

# FEATURE ARTICLE



## California's Physician Cartel: Keeping Out The Intruders

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### INTRODUCTION

In 1975, Le Bup Thi Dao was a promising medical student in her fourth year of a rigorous six-year curriculum at the University of Saigon Medical School. The eldest of nine children, she was among 200 students chosen from 5,000 applicants seeking to enter medical school in 1971. Her dreams of becoming a doctor and serving the poor in her community were shattered when communist forces took control of Saigon in May 1975, and her father was sent to a North Vietnamese prison camp. After treating war victims during her two-year residency, she graduated from medical school in 1977 and began to practice medicine at Cho Ray Hospital.

Convinced that living and working under the communist regime was intolerable, Le Dao fled to the United States in 1978. She was one of the "boat people" who literally swam to freedom. After a harrowing journey, she arrived in the United States, settled in Orange County, became fluent in English, secured American citizenship, and set out to become licensed as a doctor in California.

Le Dao has braved war, death, storms, hunger, the sorrow of leaving her family, the uncertainty of fleeing to an unknown culture, and her own fear. Today, however, she readily admits that she has never faced an obstacle more frustrating than California's Board of Medical Quality Assurance (BMQA). Since 1981 when she began the lengthy licensing process, she has passed every examination required by statute and completed a three-year residency at the University of California at Irvine. She has received glowing recommendations from hospital supervisors and faculty members.

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In short, Le Dao has satisfied every requirement for licensure as a physician in the state of California, but BMQA's Division of Licensing refuses to license her because, it claims, it is unable to "verify the operation, administration, or quality of medical schools in Vietnam after the fall of the Saigon government in the spring of 1975."<sup>1</sup> In spite of the facts that (1) the Division had already licensed at least six post-1975 Vietnamese medical graduates; (2) the Division was aware that at least 80% of the faculty at the University of Saigon remained the same until 1981; and (3) the University of Saigon remained recognized by the World Health Organization in its World Directory of Medical Schools until at least 1979, the Division began to stall on the processing of all applications from post-1975 Vietnamese graduates in January 1986. In May 1986, it inexplicably declared, without notice or hearing, a moratorium on the licensing of any person who graduated from the University of Saigon after 1975, and has unconscionably ceased all action on the issue since then.

Unfortunately, Dr. Dao's long, costly, and frustrating attempt to be licensed by BMQA is not an aberration; it is not extraordinary; it is not unusual. It is the rule rather than the exception for foreign medical graduates seeking licensure in California. The term "foreign medical graduates" (FMGs) refers to those who have attended medical school outside of the United States. Unlike Le Dao, the vast majority of FMGs seeking licensure in California are American citizens—many of them California residents—who have attended foreign schools because they have not been accepted into the limited number of expensive openings at U.S. medical schools.

California's responsibility to assure quality health care for its residents is central to any discussion of the licensing of foreign medical graduates. Over the past four years, BMQA's Division of Licensing has taken steps to limit FMGs' access to the medical profession in California, while constantly reciting

a "we-are-charged-with-protecting-the-health-and-safety-of-the-public" justification for its conduct. In fact, it appears that the Division's actions and policies have little connection to the assurance of competence, and are nothing more than a poorly-disguised attempt to limit the number of doctors entering the medical profession in California.

BMQA critics contend that the Board's recalcitrance toward the licensure of approximately thirty post-1975 Vietnamese physicians and many other FMGs is in sharp contrast to its record in the discipline of current licensees who are, or who have become, incompetent. That is, while hundreds of qualified physicians—many of them extraordinarily skilled—are denied entry through a nightmare of bureaucratic doubletalk and deceit, the Board is moribund in the removal of those currently licensed who have demonstrated incompetence.<sup>2</sup>

The California Senate Committee on Business and Professions, chaired by Senator Joseph B. Montoya, has studied the Division's FMG licensing practices for the past three years. The Committee has investigated numerous complaints received from FMG applicants, held hearings on the issue, and introduced legislation to more strictly control BMQA's licensing actions. Most recently, the Committee compiled a thirty-page accusation (supported by 84 exhibits) against the Division, charging it with numerous violations of the California Administrative Procedure Act. The Committee primarily challenges BMQA's pattern of applying unwritten and unauthorized standards to FMGs only, and contends that if those same standards were applied evenly to all applicants, many U.S. and Canadian medical graduates who are routinely licensed by BMQA would not in fact qualify for licensure. The Committee conducted a public hearing on December 5, 1986 to entertain witness testimony and BMQA's response to the allegations.<sup>3</sup>

This article surveys the Committee's contentions and supporting evidence presented at the December 5 hearing,



explores some of the the legal issues raised by BMQA's conduct, and sets forth legislative proposals which would deter future instances of BMQA's arbitrary and unfair licensing practices with respect to foreign medical graduates.<sup>4</sup>

## Statutory Background

Generally, in order to qualify for licensure, FMGs must demonstrate that they attended a medical school and completed a resident course of professional instruction equivalent to that required by section 2089 of the Business and Professions Code.<sup>5</sup> Section 2089 places the burden on all applicants (including U.S. and Canadian graduates) to prove by official transcript or other documentation satisfactory to the Division of Licensing completion of a medical curriculum extending over a period of at least four academic years, or 32 months of actual instruction. Under section 2089, the total number of hours of all courses must consist of at least 4,000 hours, and 80% actual attendance is required. The curriculum must provide for "adequate instruction" in 24 identified basic science subjects.<sup>6</sup>

FMG applicants must also pass an examination administered by the Educational Commission for Foreign Medical Graduates (ECFMG),<sup>7</sup> and the written portion of a standardized federal licensing examination commonly known as the FLEX test.<sup>8</sup> The FMG must then obtain and complete one year of post-graduate training in a program approved by the Division in the United States or Canada,<sup>9</sup> and pass the oral portion of the FLEX exam.<sup>10</sup>

FMGs must apply to and be granted permission by BMQA in order to be admitted to the ECFMG or either portion of the FLEX test, and must pass the ECFMG and the written portion of the FLEX prior to commencing the post-graduate clinical training.<sup>11</sup>

## THE COMMITTEE'S STATEMENTS

### Unauthorized Basic Science Guidelines

The Committee first contends that the Division of Licensing has violated the Administrative Procedure Act by requiring a fixed number of hours in certain basic science subjects, when no such requirement exists in any statute or properly-adopted regulation. As stated above, section 2089 of the Business and Professions Code requires that an acceptable medical curriculum shall

provide "adequate instruction" in 24 general basic science subject areas.<sup>12</sup> Nowhere in section 2089, in any other provision of the Business and Professions Code, or in any regulation adopted by BMQA, does there appear any requirement that a specific number of hours be completed in any particular basic science subject.

However, the Committee's exhibits demonstrate that the Division has rejected FMG applicants for their failure to satisfy unpublished "minimum-hour" requirements. For example, on February 26, 1986, the Division denied licensure to an FMG applicant, in part because the Division found that "your training in the basic sciences is inadequate. The Division of Licensing is specifically concerned with your training in the area of Microbiology. For your reference, medical schools in California customarily require the completion of a curriculum with average hours of basic science instruction structured as shown: Microbiology—200 hours."<sup>13</sup> On another occasion, the Division denied a license to an FMG applicant for his failure to complete ninety hours in "anatomy-neurology."<sup>14</sup>

Although it apparently uses fixed-hour basic science requirements as a basis for rejection, BMQA has never properly promulgated (or attempted to promulgate) these standards as regulations as required by the Administrative Procedure Act; nor does it provide notice to applicants that it imposes such requirements. The recently-developed "Application for Physician and Surgeon's Examination and Licensure" requires certification that an applicant has completed a total of 4,000 hours (with 80% actual attendance) in the basic science subject areas mentioned in section 2089, but gives no indication to the applicant or to the medical school that a specific number of hours in any one subject is required.<sup>15</sup>

Incredibly, members and staff of the Division of Licensing express differing views about whether the Division actually applies or utilizes fixed-hour requirements in the evaluation of applications for licensure. Former Division of Licensing Program Manager Marc Grimm has testified in deposition that "in reviewing clock hours of training with respect to basic science subjects, we have a document or a form that has the average of the hours in, I believe, California medical schools, just as a benchmark, so you can see whether the person is dramatically over or dramatically under as a general rule."<sup>16</sup> In a

