OAH Docket No. 70-0901-19396-1
Governor's Tracking No. AR 275

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of the Proposed Rules of the Board of Chiropractic Examiners Governing Records Retention and Access; *Minnesota Rules, Chapter 2500*

ORDER ON REVIEW OF RULES UNDER MINNESOTA STATUTES, SECTION 14.26

The Minnesota Board of Chiropractic Examiners ("Board") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On December 14, 2007, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum below,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.

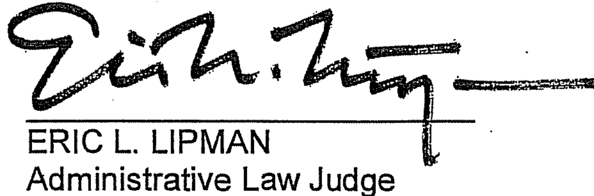
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400, with one exception, as set forth in the Memorandum below. Accordingly, the rules are **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100, item A.

3. Pursuant to Minnesota Statutes, section 14.26, subdivision 3 (b), and Minnesota Rules, Part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for further review.

4. The Board shall submit a new Additional Notice Plan to the Administrative Law Judge for review and approval prior to re-publishing a Request for Comments or a Notice of Intent to Adopt a Rule Without a Public Hearing. In order to implement the recommendations and requirements of this

Report the Board may, at its election, reinitiate the rulemaking process at either the Request for Comment phase or the Notice of Intent to Adopt a Rule phase.

Dated: December 28, 2007



ERIC L. LIPMAN
Administrative Law Judge

SUMMARY OF CONCLUSIONS

In this rulemaking proceeding, the Administrative Law Judge has found a significant procedural defect in the proposed rules.

Because this procedural defect requires the Board to renew its public notice processes – with either a new Request for Comments, or the Notice of Intent to Adopt a Rule (With or) Without a Hearing – the Board will likewise have the opportunity to review, and perhaps revise, the text of the proposed rules before submitting them for republication in the *State Register*. For that reason, the Administrative Law Judge has refrained from making formal findings in this report as to several other possible substantive defects in the proposed rules.

With this said, however, the undersigned has provided a series of recommendations – which are purely advisory in nature – that the Board may wish to consider as it prepares its proposals for republication and review. But for the procedural defect, these matters would have been important focal points for this Office's analysis of the substance of the proposed rules.

MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, the agency has submitted these rules to the Administrative Law Judge for a legal review by the Office of Administrative Hearings.

According to state law, there are several circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. A proposed rule is defective when it:

(a) is not adopted in compliance with the procedural requirements of state law, unless the judge finds that the error was harmless in nature and should be disregarded;

(b) is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule;

(c) is substantially different than the rule as originally proposed and the agency did not comply with required procedures;

(d) grants undue discretion to the agency, is unconstitutional[1] or illegal;

(e) improperly delegates the agency's powers to another entity; or

(f) falls outside of the statutory definition of a "rule."[2]

Procedural Defect Under Minn. R. 1400.2100, Item A

The Administrative Law Judge finds that a procedural error has occurred in this rulemaking process. Minn. Stat. § 14.22 requires that, in addition to publishing the proposed rules and a Notice of Intent to Adopt Rules Without a Public Hearing in the *State Register*, and mailing these materials to the agency's rulemaking mailing list, the agency must also "make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication." Minn. Stat. § 14.23 further requires that the agency describe its "efforts to provide additional notification . . . or . . . explain why these efforts were not made" in its Statement of Need and Reasonableness ("SONAR").

In its SONAR, the Board stated that it maintains a rulemaking list and mails notification of rule proposals to everyone on that list. Included on the rulemaking list is the "professional association which represents the interests of the [Chiropractic] profession at large." In addition, the Board described its additional notice plan, by stating that it mails its newsletter to all licensees as well as to others who express interest in receiving this item, and this periodical routinely includes "[n]otices regarding rule subject matter and invitations to acquire information on rules being promulgated . . . ." The Board also asserts that it maintains a website which includes "all statutorily required postings." Other than these efforts, the Board states that "no extraordinary methods were utilized for notification" regarding the proposed rules.[3]

As detailed in the agency's SONAR, the proposed rules were drafted to address the problems that arise when doctors leave their practices without making "provisions for access to the records by the patients they served."[4] The proposed rules require a chiropractor to appoint "a designee, such as the licensee's spouse, business partner, attorney, or other responsible party" to implement a plan for maintaining and disposing of these health care records.[5]

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[1] In order to meet constitutional requirements, a rule must be specific enough to provide fair warning as to the type of conduct that it regulates. *See, e.g., Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980) (citing *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972)).

[2] *See generally*, Minn. Stat. § 14.05, 14.15, 14.26, 14.44 and 14.45 (2006).

[3] SONAR at 12.

[4] SONAR at 2.

[5] Proposed Rules, 2500.5010, subp. 1.

