Guest Editorial

The Open Society and Its Enemies:[1] Growing Professional Secrecy in Massachusetts

by Charles H. Baron, LL.B., Ph.D.

On July 2, 1980, the United States Supreme Court, by a vote of 7 to 1, took a long step forward in assuring that trials in the United States would remain open to the public and the press. In *Richmond Newspapers v. Virginia*,[2] the Court held that public access to criminal trials is protected by the First and Fourteenth Amendments to the U.S. Constitution, and, in dicta, the Court suggested that these protections extend to civil trials as well. In doing so, the Court drew upon English and American statements of commitment to open government going back several centuries. Among them was the following by Jeremy Bentham:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[3]

On May 29, 1980, the Commonwealth of Massachusetts took a long step backward from principles of open government when its Governor signed legislation that dropped a cloak of absolute secrecy over the ongoing operations of the Commonwealth's Board of Registration in Medicine.[4] Entitled *An Act Facilitating the Conduct of Investigations by the Board of Registration in Medicine*, the legislation was proposed by the Massachusetts Medical Society and opposed by a majority of the current membership of the very Board whose investigations it was supposed to facilitate. Its effect is to exempt the Board from the requirements of a number of statutes that still govern the operations of every other board of registration and licensing in the Commonwealth. These older statutes establish a presumption of openness regarding all facts that come before such public agencies,[5] allowing confidentiality to be imposed only under special circumstances — including those where disclosure may "constitute an unwarranted invasion of personal privacy."[6] The new statute makes facts and proceedings before the Board of Registration in Medicine confidential under *all* circumstances until "the board has by dismissal, adjudication, or other final action disposed of the matter under investigation." In one recent case, such final action did not come until some two and one-half years after the Board took jurisdiction.

When examined closely, the arguments given for the confidentiality legislation simply do not justify it. Even the Massachusetts Medical Society admits that the ultimate enactment goes beyond the needs of the problem that gave it impetus. For several years, the Board had attempted to persuade the Society to share with it information that the Society regularly obtained through its internal, private disciplinary proceedings. Both organizations agreed that this would facilitate oversight of the medical profession. The Society, however, was afraid that the confidentiality of its proceedings would be compromised and it was unwilling to share its information unless the Board could keep it confidential until the Society was ready to refer the matter to the Board for further action. As the law stood, the Board could not guarantee such protection. However, the simple remedy for that situation would have been a statute that merely empowered the Board to preserve confidentiality as to such information until such time as the Society formally referred the matter to the Board. The statute actually passed performs a radical mastectomy where what was called for was the removal of a cyst.

In favor of the legislation as passed, the Massachusetts Medical Society argues that it is needed to protect physicians from unfavorable publicity that might be generated by frivolous complaints filed with the Board by patients. It further suggests that physicians are asking for only the same special treatment which the Commonwealth already accords lawyers. But, protection from frivolous complaints could have been afforded by merely making such complaints confidential unless and until the Board's Complaint Committee decides to recommend the issuance of an order to show cause. This, in fact, was the position taken by a majority of the present members of the Board. Moreover, the special treatment now accorded physicians goes well beyond that which lawyers receive. It is true that proceedings against lawyers before the Commonwealth's Board of Bar Overseers are almost completely confidential.[7] However, at this level the only action that can be taken against a lawyer is either an informal admonition or a private reprimand. Further sanctions, including loss of license to practice, can be obtained only through a

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court proceeding which is entirely public in nature. Analogous to the Board of Bar Overseers is the Massachusetts Medical Society which can impose reprimand, censure, or expulsion in absolute secrecy. The proceeding before the Board of Registration in Medicine for further sanctions up to loss of license to practice is analogous to the court proceeding against the accused attorney. However, the court proceeding against the attorney does not enjoy the secrecy now afforded to the Board proceeding against a physician.

Finally, and more fundamentally, the demand by professionals, be they physicians or lawyers, for favored treatment of this sort is unfair, undemocratic, and ultimately, self-defeating. No other citizen enjoys such protection from public embarrassment. What makes physicians and lawyers so sensitive in nature that they can justify discrimination of this sort in their favor? Can they expect the rest of society to recognize them, in effect, as an American aristocracy, accorded special privileges reflecting the special responsibilities of *noblesse oblige?* Among other things, society in general no longer believes that professionals are motivated only by a desire for public service or that they stand ready to police their own in order to prevent abuse of the public trust. Placing a cloak over ongoing professional disciplinary proceedings is likely only to undermine that trust even further. As the Supreme Court said in *Richmond Newspapers,* "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[8] The natural reaction to increased professional secrecy is to wonder: What are they hiding and why do they feel they need to hide it?

To its credit, a majority of the present Board of Registration in Medicine believes it has nothing to hide and is in the process of introducing legislation that would undo much of the secrecy that has been forced upon it. Preferable even to that is a bill which has already been introduced by a number of legislators for the purpose of completely undoing what was mistakenly done this year. The confidentiality legislation of 1980 should be completely repealed. It has no place in an open society. The Massachusetts Medical Society should admit its mistake and join in the move for repeal.