March 1985 deposition, Mr. Grimm described the six-page "checksheet" which has been used by Division staff since 1984 in evaluating an applicant's documentation.<sup>17</sup> The checksheet contains fixed-hour standards (such as "Anatomy—180 hours") against which the applications are measured, but Mr. Grimm stated that these numbers represent the mean number of hours for basic science courses offered in U.S. medical schools, as derived from the American Association of Medical Colleges (AAMC) Curriculum Directory.<sup>18</sup> Although Mr. Grimm stated that the numbers on the checksheet were "guidelines" rather than "standards," he also described them as "go no-go criteria with respect to that one aspect of training."<sup>19</sup>

Division of Licensing member Dr. Lindy F. Kumagai has stated that the Division has not adopted any fixed-hour requirements with respect to basic science instruction.<sup>20</sup> Dr. J. Alfred Rider, President of the Division of Licensing, has testified in deposition that he believes the Division *does* have guidelines for the basic sciences, and that (by statute or regulation), a certain number of hours is required in each area.<sup>21</sup> Similarly, BMQA Executive Director Kenneth J. Wagstaff has stated his belief that the Division has guidelines on the required number of hours for adequate instruction in the basic sciences.<sup>22</sup>

A former BMQA staff member has also testified that the "evaluation form used by the Division...included in one section a listing of the statutorily required subjects in basic sciences and certain minimum hours in those subjects against which the applicant's education was to be compared;"<sup>23</sup> and a former BMQA Division of Licensing technician who used the checksheet stated that, although she understood that the hours listed on the sheet were requirements, she had not been trained to convert credits on medical school transcripts to hours.<sup>24</sup>

Regardless of what BMQA board members or staff believe about the existence or propriety of applying fixed-hour requirements in the basic sciences area, it is clear that the staff *is* applying those unpublished and unauthorized requirements. On a theoretical level, the most basic principles of fairness require that applicants for licensure by BMQA or any other agency be given notice of the standards against which their qualifications will be measured. On a statutory level, the Administrative



Procedure Act provides that no agency shall "issue, utilize, enforce, or attempt to enforce any guideline, criterion,... standard of general application, or other rule..." unless such standard is properly adopted as an agency regulation.<sup>25</sup> The Act is designed to promote the most fundamental aspects of due process: notice of proposed regulations, an opportunity for public comment and a public hearing, agency consideration of and response to the comments, and review and approval by the Office of Administrative Law (OAL). In using and enforcing unauthorized standards which it has never attempted to properly adopt, BMQA denies due process to all FMGs.

### Unauthorized Clinical Training Requirements

The Committee next contends that the Division of Licensing also violated the Administrative Procedure Act in 1983, 1984, and 1985 when it denied licenses to FMGs because of failure to satisfy clinical training "requirements" which were not contained in any statute or regulation.

On January 1, 1986, AB 1859 became effective and added section 2089.5 to the Business and Professions Code, which authorized BMQA to apply very specific clinical rotation requirements to all applicants for licensure, both with respect to the number of weeks completed in various "core clinical courses" and the type of institution in which the clinical rotation could acceptably be performed. For the first time, the Division of Licensing could lawfully require that FMGs complete a total of 72 weeks in clinical rotation with a minimum of 36 weeks' instruction in core clinical courses, including at least eight weeks in surgery, eight weeks in medicine, six weeks in pediatrics, six weeks in obstetrics and gynecology, and four weeks in psychiatry.<sup>26</sup>

BMQA, however, did not wait for legal authority before it began to reject license applications from FMGs based on alleged deficiencies in their core clinical rotations. In fact, the Committee's exhibits prove that, since December of 1983, the Division of Licensing has been denying licensure to FMGs based upon failure to satisfy the minimum-week requirements for clinical rotations first authorized on January 1, 1986.

The history of the Division's use of unpublished clinical rotation standards is tortured. During the summer of 1983, the Division disapproved one foreign

medical school after it allegedly discovered "inconsistent or misleading documentation...in eight representative cases;" BMQA further claimed that "similar documentation problems existed with as many as five other medical schools with large numbers of pending applications."<sup>27</sup> Because of these "documentation problems" allegedly existing at a few schools, the Division formed a Task Force charged with "developing draft standards and procedures for the evaluation of individual records of persons who are graduates of disapproved foreign medical schools" (that is, *all* foreign medical schools except those in Canada).<sup>28</sup> The Task Force formally met on July 25, August 3, and August 19, 1983, and submitted its "Initial Task Force Report" to the Division of Licensing on August 19, 1983.<sup>29</sup>

The Initial Task Force Report set forth three recommendations: (1) that the guidelines recommended in the Report be uniformly applied to *all* foreign medical graduates (except those from Canadian medical schools); (2) that detailed documentation requirements concerning (a) official certification of at least four academic years with a minimum of 4,000 hours and at least 80% actual attendance in certain specified courses [*i.e.*, those required in section 2089 of the Business and Professions Code], and (b) the performance of clinical rotations in certain types of institutions, be adopted by the Division as the minimum standards for licensure of all FMGs; and (3) that the guidelines and procedures recommended in the Report be approved for immediate implementation by Division of Licensing staff.<sup>30</sup> The Initial Task Force Report did not, however, recommend the adoption or use of any specific minimum-week requirements in the various core clinical courses. The Report and its recommendations were unanimously adopted by the Division of Licensing on August 19, 1983.<sup>31</sup>

The adoption of the Initial Task Force Report placed an enormous documentation burden on all FMGs (not only those from suspect medical schools), which is not and never has been placed on U.S. or Canadian medical graduates. The recommendations in the Initial Task Force Report were summarized in a form letter entitled "Special Instructions to Foreign Graduates," which was mailed to FMGs in August 1983.<sup>32</sup> As early as December 1983, the Division began to reject FMG licensure applications based upon non-

compliance with the "guidelines" set forth in the "Special Instructions," and upon unwritten and unpublished minimum-week requirements for clinical rotations.<sup>33</sup> A letter from the Division to one FMG dated December 16, 1983,<sup>34</sup> denied his application in part upon the following grounds:

2. Minimum core rotations, based upon statutorily mandated equivalency with LCME programs, are:

|            |          |
|------------|----------|
| Medicine   | 8 weeks  |
| OB/GYN     | 6 weeks  |
| Pediatrics | 6 weeks  |
| Psychiatry | 4 weeks  |
| Surgery    | 12 weeks |

The identical language was used in another FMG denial letter from the Division dated February 6, 1984.<sup>35</sup>

In reality, no California statute existing in December 1983 mandated that FMGs (or U.S. graduates, for that matter) were required to complete a minimum number of weeks in core clinical courses. On the contrary, section 2089 of the Business and Professions Code required then and still requires that "each applicant" demonstrate successful completion of a four-year medical curriculum, consisting of a minimum of 4,000 hours and providing "adequate instruction" in twenty-four subject areas.<sup>36</sup>

After it had internally adopted and begun to enforce the minimum-week requirements for clinical rotations, BMQA began its attempt to promulgate as a regulation the "guidelines" contained in the Initial Task Force Report and the "Special Instructions" sheet. On December 13, 1983, the OAL received the Division's Notice of Proposed Regulations.<sup>37</sup> The notice was published in the California Administrative Notice Register on December 23, 1983, and a hearing on the proposed regulations was set for February 9, 1984.<sup>38</sup> Proposed section 1321 published on December 23 included the recommendations of the Task Force with respect to FMG licensure requirements, but again did *not* include minimum-week requirements for clinical rotations.<sup>39</sup>

Although FMG applicants whose documentation was being scrutinized by the Division pursuant to these unauthorized documentation and minimum-week requirements were not provided with notice that the requirements were being enforced, the medical profession in California was well aware of BMQA's practice. A December 20, 1983 memorandum from the California Medical Association (CMA) to its



Committee on Medical Schools introduced section 1321 to the profession and stated that "the proposed regulations reflect the Board's desire to make explicit requirements which *BMQA staff have already begun to enforce*. Adoption of the regulations would strengthen the Board's legal position if they are challenged."<sup>40</sup>

On March 12, 1984, the Division of Licensing held its second public hearing on proposed section 1321.<sup>41</sup> On the day of the hearing, the Division presented to the public for the first time its modifications to the version of section 1321 which had been published on December 23, 1983 and which had been the subject of the February 9, 1984 public hearing. The modifications first made public on March 12, 1984, finally included the minimum-week core clinical rotation requirements which the Division had been using to deny licensure for at least the past four months.<sup>42</sup> The revised regulations unveiled on March 12 required that FMGs demonstrate completion of a minimum of 72 weeks of clinical rotations, 54 weeks of which must have been completed in a specifically-described type of institution. The modifications also added core clinical rotation requirements of specified lengths: general surgery—twelve weeks; medicine—eight weeks; pediatrics—six weeks; obstetrics and gynecology—six weeks; and psychiatry—four weeks.<sup>43</sup>

