient C signed a Consent for Medical Surgical and Diagnostic Procedures. (Ex. 1 p. 2201)

78. On September 9, 2011, the Respondent performed a diagnostic procedure which showed that the left anterior descending coronary artery had in-stent stenosis of a prior stent. Tr. v. I p. 139 ll. 5 - 10)

79. Patient C's first diagonal branch was already jailed from prior interventions. Meaning that the stent was placed across the vessel from prior procedures. (Tr. v. I p. 146 l.23 – p. 147 ll. 2-4)

80. The Respondent decided to intervene to open up the proximal vessel and the closed diagonal branch. (Tr. v. I p. 139 ll. 19 - 22)

81. He stopped the procedure, discussed the options with Patient C and his cardiologist, and documented that in Patient C's chart. (Tr. v. I p. 144 ll. 4-15, Ex. 1 p. 2210)

Patient D

82. Dr. Sharma, a cardiologist, performed an echocardiogram on Patient D and referred Patient D to the Respondent. The echocardiogram showed an atrial septal defect, an ASD. (Tr. v. I p. 154 l. 17 and p. 149 l.7 – l. 14)

83. Patient D's primary care physician wrote "After discussion with Doctor Ramsaran she is not really a candidate for PFO closure." The Respondent believes that the primary care physician mistook PFO for ASD. (Tr. v. I p. 153 ll. 12-23)

84. "ASD" stands for atrial septal defect. It is a congenital defect, a hole in the septum of the heart between the right and left sides. (Tr. v. I p. 24 ll. 1- 15)

85. "PFO" refers to patent foramen ovale, which is a defect in foramen ovale. It is a hole in the heart that allows blood to flow to the fetus in utero. It closes after birth in 70% of the population and causes no problems. (Tr. v. I p. 24 ll. 15-24)

86. An ASD is a congenital defect between the upper chambers of the heart. Patient D had a history of aortic valve replacement. The ASD was not diagnosed at that time. (Tr. v. I p. 150 ll. 5-6)

87. ASD's are diagnosed mostly later in life as there is more stiffness of the ventricles which sets up shunting, or abnormal blood flow from one chamber of the heart to the other. (Tr. v. I p. 151 ll. 7 p. 152 l. 5)

88. There was evidence of shunting in Patient D's medical records. (Tr. v. I p. 156 l. 15 – p. 157 l. 7)

89. The Respondent closed an atrial septal defect through a PFO diagnosed by Dr. Mark Kranis and confirmed by Dr. Shah intraoperatively while the Respondent was performing the procedure. The Respondent closed the PFO. (Tr. v. I p. 154 l. 23 – p. 156 l. 3, Ex. 1 p. 3006)

90. The PFO that Patient D had was not acting as a blow hole to relieve pressure in her heart. (Tr. v. I p. 161 l. 24)

Patient E

91. The Respondent treated Patient E, who was an 88 year old male. He had a history of hypertension, abdominal aortic aneurysm, coronary artery bypass grafting, and chronic renal insufficiency. (Tr. v. I p. 163 ll.12-18)

92. The Respondent had tried to dilate Patient E's left anterior descending coronary artery on September 7, 2006. (Tr. v. I p. 163 ll. 21-24)

93. That procedure was not successful, because the vessel was too difficult to get a balloon past the legion. The calcification and a bend in the artery made it too difficult. (Tr. v. I p. 164 ll. 9-15)

94. Patient E returned to the Respondent, because of severe substernal pain while on maximum medical therapy. (Tr. v. I p. 164 ll. 18-19)

95. The Respondent decided not to perform an atherectomy on Patient E, because of the conditions he encountered during his earlier effort. (Tr. v. I p. 168 l. 16 - 169 l. 8)

96. The Respondent performed a balloon angioplasty. The procedure made a difference both clinically and an angiographic improvement. The blockage went from 90% to 40%. (Tr. v. I p. 167 l. 4 and p. 169 ll. 8-24)

97. While the medical record documents the correct reduction of the lesion from 90% to 40% three times, on one occasion it incorrectly states 90% to 0% due to an operator error. (Tr. v. I p. 170 ll. 5-9)

98. During the procedure, 320 cc's of dye were documented, which is in the range for a complicated procedure, such as that performed upon Patient E. The procedure was difficult, because of a bend in the vessel, the calcification and the degree of stenosis. (Tr. v. I p. 170 ll. 10-22)

Patient F

99. The Respondent treated Patient F, when Patient F was 50 years old. (Tr. v. I p. 171 ll. 2-6)

100. Patient F had developed exertional substernal chest discomfort and shortness of breath. He had a history of type 2 diabetes mellitus, smoking, peripheral vascular disease and an abnormal stress test. (Tr. v. I p. 171 ll. 8-12)

101. Patient F was referred to the Respondent by Dr. Shah. (Tr. v. I p. 171 l. 23 - 172 l. 1)

102. Based upon diagnostic testing, Patient F had a significant blockage. (Tr. v. I p. 172 l. 19- p. 173 13)

103. The Respondent treated Patient F with balloons and stents. (Tr. v. I p. 173 l. 22)

104. There was very mild plaque shifting during the procedure. Plaque shifting is when the balloon does not pulverize the plaque but causes it to shift to another location. It can cause a heart attack. (Tr. v. I p. 174 ll. 10-23)

105. The Respondent obtained informed consent from Patient F. (Tr. v. I p. 175 l. 9)

106. Patient F's procedure was successful. (Tr. v. I p. 176 ll. 8-9)

107. The plaque that shifted did not create a blockage. (Tr. v. I p. 177 1.23 - p. 178 l. 1)

108. After examining the flow and seeing it was normal and noting that Patient F was asymptomatic, the Respondent decided it was best to leave the vessel alone and ended the procedure. (Tr. v. I p. 180 ll. 9- p.181 l. 14).

109. Two stents were deployed. A third was not deployed and was removed. (Tr. v. I p. 183 ll. 7 - 23)

Patient G

110. The Respondent began treating Patient G on March 10, 2011. Patient G was a 77 year old female. She had a history of coronary artery bypass grafting, peripheral vascular disease, diabetes and moderate aortic stenosis. (Tr. v. I p. 185 ll. 13-22)

111. Patient G had a cardiologist. She had a nuclear imaging stress test, which demonstrated a 90% lesion in a vein graft to the ramus intermedius artery. She had a 38 millimeter gradient. A gradient across a valve is a blockage of the valve. (Tr. v. I p. 186 ll. 10-21 and p. 187 ll. 12-20)

112. Patient G was referred to cardiothoracic surgeon, who declined to treat her, and she was then referred to interventional cardiology. (Tr. v. I p. 187 l. 23 – p. 188 l. 1)

113. The Respondent treated her by performing a percutaneous intervention and vein graft. (Tr. v. I p. 188 ll. 10-11)

114. Vein grafts are very friable so distal embolization is a concern. (Tr. v. I p. 188 l. 14- p. 189 l. 15)

115. In 2018, the main technique to prevent distal embolization is using a filter wire to catch debris. (Tr. v. I p. 189 ll.18-24)

116. The Respondent's documentation of Patient G's procedure is consistent. He never went back to redo his documentation. (Tr. v. I p. 191 ll. 6-15)

117. When referring to "complications," he is documenting complications inherent to the specific region he is working on. (Tr. v. I p. 191 l. 21-24)

118. The data adjudicators only consider distal embolization if there is a significant event, if the distal embolization impairs blood flow. It is not inconsistent documentation to report no complications in one place and distal embolization in another. (Tr. v. I p. 192 ll. 16- p. 193 l.

23)

119. The Respondent was not able to catch or clean out debris from Patient G. (Tr. v. I p. 193 ll. 5-9)

Patient H

120. The Respondent treated Patient H who was a 64 year old female. (Tr. v. I p. 195 ll. 10-12)

121. Patient H complained of chest pain and had a persantine stress test. The test revealed a small area of ischemia in the anterior wall of the left ventricle. The Respondent performed a cardiac catherization on Patient H, which revealed lesions in the left coronary artery and lesions in a circumflex coronary artery. (Tr. v. I p. 195 ll. 11-24 and p. 196 ll. 11-14)

122. The Respondent performed a stent placement to the left anterior descending artery and placed stents in the left circumflex coronary artery. This was an appropriate procedure (Tr. v. I p. 196 l. 15- p. 196 l. 2)

123. Patient H was brought back for a PCI for her circumflex. The Respondent staged the procedure, because Patient H was completing cardiac rehab and he did not want to interrupt that process. In addition, Patient H wanted to wait. (Tr. v. I p. 197 ll.10-12)

124. During this procedure, the Respondent placed three drug-eluting stents using rotational atherectomy. He used a 1.5 millimeter burr. (Tr. v. I p. 197 ll. 13-23)

125. He chose that size burr because of the size of the vessel. (Tr. v. I p. 198 l. 1)

126. The burr caused a small type 2 perforation. There is a high incidence of perforation in rotational atherectomy, but it is not common. (Tr. v. I p.198 ll. 19-23)

127. The Respondent documented the perforation. (Tr. v. I p. 199 ll. 1-3)

128. The procedure was indicated for Patient H. (Tr. v. I p. 200 ll. 19-21)

Patient I

129. The Respondent treated Patient I, a 67 year old female who presented to the emergency room with substernal chest discomfort and shortness of breath. She had a history of mitral regurgitation, a leaky valve. She did not have a myocardial infarction. (Tr. v. I p. 202 l. 12- p. 203 l. 7)

130. She had an ASD repair and a repair of her tricuspid valve with a placement of an annuloplasty ring in 2007. An annuloplasty ring is placed around the tricuspid valve to bring valve leaflets together and prevent leakage. (Tr. v. I p. 203 ll. 5-24)

131. She presented with chest discomfort and had abnormal nuclear imaging stress test. She had blockages. (Tr. v. I p. 206 ll. 21-24)

132. The Respondent performed a stent placement to the obtuse marginal branch of the left circumflex coronary artery, followed by a stent placement to the left anterior descending artery. (Tr. v. I p. 206 ll. 13-16)

133. Patient I was given Plavix to help the stents heal, but she vomited immediately after the procedure. This meant she was not absorbing the Plavix. (Tr. v. I p. 207 ll. 5-22)

134. Patient I vomited a second dose of Plavix and began having chest pain. (Tr. v. I p. 209 ll. 16-19)

135. The Respondent repeated an EKG and had Patient I returned to the cath lab, where he performed a coronary angiogram, which revealed that stent was blocked. Such a blockage was uncommon in 2011. (Tr. v. I p. 211 l. 2)

136. The stent became blocked because she did not have anticoagulation on board, having vomited the Plavix. (Tr. v. I p. 211 ll. 4-5)

137. The stent closed exactly 1 hour after Angiomax was shut off and, while there was other medication available, the Respondent did not know she would vomit up the Plavix when he chose it. (Tr. v. I p. 211 ll. 8-22)

138. The Respondent performed a balloon angioplasty and a thrombectomy. During a thrombectomy, a suction device is used to manually extract a clot from an artery. (Tr. v. I p. 212 ll. 9- 16)

139. Patient I had a cardiac arrest. The Respondent shocked her and got her back very quickly. That is not uncommon. (Tr. v. I p. 214 ll. 12-15)

140. The Respondent documented Patients I's complications. (Tr. v. I p. 220 ll. 23)

141. The procedure was appropriate for Patient I. The stent was appropriately sized and it was appropriately placed. (Tr. v. I p. 217 ll. 23- p. 218 l. 10)

III. Analysis

a) Failure to maintain a medical record

The first allegation put forward for clarification is that the Respondent violated 243 CMR 2.07(13)(a) by "failing to maintain a medical record for each patient which is adequate to enable the licensee to provide proper diagnosis and treatment..." In order to prove that the Respondent's medical records were not adequate to enable the licensee "to provide proper diagnosis and treatment," the Petitioner must submit reliable expert testimony to support that finding and it did not do so.