These proposed rules raise a number of important legal and policy issues as to which members of the broader community – beyond licensed chiropractors and subscribers to the Board's newsletter – may have interests and views.

The Administrative Law Judge finds that the Board's failure to inform patient advocacy groups, privacy advocates, any of the large health plans in Minnesota, or attorneys who practice in the areas of estate planning, probate or personal injury, of its rulemaking plans, renders the Board's additional notice plan defective.[6] The failure to develop and implement a sufficient additional notice plan has deprived potentially interested persons and organizations a meaningful opportunity to participate in the rulemaking process.[7]

This procedural error is not merely technical in nature. The additional notice plan requirements of the Minnesota Administrative Procedure Act further the Act's most fundamental purposes; principally the Legislature's purpose in increasing:

(a) oversight of the powers and duties delegated to administrative agencies;

(b) public accountability of administrative agencies;

(c) public access to governmental information; and

(d) public participation in the formulation of administrative rules.[8]

Indeed, it is widely acknowledged that open and direct communication between government agencies and interested parties during the rulemaking process benefits the agency, regulated parties and the broader public.[9]

The rules of the Office of Administrative Hearings (OAH) permit a state agency to request review and approval of an additional notice plan from OAH before an agency publishes a Request for Comments or a Notice of Intent to

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[6] *Compare,* Minn. Stat. §§ 14.14 (1a) and 14.22 (1) (a) (2006) ("In addition, each agency shall make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication").

[7] *See,* Minn. Stat. §§ 14.22 (1) (a) and 14.26 (3) (d) (2006); Minn. R. 1400.2100 (A) (2007).

[8] *See*, Minn. Stat. § 14.001 (1), (2), (4) and (5) (2006).

[9] *Compare,* Minn. Stat. § 14.001 (2006) (it is the Legislature's "expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained"); *Jewish Community Action, et al. v. Comm'r of Public Safety*, 657 N.W.2d 604, 610 (Minn. App. 2003) ("an administrative agency needs public input to remain informed"); U.S. Senate Report on the federal Administrative Procedure Act of 1946, S.Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946) (public participation in the rulemaking process "is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interest").

Adopt a Rule.[10] This optional procedure is frequently used by state agencies and boards – principally because once an additional notice plan is approved, an agency can proceed through the rulemaking process with the assurance that there are not gaps or infirmities in its notice plan that might require it to reinitiate earlier steps in this process.

In this case, however, the Board, as was its privilege, did not seek prior approval of its additional notice plan before publishing the rulemaking notice in the *State Register.* Yet, without this earlier review, the Board assumed the risk that it might be obliged re-initiate steps of the rulemaking process so as to ensure that persons "who may be significantly affected by the rule" received notice of the Board's proposals. Revisiting those earlier steps is required now.[11]

Matters That May Amount to Substantive Defects in the Proposed Rules:

The proposed rules raise a number of issues that, if re-submitted to the Administrative Law Judge without change, could amount to a substantive defect.

The Rule Appears to Conflict with Federal Law

The first of these potential issues is the rule's apparent conflict with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA does apply to chiropractors – as it does to physicians, dentists and other health care professionals. The proposed rule would permit chiropractors to develop a record management plan that would confer custody and control of health care records upon persons who, presumably, would not otherwise be permitted access to such records under HIPAA.[12] Thus, notwithstanding the avowed purpose of the rule revisions – namely, to "give guidance to doctors in developing a plan commensurate with HIPAA"[13] – the Board's proposals appear to conflict with federal law. In this context, therefore, the Board's claim that because "the federal government is not involved in the licensure of doctors of chiropractic, it is believed that the rule(s) herein proposed offer no conflict with federal regulations,"[14] is simply not persuasive.

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[10] *See,* Minn. Stat. § 14.51 (2006) (OAH procedural rules must provide "a procedure to allow an agency to receive prior binding approval of its plan regarding the additional notice contemplated under sections 14.101, 14.131, 14.14, 14.22 and 14.23") and Minn. R. 1400.2060 (2007).

[11] The Board likewise chose, as was its right, not to appoint an advisory committee to assist it in drafting and reviewing the proposed rules. *See, e.g.,* Request for Comments on Possible Amendment to Rules Governing Records Retention Requirements, 30 *State Register* 1377. Given the sensitivity and complexity of the record retention issues touched by the proposed rules, this too may be a matter that the Board wishes to reconsider. Impaneling a committee of informal advisors could provide the Board with useful advice and expertise.

[12] *See,* 45 C.F.R. §§ 164.502 and 164.530 (2007).

[13] *See, e.g.,* Exhibit A, Request for Comments.

[14] *Compare,* SONAR at 11 and 12.