Editor's Note: *Printed below is a letter from Frank E. Bixby, M.D., the President of the Massachusetts Medical Society, to the Editor of the* Boston Globe. *The letter was published on July 20, 1980. The References to Professor Baron's editorial follow this letter.*

To the Editor:

On Monday, June 23, the *Globe* carried a lead article entitled "Massachusetts makes complaints against doctors a secret." On Wednesday, June 25, the *Globe* carried a lead editorial entitled "Too much secrecy for doctors." Unfortunately, these articles have seriously distorted both the intent of the Massachusetts Medical Society in supporting the recent legislation regarding the Board of Registration in Medicine as well as the real effects this law will have.

The Medical Society sponsored the legislation to *facilitate* the flow of legitimate complaints to the Board, not only from its members, but from the citizenry at large. The law gives legal immunity from civil suits to anyone who reports a complaint to the Board, as the *Globe* did point out. The Society has sponsored such a bill for the last *three consecutive years* in an effort to create an environment such that people would not be reluctant to file complaints through fear of a resultant civil suit by the accused physician.

While desiring to facilitate filings with the Board, the Society also desired to protect both doctors and the public from premature disclosure of pending complaints. Given that any citizen is now free, with immunity, to complain to the Board, it is entirely possible that some complaints with no merit will be filed. It seems fair to protect the potentially innocent until the Board has at least had an opportunity to consider the merits of the case. Then, of course, the information should and will be made public, as provided in the law.

The fears expressed in the *Globe* and other local papers that disclosure will not be made by the Board if they settle a proceeding on a "perpetually continued" or "probationary" basis appears to us to be both a misreading of the law and a conclusion based on an erroneous assumption. The law states "investigative records or information of the Board shall not be kept confidential after the Board has by dismissal, adjudication or other final action disposed of the matter under investigation . . ." This language appears to us to render public virtually any action taken by the Board regarding a pending case, and we have been so advised by our legal counsel. Thus, any such settlement as the *Globe* suggests might be kept secret we believe would in itself be a disposition of the case, and so would open that case to public disclosure. On the second point, we believe that to keep actions "secret" would require the active *intent* on the part of the Board to do so, a highly unlikely assumption. It is hard to imagine all members, including the two consumer members, conspiring to stretch the law in such manner as to allow its activities to be disguised.

It is important to note that the confidentiality section of the new law also protects the person filing the complaint, which previously was not the case.

With respect to the editorial comment that the legislation was "whisked" through the legislature, the bills were filed on December 5, 1979; heard publicly before the Committee on Health Care on February 13, 1980; considered by the legislature over the next three months; passed; and signed into law by the Governor on May 29, 1980. Certainly, everyone had plenty of time to evaluate the merits of the legislation.

In summary, the Society believes that the law: 1) facilitates the Board's receipt of complaints; 2) protects the potentially innocent until the Board has considered the facts; and 3) guarantees full public disclosure after the Board has taken whatever action it deems appropriate. We believe the law is very much in the public interest.

Frank E. Bixby, M.D.

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1. *See* K.R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES, Vol. 1 (Plato), Vol. 2 (Hegel & Marx) (1945).

2. *Richmond Newspapers* v. *Virginia*, 100 S.Ct. 2814 (1980).

3. 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827), *quoted id. at* 2824.

4. C. 213 of the Acts of 1980. It reads in pertinent part:

> No person filing a complaint or reporting or providing information pursuant to this section or assisting the board at its request in any manner in discharging its duties and functions shall be liable in any cause of action arising out of the receiving of such information or assistance,

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provided the person making the complaint or reporting or providing such information or assistance does so in good faith without malice. The board shall keep confidential any complaint, report, record, or other information received or kept by the board in connection with an investigation conducted by the board pursuant to this section; provided, however, that except to the extent that disclosures of records or other information may be restricted as otherwise provided by law, investigative records or information of the board shall not be kept confidential after the board has by dismissal, adjudication or other final action disposed of the matter under investigation nor shall the requirement that investigative records or information be kept confidential at any time apply to requests from the person under investigation for disclosure of information.

5. *See e.g.,* MASS. GEN. LAWS c. 66, §10(c).

6. MASS. GEN. LAWS c. 4, §7(c). The relevant statutes in Massachusetts include MASS. GEN. LAWS c. 66, §10 (Public Records Act, Title X); MASS. GEN. LAWS c. 66A, §2 (Fair Information Practices); MASS. GEN. LAWS c. 4, §7 (in Title I, Jurisdiction and Emblems of the Commonwealth, the General Court, Statutes and Public Documents); and MASS. GEN. LAWS c. 30A, §11A (Open Meeting Law). For a definitive discussion of the interrelationship of all of these but the last, *see* Opinion of the Attorney General, May 18, 1977.

7. Mass. Rules of the Board of Bar Overseers, Subsection F, §5.25.

8. *Richmond Newspapers v. Virginia, supra* note 1, at 2825.

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