After lengthy discussion of the modified regulations and testimony by at least eleven members of the public, it was moved that the Division adopt the modified regulations, including the minimum-week requirements made public for the first time that day.<sup>44</sup> Although a member of the public stated that adoption of modified section 1321 on the same day it had been introduced would violate the state Administrative Procedure Act, the Board's legal counsel Gregory Gorges took the position that the modifications to section 1321 were insubstantial changes which could be adopted by the Board at the March 12 meeting to become effective fifteen days later, provided that the Board publish the changes during those fifteen days and allow for public comment on the modified regulations.<sup>45</sup> At the conclusion of the hearing, the Division voted to adopt the proposed regulations—including modified section 1321—to become effective fifteen days later.<sup>46</sup>

After the Director of the Department of Consumer Affairs approved section 1321 on December 20, 1984, the

regulation was submitted to the OAL on December 21, 1984. Approximately one month later, OAL rejected section 1321 for a variety of reasons.<sup>47</sup> First, OAL found that section 1321 applied the individualized documentation standards to *all* FMGs and to FMGs only, with no demonstration by BMQA that the documentation deficiency problems were limited to foreign medical schools and graduates.<sup>48</sup> OAL also found that the standards contained in section 1321 in effect discriminated against FMGs, because "the methodology used by the Board to develop the standards for foreign medical schools has resulted in the adoption of a standard which some approved U.S. schools could not meet. ... The record indicates that at least 30 approved U.S. medical schools could not meet the [minimum-week clinical rotation] standards of section 1321. ... The Board has determined to apply a more stringent test to the educational experience of students at foreign medical schools; however, it has not provided any facts or information to demonstrate the necessity for adopting such a standard."<sup>49</sup>

OAL also found that section 1321 was inconsistent with existing provisions of the Business and Professions Code which "mandate the application of the *same* standard to the educational experience of *all* applicants for licensure whether that education is received at an approved U.S. medical school or at a foreign medical school."<sup>50</sup> Because section 1321 imposed different standards on FMGs, it was determined to be invalid under the "consistency" criterion applied by OAL under Government Code section 11349.1(a)(4).<sup>51</sup>

OAL also expressly found that BMQA had violated the Administrative Procedure Act in that it had adopted, at its March 12 hearing, modifications introduced that day which were "not insubstantial nor [were] they solely grammatical in nature,"<sup>52</sup> and which had not been made available to the public for at least fifteen days prior to their adoption.<sup>53</sup>

BMQA never responded to the deficiencies in the section 1321 rulemaking proceedings raised by OAL. Instead, despite the clear and unequivocal rejection of section 1321 by OAL, BMQA continued to utilize and enforce the documentation and minimum-week requirements contained in the proposed regulation after its rejection. Former Division of Licensing Program Manager Grimm has testified in deposition

that, even after receipt of the January 24, 1985 rejection from OAL, Division staff "continued using the [section 1321] guidelines as a working tool to screen the many thousands of applications that come in...."<sup>54</sup> On March 5, 1985 (two months after OAL's rejection of the minimum-week requirements), Grimm testified that Division staff "are required to screen [clinical rotations] for specified number of weeks by subject."<sup>55</sup>

Thus, despite the existence and applicability of the Administrative Procedure Act,<sup>56</sup> BMQA again improperly adopted, used, and enforced discriminatory documentation and minimum-week requirements from December 1983 through January 1, 1986, when section 2089.5 of the Business and Professions Code became effective.<sup>57</sup> In so doing, the Board applied unwritten standards to FMGs only—standards which OAL has found cannot be met by many U.S. medical graduates.

### Selective Application Of Clinical Training Requirements

The minimum-week clinical rotation requirements originally proposed as section 1321 of BMQA's regulations were rejected by OAL as being discriminatory, inconsistent with existing statutes, and unclear.<sup>58</sup> Nevertheless, the California legislature approved minimum-week clinical rotation standards similar to those contained in proposed section 1321 when it enacted section 2089.5 of the Business and Professions Code, effective January 1, 1986.

Section 2089.5 is not restricted to FMGs. Section 2089.5 provides that *all* applicants for licensure must demonstrate completion of a total of 72 weeks of clinical training, including 36 weeks in the core clinical areas of medicine, surgery, pediatrics, psychiatry, and obstetrics and gynecology. BMQA itself has affirmatively and emphatically stated that sections 2089 and 2089.5 "are requirements for licensure which apply to *all* applicants for licensure."<sup>59</sup> Despite the mandatory language of section 2089.5, the Division of Licensing does not require U.S. and Canadian medical school graduates to prove they have completed the mandated clinical experience.<sup>60</sup> Rather than demanding that all U.S. and Canadian medical school graduates complete individual "Certificates of Clinical Training" and "Reports of Junior and Senior Year Clinical Rotation," as are required of all FMGs, the Division



claims to rely on medical school catalogs and the AAMC Curriculum Directory for proof of the clinical experience of U.S. and Canadian graduates.<sup>61</sup>

Even more disturbing than its failure to require the same documentation from U.S. and Canadian graduates as it requires from FMGs is the fact that BMQA fails to require such documentation in light of its admitted knowledge that the curricula of many U.S. and Canadian medical schools are deficient in clinical training under the standards set forth in section 2089.5. As early as March 1984, then-Program Manager Grimm demonstrated at a public hearing the fact that the clinical curricula of many U.S. medical schools—including schools the caliber of Cornell, the University of Pennsylvania, the University of Virginia, and Vanderbilt—failed to meet the minimum-week requirements enforced against FMGs by BMQA.<sup>62</sup>

On May 22, 1986, Division members and staff were clearly notified by copy of a letter to the President of the Division of Licensing that many U.S. and Canadian medical schools—including Harvard, Yale, and Stanford—offer a curriculum which does not comply with the section 2089.5 requirements.<sup>63</sup> Specific citations to the AAMC Curriculum Directory were provided in order to allow for verification of the information. According to the Directory, 116 of the accredited U.S. medical schools do not require the 72 weeks of clinical training mandated by the California statute. Further, of the sixteen Canadian schools, twelve do not even offer in their curriculum the 72 weeks of minimum clinical training required by section 2089.5.<sup>64</sup> Yet, students from those schools are routinely licensed by the Division of Licensing.

In his June 4, 1986 response to this information, BMQA Executive Director Kenneth Wagstaff rejected the suggestion that BMQA should require detailed clinical training documentation from U.S. and Canadian graduates by citing section 2084 of the Business and Professions Code, under which the Division may approve "every school which substantially complies with the requirements of this chapter," graduates of which are then "deemed to meet the requirements of section 2089."<sup>65</sup> Without addressing any of the specific deficiencies in clinical training proven by the AAMC Directory, Mr. Wagstaff qualifiedly stated that, with respect to U.S. medical programs, "...for the most part, the curriculum of each school

complies, in a substantial manner, with the requirements of section 2089."<sup>66</sup>

The Division's ignorance of obvious and proven deficiencies in U.S. clinical training programs and its selective application and enforcement of California's medical licensing statutes is further evidence of a pattern and practice of discrimination against FMGs.

### Arbitrariness, Inconsistency and Mismanagement

The Committee devoted the rest of its report and exhibits to the exposition of over twenty specific instances of inconsistency, gross mismanagement, failure to comply with statutory procedural requirements, retroactive application of new "requirements" to applicants who are midway through the licensing process (or "in the pipeline," as BMQA calls it), questionable delegation of licensing authority, misinformation, and incompetence. A few examples of those instances follow.