In addition, setting aside the failure of the Petitioner's expert testimony, I was not persuaded that the Respondent failed to maintain an adequate medical record for any of the patients listed in the Statement of Allegations. While the Respondent did not have the burden of proof, I found his testimony concerning the medical records of his patients to be clear and persuasive. For

example, he testified credibly explaining that he adequately documented, diagnosed, and performed an ASD closure through a PFO and closed the PFO on Patient C. (Finding 89). To the extent there was confusion over the existence of an ASD or PFO, it was generated during the testimony of the Petitioner's expert referring to Dr. Shah's records and I gave his testimony no weight. In addition, while there was one error in Patient E's medical record because it incorrectly referred to the reduction of Patient E's blockage to 0%, there were three accurate references to the correct figure. (Finding 97) I do not find that one mistake in a medical record constitutes an inadequate medical record for the proper diagnosis and treatment of a patient, especially when that finding was not supported by expert medical testimony. Likewise, the Respondent's explanation of why he did not consider Patient G's distal embolization a "complication" for reporting purposes made sense. (Findings 117 and 118) Without credible expert medical testimony, I will not find that this was a violation of 243 CMR 2.07(13)(a).

My recommended decision did not separately address the Petitioner's allegations that the Respondent engaged in misconduct in the practice of medicine or in conduct which undermines public confidence in the integrity of the medical profession, but I did recommend that the entire statement of allegations should be dismissed, because of the failure of the Petitioner's expert testimony. I issued the Recommended Decision based upon the way the Board presented the evidence and responded to the motion to dismiss.

I offer the following by way of further explanation.

b) Committing misconduct in the practice of medicine

243 CMR 1.03(5)(a)18 provides that the Board may discipline a physician for committing misconduct in the practice of medicine. While misconduct in the practice of medicine may be an independent and sufficient ground to warrant discipline, the Petitioner in this case did not offer

any evidence of alleged "misconduct" except for conduct in the way the Respondent practiced medicine. *See Weinberg v. Board of Registration in Medicine*, 443 Mass. 679, 687, 824 N.E.2d 38, 44 (2005) (discussing independent ground for discipline). The Petitioner summarized its evidence as follows:

> The Respondent's act of performing procedures on a patient which *were not medically necessary constitutes misconduct in the practice of medicine.*

Petitioner's Opposition to the Respondent's Motion to Dismiss All Remaining Allegations dated February 28, 2019 p. 14 (emphasis added). The Petitioner failed to convince me that the Respondent performed procedures which were not medically necessary. The Petitioner's expert testimony was not credible and I found the Respondent's testimony concerning his treatment of the patients identified in the statement of allegations to be credible.

c) Engaging in conduct that undermines the public confidence in the integrity of the medical profession

To the extent the Petitioner argues that the Respondent undermined the public's confidence in the medical profession by performing unnecessary medical procedures or failing to do medically necessary procedures it had to prove those allegations and it failed to do so, because of the failure of its expert testimony.

> Disciplining physicians for lack of good moral character, and for conduct that undermines public confidence in the integrity of the profession, is reasonably related to promotion of the public health, welfare, and safety. A physician's bad moral character may reasonably call into question his ability to practice medicine.

Raymond v. Board of Registration in Medicine, 387 Mass. 708, 713, 443 N.E.2d 391, 395 (1982). On page 10 of the Petitioner's Opposition to the Respondent's Motion to Dismiss All Remaining Allegations dated February 28, 2019, the Petitioner's Attorney wrote:

> The Respondent engaged in conduct that undermines the public confidence in the integrity of the medical profession by failing to perform medically indicated

> procedures for patients or by *performing unnecessary medical procedures for patients.*

(emphasis added).

Considering the presentation of the evidence, that statement made sense, as no evidence was offered during the hearing that would support a finding that the Respondent engaged in conduct that undermines the public confidence in the integrity of the medical profession that did not involve failing to provide medically necessary procedures or performing unnecessary procedures. The need for expert testimony on this allegation is confirmed by the remaining statements pertaining to this topic in the Petitioner's Opposition to the Respondent's Motion to Dismiss All Remaining Allegations dated February 28, 2019 pages 10-14. In addition, while he did not have the burden of proof, I found the Respondent's testimony concerning the care of his patients to be credible.

Conclusion After Remand

I have considered all the allegations contained in the statement of allegations and, for the reasons set out in the Recommended Decision and above, I recommend that the Statement of Allegations be DISMISSED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Edward B. McGrath
Chief Administrative Magistrate

Dated: APR 30 2019

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

BOARD OF REGISTRATION
IN MEDICINE

Adjudicatory Case No. 2015-040

In the Matter of

Eddison Ramsaran, M.D.

ORDER

This matter came before the Board for consideration of the Chief Magistrate's (Magistrate's) October 22, 2018 Recommended Decision on Motion to Dismiss (Recommended Decision), the Magistrate's April 30, 2019 Response to Order of Remand, and the Parties' pleadings.

Based on the Magistrate's determination that the Board's expert was not credible and that he could "give [the Board expert's] testimony no weight," the Magistrate concluded that the Board failed to meet its burden to prove each charge in its Statement of Allegations.

The Board adopts the October 22, 2018 Recommended Decision, as amended by the April 30, 2019 Response to Order of Remand. The Board hereby dismisses the December 18, 2015 Statement of Allegations.

Candace Lapidus Sloane, MD

Date: May 30, 2019

Candace Lapidus Sloane, M.D.
Board Chair

243 CMR 1.00: DISCIPLINARY PROCEEDINGS FOR PHYSICIANS

Section

1.01: Scope and Construction

(1) Procedure Governed. 243 CMR 1.00 governs the disposition of matters relating to the practice of medicine by any person holding or having held a certificate of registration issued by the Board of Registration in Medicine under M.G.L. c. 112, §§ 2 through 9B, and the conduct of adjudicatory hearings by the Board. 243 CMR 1.00 is based on the principle of fundamental fairness to physicians and patients and shall be construed to secure a speedy and just disposition. The Board may issue standing orders consistent with 243 CMR 1.00 and 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure.*

(2) Definitions.

Adjudicatory Hearing: a formal administrative hearing conducted pursuant to M.G.L. c. 30A.

Board: the Board of Registration in Medicine, including, but not limited to, its Data Repository/Data Management Unit, Disciplinary Unit, Patient Care Assessment Unit, Legal Unit, Licensing and Examining Unit, and its agents and employees.

Complaint: a communication filed with the Board which charges a licensee with misconduct. A Statutory Report is not a Complaint; *See* 243 CMR 1.03(14).

Disciplinary Action means an action adversely affecting a licensee which simultaneously meets the descriptions in 243 CMR 1.01(2)(a) through (c), and which is limited as described in 243 CMR 1.01(2)(d) and (e).

(a) disciplinary action means an action of an entity including, but not limited to, a governmental authority, a health care facility, an employer, or a professional medical association (international, national, or local).

(b) A disciplinary action is:

1. formal or informal, or
2. oral or written.
3. An oral reprimand is not a Disciplinary Action. However, the fact that conduct resulted in an oral reprimand does not relieve any obligation to report under M.G.L. c. 112, § 5F.

(c) A disciplinary action includes any of the following actions or their substantial equivalents, whether voluntary or involuntary:

1. Revocation of a right or privilege.
2. Suspension of a right or privilege.
3. Censure.
4. Written reprimand or admonition.
5. Restriction of a right or privilege.
6. Non renewal of a right or privilege.
7. Fine.
8. Required performance of public service.
9. A course of education, training, counseling, or monitoring, only if such course arose out of the filing of a complaint or the filing of any other formal charges reflecting upon the licensee's competence to practice medicine.
10. Denial of a right or privilege.
11. Resignation.
12. Leave of absence.
13. Withdrawal of an application.
14. Termination or non renewal of a contract with a licensee.

1.01: continued

(d) The actions described in 243 CMR 1.01(2)(c)5., 6. and 10. through 14. are Disciplinary Actions only if they relate, directly or indirectly to:

1. the licensee's competence to practice medicine, or
2. a complaint or allegation regarding any violation of law or regulation (including, but not limited to, the regulations of the Board (243 CMR)) or bylaws of a health care facility, medical staff, group practice, or professional medical association, whether or not the complaint or allegation specifically cites violation of a specific law or regulation.

(e) If based upon a failure to complete medical records in a timely fashion or failure to perform minor administrative functions, the action adversely affecting the licensee is not a Disciplinary Action for the purposes of mandatory reporting to the Board, provided that the adverse action does not relate directly or indirectly to:

1. the licensee's competence to practice medicine, or
2. a complaint or allegation regarding any violation of law or a Board regulation, whether or not the complaint or allegation specifically cites violation of a specific law or regulation.

Informal: not subject to strict procedural or evidentiary rules.

Licensee: a person holding or having held any type of license issued pursuant to M.G.L. c. 112, §§ 2 through 9B.

Party: a respondent, associate prosecutor representing the disciplinary unit, or intervenor in an adjudicatory proceeding pursuant to 801 CMR 1.01(9).

Respondent: the licensee named in a Statement of Allegations.

Statement of Allegations: a paper served by the Board upon a licensee ordering the licensee to appear before the Board for an adjudicatory proceeding and show cause why the licensee should not be disciplined; a "Statement of Allegations" is an "Order to Show Cause" within the meaning of 801 CMR 1.01(6)(d).

1.02: General Provisions

(1) Communications. All written correspondence should be addressed to and filed with the Board of Registration in Medicine, 200 Harvard Mills Square, Suite 330, Wakefield, MA 01880.

(2) (a) Service. The Board shall provide notice of its actions in accordance with the Standard Adjudicatory Rules, 801 CMR 1.01(4)(b) and (5)(f), or otherwise with reasonable attempts at in-hand service, unless the Respondent otherwise has actual notice of the Board's action. Where 243 CMR 1.00 provides that the Board must notify parties, service may be made by first class mail. A notice of appearance on behalf of a Respondent shall be deemed an agreement to accept service of any document on behalf of the Respondent, including a Final Decision and Order of the Board. When a Hearing Officer has jurisdiction over an adjudicatory proceeding, proper service by the Respondent includes filing copies of all papers and exhibits with:

1. the Board, care of its General Counsel;
2. the Hearing Officer assigned to the adjudicatory proceeding; and
3. the Associate Prosecutor assigned to the adjudicatory proceeding. All papers served must be accompanied by a certificate of service.

(b) Notice to Board Members. A Respondent (or his or her representative) and other persons shall not engage in *ex parte* communications with individual Board members regarding a disciplinary proceeding. Communications to Board members regarding disciplinary proceedings shall be in writing and directed to Board members as follows: Eight copies to the Executive Director, one copy to the General Counsel, and one copy to the Chief of the Disciplinary Unit.

1.02: continued

(3) Date of Receipt. Communications are deemed received on the date of actual receipt by the Board.

(4) Computation of Time. The Board shall compute time in accordance with 801 CMR 1.01(4)(c): *Notice of Agency Actions.*

(5) Extension of Time. The Board in its discretion may extend any time limit prescribed or allowed by 243 CMR 1.00.

(6) Identification and Signature; Paper Size. All papers filed with the Board in the course of a disciplinary proceeding must contain the name, address, and telephone number of the party making the filing and must be signed by either the party or an authorized representative. Paper size shall be 8½" by 11".

(7) Decisions by the Board; Quorum. Unless 243 CMR 1.00 provides otherwise, a majority of members present and voting at a Board meeting shall make all decisions and the Board shall record its decisions in the minutes of its meetings. A quorum is a majority of the Board, excluding vacancies.

(8) Availability of Board Records to the Public.

(a) The availability of the Board's records to the public is governed by the provisions of the Public Records Law, M.G.L. c. 66, § 10, and M.G.L. c. 4, § 7, clause 26, as limited by the confidentiality provisions of M.G.L. c. 112, §§ 5 through 5I and 243 CMR. A file or some portion of it is not a public record if the Board determines that disclosure may constitute an unwarranted invasion of personal privacy, prejudice the effectiveness of law enforcement efforts (if the records were necessarily compiled out of public view), violate any provision of state or federal law, or if the records are otherwise legally exempt from disclosure.

(b) Before the Board issues a Statement of Allegations, dismisses a complaint, or takes other final action, the Board's records concerning a disciplinary matter are confidential.

