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May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 255 and House Bill 282

Dear Governor O'Malley:

We have reviewed Senate Bill 255 and House Bill 282, companion bills entitled "State Board of Physicians - Sunset Extension and Program Evaluation," for constitutionality and legal sufficiency.¹ While we approve the bill, we write to point out a severable portion of the bill that is unconstitutional and may not be given effect.²

Senate Bill 255 and House Bill 282 amend Health Occupations Article § 14-206(d)(1), which permits the Executive Director of the Board of Physicians or other authorized agent or inspector of the Board to enter the place of business of a licensed physician or public premises if that entry is necessary to carry out a duty under the Physicians Title. Specifically, the bills extend this right of entry to "private premises where the Board suspects that a person who is not licensed by the Board is practicing,

¹ House Bill 282 and Senate Bill 255 are nearly identical. In Senate Bill 255 there is a reference to Health Occupations Article, § 14-316(e) in both the "repealing and reenacting, with amendments" and the "repealing and reenacting, without amendments" function paragraphs. It should be referred to only in the latter, as it is in the House bill. On page 28, line 15 of Senate Bill 255 there is a reference to "PARAGRAPH (I)." The House bill, on page 28, line 24, correctly refers to "SUBPARAGRAPH (I)."

² Senate Bill 255 and House Bill 282 make a series of changes to the provisions of law relating to the practice of medicine by physicians. These changes arise out of the latest sunset review of the State Board of Physicians. The changes are all related to the general subject of improving the regulation of physicians, but are not so interrelated that they must be seen as non severable. Therefore, it is our view that our recommendation that a single provision not be enforced does not require invalidation of the entire bill.

attempting to practice, or offering to practice medicine, based on a formal complaint.” Nothing in the bills, or in the existing provisions of § 14-206, require that a search warrant be obtained before this entry.³

The unlicensed practice of medicine is a misdemeanor punishable by a fine of up to \$5000, imprisonment of up to 5 years, or both. Health Occupations Article §§ 14-601, 14-606(a). In addition, a person who engages in the unlicensed practice of medicine is subject to a civil fine of up to \$50,000, levied by the Board of Physicians. Thus, an entry into a private place based on a suspicion that a person is engaged in the unlicensed practice of medicine is, at least in part, an entry to detect evidence of a crime. It is well-settled that such an entry must be supported by the issuance of a warrant. United States Constitution, Amendment IV; Maryland Declaration of Rights, Article 26.

Even if the entry is deemed to be solely for administrative purposes, an administrative search generally requires a warrant. *Michigan v. Clifford*, 464 U.S. 287, 291 (1984); *Cahill v. Montgomery County*, 72 Md.App. 274, 280 *cert. denied* 311 Md. 286 (1987). While there are certain exceptions to this requirement, none are applicable here. The primary exception permitting warrantless administrative searches is that for those allowing regular inspections of commercial property in which a “closely regulated business” is conducted. Such inspections are deemed reasonable only if three criteria are met. *New York v. Burger*, 482 U.S. 691, 702 (1987). First, it must be shown that there is “a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made.” *Id.* Second, “the warrantless inspections must be ‘necessary to further [the] regulatory scheme.’” *Id.* And third, “the statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.” *Id.* at 703. “In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Id.*

While the regulatory scheme in question clearly serves substantial governmental interests, it is less than clear that the warrantless entry is necessary to further those interests. More importantly, the ability to enter individually selected private premises, based on suspicion of specific activity, bears no relation to the type of regular inspection scheme envisioned in cases like *Burger*. Moreover, nothing in the statute provides protections equivalent to those provided by a warrant, in that it does not provide for regular, predictable inspections, or provide guidance to inspectors “either in their selection of establishments to be searched or in the exercise of their authority to search.” *Donovan v. Dewey*, 452 U.S. 594, 601 (1981); *New York v. Burger*, 482 U.S. at 722.

³ Section 14-206(d)(2) and (3) make it a misdemeanor punishable by a fine of up to \$100 to deny or interfere with an entry under the subsection.

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Thus, it is our view that the authorization to enter private premises without a warrant cannot be upheld under the exception for inspection schemes applicable to heavily regulated industries. To the extent that the bills might authorize entry of private homes, the barriers are even greater, as the Supreme Court has held that warrants are necessary for even administrative searches involving residences. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967); *Anobile v. Pelligrino*, 303 F.3d 107 (2nd Cir. 2002).

For these reasons, we recommend that the provision not be enforced as it stands, and that the statute be amended in the next session to remove the provision, or to authorize the issuance of warrants to the officers in question where they are able to show probable cause.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Joan Carter Conway
The Honorable Peter A. Hammen