*Shasta General Hospital Program Closure.* In an action which generated subsequent litigation, the Division unanimously voted to disapprove the foreign student clinical training program at Shasta General Hospital in Redding, California on January 31, 1986.<sup>67</sup> The Division decided to apply its decision both prospectively and retroactively, even though it had previously approved Shasta's clinical program on two occasions.<sup>68</sup> The Committee contends that not one of the Division members or staff had ever visited Shasta General Hospital; the January 31 Division vote was made after consideration of a report compiled by a paid consultant who visited the hospital. The consultant (a former President of the Division of Licensing) actually recommended that the clinical training program be allowed to remain open, but limited to three seventh- or eighth-semester students and subject to a repeat site visit in one year.<sup>69</sup> The Committee further contends that BMQA abruptly closed the program without complying with any of the procedural requirements for program disapproval mandated by Business and Professions Code section 2089.5(e)(2).<sup>70</sup>

At its May 1986 meeting, the Division recanted on its decision, and voted that all clinical training performed by the eight medical students then at Shasta General Hospital would be acceptable as core clinical training.<sup>71</sup> The vote expressly provided for approval of all training, and not training in certain subjects only.<sup>72</sup> The tran-

script of the May 1986 meeting was so clear that it prompted the Attorney General to represent to a state court judge that the entire legal dispute over the Division's January action regarding Shasta had been resolved.<sup>73</sup>

The minutes of the May meeting as prepared by staff for official Division approval, however, were strikingly different. Not only do the minutes specifically mention clinical subjects by name, but they specifically omit approval of the core clinical course of psychiatry.<sup>74</sup>

*Refusal to Comply With the Language and Intent of Section 2089.5.* The Committee has also charged (and witnesses testifying at the December hearing verified) that the Division improperly refuses to consider postgraduate residency training to remediate claimed deficiencies in core clinical training.<sup>75</sup> At the December 5, 1986 hearing, Sacramento attorney Gene Livingston testified that in 1984, he represented several FMGs who challenged the Division's application of clinical training "requirements" which had not been properly adopted pursuant to the Administrative Procedure Act.<sup>76</sup> The Division agreed to settle the case, and further agreed to consider the applicants' postgraduate residency training as remediating their allegedly deficient (under the unauthorized "requirements") core clinical training.

After the settlement, Livingston worked with the Committee and the Division to carefully draft proposed section 2089.5 of the Business and Professions Code, to provide that an applicant who obtains core clinical training at a hospital satisfying the statutory criteria is deemed to have satisfied the "adequate instruction" requirements of section 2089,<sup>77</sup> but that such core clinical training is not the exclusive means of achieving "adequate" clinical instruction under section 2089. Section 2089.5 was passed and enacted, effective January 1, 1986.

Before the statute ever took effect, BMQA sought to amend the section to eliminate the statutory basis allowing it to consider satisfactory residency training as remediating alleged problems with core clinical training. After a hearing on the proposed amendments, the Committee specifically rejected the Division's efforts and retained section 2089.5 in its original form.

Mr. Livingston testified that, contrary to the language of section 2089.5, the Board's agreement in the earlier litigation, and the legislature's clear intent when it rejected BMQA's pro-



## FEATURE ARTICLE

posed amendments to the section, the Division refuses to consider residency training as remediating claimed deficiencies in core clinical training.<sup>78</sup>

*Who Licenses Physicians?* The Committee further challenges the actual manner in which applications are evaluated and licensure is determined. The Division of Licensing, pursuant to section 1301 of BMQA's regulations,<sup>79</sup> has delegated its licensing authority to its Program Manager. In past depositions, former Program Manager Marc Grimm has described the application evaluation process performed by technicians within the Division. A licensing technician is "an independent employee who exercises a significant amount of discretion in prioritizing their work and organizing the process. They are given the general task of determining if the individual is eligible...."<sup>80</sup> If the technician experiences problems, the file may be referred to a higher level, such as the Program Manager or the credentials committee of the Division. In most cases, however, supervisors only spot-check the technicians' work.<sup>81</sup> If the technician decides that an applicant is eligible for licensure, and the technician's supervisor agrees that no significant questions are raised by the applicant's documentation, the Program Manager issues a license. Files approved by staff for licensure are not reviewed by the Division of Licensing members or the Division's credentials committee.<sup>82</sup> In sum, the Committee contends that since the Division members are not familiar with the documentation of an eligible applicant, they cannot properly evaluate the application packages forwarded to them for review in questionable cases.<sup>83</sup>

Even more troublesome is the fact that the licensing technicians who are apparently vested with significant discretion in evaluating applications and making recommendations with respect to license eligibility are not provided with any written office procedure manual.<sup>84</sup> New policies are communicated to staff in what the former Program Manager refers to as "mob meetings." These meetings may be called by the Program Manager, his/her assistant, or technician supervisors. No written communication of new policies or procedures is generally attempted.<sup>85</sup>

### POST-1975 VIETNAMESE MEDICAL GRADUATES

The experience of Dr. Le Bup Thi Dao, who also testified at the December

5, 1986 hearing, and approximately thirty other post-1975 Vietnamese medical graduates now seeking licensure in California provides a case study of BMQA's ad hoc decisionmaking and unfair application of unauthorized standards to FMGs.

Dr. Dao was admitted to the University of Saigon Medical School in 1971; by 1975, she had completed the vast majority of her coursework and her core clinical rotations. During 1976 and 1977, she completed her residency. She graduated from medical school in 1977, and practiced medicine at Cho Ray Hospital from September 1977 to March 1978, when she fled to the United States as a refugee.

After settling in the United States, she passed her ECFMG exam in February 1981. She applied to BMQA and was permitted to take the written portion of the FLEX exam, which she passed in June of 1982. Dr. Dao then completed a one-year internship at UC Irvine Medical Center in 1984, and a subsequent two-year residency at the same hospital in June 1986. She became an American citizen in November 1985.

After she finished her internship and one year of her residency, she applied to BMQA to take the oral portion of her FLEX exam. Permission was granted on the strength of the documentation in her application file; she passed the oral FLEX exam on her first attempt in January 1986.

In February 1986, after she had passed all of her examinations and was on the verge of completing her residency, she received a letter from the Division which informed her that the only remaining licensure requirements were a fee of \$200 and a recent photograph of herself,<sup>86</sup> which she promptly mailed. She received no response from BMQA.

Between February and June 1986, Le Dao wrote and telephoned BMQA on many occasions to determine why her license had not been issued as had been represented to her. Dr. Dao testified that on several occasions prior to May 29, 1986, she was informed on the telephone by BMQA licensing technicians that all processing of applications from post-1975 Vietnamese medical graduates had been suspended.

Because BMQA had neither responded in any way nor explained why her license was being withheld, or when (if ever) she might receive it, Dr. Dao was forced to refuse an offer to work as a pediatrician at Orange County Children's Hospital, a position which

could not be held open for her after May 1986.

On May 29, 1986 in closed session, the Division of Licensing formally voted to suspend the processing of all applications for licensure from post-1975 Vietnamese medical graduates.<sup>87</sup> On June 4, 1986, BMQA informed Le Dao that because the Division "cannot verify the operation, administration or quality of medical schools in Vietnam after the fall of the Saigon government in the spring of 1975," she could not be licensed.<sup>88</sup> In spite of the fact that Le Dao had, in late 1985, submitted detailed forms and documentation of her medical education verified by former University of Saigon faculty members who have also fled to the United States, the Division insisted upon "official documentation and information which is verifiable in order that it might review and approve the medical programs presented after the spring of 1975....Such proof must be based upon original documents including such items as transcripts, diplomas, mark books and reports of clinical training, which are in sufficient detail to show that each of the specific requirements of...the Business and Professions Code have been met."<sup>89</sup> With the June 4 letter, Dr. Dao also received some blank forms to complete and return—the very same forms she had already completed and submitted to BMQA in late 1985.

On June 30, 1986, Dr. Dao wrote to the Program Manager and explained that it was impossible for her to submit original, official documentation of her medical school achievements, as she had to flee Vietnam with only the clothes she was wearing. She also questioned BMQA's sudden distrust of her documentation after it had considered that very same documentation sufficient to permit her to take the FLEX exam. She requested another review of her application file.