(c) The Board's records of disciplinary matters, as limited by 243 CMR 1.02(8)(a) and (b), include the following:

1. Closed complaint files, which contain the complaint and other information in matters which have been dismissed or otherwise resolved without adjudication, are public records. The name or a complainant or patient and relevant medical records shall be disclosed to the Respondent, but this information is otherwise confidential. The names of reviewers and the contents of complaint reviews shall be confidential.
2. Disciplinary Unit files, which contain portions of complaint files (and related confidential files) as well as papers related to adjudicatory proceedings and attorney work product, are not public records and are confidential.
3. The Board's files, which contain each paper filed with the Board in connection with an adjudicatory proceeding, are public records, unless otherwise impounded or placed under seal by the Hearing Officer or the Board.
4. Peer review information and records shall remain confidential, to the extent allowable under M.G.L. c. 111, § 204 and 243 CMR 3.04: *Confidentiality of Records and Information*, unless introduced into evidence in an adjudicatory proceeding.
5. Records of any Board unit's review and investigation of statutory reports, consistent with 243 CMR 1.03(14); are not public records and are confidential.
6. Closed anonymous complaints, which are determined to be frivolous or lacking in either legal merit or factual basis, consistent with 243 CMR 1.03(3)(a); are not public records and are confidential.

(d) Communications or complaints reviewed by the Complaint Committee prior to August 21, 1987 and not docketed for reasons other than the criteria set forth in 243 CMR 1.03(3)(a), shall be made available to the public as if they were closed complaint files under 243 CMR 1.02(8)(c)1., whether or not such documents were previously considered to be confidential Board records, unless release is otherwise limited by law or regulations.

1.02: continued

(9) Public Nature of Board Meetings Under 243 CMR 1.00.

(a) All meetings of the Board are open to the public to the extent required by M.G.L. c. 30A, § 20.

(b) As provided by M.G.L. c. 30A, § 20, a Board meeting held for the purpose of making a decision required in an adjudicatory proceeding is not open to the public. Evidentiary hearings before individual hearing officers are generally open to the public, but the Board may carry out its functions under 243 CMR 1.00 in closed session if these functions effect an individual licensee or patient, the licensee or patient requests that the Board function in closed session, and the Board or hearing officer determines that functioning in closed session would be consistent with law and in the public interest.

(10) Conditional Privilege of Communications with the Board. All communications with the Board charging misconduct, or reporting or providing information to the Board pursuant to M.G.L. c. 112, §§ 5 through 5I, or assisting the Board in any manner in discharging its duties and functions, are privileged, and a person making a communication is privileged from liability based upon the communication unless the person makes the communication in bad faith or for a malicious reason. This limitation on liability is established by M.G.L. c. 112, §§ 5 and 5G(b).

(11) State or Federal Agencies, Boards or Institutions Designated to Receive Investigative Records or Confidential Information. Pursuant to M.G.L. c. 112, § 5, the Board will review written requests for investigative records or other confidential information from the following agencies which are hereby designated to receive, upon Board approval, such information consistent with the Fair Information Practices Act (FIPA), M.G.L. c. 66A:

(a) Massachusetts Department of the Attorney General;
(b) Offices of the Massachusetts District Attorneys;
(c) Massachusetts Municipal Police Departments;
(d) Massachusetts State Police;
(e) Federal Trade Commission;
(f) Office of the United States Attorney;
(g) U.S. Postal Inspector;
(h) U.S. Department of Justice, Drug Enforcement Administration, and Federal Bureau of Investigation;
(i) Division of Professional Licensure;
(j) All other state Medical Boards;
(k) The Federation of State Medical Boards of the United States, Inc.;
(l) Division of Insurance and the Insurance Rating Bureau;
(m) Massachusetts Health Data Consortium, Inc.;
(n) Department of Public Health;
(o) Massachusetts Department of Revenue;
(p) U.S. Internal Revenue Service;
(q) Office of Chief Medical Examiner;
(r) Capitol Police;
(s) U.S. Department of Health and Human Services, Office of the Inspector General;
(t) Insurance Fraud Bureau of Massachusetts.
(u) Department of Industrial Accidents.
(v) Division of Medical Assistance, Executive Office of Health and Human Services.

All recipients of confidential information designated by 243 CMR 1.00 shall preserve the confidentiality of such data and make it available to the data subject, to the extent such access is required by FIPA.

(12) Membership of Committees. The Board may establish committees of its members to assist in accomplishing its responsibilities. The Board may designate former members for assignment to these committees; however, at least one member of each committee shall be a current member of the Board.

1.03: Disposition of Complaints and Statutory Reports

(1) Initiation. Any person, organization, or member of the Board may make a complaint to the Board which charges a licensee with misconduct. A complaint may be filed in any form. The Board, in its discretion, may investigate anonymous complaints.

(2) Complaint Committee. The Board may establish a committee known as the Complaint Committee to review complaints charging a licensee with misconduct. If the Committee or a Board Investigator determines that a communication does not relate to any of the matters set forth in 243 CMR 1.03(5), the committee or the investigator may refer the communication to the proper authority or regulatory agency.

(3) (a) Preliminary Investigation. A Board Investigator shall conduct such preliminary investigation, including a request for an answer from the licensee, as is necessary to allow the Complaint Committee to determine whether a complaint is frivolous or lacking in either merit or factual basis. If, after a preliminary investigation of an anonymous complaint, the investigator determines that the anonymous complaint is frivolous or lacking in either merit or factual basis, the anonymous complaint shall not be docketed, shall be filed in a general correspondence file, and shall remain confidential.

(b) Subsequent Inquiry, Investigation. After receipt and review of a complaint, if the Complaint Committee determines that the complaint is frivolous or lacking in either legal merit or factual basis, it may close the complaint. The Committee shall notify the person who made the communication of its determination and the reasons for it. As to other complaints, the Committee shall conduct, or cause to be conducted, any reasonable inquiry or investigation it deems necessary to determine the truth and validity of the allegations set forth in the complaint.

(4) Conference. To facilitate disposition, the Board or the Complaint Committee may request any person to attend a conference at any time prior to the commencement of an adjudicatory proceeding. The Board or Committee shall give timely notice of the conference, and this notice must include either a reference to the complaint or a statement of the nature of the issues to be discussed.

(5) Grounds for Complaint.

(a) Specific Grounds for Complaints Against Physicians. A complaint against a physician must allege that a licensee is practicing medicine in violation of law, regulations, or good and accepted medical practice and may be founded on any of the following:

1. Fraudulent procurement of his or her certificate of registration or its renewal;
2. Commitment of an offense against any provision of the laws of the Commonwealth relating to the practice of medicine, or any rule or regulation adopted thereunder;
3. 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 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;
4. Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability or mental instability;
5. Being habitually drunk or being or having been addicted to, dependent on, or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects;
6. Knowingly permitting, aiding or abetting an unlicensed person to perform activities requiring a license.
7. Conviction of any crime;
8. Continuing to practice while his or her registration is lapsed, suspended, or revoked;
9. Being insane;
10. Practicing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud.
11. Violation of any rule or regulation of the Board;

1.03: continued

12. Having been disciplined in another jurisdiction in any way by the proper licensing authority for reasons substantially the same as those set forth in M.G.L. c. 112, § 5 or 243 CMR 1.03(5);

13. Violation of 243 CMR 2.07(15): *Medicare Payments*;

14. Cheating on or attempting to compromise the integrity of any medical licensing examination;

15. Failure to report to the Board, within the time period provided by law or regulation, any disciplinary action taken against the licensee by another licensing jurisdiction (United States or foreign), by any health care institution, by any professional or medical society or association, by any governmental agency, by any law enforcement agency, or by any court for acts or conduct substantially the same as acts or conduct which would constitute grounds for complaint as defined in 243 CMR 1.03(5);

16. Failure to respond to a subpoena or to furnish the Board, its investigators or representatives, documents, information or testimony to which the Board is legally entitled;

17. Malpractice within the meaning of M.G.L. c. 112, § 61;

18. Misconduct in the practice of medicine.

(b) Other Grounds for Complaints Against Physicians. Nothing in 243 CMR 1.00 shall limit the Board's adoption of policies and grounds for discipline through adjudication as well as through rule-making.

(6) Docket. The Board shall assign a docket number to all complaints and shall mark the complaint with this number and the date filed. All subsequent papers relating to the particular complaint shall be marked with the same docket number and shall be placed in a file (the docket) with all other papers bearing the same number.

(7) Order for Answering and Answer. The Committee may order that the licensee complained of answer the complaint within ten days. The Committee shall attach a copy of the complaint to the order for answering or shall describe the acts alleged in the complaint. A licensee shall respond to an order for answering either personally or through his or her attorney, in compliance with 243 CMR 1.02(6). An answer must address the substantive allegations set forth in the complaint or order.

(8) Dismissal by Complaint Committee. Upon receipt of a licensee's answer or at any point during the course of investigation or inquiry into a complaint, the Committee may determine that there is not and will not be sufficient evidence to warrant further proceedings or that the complaint fails to allege misconduct for which a licensee may be sanctioned by the Board. In such event, the Committee shall close the complaint. The Committee shall retain a file of all complaints.

(9) Board Action Required. If a licensee fails to answer within the ten-day period or if the Committee determines that there is reason to believe that the acts alleged occurred and constitute a violation for which a licensee may be sanctioned by the Board, the Committee may recommend to the Board that it issue a Statement of Allegations.

(10) Disposition by the Board. The Board shall review each recommendation which the Committee forwards to it within a reasonable time and shall require an adjudicatory hearing if it determines that there is reason to believe that the acts alleged occurred and constitute a violation of any provision of 243 CMR 1.03(5) or M.G.L. c. 112, § 5. The Board may take such informal action as it deems a complaint warrants. If the Board requires an adjudicatory hearing, it may refer the matter to a hearing officer.

(11) Suspension Prior to Hearing. The Board may suspend or refuse to renew a license pending a hearing on the question of revocation if the health, safety or welfare of the public necessitates such summary action. The procedure for summary suspension is as follows:

1.03: continued

(a) Immediate and Serious Threat. If, based upon affidavits or other documentary evidence, the Board determines that a licensee is an immediate and serious threat to the public health, safety, or welfare, the Board may suspend or refuse to renew a license, pending a final hearing on the merits of the Statement of Allegations. The Board must provide a hearing on the necessity for the summary action within seven days after the suspension.

(b) Serious Threat. If, based upon affidavits or other documentary evidence, the Board determines that a licensee may be a serious threat to the public health, safety or welfare, the Board may order the licensee to file opposing affidavits or other evidence within three business days. Based upon the evidence before it, the Board may then suspend or refuse to renew the license, pending a final hearing on the merits of the Statement of Allegations. The Board must provide a hearing on the necessity for the summary action within seven days after the suspension.

(12) Classification of Complaints. (Reserved).

(13) Assurance of Discontinuance.

(a) 243 CMR 1.03(13) shall apply to minor violations of 243 CMR 1.03(5), and, unless there is an allegation of patient harm, allegations of drug or alcohol impairment, as determined within the discretion of the Complaint Committee and the Board.

(b) At the time that the Complaint Committee determines that a recommendation for a Statement of Allegations is warranted, it may either forward such recommendation to the Board or refer the matter to a conference including a Hearing Officer, a representative of the Disciplinary Unit, and the Respondent. At the conference, the representative of the Disciplinary Unit and the Respondent may submit to the Hearing Officer a proposed Assurance of Discontinuance, which shall include:

1. Recitation of Circumstances giving rise to the Assurance of Discontinuance,
2. The Respondent's assurance of discontinuance,
3. A sanction and/or the Respondent's agreement to pay the Commonwealth's costs of the investigation, and
4. The Respondent's agreement that violation of the Assurance of Discontinuance shall be *prima facie* evidence of violation of the applicable law, regulations or standards of good and accepted medical practice referenced in the Assurance of Discontinuance.

(c) If the Hearing Officer approves the Assurance of Discontinuance, it shall be forwarded to the Board for final approval.

(d) If the Hearing Officer and the Board do not approve an Assurance of Discontinuance within 60 days of referral of the matter to the Hearing Officer for conference, or if the Hearing Officer refers the matter back to the Complaint Committee, the Complaint Committee shall forward its recommendation regarding issuance of the Statement of Allegations to the Board.

(e) Pursuant to M.G.L. c. 112, § 2, the Board must report an Assurance of Discontinuance to any national data reporting system which provides information on individual physicians.

(f) The Respondent may request that the Board not process his or her case pursuant to 243 CMR 1.03, in which event the Complaint Committee shall forward its recommendation regarding issuance of a Statement of Allegations to the Board.