A second, but related problem is that the SONAR does not claim, or establish, that the "administrative requirements" of HIPAA will be met under the Board's proposed rules. Indeed, there is genuine doubt that the Board's proposal that the records be held in a secure location by a responsible person will satisfy the more rigorous federal standards.[15]

There are, to be sure, regulatory approaches that could meet these shortcomings; but the Board may need to enlist the help, advice and problem-solving skills of those who know the federal requirements well. As outlined above, the Board is urged to consider convening an advisory committee to review the proposals, and, at a minimum, solicit comments from knowledgeable professionals.

The Rule Appears to Be Unenforceable

Another substantive problem with the rule is that to the extent that it purports to regulate the conduct of designees who are not licensed by the Board, (*see*, subparts 2A, 2B, 2C, 2E, 3 and 4) the rule appears to be unenforceable. If a rule "by its own terms cannot have the force and effect of law," it must be disapproved by the Administrative Law Judge.[16] As before, it is likely that there are regulatory approaches that could be developed to address these shortcomings; but the Board may need to enlist the help and advice of skilled professionals in order to craft the needed changes.

The Rule Appears to Violate State Law

Subpart E. of the proposed rule states "[n]otwithstanding Minnesota Statutes, section 148.10, subdivision 1, paragraph (a), clause (18), health care records need not be maintained for longer than 18 months on behalf of any practitioner who is deceased." The statute referenced in this subpart is a licensing statute which states that disciplinary action may be taken against licensed chiropractors who fail to:

> keep written chiropractic records . . . including, but not limited to, patient histories, examination results, test results, and x-rays. Unless otherwise required by law, written records need not be retained for more than seven years and x-rays need not be retained for more than four years.[17]

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[15] *Compare, e.g.,* 45 C.F.R. § 164.530 (2007).

[16] Minn. R. 1400.2100 (G) (2007).

[17] *See,* Minn. Stat. § 148.10 (1) (a) (18) (2006) (emphasis added); *compare also*, 45 C.F.R. § 164.530 (j) (2) (2007) ("A covered entity must retain the documentation required by paragraph (j)(1) of this section for six years from the date of its creation or the date when it last was in effect, whichever is later") (emphasis added).

The SONAR submitted by the Board does not claim, or establish, that it has the authority to set the record retention period for successor designees of health care providers at less than the intervals established by the Minnesota Legislature in Minn. Stat. § 148.10 (1) (a) (18). Nor can it be lightly inferred that the Legislature intended that patient health care information be maintained for at least seven years if a chiropractor continues to practice, but a quarter of that time if the provider dies or otherwise leaves chiropractic practice. A key part of any later legal review will, of course, be an assessment of the Board's legal authority to promulgate the proposed rules.

Permissive Language is Used When Mandatory Language is Needed

Subpart 3 of the proposed rules states that "[t]he licensee or the licensee's designee may maintain or store records in one of the following manners . . . ." Use of the word "may" implies that the licensee or the licensee's designee is authorized to store records in any of the listed methods or none of those listed methods, as the custodian of records sees fit. So stated, the provision is both unenforceable and unrelated to the Board's objective of maintaining the security of patient records. Such an error in any later rule proposal would amount to a substantive defect. Accordingly, the Board should consider substituting the word "shall" for the word "may" in any later proposal along these lines.

Other Technical Concerns

There are a number of areas of concern which would not rise to the level of defects but which the Administrative Law Judge recommends the Board review and consider revising so as to achieve greater clarity.

Inconsistency Concerning Notice of Intent to Adopt

The SONAR stated that the "Board will publish a Dual Notice of Intent to Amend or Adopt the Rules With and Without a Public Hearing."[18] The Notice that was published, however, only included a Notice of Intent to Adopt Rules Without a Public Hearing. This inconsistency is troubling; particularly due to the lack of notice to interested stakeholders regarding the proposed rules. The Administrative Law Judge recommends that the Board either revise the SONAR or consider publishing a dual notice.

Publication of Location of Records

Subparts 2B, 2C and 3D require or permit the publication of the location of patient records. The Board may wish to consider whether and how publication of the location of the records increases the security risks to those records;

[18] SONAR at 6.

particularly if the Board later proposes a rule that would permit the retention of records in a private home.[19]

Potentially Inconsistent Use of the Word "Designee"

Some sections of subparts 2A through 2E refer to the "licensee or licensee's designee" whereas other sections of the proposed rule refer only to the "licensee." This dichotomy occurs even in those instances when, based upon the context of the rule, a provision appears to apply equally to the licensee and a designee. The Administrative Law Judge recommends that the Board review its use of the alternative language throughout the proposed rule so as to ensure that it accurately reflects the Board's regulatory intentions.

Placement of Subpart 3E

Subpart 3E permits the use of electronic storage media. Further, Subparts 3A through 3D list locations at which records may be stored. The Administrative Law Judge recommends that the Board carefully consider whether the provisions of these subparts are consistent with each other and the overlay of federal requirements governing the handling of electronic records.

E.L.L.

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[19] *Compare also,* 45 C.F.R. § 164.530 (c) (1) (2007) ("A covered entity must have in place appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information").