On July 24, 1986, the credentials committee of the Division of Licensing met in closed session and again denied Dr. Dao's application. In its letter of August 12, 1986, the Division imposed a new requirement (citing no legal authority for the imposition of such a requirement)—completion of a "minimum of 11 months of actual clinical training in a program such as the Fifth Pathway Program conducted at the University of California, Irvine."<sup>90</sup>

On November 14, 1986, Dr. Dao appeared at the Division of Licensing meeting and testified in her own behalf about BMQA's failure to license her in



spite of the fact that she has fulfilled every statutory requirement, passed every examination, and completed a full residency at the University of California at Irvine, where she not only treated California patients, but also supervised subsequently-licensed physicians in their internships at the hospital. She was told to seek a rehearing by the credentials committee.<sup>91</sup>

Also on November 14, the Division was scheduled to consider a proposal for the creation of a "faculty council-in-exile" for purposes of attesting to the education, clinical training, graduation, and physical identities of post-1975 Vietnamese FMGs.<sup>92</sup> The American Medical Association had previously established a faculty council-in-exile, consisting of former faculty members of Vietnamese schools who have verified the credentials and qualifications of pre-1975 Vietnamese medical graduates and issued a certificate in lieu of a diploma. During August 1986, the Division requested detailed information and a proposal for the creation of another faculty council-in-exile to certify post-1975 Vietnamese medical graduates from the Vietnamese-American Physicians' Association.<sup>93</sup> The Association prepared the proposal and submitted it to BMQA on September 9, 1986. The Division, however, neither accepted, rejected, or even discussed the proposal at its November 14 meeting or thereafter.<sup>94</sup> As of this writing, the Division has yet to avail itself of the knowledge and testimony of physicians who were faculty members at the University of Saigon both before and after 1975, and who are fully capable of informing the Division about the identity of the school's faculty and adequacy of its curriculum after 1975. The Division has apparently determined (although not at a public meeting, as is required by the Bagley-Keene Open Meetings Act) that the creation of a faculty council-in-exile "would not be in the best interests of the public health and safety."<sup>95</sup>

After the Senate Committee hearing on December 5, 1986, the credentials committee reconvened to consider the applications of the post-1975 Vietnamese medical graduates. Once again, the Division reaffirmed its July 24, 1986 decision to deny Le Dao's license because, "at this time, it is impossible for the Division to grant credit toward meeting licensure requirements for work which you completed during your last two years of medical school."<sup>96</sup>

Dr. Dao's lengthy, frustrating, and yet-unresolved experience is another

illustration of the arbitrary procedures and ad hoc decisionmaking employed by the Division of Licensing with respect to FMGs. Several legal issues are immediately and strikingly apparent. First, BMQA's imposition of an immediate, blanket, and indefinite suspension of the processing of *all* applications from post-1975 Vietnamese medical graduates certainly qualifies as an "order" or "standard of general application" which is required to be adopted as a regulation after notice and comment to the Administrative Procedure Act.<sup>97</sup>

Second, no exemption to the Bagley-Keene Open Meetings Act allowed the Division of Licensing to meet and vote in closed session on May 29, 1986 to suspend the processing of all applications from post-1975 Vietnamese graduates.<sup>98</sup> Any discussion and vote on a blanket denial of licensure to a large group of people must be held in public. Even assuming the Division properly met in closed session on May 29, it is clear that the Division enforced its decision prior to the time it had formally been made. Dr. Dao was informed on several occasions prior to May 29 by BMQA licensing technicians that she had not received her license because the Division had suspended the processing of all applications from post-1975 Vietnamese medical graduates, yet no vote on that issue was taken until May 29, 1986.<sup>99</sup>

Next, Le Dao's experience also illustrates BMQA's unfair practice of accepting an applicant's documentation for certain purposes (such as permission to take the FLEX test, which costs \$600, or for the purpose of treating patients at the low wages and difficult hours imposed by hospitals on pre-licensure candidates). However, BMQA then rejects that same documentation when it comes to licensing, *after* the agency has induced significant detrimental reliance on the part of the applicant.

After BMQA's initial June 4 denial of Le Dao's license, the Division referred her file to the "credentials committee," which again denied her license in closed session on July 24. On November 24, 1986, Dr. Dao was told to seek a rehearing by the "credentials committee." On December 18, the "credentials committee" met to reconsider the applications of the post-1975 Vietnamese graduates. While section 2015 of the Business and Professions Code allows the Division to create advisory committees, the

Division has never promulgated any regulation which establishes the "credentials committee." Nothing in the Business and Professions Code or the California Administrative Code defines its authority, its membership, its procedural rules, or establishes an applicant's appeal rights to it or from it. Most critically, no statutory or regulatory provision sets out the relationship of the committee to the Division, and/or requires that the Division ratify the actions and decisions of the credentials committee. Dr. Kumagai, with perhaps the longest tenure on that committee, has testified that membership on the committee is not by Division vote, but rather that membership belongs to anyone who expresses interest and shows up for committee meetings.<sup>100</sup>

Finally and most significantly, the Division's final decision with respect to Dr. Dao's application requires that she complete an eleven-month clinical-training program. Momentarily ignoring the fact that no legal authority is cited or exists for the imposition of this new requirement, there is absolutely no connection between this "remedial" clinical training requirement and the "problem" identified by BMQA—that is, its alleged inability to evaluate the quality of the academic curriculum and the adequacy of the faculty at the University of Saigon *after* the communist takeover in 1975. This eleven-month clinical training program would require Dr. Dao to repeat clinical rotations she completed during her third (1973-74) and fourth (1974-75) years in medical school—years during which there is no question, issue, or challenge regarding the quality of the curriculum and the adequacy of the faculty at the University of Saigon. Adding to the absurdity of this new requirement is the fact that Dr. Dao has, of course, subsequent to the unchallenged clinical training she received prior to 1975, completed a two-year residency in Vietnam, practiced medicine in Vietnam for six months, and completed a three-year residency at the University of California at Irvine. In short, there is no nexus between what BMQA now requires her to do and the problem it has identified (assuming it exists), and her five-plus years of clinical experience subsequent to her core clinical training certainly remediates any claimed deficiencies in that training.



## RESPONSE AND REBUTTAL

On January 16, 1987, BMQA Executive Director Kenneth J. Wagstaff submitted a carefully-drafted written response to the Committee's allegations, exhibits, and the testimony presented at the December 5, 1986 hearing.<sup>101</sup> After reiterating its statutory charge, Wagstaff defended the Division's "strong track record of licensing graduates of foreign medical schools," claiming that during 1983 to 1986, "from 18% to 30% of the new licenses issued each year were granted to graduates of foreign medical schools, a percentage higher than their actual representation in the practicing population."<sup>102</sup> Wagstaff went on to discuss "the great diversity in approaches to medical education in other parts of the world, the emergence of the proprietary and quasi-proprietary medical school, language and definitional problems, and the discovery in 1983 of widespread licensing fraud,"<sup>103</sup> all of which have combined to make "the evaluation of transcripts and other documents presented in support of an application for licensure...a complex and time-consuming process."<sup>104</sup>

With respect to the Committee's specific charge that the Division has unlawfully applied unauthorized minimum-hour requirements in the basic science area, Wagstaff assured the Committee that such standards are merely "guidelines...nothing more than an internal tool...which allows technical staff to sort files into two groups, one which contains files of applicants who clearly have participated in a basic science program which is substantially the same as that found in U.S. and Canadian schools, and one which contains files of applicants where the issue of the adequacy of their training must be more completely assessed."<sup>105</sup>

On the subject of the Division's unauthorized use of the discriminatory minimum-week requirements for core clinical rotations, Wagstaff charged that the Committee has "almost totally ignore[d] the extraordinary circumstances which confronted the Division of Licensing early in 1983 and continued to pose challenges throughout 1984 and 1985....Early 1983 began a series of revelations which ranged from confirmed reports of wholesale exam cheating to the operation of fraudulent medical schools...."<sup>106</sup> Wagstaff claimed that these revelations and the "strict application" of licensing statutes "would have virtually shut down the processing of licensing foreign-trained doctors."<sup>107</sup>

Rather than resorting to this drastic measure, "[r]easonable working definitions were developed by the Division which would allow for some flexibility in the application of the statutes."<sup>108</sup>

Wagstaff further stated that all actions taken by the Division during this period were considered and reviewed by attorneys from the Department of Consumer Affairs and the Office of the Attorney General, who advised the Division that it had "both the authority and the immediate responsibility to act, given the problems which had developed."<sup>109</sup> Mr. Wagstaff summed up his comments on the core clinical rotation requirements issue by stating that "[t]he passage of AB 1859...makes the argument of the events of 1983, 1984, and 1985 moot."<sup>110</sup>