(14) Statutory Reports. The Complaint Committee, an investigator, and any of the Board's units may also review and investigate any report filed pursuant to M.G.L. c. 111, § 53B, M.G.L. c. 112, §§ 5A through 5I, or 243 CMR 2.00: *Licensing and the Practice of Medicine* and 3.00: *The Establishment of and Participation in Qualified Patient Care Assessment Programs, Pursuant to M.G.L. c. 112, § 5, and M.G.L. c. 111, § 203.* If the Board does not issue a Statement of Allegations based upon the statutory report, the statutory report and the records directly related to its review and investigation shall remain confidential. However, if such report and records are relevant to a resignation pursuant to 243 CMR 1.05(5), then they shall be treated like closed complaint files, under 243 CMR 1.02(8)(c)1.; provided, however, that confidentiality of peer review documents is maintained in accordance with 243 CMR 1.02(8)(c)4. and that confidentiality of documents filed under M.G.L. c. 111, § 53B is maintained to the extent required by law.

1.03: continued

(15) Discipline When License Has Been Revoked by Operation of Law. For purposes of administrative economy and convenience, the Board may, in its discretion, defer commencement of formal disciplinary proceedings against a physician whose license has been revoked by operation of law under the provisions of M.G.L. c. 112, § 2 or through application of 243 CMR 2.06(2): *Requirements for Renewing a Full, Administrative or Volunteer License.* Such deferral may be until such time as the physician takes action to complete the renewal process. The Board shall notify the physician of its intent to defer action under 243 CMR 1.03(15); if the physician files a written objection within 60 days by certified, return-receipt mail, the Board shall not defer commencement of said proceeding. Nothing in 243 CMR 1.03(15) shall be construed to bar the Board from commencing disciplinary proceedings at any time, including any proceedings which may or may not have previously been deferred.

(16) Stale Matters. Except where the Complaint Committee or the Board determines otherwise for good cause, the Board shall not entertain any complaint arising out of acts or omissions occurring more than six years prior to the date the complaint is filed with the Board.

1.04: Adjudicatory Hearing.

After the Board issues a Statement of Allegations, the Board shall conduct all hearings in accordance with 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure.*

1.05: Final Decision and Order and Miscellaneous Provisions.

(1) In General. Every Final Decision and Order of the Board requires the concurrence of at least four members, or of a majority of the Board if it has more than one vacancy. If the Hearing Officer is a member of the Board, his or her vote counts in the event the Board is not otherwise able to reach a final decision.

(2) Sanctions. In disposition of disciplinary charges brought by the Board, the Board may revoke, suspend, or cancel the certificate of registration, or reprimand, censure, impose a fine not to exceed $10,000 for each classification of violation, require the performance of up to 100 hours of public service, in a manner and at a time and place to be determined by the Board, require a course of education or training or otherwise discipline or limit the practice of the physician. A reprimand is a severe censure.

(3) Nature and Effect, Generally. Any order of the Board which imposes a sanction as a result of a disciplinary action is effective immediately, unless the Board orders otherwise.

(a) Suspension. A licensee whose certificate is suspended for a period of time is automatically reinstated upon expiration of the suspension period.

(b) Revocation. The cancellation or revocation of a certificate of registration is effective for at least five years, unless the Board orders otherwise. Reinstatement thereafter may be granted or denied in the Board's discretion. A cancellation or revocation is lifted only through a petition for reinstatement.

(4) Reinstatement. A person previously registered by the Board may apply for reinstatement of his or her application no sooner than five years after revocation, unless the Board orders otherwise. An application for reinstatement is addressed to the Board's discretion, must be made in the form the Board prescribes, must be filed in original with ten copies, and will be granted only if the Board determines that doing so would advance the public interest. If the Board denies a petition for reinstatement, the Respondent shall not re-petition for reinstatement until at least two years after the date of denial, unless the Board orders otherwise.

1.05: continued

(5) Resignation.

(a) A licensee who is named in a complaint or who is subject to an investigation by the Board or who is the respondent in a disciplinary action may submit his or her resignation by delivering to the Board a writing stating that: he or she desires to resign; his or her resignation is tendered voluntarily; he or she realizes that resignation is a final act which deprives a person of all privileges of registration and is not subject to reconsideration or judicial review; and that the licensee is not currently licensed to practice in any other state or jurisdiction, will make no attempt to gain licensure elsewhere, or will resign any other licenses contemporaneously with his or her resignation in the Commonwealth.

(b) If a complaint, investigation, or Statement of Allegations arises solely out of a disciplinary action in another jurisdiction, within the meaning of 243 CMR 1.03(5)(a)12., then the registrant may submit a resignation pursuant to 243 CMR 1.05(5)(a), but need not make any representation regarding licensure status in other jurisdictions, is permitted to gain licensure elsewhere, and need not resign any other licenses contemporaneously with the resignation.

(c) The Board is not obligated to accept a resignation tendered pursuant to 243 CMR 1.05. The acceptance of such a resignation is within the discretion of the Board, and is a Final Decision and Order subject to a vote of the Board.

(6) Unauthorized Medical Practice. The Board shall refer to the appropriate District Attorney or other appropriate law enforcement agency any incidents of unauthorized medical practice which comes to its attention, as required by M.G.L. c. 112, § 5.

(7) Imposition of Restrictions. Consistent with 243 CMR 1.00 and M.G.L. c. 30A or otherwise by agreement with the licensee, the Board may impose restrictions to prohibit a licensee from performing certain medical procedures, or from performing certain medical procedures except under certain conditions, if the Board determines that:

(a) the licensee has engaged in a pattern or practice which calls into question her competence to perform such medical procedures, or

(b) the restrictions are otherwise warranted by the public health, safety and welfare.

REGULATORY AUTHORITY

243 CMR 1.00: M.G.L. c. 13, § 10; c. 112, §§ 2 through 9B.

NON-TEXT PAGE

801 CMR 1.00: STANDARD ADJUDICATORY RULES OF PRACTICE AND PROCEDURE

Section

801 CMR 1.00 is promulgated pursuant to M.G.L. c. 30A. Issues not addressed in 801 CMR 1.00 or for which any party seeks clarity are to be considered in light of the entire M.G.L. c. 30A. 801 CMR 1.00 is applicable to those state administrative agencies bound by the mandate of M.G.L. c. 30A and shall become effective 90 days after publication by the Secretary of the Commonwealth and will govern only adjudicatory proceedings commenced after the effective date. Existing agency rules will thus remain in effect for an indefinite period in the future, applicable to preexisting matters.

1.01: Formal Rules

(1) Preamble. 801 CMR 1.01 of the Standard Rules of Adjudicatory Practice and Procedure is a self-contained segregable body of regulations of general applicability for proceedings in which formal rules are desired. An Agency must determine for any class of hearing whether to hold hearings under 801 CMR 1.01 or 801 CMR 1.02 Informal/ Fair Hearing Rules. Agencies shall determine based on such factors as: the volume of cases held; whether claimants are represented by counsel; the complexity of the issues; or the applicability of Federal fair hearings procedures. All notices from which an Adjudicatory Proceeding can be claimed shall state which rules apply, whether formal under 801 CMR 1.01, or informal under 801 CMR 1.02. In addition, all notices shall contain a notice printed in English, Spanish, Portuguese, Italian, Greek, French and Chinese that informs the reader that the document is important and should be translated immediately.

(2) Scope, Construction and Definitions.

(a) Scope 801 CMR 1.00 governs the conduct of formal Adjudicatory Proceedings of all Commonwealth agencies governed by M.G.L. c. 30A.

(b) Construction. 801 CMR 1.00 shall be construed to secure a just and speedy determination of every proceeding.

(c) Definitions. Refer to all definitions included in M.G.L. c 30A. In addition, the following words when used in 801 CMR 1.01 shall have the following meanings:

Authorized Representative. An attorney, legal guardian or other person authorized by a Party to represent him in an Adjudicatory Proceeding.

Electronic Medium. Any device used to transmit information electronically, including but not limited to facsimile and e-mail.

Hand Delivery. Delivery by any method other than pre-paid U.S. mail, including but not limited to private mail services.

Petitioner The Party or Agency who initiates an Adjudicatory Proceeding.

Presiding Officer The individual(s) authorized by law or designated by the Agency to conduct an Adjudicatory Proceeding.

Respondent. The Party or Agency who must answer in an Adjudicatory Proceeding.

(3) Representation

(a) Appearance. An individual may appear in his or her own behalf, or may be accompanied, represented and advised by an Authorized Representative. An authorized officer or employee may represent a corporation, an authorized member may represent a partnership or joint venture, and an authorized trustee may represent a trust.

1.01: continued

(b) Notice of Appearance. An Authorized Representative shall appear by filing a written notice with the Agency or Presiding Officer. Notice shall contain the name, address and telephone number, as well as facsimile number and email address of the Authorized Representative and of the Party represented, and may limit the purpose of the appearance. The filing by an attorney of any pleading, motion or other paper shall constitute an appearance by the attorney who sent it, unless otherwise stated.

(4) Timely Filing. Parties must file papers required or permitted to be filed with the Agency under 801 CMR 1.00, or any provision of applicable law, within the time provided by statute or Agency rule. Unless otherwise provided by applicable statute or regulation, Parties must file papers at an office of the Agency or with the Presiding Officer.

(a) Manner of Filing. All documents must be filed by email, unless otherwise ordered by the Presiding Officer for good cause or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Agencies must use all reasonable efforts to inform the general public of the appropriate email address where documents will be accepted, such as posting the email address on the Agency website or by other means. Papers filed by Electronic Medium shall be deemed filed at the office of the Agency or with the Presiding Officer on the date received by the Agency or Officer during usual business hours, but not later than 5:00 P.M. Parties are reminded of the prohibition concerning *ex parte* communications contained in 801 CMR 1.03(6). Parties must refrain from contacting the Presiding Officer about a matter, unless permission is granted by the Presiding Officer and a copy of the communication is sent to all other parties. If a party lacks access to sufficient Electronic Medium, Papers filed by U.S. mail shall be deemed filed on the date contained in the U.S. postal cancellation stamp or U.S. postmark, and not the date contained on a postal meter stamp. Papers filed by all other means shall be considered hand-delivered, and shall be deemed filed on the date received by the Agency during usual business hours. Any recipient of papers filed as provided in 801 CMR 1.01 (4)(a) shall stamp papers with the date received. The recipient shall provide on request date receipts to Persons filing papers by hand-delivery during business hours. The Presiding Officer shall make his or her best efforts to process filings delivered by mail and conduct hearings in a reasonable and timely manner.

(b) Papers received after usual business hours shall be deemed filed on the following business day.

(c) Notice of Agency Actions. Notice of actions and other communications from the Presiding Officer or adjudicating Agency, or its designee, shall be delivered by email, unless otherwise agreed upon by the parties, or directed by the Presiding Officer for good cause, or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Notice of actions and other communications by mail shall be presumed to be received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail. The postmark shall be evidence of the date of mailing.

(d) Computation of Time. Unless otherwise specifically provided by 801 CMR 1.00 or by other applicable law, computation of any time period referred to in 801 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included, unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Agency is closed, when the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the Agency is closed shall be excluded.

(e) Extension of Time. The Agency or Presiding Officer may, for good cause shown, extend any time limit contained in 801 CMR 1.00, unless otherwise restricted by law. All requests for extensions of time shall be made by motion before the expiration of the original or next previous extended time period. The filing of such motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion. 801 CMR 1.01(4)(e) shall not apply to any limitation of time prescribed by statute, unless extensions are permitted by the applicable statute

(5) Filing Format.

(a) Title. Papers filed with an Agency shall be titled with the name of the Agency, the docket number of the case if known, the names of the Parties and the nature of the filing.

1.01: continued

(b) Signatures. Documents filed by email will be deemed to be signed by the sender, and must include the sender's email address, street address, and telephone number. Papers filed with an Agency shall be signed and dated by an unrepresented Party, or by a Party's Authorized Representative, and shall state the address and telephone number of the Person signing the document. Such signature constitutes the signer's certification that he has read the document and knows the content thereof, that statements contained therein are believed to be true, that it is not interposed for delay and that if the document has been signed by an Authorized Representative that he has full power and authority to do so.

(c) Designation of Agency. An Agency designated as a Party to Adjudicatory Proceedings shall be designated by its name and not by the individual names of those constituting the Agency. If while the Adjudicatory Proceeding is pending, a change of employees occurs within the Agency, the Adjudicatory Proceeding shall not abate, and no substitution of Parties shall be necessary.