Although Mr. Wagstaff's response generally denies the Committee's allegations, it does not deny that the Division did in fact recite unpublished and unauthorized minimum-hour basic sciences standards in license denial letters to FMGs.<sup>111</sup> It does not deny (and in fact admits) that the Division developed and applied—without the benefit of legally-required and properly-conducted rulemaking proceedings—"reasonable working definitions,"<sup>112</sup> that is, minimum-week core clinical rotation standards which it applied only to FMGs and to this day admittedly continues to ignore with respect to U.S. and Canadian graduates.<sup>113</sup> Contrary to Mr. Wagstaff's complaints, the Committee has not ignored the "extraordinary circumstances" which allegedly confronted the Division in 1983.<sup>114</sup> Instead, the Board has once again ignored the Administrative Procedure Act, which allows state agencies to adopt emergency regulations to cope with just such situations.<sup>115</sup>

No one disagrees with the Board's contention that the process of evaluating hundreds of license applications from graduates of medical schools all over the world is a complex and time-consuming task. If it were easy, the Division of Licensing, with its \$2.9 million annual budget, would not exist. But the Committee's exhibits prove that the Board had exacerbated the difficulty of the task. Does not a complicated application evaluation process demand published, noticed minimum standards for licensure properly promulgated in agency regulations? BMQA has none. Does not such a process demand a written and detailed procedure manual to be followed by licensing technicians? BMQA has none.<sup>116</sup> Does not such a

process which, after all, results in the licensure of physicians who are in a position to cause irreparable harm, demand an established and systematic procedure for the review of questionable applications by experienced and objective professionals who do *not* have a profit stake in the outcome? BMQA has none.<sup>117</sup>

The Board's response to the Committee's presentation suffers from omission as well as commission. It does not address the charge that the Division refuses to comply with section 2089.5 of the Business and Professions Code, which allows postgraduate residency training to remediate alleged deficiencies in core clinical training.<sup>118</sup> It further does not address the allegations that the Division violated the Bagley-Keene Open Meetings Act when it met in private to vote on a suspension of all processing of applications from post-1975 Vietnamese medical graduates,<sup>119</sup> nor does it respond to the charge that such a blanket moratorium is a regulation which must be accompanied by notice, comment, a hearing, and approval by the OAL pursuant to the Administrative Procedure Act.<sup>120</sup>

With respect to the charge that BMQA discriminates against FMGs by strictly enforcing now-legal minimum-week standards for core clinical rotations against FMGs while it did *not* enforce them (and still does not) with respect to U.S. and Canadian graduates, Mr. Wagstaff somewhat arrogantly suggested that the Committee has overlooked section 2089 of the Business and Professions Code, which merely requires that documentation presented in support of an application for licensure be "satisfactory to the Division."<sup>121</sup> Mr. Wagstaff further argued that the relevant statutes effectively give BMQA a license to discriminate against FMGs,<sup>122</sup> because they allow BMQA to "approve" medical schools whose curricula "substantially comply" with the licensing requirements,<sup>123</sup> graduates of which are then "deemed" to have complied with California's licensing statutes without being required to furnish specific proof of precise compliance.<sup>124</sup> Mr. Wagstaff fails to mention, however, that the only schools which have been "approved" by BMQA are those which have been "accredited" by the Liaison Committee on Medical Education (LCME) of the private American Medical Association. Further, many of these schools have been "approved" by BMQA in spite of the fact that their core clinical rotation curricula do not



come close to meeting the statutory requirements set forth in section 2089.5 of the Business and Professions Code.<sup>125</sup>

Mr. Wagstaff states that "[i]f the Business and Professions Committee finds that discrimination in favor of U.S. and Canadian medical school graduates—a discrimination based upon a confidence in the national accreditation process—is ill advised, the Committee should attempt to change the law."<sup>126</sup> The Committee, apparently deeply dissatisfied with the manner in which the Division has exercised the discretion vested in it by the Code, has accepted Mr. Wagstaff's offer.

## LEGISLATIVE PROPOSALS

Senate Bill 1116, as introduced and amended by Senator Montoya, would make sweeping changes in the authority and procedures of the Division of Licensing. The bill contains eleven separate proposals which would operate to require the Division to apply the same minimum licensing standards to all applicants, and to prohibit it from rejecting an application because of failure to comply with "requirements" which do not appear in any statute or regulation.

For example, SB 1116 would amend section 2018 of the Business and Professions Code. Proposed subsection (b) of section 2018 would prohibit the Division from denying licensure or admission to any examination, unless the specific deficiency which is the basis for the denial is clearly set forth in the Code or in a regulation duly adopted by the Division in accordance with the Administrative Procedure Act. Proposed subsection (c) would prevent unfair retroactive application of new standards to those "in the pipeline," by providing that changes made to the classroom, clinical clerkship, or postgraduate residency phase requirements could *not* be applied to those currently enrolled in the phase to which the changes have been made.

SB 1116 would also add new section 2097 to the Code, to require BMQA, when denying a license or a request for permission to take an examination, to specifically notify the applicant of the statutory or regulatory provision which contains the requirements which the applicant does not meet. In addition, the Board must inform the applicant of the specific actions required to render the application acceptable.

The bill would amend section 2099

of the Code to more clearly define the role and responsibilities of the Program Manager of the Division of Licensing. This amendment would invalidate the Division's present, complete, and permanent delegation of its licensing authority to the Program Manager.<sup>127</sup> Proposed section 2099 would provide that a delegation of licensing authority shall be effective for a maximum of three months (unless renewed), require that any person vested with authority to approve licenses be an employee who serves at the pleasure of the Division, and prohibit one who has been delegated authority to approve licenses by the Division from re delegating that authority.

SB 1116 also contains three express anti-discrimination provisions. Section 2089.5 of the Business and Professions Code, which sets forth the minimum-week core clinical rotation standards, would be amended to provide that no applicant shall be granted a license unless he/she has demonstrated full compliance with the requirements of the section and has submitted detailed documentation proving such compliance. Thus, the Division would be required to apply the clinical rotation minimum-week standards to all applicants, including U.S. and Canadian graduates. Further, section 2084 of the Code would be amended to preclude the Division's "approval" of U.S. and Canadian medical schools unless those schools demonstrate that the minimum graduation standards *actually* comply with the requirements of California licensing statutes. Finally, new section 2089.1 would be added to the Code, and would expressly provide that no requirements may be applied to graduates of medical schools outside the United States unless those requirements are also applied to graduates of medical schools in the United States.<sup>128</sup>

Senate Bills 858 and 859, as introduced and amended by Senator Montoya, would attempt to alleviate some of the problems FMGs experience in securing a residency in the United States in compliance with section 2102(c) of the Code.<sup>129</sup> Currently, LCME-approved medical schools affiliate with a teaching hospital, which offers a school-approved program for residents and teaches core clinical rotations to the medical school's students. In practice, the medical school has been able to dictate that the affiliated hospital shall accept all the school's students and only the school's students for residencies and clinical training, thus leaving no positions available for

FMGs. SB 858 would amend section 2104 of the Business and Professions Code to provide that the fact that an applicant for a core clinical training program or residency is not a student at the medical school with which the hospital is affiliated shall not be a reason for the hospital to refuse to accept the applicant. SB 859 would provide that any hospital which excludes any person from participation in a postgraduate training program solely because the person has received his/her medical education outside the United States shall not receive any state funding in any form.

Senate Bill 857, as introduced by Senator Montoya, would ease the burden on FMGs currently imposed by the so-called "four-year rule" contained in section 2184 of the Business and Professions Code. Under current law, test scores from the written FLEX are valid for a maximum of four years. That is, an applicant must secure the postgraduate training required by section 2102(c) and pass the oral FLEX test required by section 2102(d) within four years of the date he/she passed the written FLEX test. In practice, because of the limited number of residencies available and hospitals' practices of reserving those openings for graduates of LCME-approved schools, many FMGs are not able to secure a residency, substantially complete it, and pass the oral FLEX within the four-year limit. SB 857 would extend the four-year period on a year-for-year basis for each full year during which the applicant maintains a pending application with an approved postgraduate training program and is awaiting acceptance.

Senate Bill 1358, which would provide relief to post-1975 Vietnamese medical graduates, has been introduced by Senator Royce. Its principal co-author is Senator Montoya; as of this writing, other co-authors include Senators Roberti, Doolittle, McCorkquodale, and Watson, and Assemblymembers Isenberg and Mojonner. The bill would require BMQA to appoint a faculty council-in-exile to review the applications of individuals who attended the University of Saigon between 1975 and 1980 to determine their eligibility for licensure. The council, which would consist of five former faculty members from the University of Saigon and one member of the Division of Licensing, would make licensure recommendations to the Division, which in turn must act upon the recommendation within ninety days after receipt.



## CONCLUSION

It is unfortunate that our representatives have been forced to propose legislation which is in large part a restatement of currently-existing law already applicable to—but ignored by—the Board of Medical Quality Assurance. The Board's habitual and pervasive refusal to follow the Administrative Procedure Act is not merely a disgrace; it has worked a tremendous disservice on physicians, patients, and the quality and quantity of available health care. A recent New York legislative report has succinctly described the societal effects of what appears to be a concerted effort on the part of organized medicine to keep out the "intruders" and limit the number of physicians practicing in the United States: "Such action...is creating unfair barriers to those foreign medical students who are capable of caring, professional medical service. It also threatens the quality of care provided by numerous inner-city hospitals and state institutions which rely on foreign medical graduates for medical staffing because U.S. medical graduates will not accept such positions. The ultimate effect is to victimize patients who do not have access to prestigious teaching hospitals or private-practice physicians."<sup>130</sup>

The California legislature appears willing to cure these problems notwithstanding the American Medical Association, the California Medical Association, and the assorted political action committees which dominate public advocacy on medical issues in the proprietary interests of practicing physicians. The Board of Medical Quality Assurance consists by majority vote of practicing physicians. Appointment to the Board generally involves informal approval by the California Medical Association. The Board is in structure and practice a cartel whose existence without legislative sanction would constitute a felony antitrust offense under federal and state law. Some of its members operate in the best of faith. But it is not surprising that empathy for those who are now physicians, like themselves, and suspicion for outsiders who desire entry, pervade physician regulation. That suspicion is perhaps exacerbated when the intruders have not gone to the same boot camp as those judging them, and who sometimes look and speak differently.

Physician entry should safeguard against incompetence and fraud, but

these legitimate state interests should not be a shield for a different agenda. The evidence is now substantial that a different agenda is very much in force in California. It must be ironic for foreign medical graduates to ponder the current state of gratuitous medical red tape. How do Le Dao and her colleagues—with outstanding educations and proven competence in every fair test (whether written examination, oral examination, or supervised apprenticeship)—perceive their new country? Le Dao knows it stands for freedom and fairness. She knows it stands for opportunity. These have been America's clarion calls to the world. Is she to doubt her competence when she has proven it repeatedly? Must she wonder why, if there are doubts about her competence, she has been allowed to spend the last three years treating patients and directing and conducting major medical procedures at a respected American medical center? Why, she wonders, is she allowed to practice—but not for money in competition with private physicians? What must she think of BMQA, which finds reasons to block her service, but which does not monitor malpractice judgments against licensed physicians, requires no competence by a physician in the specialty he/she actually practices, and which revokes few, if any, licenses for incompetence? What must she think when she sees tremendous increases in medical and physician costs to consumers, and learns of the heartrending lack of care in the poorer communities she would like to serve? What must she feel when she sees American health standards, except for expensive medical technology, deteriorating in seven major indices, ranging from infant mortality to longevity?

We have asked Le Dao some of these questions. Her answer is that BMQA is not America. The America Le Dao was prepared to die to reach is the America of a refugee's dream. It lives as a hope for her and her colleagues. The intruders to that vision are not dark-skinned people who work eighteen hours per day, master a difficult language, and are prepared to prove their mettle in any fair test. The intruder here is indigenous, and it is the entity which must be put under a legislative knife.



## FOOTNOTES

1. Letter to Dr. Le Bup Thi Dao from Marc E. Grimm, Program Manager, BMQA Division of Licensing (June 4, 1986).

2. See, e.g., San Jose Mercury News, Oct. 19-22, 1986, at 1 (four-part series).

3. All Committee exhibits cited in this article were discovered and compiled by the staff of the Senate Committee on Business and Professions, and are on file in its office.

4. This article does not cover all of the Committee's precise allegations, nor does it discuss each of the Committee's 84 exhibits. In fact, although this article exposes serious and repeated violations of the Administrative Procedure Act and the Bagley-Keene Open Meetings Act by the Board of Medical Quality Assurance, it only scratches the surface of the facts and the legal issues raised by organized medicine's discrimination against foreign medical graduates, and its pervasive attempts to limit the supply of physicians practicing in California.

5. Business and Professions Code section 2102(a).

6. Business and Professions Code section 2089. For example, an applicant's transcript must demonstrate "adequate instruction" in biochemistry, neurology, obstetrics and gynecology, physiology, psychiatry, and tropical medicine, to name a few of the subject areas included in section 2089.

7. Business and Professions Code section 2102(b).

8. Business and Professions Code section 2102(d).

9. Business and Professions Code section 2102(c).

10. Business and Professions Code section 2102(d).

11. *Id.*

12. Business and Professions Code section 2089.

13. Committee's Exhibit 1 (letter from Division of Licensing; February 26, 1986). The Division further told the FMG applicant that "in order to qualify for licensure in California, it will be necessary for you to supplement your education in the basic sciences participation [sic] in formal courses presented by an 'approved' or accepted school of medicine." Exhibit 1, *supra*.

14. Committee's Exhibit 2 (letter from Division of Licensing; April 25, 1986). In addition to the fact that the Division improperly required a minimum number of hours in microbiology and "anatomy-neurology," neither of those subject areas are specifically mentioned in section 2089.



15. Committee's Exhibit 4 at L2 (Application for Physician and Surgeon's Examination and Licensure).

16. Committee's Exhibit 13 at 349 (Deposition of Marc E. Grimm; June 24, 1986).

17. Committee's Exhibit 14 at 52-53 (Deposition of Marc E. Grimm; March 5, 1985).

18. *Id.* at 50-51.

19. *Id.* at 51.

20. Committee's Exhibit 16 at 99-100 (Deposition of Dr. Lindy F. Kumagai; July 1, 1986). Dr. Kumagai further stated that, although Program Manager Grimm conducted a survey of basic science requirements at LCME-approved medical schools, "it became fairly apparent that some exact data would be virtually impossible to get," and that minimum fixed-hour standards for the basic sciences were not adopted by the Board "simply because not only was the range very wide, but, as I stated, even within California it was virtually impossible to get very exact information." Committee's Exhibit 16 at 101-02.

21. Committee's Exhibit 15 at 54-55 (Deposition of Dr. J. Alfred Rider; June 26, 1986).

22. Committee's Exhibit 18 at 121 (Deposition of Kenneth J. Wagstaff; June 30, 1986).

23. Committee's Exhibit 19 at 111 (Deposition of Michael S. Cannon; January 23, 1985).

24. Committee's Exhibit 20 at 56 (Deposition of Jennifer Barnhart; October 11, 1984).

25. Government Code section 11347.5.

26. Business and Professions Code section 2089.5.

27. Committee's Exhibit 37 at 1-2 (letter from Kenneth J. Wagstaff; May 16, 1984).

28. Committee's Exhibit 24 at 2 (Division of Licensing Minutes; August 19, 1983).

29. *Id.*

30. Committee's Exhibit 25 (Initial Task Force Report).

31. Committee's Exhibit 24 at 3 (Division of Licensing Minutes; August 19, 1983).

32. Committee's Exhibit 27 (Special Instructions for Foreign Graduates).

33. Committee's Exhibit 21 at 43 (Deposition of Michael S. Cannon; January 23, 1985) ("I would say it [application of minimum-week requirements] would have been done approximately December of 1983 to January of 1984, when the specific review for the number of weeks as well as facilities was done").

34. Committee's Exhibit 22 (letter from Division of Licensing; December 16, 1983).

35. Committee's Exhibit 23 (letter from Division of Licensing; February 6, 1984).

36. *See supra* text at note 6.

37. Committee's Exhibit 28 (Notice of Proposed Changes in the Regulations of the Board of Medical Quality Assurance, Division of Licensing).

38. *Id.*

39. Committee's Exhibit 29 (Specific Language of Proposed Regulations).

40. Committee's Exhibit 30 (Memorandum from California Medical Association; December 20, 1983) (emphasis added).

41. Committee's Exhibit 34 (Division of Licensing Minutes; March 12, 1984).

42. *Id.* at 3; Committee's Exhibit 35 (Modification of Section 1321). *See also* Committee's Exhibit 22, *supra* note 34.