(d) Form.

1. Size and Printing Requirements. All papers filed for possible inclusion in the record shall be clear and legible and shall be presented in accordance with the standards of the Presiding Officer, if any, or on Agency forms whenever available.

2 Agency Format. An Agency may provide forms to be used for specific purposes by any Person or Party and use of forms provided shall be mandatory.

(e) Maintenance of Files. The papers filed in a given case shall be consolidated and maintained in an individual folder under a unique case or docket number with additional copies as the Agency or applicable statute may require.

(f) Service of Copies. In addition to the filing of any papers with the Agency, the Party filing papers shall serve a copy on all other Parties to the proceedings by email, unless a party lacks access to sufficient Electronic Medium or the Presiding Officer has ordered that papers may be filed by a method other than email, such as either delivery in hand or prepaid U.S. Mail. All papers filed with the Agency shall be accompanied by a statement certifying the date copies have been served, specifying the mode of service, the name of the Party served and the address of service. Papers served by Electronic Medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal. Failure to comply with this rule shall be grounds for the Agency to refuse to accept papers for filing. The means of service of copies should take no longer than the means of filing.

(6) Initiation of Formal Adjudicatory Proceedings.

(a) Agency Notice of Action. When an Agency initiates a proceeding against a Person regarding an Agency action or intended action, the Agency shall provide the Person with notice of the action or an order to show cause why the action should not be taken. The notice or order shall state the reason for the action. It shall specify in numbered paragraphs the specific facts relied upon as the basis for the action, the statute(s) or regulations authorizing the Agency to take action, and, in the case of a notice, any right to request an Adjudicatory Proceeding.

(b) Claim for Adjudicatory Proceeding. Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party.

(c) Form and Content of Claims. The notice of claim for an Adjudicatory Proceeding shall identify the basis for the claim. The notice shall state clearly and concisely the facts upon which the Party is relying as grounds, the relief sought and any additional information required by statute or Agency rule.

(d) Answer.

1. Answer to Claim. Except as statute or Agency rule may otherwise prescribe, within 21 days of receipt of a notice of claim for an Adjudicatory Proceeding, a Respondent shall file an answer to the initiating pleading. The answer shall contain full, direct and specific answers. The answer shall admit, deny, further explain, or state that the Respondent has insufficient knowledge to answer with specificity the initiating Party's allegations or claims. An allegation of inability to admit or deny for lack of information shall be treated as a denial. The answer shall also contain all affirmative defenses which the Respondent claims and may cite any supporting statute or regulation. All allegations contained in an initiating pleading which are neither admitted nor denied in the answer shall be deemed denied.

1.01: continued

2. Answer to Order to Show Cause. Except as statute or Agency rule may otherwise prescribe, within 21 days of receipt of an order to show cause, a Respondent shall file an answer thereto. The answer shall contain full, direct and specific answers. The answer shall admit, deny, further explain, or state that the Respondent has insufficient knowledge to answer with specificity the initiating Party's allegations or claims. An allegation of inability to admit or deny for lack of information shall be treated as a denial. The answer shall also contain all affirmative defenses which the Respondent claims and may cite any supporting statute or regulation. All allegations contained in an initiating pleading which are neither admitted nor denied in the answer shall be deemed denied.

(e) Agency Answer. An Agency shall not be required to file an answer if, at the time the Agency took the action being appealed, the Agency disclosed to the Petitioner the material facts on which the Agency relied in taking such action and the statutes and/or regulations which authorized or required the Agency to take such action.

(f) Joinder of Additional Parties and Amendments of Pleadings. If a Person is later joined or allowed to intervene, or allowed as a substitute Party, the Presiding Officer, upon his or her own initiative or upon the motion of any Party, may establish reasonable times for the filing of pleadings or other documents by any additional Party. The Presiding Officer may allow the amendment of any pleading previously filed by a Party upon conditions just to all Parties, and may order any Party to file an Answer or other pleading, or to reply to any pleading.

(g) Withdrawal. Any Party may, by motion, apply to withdraw a claim, a defense, or a request for action or for review, upon terms established by Agency rule, or which the Presiding Officer may allow in fairness to all Parties.

(7) Motions.

(a) General Requirements.

1. Presentations and Responses. An 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. Motions may be made in writing at any time after the commencement of an Adjudicatory Proceeding or orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether a hearing is desired. Within seven days after a written motion is filed with the Presiding Officer, any other Agency or Party may file written responses to the motion and may request a hearing. Responses to oral motions may be made orally at the hearing or in writing filed within seven days according to the discretion of the Presiding Officer.

2. Action on Motions. The Agency or Presiding Officer shall, unless the Parties otherwise agree, give at least three days' notice of the time and place for the hearing when the Agency or Presiding Officer determines that a hearing on the motion is warranted. The Agency or Presiding Officer may grant requests for continuances for good cause shown or may, in the event of unexcused absence of a Party who received notice, permit the hearing to proceed. The unexcused Party's written motion or objections, if any, are to be regarded as submitted on the written papers. The Agency or Presiding Officer may rule on a motion without holding a hearing if delay would seriously injure a Party, or if presentation of testimony or oral argument would not advance the Agency or Presiding Officer's understanding of the issues involved, or if disposition without a hearing would best serve the public interest. The Agency or Presiding Officer may otherwise act on a motion when all Parties have responded or the deadline for response has expired, whichever occurs first. If the Agency or Presiding Officer acts on the motion before all Parties have responded and the time has not expired, the ruling may be subject to modification or rescission upon the filing of one or more subsequent but timely responses.

3. Scope of Factual Basis for Hearing on Motions. The Parties may offer at a hearing on a motion evidence relevant to the particular motion. This evidence may consist of statements which are presented orally by sworn testimony, by affidavit, or which appear in admissible records, files, depositions or answers to interrogatories.

(b) Motion for More Definite Statement. If a pleading to which a responsive pleading is required is so vague or ambiguous that a Party cannot reasonably frame a response, the Party may, within the time permitted for such response, move for a more definite statement before filing its answer. The motion shall set forth the defects complained of and the details desired. If the motion is granted, the more definite statement shall be filed within ten days of the order allowing the motion or within the deadline determined by the Agency or

Presiding Officer.

1.01: continued

(c) Motion to Strike. A Party may move to strike from any pleading, or the Agency or Presiding Officer may on its own motion strike, any insufficient allegation or defense, or any redundant, immaterial, impertinent or scandalous matter.

(d) Motion to Continue. For good cause shown a scheduled hearing may be continued to another date:

1. by agreement of all Parties with the permission of the Presiding Officer, provided the Presiding Officer receives a letter confirming the request and agreement before the hearing date; or

2. by written motion to continue made by a Party at least three days prior to the hearing date; or

3. by the Presiding Officer on his or her own motion or upon a motion to continue made at the scheduled hearing.

(e) Motion to Change Venue. Any Party may move to have a hearing held in a place other than the scheduled location. In deciding such motions the Presiding Officer shall consider the objections of Parties, the transportation expenses of the Presiding Officer, the possibility of conducting the hearing by means of telecommunication facilities, the availability of either stenographic services or a suitable recording system, the availability of a neutral and appropriate hearing site, the availability of witnesses because of their place of residence or state of health, and other appropriate matters.

(f) Motion for Speedy Hearing. Upon motion of any Party and upon good cause shown, the Presiding Officer may advance a case for hearing.

(g) Motion to Dismiss.

1. Grounds. Upon completion by the Petitioner of the presentation of his or her evidence, the Respondent may move to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his or her case. The Presiding Officer may act upon the dismissal motion when presented, or during a stay or continuance of proceedings, or may wait until the close of all the evidence.

2. Failure to Prosecute or Defend. When the record discloses the failure of a Party to file documents required by statute or by 801 CMR 1.00, to respond to notices or correspondence, to comply with orders of the Presiding Officer, or otherwise indicates an intention not to continue with the prosecution of a claim, the Presiding Officer may initiate or a Party may move for an order requiring the Party to show cause why the claim shall not be dismissed for lack of prosecution. If a Party fails to respond to such order within ten days, or a Party's response fails to establish such cause, the Presiding Officer may dismiss the claim with or without prejudice.

3. Dismissal for Other Good Cause. The Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided.

(h) Motion for Summary Decision. When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues.

(i) Substitution of Parties. The Agency or Presiding Officer may, on motion, at any time in the course of a proceeding, permit substitution of Parties as justice or convenience may require.

(j) Consolidation of Proceedings. If there are multiple proceedings which involve common issues, a Party shall notify the Agency or Presiding Officer of this fact, stating with particularity the common issues. The Agency or Presiding Officer may with the concurrence of all parties and any other tribunal that may be involved, consolidate the proceedings.

(k) Motion to Reopen. At any time after the close of a hearing and prior to a decision being rendered, a Party may move to reopen the record if there is new evidence to be introduced. New evidence consists of newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it. A motion to reopen shall describe the new evidence which the Party wishes to introduce.

1.01: continued

(l) Motion for Reconsideration. After a decision has been rendered and before the expiration of the time for filing a request for review or appeal, a Party may move for reconsideration. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A, § 14(1) for the purposes of tolling the time for appeal.

(8) Discovery.

(a) General Policy and Protective Orders. The Parties are encouraged to engage in voluntary discovery procedures. In connection with document requests, interrogatories, depositions or other means of discovery, the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense. Orders may include limitations on the method, time, place and scope of discovery and provisions for protecting the secrecy of confidential information or documents.

(b) Document Request Procedure and Costs. After a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve another Party or Agency with a document request which lists with reasonable specificity items requested for inspection which are in the possession, custody or control of the Party or Agency requested to provide them. A Party or Agency served with a document request shall respond within 30 days or as otherwise determined by the Presiding Officer. The Presiding Officer may require a Party requesting documents to pay the Party or Agency responding to a document request the fee per page determined by the Executive Office for Administration and Finance.

(c) Depositions: When Permitted. After a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, the Presiding Officer may, upon motion by a Party, order the taking of the testimony of any Person by deposition before any officer authorized to administer oaths. The motion shall specify the name and address of each deponent and the reasons for the deposition. The Presiding Officer shall allow the motion only upon showing that the parties have agreed to submit the deposition in lieu of testimony by the witness, or the witness cannot appear before the Presiding Officer without substantial hardship. The motion shall only be allowed upon a showing by the moving Party that the testimony sought is significant, relevant, and not discoverable by alternative means. Motions for depositions shall be considered and acted upon in accordance with 801 CMR 1.01(7)(a).

(d) Depositions: How Taken. Signing. Depositions shall be taken orally before an officer having power to administer oaths. Each deponent shall be duly sworn. In instances where sincere scruple forbids the taking of an oath, a person may affirm with the same legal effect as having been sworn. Any Party shall have the right to cross-examine. The questions asked, the answers given, and any objections shall be recorded. The Presiding Officer shall rule only on objections accompanied by a reason and only in regard to the stated reason. Each deponent shall have the option of reviewing and affirming the deposition transcript and of indicating an affirmance in whole or in part by signing a statement to that effect on the title page of the transcript. The deponent may waive the reviewing and signing, in which case the officer shall state the fact of the waiver in the officer's certification, and the transcript shall then have the same status as if signed by the deponent. Subject to appropriate rulings on objections, the Presiding Officer may receive the deposition in evidence, as if the testimony contained therein had been given by a witness in the proceeding.

(e) Recording by Other than Stenographic Means. The Presiding Officer may on motion permit the testimony at a deposition to be recorded by other than stenographic means, in which event the Presiding Officer's authorization shall designate the manner of recording, preserving, and filing of the record of the deposition and may include other provisions to assure that the recorded testimony will be accurately preserved.

(f) Certification of Transcript. A duplicate transcript of the deposition shall be certified by the officer before whom the deposition was taken. When the deposition is introduced into evidence, the Party requesting the deposition shall order a duplicate copy of the transcript and forward a copy to the Presiding Officer.

1.01: continued

(g) Interrogatories. With the approval of the Agency or Presiding Officer, after a requestfor an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve written interrogatories upon any other Party for the purpose of discovering relevant information not privileged and not previously supplied through voluntary discovery. Interrogatories may be served by Hand-delivery, pre-paid U.S. mail or Electronic Medium. A duplicate of all interrogatories shall be simultaneously filed with the Presiding Officer. No Party, without the approval of the Presiding Officer, shall serve more than a total of 30 interrogatories either concurrently or serially including subsidiary or incidental questions. A Party may not serve any interrogatories less than 45 days before the scheduled hearing, without the approval of the Agency or Presiding Officer.

(h) Answers to Interrogatories. Each interrogatory shall be separately and fully answered under the penalties of perjury, unless an objection to the interrogatory with supporting reasons are stated in *lieu* of an answer. An answer shall be served within 30 days of receipt of an interrogatory, or within such other time as the Presiding Officer may specify. A duplicate of all answers to interrogatories shall be simultaneously filed with the Presiding Officer.

(i) Motion for Order Compelling Discovery. A Party may file with the Presiding Officer, subject to 801 CMR 1.01(7)(a), a motion to compel discovery if a discovery request is not honored, or only partially honored, or interrogatories or questions at deposition are not fully answered. If the motion is granted and the other Party fails without good cause to obey an order to provide or permit discovery, the Presiding Officer, before whom the action is pending, may make orders in regard to the failure as are just, including one or more of the following:

1. An order that designated facts shall be established adversely to the Party failing to comply with the order; or
2. An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.

(9) Intervention and Participation.

(a) Intervention. Any Person not initially a Party, who may be substantially and specifically affected thereby and wishes to intervene or participate in an Adjudicatory Proceeding shall file a written petition for leave to be allowed to do so. Except as otherwise provided in 801 CMR 1.01(9), the petition shall be subject to 801CMR 1.01(7)(a).

(b) Form and Content. The petition shall state the name and address of the Person filing the petition. It shall describe the manner in which the Person making the petition may be affected by the proceeding. It shall state why the Agency or Presiding Officer should allow intervention or participation, any relief sought, and any supporting law.

(c) Filing the Petition. The petition may be filed at any time following a request for an Adjudicatory Proceeding or an order to show cause, but in no event later than the date of hearing. Petitions may be allowed at the discretion of the Presiding Officer, for any Person who is likely to be substantially and specifically affected by the proceeding, provided all existing Parties are given notice and an opportunity to respond pursuant to 801 CMR 1.01(7)(a).

(d) Rights of Intervenors. The Presiding Officer may permit any Person who is likely to be substantially and specifically affected by the proceeding. Any Person permitted to intervene shall have all the rights of a Party, subject to the discretion of the Presiding Officer to avoid undue delay or unnecessary duplication of evidence, and shall be subject to all limitations imposed upon a Party.

(e) Rights of Participants. The Presiding Officer may permit any Person who may be affected by a proceeding may be permitted to participate. Permission to participate shall be limited to the right to argue orally at the close of a hearing and to file an amicus brief, but shall not necessarily make the Person allowed to participate a Party in interest who may be aggrieved by any result of the proceeding. A Person who petitioned to intervene and who was allowed only to participate may participate without waiving his or her rights to administrative or judicial review of the denial of his or her motion to intervene.

1.01: continued

(f) Intervention to Protect the Environment. Any group of ten or more Persons may intervene collectively as a Party in any Adjudicatory Proceeding according to M.G.L. c. 30A, § 10A, provided that intervention is limited to the issue of actual or probable damage to the environment as defined in M.G.L. c. 214 § 7A, and the elimination or reduction thereof. The petition to intervene pursuant to M.G.L. c. 30A, § 10A shall also state the names and addresses of the members of the group and identify the member of the group, or the group's attorney, or the group's agent, who will be the group's representative before the Presiding Officer. The representative shall have the sole authority to sign papers for the group and to accept service for the group. Any Paper served on the representative of the group shall be deemed served on the entire group. If no representative is specifically stated in the petition, the first Person mentioned in the motion to intervene as a member of the group shall be deemed the representative of the group. A group that is permitted to intervene as a Party shall be collectively deemed a single Party as defined in 801 CMR 1.00.

(g) Permissive Reference. When a Party to an action relies upon any rule or regulation issued by an Agency, other than the one conducting the proceeding as grounds for a claim or defense, the Agency having promulgated the rule or regulation on timely application by a Party and in the discretion of the Presiding Officer, or at the initiative of the Presiding Officer, may offer a relevant construction, interpretation or application of the rule or regulation in aid of the resolution of one or more of the issues involved in the Adjudicatory Proceeding. Any request to the promulgating Agency shall be in writing and present a neutral statement of the issue or issues possibly affected by the rule or regulation. The promulgating Agency may respond in writing as promptly as its resources allow, but in no event later than 30 days from its receipt of the request. The promulgating Agency may expressly decline to respond and need not justify its position, and its failure to respond within the time limited shall be deemed a declination to do so.

(10) Hearings and Conferences.

(a) Pre-hearing Conference. The Presiding Officer may initiate or upon the application of any Party, may call upon the Parties to appear for a conference to consider;

1. the simplification or clarification of the issues;
2. the possibility of obtaining stipulations, admissions, agreements on matters already of record, or similar agreements which will reduce or eliminate the need of proof;
3. the limitation of the number of expert witnesses, or avoidance of cumulative evidence, if the case is to be heard;
4. the possibility of an agreement disposing of any or all issues in dispute; and
5. such other matters as may aid in the disposition of the Adjudicatory Proceeding.

Those matters agreed upon by the Parties shall be reduced to writing and signed by them, and the signed writing shall constitute a part of the record. The scheduling of a pre-hearing conference shall be according to Agency rule or, in the absence of rules, solely within the discretion of the Presiding Officer.

(b) Stipulations. In the discretion of the Presiding Officer, the Parties may, by written stipulation filed with the Presiding Officer at any stage of the proceeding, or by oral stipulation made at a hearing, agree as to the truth of any fact pertinent to the proceeding. The Presiding Officer may require parties to propose stipulations. In making findings, the Presiding Officer need not be bound by a stipulation which is in contravention of law or erroneous on its face.

(c) Submission without a Hearing. Any Party may elect to waive a hearing and submit his or her case upon written submissions. Submission of a case without a hearing does not relieve the Parties from the necessity of proving the facts supporting their allegations or defenses on which a Party has the burden of proof.

(d) Conduct of Hearing.

1. Decorum. All Parties, their Authorized Representatives, witnesses and other Persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Presiding Officer may take appropriate action. Appropriate action may include refusal to allow a disruptive Person to remain in the hearing room and, if such Person is a Party, to allow participation by representative only.

1.01: continued

2. Duties of Presiding Officer. The Presiding Officer shall conduct the hearing, administering an oath or affirmation to all witnesses, making all decisions on the admission or exclusion of evidence and resolving questions of procedure. The Presiding Officer shall file a decision or recommended decision with the Agency within a reasonable time after the close of the hearing.

(e) Order of Proceedings.

1. Opening. In the usual case, except as otherwise required by law, in hearings resulting from a notice of claim of an adjudicatory proceeding, the Party filing the claim shall open and first present evidence; in hearings resulting from orders to show cause, the Agency issuing the order shall open and first present evidence.

2. Order of Presentation. The Party taking the position contrary to that of the Party opening shall have the right to present his or her position upon completion of the opening Party's case.

3. Closing. The Party opening shall argue last in summation.

4. Discretion of the Presiding Officer. The Presiding Officer may, when the evidence is peculiarly within the knowledge of one Party, or when there are multiple Petitioners, or when he or she otherwise determines appropriate, direct who shall open and may otherwise determine the order of presentation.

(f) Presentation of Evidence. All Parties shall have the right to present documentary and oral evidence, to cross-examine adverse or hostile witnesses, to interpose objections, to make motions and oral arguments. Cross-examination is to follow the direct testimony of a witness. Whenever appropriate, the Presiding Officer shall permit reasonable redirect and recross-examination and allow a Party an adequate opportunity to submit rebuttal evidence. Except as otherwise provided, evidence of the Respondent shall be presented after the presentation of the Petitioner's case in chief. The Respondent shall first argue in summation.

1. Oath. A witness's testimony shall be under oath or affirmation.

2. Offer of Proof. An offer of proof made in connection with a ruling of the Presiding Officer rejecting or excluding proffered testimony shall consist of a statement of the substance of the evidence which the Party contends would be adduced by the testimony. If the excluded evidence consists of evidence in documentary or written form, it shall be filed and marked for identification and shall constitute the offer of proof.

(g) Subpoenas. The Agency or Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12.

(h) Administrative Notice. The Presiding Officer may take notice of fact(s), pursuant to the requirements of M.G.L. c. 30A, § 11(5).

(i) Transcript of Proceedings.

1. Stenographic or Recorded Records and Transcripts. Except where a Party elects to provide a public stenographer as provided herein, the testimony and argument at the hearing shall be recorded either stenographically or by Electronic Medium. The Presiding Officer shall arrange for verbatim transcripts of the proceedings to be supplied at cost to any Party upon request, at the Party's own expense. The Agency may elect to supply a copy of the tape, disc or other audio-visual preserving medium employed at the proceeding to record its events in *lieu* of a verbatim transcript. Any Party, upon motion, may be allowed to provide a public stenographer to transcribe the proceedings at the Party's own expense upon terms ordered by the Presiding Officer. In this event, a verbatim transcript shall be supplied to the Presiding Officer at no expense to the Agency.

2. Correction of Transcript. Corrections of the official hearing transcript may be made only to make it conform to the evidence presented at the hearing. Transcript corrections, agreed to by opposing Parties, may be incorporated into the record, if and when approved by the Presiding Officer. If opposing Parties cannot agree on transcript corrections, any Party may report the fact to the Presiding Officer, who may call for the submission of proposed corrections and shall determine what corrections, if any, are to be made with reliance on his or her own notes.

(j) Hearing Briefs. At the close of the taking of testimony and prior to his or her rendering a decision, the Presiding Officer may in his or her discretion call for and fix the terms of the filing of written summaries and arguments on the evidence and/or proposed findings of fact and conclusions of law.

1.01: continued

(k) Settling the Record.

1. Contents of Record. The record of the proceeding shall consist of the following items: notices of all proceedings; all motions, pleadings, briefs, memoranda, petitions, objections, requests and rulings; evidence received, including deposition transcripts, and offers of proof with the arguments; statements of matters officially noticed if not otherwise documented; interrogatories and the answers; all findings, decisions and orders presented whether recommended or final; transcripts of the hearing testimony, argument, comments or discussions of record or the tape, disc or preserving medium; and any other item the Presiding Officer has specifically designated be made a part of the record. The record shall at all reasonable times be available at the offices of the Agency or other designated location for inspection by the Parties.

2. Evidence after Record Closed. No evidence shall be admitted after the close of the record, unless the Presiding Officer reopens the record.

3. Exceptions. Formal exceptions to rulings on evidence and procedure are unnecessary. It is sufficient that a Party, at the time that a ruling is made or sought, makes known his or her objection to and grounds for any action taken. If a Party does not have an opportunity to object to a ruling at the time it is made, or to request a particular ruling at an appropriate time, the Party may submit a written statement of his or her specific objections and grounds within three days of notification of action taken or refused. Oral or written objections to evidentiary rulings shall be part of the record.

(11) Decisions. Unless otherwise provided by statute, decisions shall be made as follows:

(a) Direct Agency Decisions. The Agency may by regulation elect to preside at the reception of evidence in all cases. In the absence of such regulation, the Agency may elect to preside at the reception of evidence in particular cases and shall exercise this election by so stating in the notice scheduling the time and place for the Adjudicatory Proceeding in the particular case. The decision of the Agency as Presiding Officer shall be the final Agency decision.

(b) Initial Decisions. A Presiding Officer other than the Agency who presided at the reception of evidence shall render a decision as provided in M.G.L. c. 30A § 11(8). The decision of the Presiding Officer shall be called an initial decision. The Presiding Officer shall promptly provide the parties with a copy of his or her decision when filed with the Agency.

(c) Tentative Decisions. If the Agency elects to render a decision on the record without having presided at the reception of evidence, either by regulation or by statement in the notice scheduling the hearing, the initial decision shall also become a tentative decision.

1. Objections and Response. The Parties shall have the opportunity to file written objections to the tentative decision with the Agency, which may be accompanied by supporting briefs. The Parties shall have 30 days from the filing of the tentative decision or the transcript corrections under 801 CMR 1.01(10)(i)2., whichever occurs last, to file written objections. Parties may file responses to objections within 20 days of receipt of a copy of the objections. The Agency may order or allow the Parties to argue orally. A Party requesting oral argument shall file the request with the Party's written objections or response.