43. Committee's Exhibit 35 (Modification of Section 1321).

44. Committee's Exhibit 34 at 17 (Division of Licensing Minutes; March 12, 1984).

45. *Id.* at 20. The Administrative Procedure Act, Government Code section 11340 *et seq.*, generally provides that a full text of the proposed action must be available to the public at least 45 days before a public hearing or the close of the written comment period. Government Code sections 11346.4, 11346.5. However, an agency may change or modify a regulation that was properly made available to the public if (1) the change is "nonsubstantial or solely grammatical in nature;" or (2) sufficiently related to the original text that the public was adequately placed on notice that the change would result from the originally proposed regulatory action. Government Code section 11346.8(c). The full text of the resulting regulation, with the change or modification clearly indicated, must be made available to the public at least fifteen days before the date upon which the agency adopts the regulation. *See also* R. FELLMETH & R. FOLSOM, CALIFORNIA REGULATORY LAW AND PRACTICE 86 (Butterworth 1981).

46. Committee's Exhibit 34 at 20 (Division of Licensing Minutes; March 12, 1984).

47. Committee's Exhibit 39 (letter from OAL; January 24, 1985).

48. *Id.* at 2.

49. *Id.* at 2-3.

50. *Id.* at 4 (emphasis added).

51. *Id.* OAL further found that proposed section 1321 violated the "clarity"

standard contained in Government Code section 11349.1(a)(3) in no less than seven respects.

52. *See supra* text at note 45 and n.45.

53. Committee's Exhibit 39 at 11 (letter from OAL; January 24, 1985).

54. Committee's Exhibit 40 at 330 (Deposition of Marc E. Grimm; June 24, 1986).

55. Committee's Exhibit 14 at 50 (Deposition of Marc E. Grimm; March 5, 1985).

56. Government Code section 11347.5.

57. *See supra* text at note 26.

58. *See supra* text at notes 47-55.

59. Committee's Exhibit 45 at 6 (BMQA's Comments and Responses to Livingston Testimony) (emphasis original).

60. Committee's Exhibit 4 at 2 (Check Sheet to Application for Physician and Surgeon's Examination and Licensure).

61. Committee's Exhibit 47 at 115-16 (Deposition of Marc E. Grimm; June 23, 1986).

62. Committee's Exhibit 34 at 4-5 (Division of Licensing Minutes; March 12, 1984).

63. Committee's Exhibit 48 (letter from Kevin P. Donovan; May 22, 1986).

64. *Id.*

65. Business and Professions Code section 2084.

66. Committee's Exhibit 84 (letter from Kenneth J. Wagstaff; June 4, 1986).

67. Committee's Exhibit 56 at 12 (Division of Licensing Minutes; January 30-31, 1986).

68. Committee's Exhibit 51 (letter from Division of Licensing approving clinical training program at Shasta General Hospital; December 23, 1981); Committee's Exhibit 52 (letter from Division of Licensing approving clinical training program at Shasta General Hospital; March 21, 1984).

69. Committee's Exhibit 53 at 4 (Site Review-Shasta General Hospital; November 6, 1985).

70. Business and Professions Code section 2089.5(e)(2) requires that "if the division does not approve the [clinical] program, it shall provide its reasons for disapproval to the school and hospital in writing specifying its findings about each aspect of the program that it considers to be deficient and the changes required to obtain approval."

71. Committee's Exhibit 62 (verbatim transcript of Division of Licensing meeting; May 29, 1986).

72. *Id.*

73. Committee's Exhibit 63 (portion



of Attorney General's pleading; June 23, 1986).

74. Committee's Exhibit 64 at 18 (Draft Division of Licensing Minutes; May 29, 1986).

75. Committee Statements at 19. For example, the Committee alleges that in February 1986, when the Division held up the licensure of graduates of the Universidad Autonoma de Guadalajara (UAG), Program Manager Marc Grimm stated that graduate residency training could *not* be used to replace or remediate perceived deficiencies in third-year clinical training at UAG. Division supervising staff, on the other hand, informed a UAG graduate in March 1986 that post-graduate training "will be very helpfull [sic] in making up deficiencies you presently have." See Committee's Exhibit 60 (letter from Division of Licensing; March 20, 1986).

76. Hearing Before the Senate Business and Professions Committee, December 5, 1986 (testimony of Gene Livingston).

77. *Id.*

78. *Id.*

79. The Division of Licensing's regulations appear at Title 16, section 1300 *et seq.*, of the California Administrative Code.

80. Committee's Exhibit 66 at 196 (Deposition of Marc E. Grimm; June 24, 1986).

81. *Id.* at 199.

82. Committee's Exhibit 68 at 13 (Deposition of Dr. Lindy F. Kumagai; July 1, 1986). The existence of the Division's "credentials committee" also raises questions. See *infra* text at note 100.

83. Committee Statements at 22.

84. Committee's Exhibit 72 at 82 (Deposition of Marc E. Grimm; June 23, 1986).

85. *Id.* at 83-84.

86. Letter to Le Bup Thi Dao from Division of Licensing (February 4, 1986).

87. Minutes of BMQA Division of Licensing Meeting (May 29, 1986).

88. Letter to Le Bup Thi Dao from Division of Licensing (June 4, 1986).

89. *Id.*

90. Letter to Le Bup Thi Dao from Division of Licensing (August 12, 1986). A "Fifth Pathway" program is an alternative licensure route through which students whose medical school education has been deficient may nevertheless be licensed. Most states have a Fifth Pathway statute; California's statute appears at Business and Professions Code sections 2103-2105.

91. Minutes of BMQA Division of

Licensing Meeting (November 14, 1986).

92. Agenda of BMQA Division of Licensing Meeting (November 14, 1986).

93. Letter to Dr. Quynh Kieu from Division of Licensing (August 18, 1986).

94. Minutes of BMQA Division of Licensing Meeting (November 14, 1986).

95. Letter to Senator Joseph B. Montoya from BMQA Executive Director Kenneth J. Wagstaff (January 16, 1987) (BMQA's Response to Statements and Testimony Presented to the Senate Business and Professions Committee, December 5, 1986).

96. Letter to Le Bup Thi Dao from Division of Licensing (January 22, 1987).

97. Government Code section 11347.5; see also text at notes 25, 56-57.

98. See, e.g., Government Code section 11126. Nor does any exemption to the Bagley-Keene Open Meetings Act allow the Division to reject the faculty council-in-exile proposal outside an open meeting. See *supra* text at note 95.

99. Minutes of BMQA Division of Licensing Meeting (May 29, 1986), *supra* note 87.

100. Committee's Exhibit 74 (Deposition of Dr. Lindy F. Kumagai; July 1, 1986).

101. Letter to Senator Joseph B. Montoya, *supra* note 95.

102. *Id.* at 1.

103. *Id.* at 2.

104. *Id.* at 7.

105. *Id.* at 5.

106. *Id.* at 7.

107. *Id.* at 8.

108. *Id.*

109. *Id.*

110. *Id.* at 9.

111. See *supra* text at notes 13-24.

112. Letter to Senator Joseph B. Montoya, *supra* note 95, at 8.

113. See *supra* text at notes 33-55.

114. Letter to Senator Joseph B. Montoya, *supra* note 95, at 7.

115. Government Code section 11346.1.

116. See *supra* text at notes 84-85.

117. See *supra* text at note 100.

118. See *supra* text at notes 75-78.

119. See *supra* text at notes 98-99.

120. See *supra* text at note 97.

121. Letter to Senator Joseph B. Montoya, *supra* note 95, at 10; Business and Professions Code section 2089.

122. Letter to Senator Joseph B. Montoya, *supra* note 95, at 10.

123. Business and Professions Code section 2084.

124. *Id.*; see *supra* text at notes 61-66.

125. *Id.* Furthermore, the Board's cavalier suggestion that the issue of the

Division's three-year denial of due process to FMGs is now moot due to the enactment of section 2089.5, see *supra* text at note 110, clearly reflects the Board's deep indifference to the plight of countless FMGs who have been unfairly denied licensure and the communities they might have served.

126. Letter to Senator Joseph B. Montoya, *supra* note 95, at 11.

127. Title 16, California Administrative Code, section 1301.

128. SB 1116 would additionally amend California's Fifth Pathway statute, Business and Professions Code sections 2103 and 2104, so that it more closely conforms to the American Medical Association's Fifth Pathway Statement and Fifth Pathway statutes in other states. The bill would also limit and condition the use of results of national examinations which FMGs are prohibited from taking in this jurisdiction.

129. See *supra* text at note 9.

130. Staff of New York State Assembly Committee on Ways and Means, *The Hidden Agenda: New York State's Restrictions on Foreign Medical Schools 2* (March 1986).