2. Agency Action on the Tentative Decision. The Agency may affirm and adopt the tentative decision in whole or in part, and it may recommit the tentative decision to the Presiding Officer for further findings as it may direct. The same procedural provisions applicable to the initial filing of the tentative decision shall apply to any refiled tentative decision after recommittal. If the Agency does not accept the whole of the tentative decision, it shall provide an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt. However, the Agency may not reject a Presiding Officer's tentative determinations of credibility of witnesses personally appearing. The Agency's decision shall be on the record, including the Presiding Officer's tentative decision, and shall be the final decision of the Agency not subject to further Agency review.

3. Failure to Issue Final Decision. If the Agency fails to issue a final decision within 180 days of the filing or refiling of the tentative decision, the initial decision shall become the final decision of the Agency, not subject to further Agency review.

1.01: continued

(d) Final Decisions. Every decision shall be made as required in M.G.L. c. 30A § 11(8), and shall be mechanically or electronically printed, and signed by the Presiding Officer or by those members of the Agency making the decision. A majority of the members constituting the Agency or the Agency panel authorized by the Agency to decide the case shall make direct Agency decisions. A final decision shall incorporate by reference those portions of an initial or tentative decision that are affirmed and adopted, and may expressly incorporate other portions it modifies or rejects with its reasons therefor. A final decision by an Agency under 801 CMR 1.01(11)(c) shall make appropriate response to any objections filed in regard to an initial or tentative decision.

(e) Decision Maker Unavailable. When a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence again from the beginning. The Agency shall provide without cost to all Parties and the successor a copy of the official verbatim transcript, or completed portions thereof, if not previously provided.

(f) Notice of Decision. The Agency or Presiding Officer shall promptly provide all Parties with a copy of every Agency decision or order when filed and otherwise give prompt notice of all Agency actions from which any time limitation commences.

(12) Telecommunications. The Presiding Officer may designate that all or a portion of a hearing be conducted with one or more participants situated in different locations and communicating through the medium of one or more telecommunication devices, including telephone and video conferencing, unless the Respondent or Petitioner lacks access to sufficient Electronic Medium.

(13) Further Appeal. After the issuance of a final decision, except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any Agency in an Adjudicatory Proceeding shall be entitled to a judicial review thereof in accordance with M.G.L. c. 30A, § 14.

(14) Withdrawal of Exhibits and Recording Media. Three years after a decision in a given case has become final and all periods for requesting further review, whether administrative or judicial, which may require reference to original exhibits or the reproduction or transcription of events recorded stenographically or by Electronic Medium, have lapsed, an Agency or Presiding Officer may in its discretion:

(a) permit the withdrawal of original exhibits or any part thereof by the Party or Person entitled thereto; and

(b) withdraw from its file stenographic or electronic media employed to record the events of the Adjudicatory Proceedings before it and dispose of them as it sees fit.

1.02: Informal/Fair Hearing Rules

(1) Preamble. 801 CMR 1.02 of the Standard Adjudicatory Rules of Practice and Procedure is a self- contained segregable body of regulations of general applicability for proceedings in which formal rules cannot be utilized or federal fair hearing procedures are applicable. An Agency must determine for any class of hearings whether to hold hearings under 801 CMR 1.01, Formal Hearings, or 801 CMR 1.02. Agencies shall determine based on such factors as: the volume of cases held; whether claimants are represented by counsel; the complexity of the issues; or the applicability of Federal fair hearings procedures. All notices from which an Adjudicatory Proceeding can be claimed shall state which rules apply, whether formal under 801 CMR 1.01, or informal under 801 CMR 1.02. In addition, all notices shall contain a notice printed in English, Spanish, Portuguese, Italian, Greek, French and Chinese that informs the reader that the document is important and should be translated immediately.

1.02: continued

(2) Scope, Construction and Definitions.

(a) Scope and Construction. 801 CMR 1.02 shall apply to Adjudicatory Proceedings involving review of action or inaction of an Agency or of a Veterans' agent with respect to a claim for benefits or services. Without intending to limit its applicability, 801 CMR 1.02 shall apply to all hearings held pursuant to the fair hearing requirements of 7 CFR 273; 42 USC 503 (a)(3) and M.G.L. c. 151A, §§ 39 and 41. 801 CMR 1.02 shall also apply to the hearing procedures of any other Agency which is, in whole or in part, governed by the requirements of similar law, and to classes of hearings of any Agency for which 801 CMR 1.02 establishes minimum procedural protections for applicants or recipients in such proceedings, and shall in no way be construed to limit the protections afforded by state or federal law.

(b) Definitions. Refer to all definitions included in M.G.L. c. 30A and in 801 CMR 1.01. In addition, the following words when used in 801 CMR 1.02 shall have the following meanings:

Applicant. An individual who has applied or been denied the opportunity to apply for benefits available under any program administered by an Agency, H.C.C. or veterans' agent appointed pursuant to M.G.L. c. 115, § 3.

ASAP. An Aging Services Access Point organized to provide services pursuant to a contract with The Executive Office of Elder Affairs.

Benefits. Any benefit to an individual or service administered or rendered by an Agency.

Case Manager. The Person who performs case management services.

DALA. The Division of Administrative Law Appeals.

Division of Hearings (DTA). The Division of Hearings for the Department of Transitional Assistance.

Electronic Medium. Any device used to preserve or transmit information electronically, including but not limited to telephone, e-mail and facsimile.

Hearing. An Adjudicatory Proceeding held under these informal rules at 801 CMR 1.02.

Institution. Any licensed hospital, nursing home or public medical institution.

Presiding Officer. The individual(s) authorized by law or designated by the Agency or DALA to conduct an Adjudicatory Proceeding.

Recipient. A Person or family receiving benefits under a program administered by an Agency, ASAP, or Veterans' Agent pursuant to M.G.L. c. 115, § 3.

(3) Representation.

(a) Appearance. An individual may appear in his or her own behalf, or may be accompanied, represented and advised by an Authorized Representative.

(b) Notice. An Authorized Representative shall appear by filing a written notice with the Agency or Presiding Officer. Notice shall contain the name, address and telephone number, as well as facsimile number and e-mail address if available, of the Authorized Representative and of the Party represented, and may limit the purpose of the appearance. The filing by an attorney of any pleading, motion or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise.

(c) Powers. An Authorized Representative may exercise on a Party's behalf any rights and powers vested in that Party by 801 CMR 1.00.

(4) Time. Papers shall be filed according to the procedures set forth in 801 CMR 1.01(4)(a) through (e).

1.02: continued

(5) Filing. All papers filed with the Agency, its designee, or DALA should contain the name, address, telephone number and signature of the sender or Authorized Representative. Papers which do not contain all of this information shall be accepted for filing if they contain sufficient identifying information so they can be placed in the appropriate file.

(6) Initiation of Adjudicatory Proceedings.

(a) Notice of Agency, ASAP, or Veterans' Agent Action.

1. Requirements. Notice of action by an Agency, ASAP or Veterans' agent to deny, terminate, reduce, or suspend services or Benefits to a Recipient or to deny Benefits or services to an applicant shall include but not be limited to:

a. clear and plain statement of the action to be taken;
b. the date on which the action shall become effective;
c. an explanation of reasons for the action;
d. the regulation or other legal authority on which such action is based;
e. the telephone number and address where further information may be obtained;
f. an explanation of the applicant's or recipient's right to request a hearing (including the time limits and manner for request);
g. a copy of the form used to request a hearing;
h. an explanation of the circumstances, if any, under which Benefits or services will continue pending an Adjudicatory Proceeding;
i. an explanation of the right to be represented, including if applicable, the availability of assistance; and
j. the mailing address, telephone number and office hours of the office responsible for receiving and/or hearing appeals from the Agency action.

2. Exceptions for ASAP.

a. If a Recipient voluntarily assents in writing to a termination, reduction or suspension of services, the ASAP shall implement the change in service in accordance with the terms of that assent, without sending notice of action. ASAP shall use a written assent format provided by Elder Affairs.
b. If a recipient is hospitalized or otherwise institutionalized, ASAP shall suspend the Recipient's services as soon as feasible, without sending notice of action. Upon discharge, the ASAP shall reassess the Recipient's service needs.
c. If an ASAP has actual knowledge that a Recipient is temporarily absent from the ASAP service area and is therefore unavailable to receive services, the ASAP may suspend services for the period of the Recipient's absence without sending notice of action.

(b) Grounds for Appeal. A right to request an Adjudicatory Proceeding shall arise when controversy exists which by law or Agency regulation requires an Adjudicatory Proceeding, or when a Person is aggrieved by an Agency, ASAP, or veterans' agent action or failure to act.

(c) Adjudicatory Proceedings - How Taken. A Person entitled to an Adjudicatory Proceeding or his or her Authorized Representative must request a hearing in writing in the form prescribed, or on the form provided by the Agency or the Presiding Officer, and must sign and date the request. At the discretion of the Agency, the request for hearing may be filed by Electronic Medium. The requesting Party must file with the Agency or the Presiding Officer within the time limit prescribed by law. In the absence of any time limit, the requesting Party must file within 60 days after receipt of the notice of action or, for failure to act, within 120 days from application, unless the Agency has established a longer period.

(d) Continuation of Benefits Pending Appeal. Benefits shall continue when required by applicable statute or regulation, if the Recipient or Institution has met the standard set forth by applicable statute or regulation.

(e) Termination of Continued Benefits. Benefits continued in accordance with 801 CMR 1.02(6)(d) shall be terminated if:

1. a determination is made at the hearing that the sole issue is a challenge to the validity of a particular law or regulation; or
2. a change affecting the Recipient's Benefits occurs subsequent to the Adjudicatory Proceeding request which makes the previously filed Adjudicatory proceeding request moot, and the Recipient fails to request a hearing on the subsequent matter within the applicable time period; or

1.02: continued

3. a determination is made at the hearing that the Agency action to terminate Benefits was correct.

(7) Special Requests.

(a) Withdrawals. With the approval of the Agency or the Presiding Officer, a Petitioner may withdraw his or her request for an Adjudicatory Proceeding in a writing signed by the Petitioner or his or her Authorized Representative.

(b) Emergency Scheduling. The Agency or the Presiding Officer, on its own or by request of a Party, may for good cause order an accelerated hearing.

(c) Other Requests. A Party may request rulings or relief in writing at any time or orally during a hearing. After providing notice to the other Parties, the Agency or Presiding Officer shall rule on the request with or without a hearing.

(8) Discovery.

(a) Generally. Parties to an Adjudicatory Proceeding are encouraged to engage in voluntary discovery.

(b) Examination of File. At any time after an Adjudicatory Proceeding has been requested, a Party and its Authorized Representative shall have adequate access to and an opportunity to examine and copy or photocopy the entire content of his or her case file and all other documents to be used by the Agency, ASAP, or Veterans' Agent at the hearing. The cost of photocopying shall be determined from time to time by the Executive Office for Administration and Finance.

(9) Group Hearings.

(a) Purpose. A group hearing may be held if it appears from the request for a hearing or other written information submitted by the Parties that the matters involve questions of fact which are identical, or the sole issue involves federal or state law or policy, or changes in federal or state law. For these purposes, a change in federal or state law shall mean any change in standards governing eligibility or limitation in the amount of time for which Benefits or services are provided, affecting a class of Recipients or Applicants and promulgated by state or federal law or regulation.

(b) Severance of Individual Hearing. If, at any stage of such group hearing, the Presiding Officer finds that any individual appeal involves questions of fact unique to the individual Petitioner, such as the applicability of the law change to such Petitioner, the Presiding Officer shall sever the appeal and hear it individually.

(10) Hearings.

(a) Adjustment of Matters Related to Hearing. A filed request for hearing does not prohibit an adjustment in the matters at issue prior to the hearing. If as a result of an adjustment, the Petitioner is satisfied and wishes to withdraw all or part of his or her appeal, he or she shall file a signed withdrawal in writing with the Agency or the Presiding Officer in accordance with 801 CMR 1.02(7)(a). A hearing shall not be delayed or canceled because of a proposed adjustment under consideration, unless the Petitioner requests a delay or cancellation.

(b) Submission without a Hearing. The Petitioner may elect to waive a hearing and to submit any documents without appearing at the time and place designated for the hearing. Submission of a case without a hearing does not relieve the Parties from supplying all documents supporting their allegations or defenses. Affidavits and stipulations may be employed to supplement other documentary evidence in the record.

(c) Notice of Hearing. The notice of the hearing must include the date, time, and place of the hearing, an explanation of the hearing procedure and an explanation of the Party's right to have an Authorized Representative present. Unless already provided in the notice of action under 801 CMR 1.02(6)(a)(1), the notice shall provide sufficient notice of the issues involved so that the Parties may have a reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all Parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

1.02: continued

(d) Dismissals for Failure to Appear. If the Petitioner fails to appear at the hearing, the Presiding Officer shall notify the Petitioner in writing that a default will be entered against him, unless within ten days from the date of said notice he or she files a motion for a rescheduled hearing, and the motion is granted. In the event a Petitioner fails to appear at the time and place of a granted rescheduled hearing, the appeal shall be dismissed and shall include an explanation of the manner in which dismissals may be vacated. Any motions to vacate a dismissal must be in writing, signed by the Petitioner or his or her Authorized Representative, and directed to the Presiding Officer. Dismissals shall be vacated only for good cause shown.

(e) Dismissal for Failure to Prosecute. The Agency or the Presiding Officer may order dismissal for failure to prosecute in accordance with the provisions of 801 CMR 1.01(7)(g)2.

(f) Presiding Officer's Duties and Powers at Hearings. The Presiding Officer shall have the duty to conduct a fair hearing to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence, including examining witnesses and authorizing the Agency to pay for an independent medical examination; to exclude irrelevant or unduly repetitious evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; to reach a fair, independent and impartial decision based upon the issues and evidence presented at the hearing and in accordance with the law; and to reconvene the hearing with notice to the parties at any time prior to the decision being issued.

(g) Rights and Duties of Parties.

1. Each Party may present his or her own case, or may be assisted by an Authorized Representative at his or her expense. The Party, or Authorized Representative, shall have a right to:
   a. present witnesses;
   b. present and establish all relevant facts and circumstances by oral testimony and documentary evidence;
   c. advance any pertinent arguments without undue interference;
   d. question or refute any testimony, including an opportunity to cross-examine adverse witnesses; and
   e. examine and introduce evidence from his or her case record, and examine and introduce any other pertinent documents.
2. The Agency, in addition to the rights and duties above, at 801 CMR 1.02(10)(g)1.:
   a. is responsible for submitting at the hearing all documented information on which its action or motions are based;
   b. shall introduce into the hearing only material which pertains to the issues; and
   c. may designate and may send a staff person to the hearing to testify as to its action or inaction. In cases involving the judgment of the Case Manager relative to reduction, suspension, or termination of services, the Case Manager, or a person authorized to represent the Case Manager, shall be present at the hearing.

(h) Evidence.

1. General. The Agency or Presiding Officer shall admit and consider evidence in accordance with M.G.L. c. 30A, § 11(2).
2. Presented at Hearing. Except as the Agency, its designee, or Presiding Officer may otherwise order, any documentary evidence on which a decision is based must be presented either at the hearing or, in cases submitted without a hearing pursuant to 801 CMR 1.02(10)(b), before notification that the case is ready for decision. Copies of any evidence shall be provided to all other Parties.
3. Oral Testimony. Oral testimony shall be given under oath or affirmation. Witnesses shall be available for examination and cross-examination.
4. Stipulations. Stipulations may be used as evidence in accordance with the provisions of 801 CMR 1.01(10)(b).
5. Additional Evidence. The Agency or the Presiding Officer may in any case require any Party or the Agency, with appropriate notice to all other Parties, to submit additional evidence on any relevant matter.

(i) Subpoenas. The Agency or the Presiding Officer may issue, vacate or modify subpoenas in accordance with M.G.L. c. 30A, § 12. Parties may issue subpoenas in accordance with M.G.L. c. 30A, § 12(3). Witnesses may petition the Agency to vacate or modify subpoenas in accordance with M.G.L. c. 30A, § 12(4).

1.02: continued

(j) Scheduling. Upon receipt of a request for a hearing, the Agency or Presiding Officer shall within a reasonable time register the appeal, set a date and designate a site for a hearing, and notify all Parties. If the Petitioner has a disability or is otherwise unable to appear at the designated site, the Petitioner may request that the hearing be held at another convenient location. The Agency or Presiding Officer may grant such request.

(k) The Hearing Record.

1. Contents of the Record All documents and other evidence offered or taken shall become part of the record, which shall be the exclusive basis of the decision. The record shall at reasonable business hours be available at the offices of the Agency or other designated location for inspection by the parties.

2. Stenographic or Taped Record. All evidence and testimony at the hearing shall be recorded either stenographically or by Electronic Medium. The Presiding Officer shall arrange for verbatim transcripts of the proceedings to be supplied at cost to any Party upon request, at the Party's own expense. The Agency by rule may elect to supply a copy of the tape, disc or other audio-visual preserving medium employed at the proceeding to record its events in lieu of a verbatim transcript at the Party's own expense. The Agency or the Presiding Officer may permit any Party to maintain his or her own stenographic or electronic record.

(l) Continuances. The Agency or the Presiding Officer may continue a hearing by notifying all parties and authorized representatives of the date, time and place of the continued hearing.

(11) Decisions. Upon completion of the hearing, the Agency or Presiding Officer shall render a written decision as promptly as administratively feasible, in accordance with M.G.L. c. 30A, § 11(8).

(12) Appeals.

(a) General. Within the time prescribed by law or regulation, or within ten days where no other time limit is prescribed, any Party entitled to further administrative review of the decision at an Agency which has a review process, may file a request for review with the appropriate reviewing Agency. Upon receipt of motion for administrative review, the reviewing Agency shall notify all other parties of any hearing scheduled.

(b) DALA Appeals. For any decision adverse to a Petitioner, DALA shall send the Petitioner a copy of the decision with a notice informing the Petitioner of his or her right to appeal. The notice should specify:

1. that the Petitioner must make a written request for appeal within 15 days of the date DALA mailed the notice;
2. that the Petitioner must send the written request for hearing to DALA;
3. that the Petitioner must ask for a new hearing in order to have a new hearing; and
4. that unless the Petitioner requests a new hearing, the appeal shall be limited to a review of the record to determine if the decision was supported by substantial evidence.

1.03: Miscellaneous Provisions Applicable to All Adjudicatory Proceedings

(1) Preamble. 801 CMR 1.03 is applicable to all proceedings held under 801 CMR 1.01 and 1.02.

(2) Amendments. The Secretary of Administration and Finance may adopt any appropriate amendments and additions to 801 CMR 1.00 in accordance with M.G.L c. 30A, § 9. Any Agency may make application to the Secretary of Administration and Finance for amendments to 801 CMR 1.00.

(3) Severability. If any rule contained herein is found to be unconstitutional or invalid by a Court of competent jurisdiction, the validity of the remaining rules will not be so affected.

(4) Exemptions. Any agency wishing to be exempted from 801 CMR 1.00 shall apply for exemption to the Secretary of Administration and Finance.

(5) Conflicts. No Presiding Officer who has a direct or indirect interest, personal involvement or bias in an Adjudicatory Proceeding shall conduct a hearing or participate in decision-making for the relevant Adjudicatory Proceeding.

1.03: continued

(6) *Ex Parte* Communications.

(a) General Provisions. In any Adjudicatory Proceeding:

1. Any member of the body comprising the Agency, Presiding Officer, or other Agency employee who is or may reasonably be expected to be involved in the decisional process of the Adjudicatory Proceeding:

a. shall not make or receive an *ex parte* communication to or from any interested person outside the Agency relevant to the merits of the Adjudicatory Proceeding; and

b. shall place on the public record of the Adjudicatory Proceeding:

i. all prohibited written communications made or received;

ii. memoranda stating the substance of all prohibited oral communications made or received;

iii. all written responses, and memoranda stating the substance of all oral responses, to the materials described in 801 CMR 1.03(6)(a)1.b.i. and .ii.; and

iv. a statement whether, in his or her opinion, the receipt of the *ex parte* communication disqualifies him or her from further participation in the Adjudicatory Proceeding, pursuant to 801 CMR 1.04(5).

2. The Presiding Officer may, upon the motion of any Party or on his or her own motion, accept or require the submission of additional evidence of the substance of a communication prohibited by 801 CMR 1.03(6).

3. Upon receipt of a communication knowingly made or knowingly caused to be made by a Party in violation of 801 CMR 1.03(6), the Presiding Officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the Party to show cause why his or her claim or interest in the Adjudicatory Proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

4. The prohibitions of 801 CMR 1.03(6) shall apply beginning at the time at which an Adjudicatory Proceeding is initiated under 801 CMR 1.01(6) or 1.02(6), unless the person responsible for the communication knows or reasonably should know that the Adjudicatory Proceeding will be initiated, in which case the prohibitions shall apply beginning at the time of such person's acquisition of such actual or constructive knowledge.

(b) Exception. 801 CMR 1.03(6)(b) does not apply to consultation among Agency members concerning the Agency's internal administrative functions or procedures.

1.04: Conduct of Mediation at the Division of Administrative Law Appeals

(1) Preamble. On cases appealed to the Division of Administrative Law Appeals, or assigned to the Division of Administrative Law Appeals for hearing, the case may be assigned to mediation at the request of any Party. Any Party may decline assignment to mediation.

(2) Definitions. Refer to all definitions included in M.G.L. c. 30A and in 801 CMR 1.01 and 1.02. In addition, MODR shall mean the Massachusetts Office of Dispute Resolution.

(3) Mediation Referral.

(a) Internal Mediation. DALA shall supply the Parties with a list containing not less than three DALA administrative magistrates as suggested mediators. Each Party may strike one administrative magistrate from the list, and DALA will not assign any administrative magistrate who has been stricken from the list to conduct the mediation. DALA shall notify the parties of the assigned mediator. The mediator shall, within ten days of assignment, schedule a mediation at a convenient time and location.

(b) External Mediation. By decision of DALA or by agreement between the parties in *lieu* of or following an internal mediation, a case can be referred to the Massachusetts Office of Dispute Resolution (MODR) for mediation or other dispute resolution service. MODR will supply the parties with a list of three suggested mediators. Each Party shall indicate to MODR their order of preference and MODR will coordinate the selection of the mediator and the mediation process. The Massachusetts Office of Dispute Resolution will work with the Department of Administrative Law Appeals to develop criteria for referrals, screening and fee policy.

1.04: continued

(4) Mediation. Mediation, either with a DALA administrative magistrate or a mediator from the Massachusetts Office of Dispute Resolution, shall be conducted in accordance with the following procedures.

(a) All Parties shall make available to the mediation a Person who has authority to bind the Party to a mediated settlement.

(b) All Parties must agree in writing to the following:

1. Not to use any information gained solely from the mediation in any subsequent proceeding;

2. Not to disclose any information gained solely from the mediation to persons not involved in the mediation;

3. Not to subpoena the mediator for any subsequent proceeding;

4. Not to disclose to any subsequently assigned administrative magistrate the content of the prior mediation discussion;

5. To mediate in good faith;

6. That any agreement of the parties derived from the mediation shall be binding on the parties and, once reduced to writing and signed by all parties, will have the effect of a contract in subsequent proceedings; and

7. That this confidentiality provision set forth in this agreement shall also apply to the person serving as mediator.

8. If any Party fails to appear at the mediation without explanation, the mediator shall return the matter to DALA.

9. The mediator may at any time return the matter to DALA. If the mediator was a DALA administrative magistrate, the hearing shall be scheduled before another DALA magistrate.

10. No particular form of mediation is required. The structure of the mediation shall be tailored to the needs of the particular dispute. Where helpful, Parties may be permitted to present any documents, exhibits, testimony or other evidence which would aid in the attainment of a mediated settlement.

(c) Time Limit. In no event shall mediation efforts continue beyond 30 days from the date of the first scheduled mediation, unless this time limit is extended by agreement of all the parties.

(d) Conclusion of Mediation.

1. If mediation results in agreement, mediation shall be concluded by a settlement agreement.

2. If mediation does not result in agreement resolving the entire matter, the matter shall be returned to DALA for scheduling appropriate subsequent proceedings at the earliest possible time.

REGULATORY AUTHORITY

801 CMR 1.00: M.G.L. c. 30A, §§ 9 and 10.

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