

STATE OF MINNESOTA
COUNTY OF HENNEPIN

BEFORE THE MINNESOTA
BOARD OF DENTISTRY

In the Matter of Proposed
Amendments to Dentistry Rules
Relating to Dental Auxiliary
Personnel and Services,
parts 3100.8400, 3100.8500,
3100.8700; and repealing
part 3100.8400, subpart 2

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

The Minnesota Board of Dentistry (hereinafter "Board"), pursuant to the rulemaking provisions of the Administrative Procedure Act, Minn. Stat. ch. 14 (1984), hereby affirmatively presents the need for and facts establishing the reasonableness of the above captioned proposed amendments to the Board's rules. Terms used in this Statement have the meanings given them in Minn. Rules pt. 3100.0100 (1983).

In order to adopt the proposed amendments, the Board must demonstrate that it has complied with all the procedural and substantive requirements of rulemaking. Those requirements are that: 1) there is statutory authority to adopt the rule; 2) all necessary procedural steps have been taken; 3) any additional requirements imposed by law have been satisfied; 4) the rules are needed; and 5) the rules are reasonable. This Statement demonstrates that the Board has met these requirements.

II. STATUTORY AUTHORITY

The basic authority to adopt the above subject amendments is contained in Minn. Stat. § 150A.04, subd. 5 (1984), which authorizes the Board to "promulgate rules as are necessary to carry out and make effective the provisions and purposes of sections 150A.01 to 150A.12." In addition, Minn. Stat. § 150A.10, subds. 1 and 2 (1984) specifically authorize the Board to set forth the different services or acts which dental hygienists and

registered dental assistants may perform. The Board is also authorized to permit different levels of dental assisting.

III. COMPLIANCE WITH PROCEDURAL RULEMAKING REQUIREMENTS

A. Requirements in General

The Board has determined that the above captioned amendments are noncontroversial and has elected to follow the procedures set forth in Minn. Stat. §§ 14.05 to 14.12 and 14.22 to 14.28 (1984) which provide for the adoption of noncontroversial rules without the holding of a public hearing. However, if during the 30-day comment period 25 or more people request a hearing, one must be held. In order to expedite the hearing should the requisite number of people request one, the hearing is being noticed at the same time and as part of the same notice by which the Board is announcing its intent to adopt the rules via the noncontroversial process. Therefore, the procedures for adopting rules after a hearing as specified in Minn. Stat. §§ 14.131 to 14.20 (1984) and in Minn. Rules pt. 1400.0200 to 1400.1200 (1983), as amended in 9 S.R. 2279 (April 8, 1985), will also be met. The hearing, of course, will be cancelled if the Board does not receive a request for one from 25 or more people.

Pursuant to Minn. Stat. §§ 14.131 and 14.23 (1984) and Minn. Rules pt. 1400.0500, the Board has prepared this Statement of Need and Reasonableness which is available to the public. It contains the verbatim affirmative presentation in support of the above captioned rule amendments pursuant to Minn. Rules pt. 1400.0500, subp. 3 (1983) as amended in 9 S.R. 2279 (April 8, 1985). If a hearing is held, this Statement of Need and reasonableness will be introduced into the record as an exhibit and copies will be available for review at the hearing. Because the Statement of Need and Reasonableness contains the Board's complete presentation, the Board will not call any witnesses to testify on its behalf. Dr. Robert Hoover and Kathleen Lapham, RDA, the current and former chairpersons of the Board's rules committee, and Dale Forseth, the Board's

Executive Secretary, will be present at the hearing to summarize all or portions of this Statement of Need and Reasonableness, if requested by the Administrative Law Judge, to answer questions, and to respond to concerns that may be raised.

The Board will publish in the State Register the proposed amendments and notice of its intention to amend the rules without a public hearing in combination with its notice of intent to amend with a public hearing if 25 or more persons request a hearing. The Board will also mail copies of the combined notices to persons registered with the Board pursuant to Minn. Stat. § 14.14, subd. 1a (1984) as well as to others whom the Board believes will have an interest in the amendments.

These rules will become effective five work days after publication of a notice of adoption in the State Register pursuant to Minn. Stat. §§ 14.18 and 14.27 (1984).

B. Notice of Intent to Solicit Information from Non-Agency Sources

Minn. Stat. § 14.10 (1984) requires an agency which seeks information or opinions from sources outside the agency in preparing to propose the amendment of rules to publish a notice of its action in the State Register and afford all interested persons an opportunity to submit data or comments on the subject of concern in writing or orally. In the State Register issue of Monday, February 1, 1982, at page 1386, the Board published a notice entitled, "Notice of Intent to Solicit Information or Opinions from Non-Agency Sources on Rule Revisions."

The Notice stated that the Board was reviewing its rules to determine if there was a need to amend them and was therefore soliciting information and opinions from sources outside the Board. After a series of meetings of the Board's Rules Committee, it identified a number of subject areas for potential rule amendment. The Board then held a "Forum" on September 9, 1983, notice of which was sent to everyone on file with the Board who wanted to be informed of Board rulemaking activities pursuant to Minn. Stat. § 14.14, subd. 1a (1984), including the various dental associations, as well as to others who

may have had an interest in the rules but who had not filed with the Board. The purpose of the Forum was to give interested persons an opportunity to comment on various proposals, including proposals covered by the above subject amendments.

As a result of the comments received at the Forum, the Board's Rule Committee continued to meet. Many of its meetings were attended by representatives of the various dental associations and other interested parties. Written comments were also received during the entire process. Those comments will be placed into the rulemaking record. Drafts of amendments were submitted to the entire Board on several occasions at which interested persons were permitted to comment. Finally, on June 22, 1985, the Board directed that the formal rulemaking proceeding be started with respect to the above captioned rules.

IV. COMPLIANCE WITH OTHER RULEMAKING REQUIREMENTS

A. Miscellaneous Requirements

These rules do not incorporate by reference text from any other law, rule, or available text or book. Minn. Stat. § 14.07, subd. 4 (1984). These rules minimize the duplication of statutory language. Minn. Stat. § 14.07, subd. 3(1) (1984). The adoption of these rules will not require the expenditure of public money by local public bodies of greater than \$100,000.00 in either of the two years following promulgation, nor do the rules have any impact on agricultural land. Minn. Stat. § 14.11 (1984). Finally, a fiscal note referenced in Minn. Laws 1985, Ex. Sess., ch. 10, §§ 34 to 36 and 38, is not required because these rules do not mandate that a local agency or school district take an action which would force them to incur costs.

B. Small Business Considerations

It is the position of the Board that Minn. Stat. § 14.115 (1984) relating to small business considerations in rulemaking does not apply to the rules it promulgates. Minn. Stat. § 14.115, subd. 7(b) (1984) states that section 14.115 does not apply to "agency rules

that do not affect small businesses directly." The Board's authority relates only to dentists and not to the dental businesses they operate. While someone cannot operate a dental business without being licensed as a dentist by the Board, the license runs primarily to the technical ability to provide dental services and not to the business aspects. This is graphically illustrated in recent dealing with non-dentists who are involved with dental franchise offices. The Board has not taken the position that non-dentists can have no involvement in operating a dental business. Instead, its position is that non-dentists may not interfere with or have any control over the dentist when it comes to any aspect of the practice which could affect the providing of professional services to a patient. Thus the Board regulates the provision of dental services and not the dental business per se. As such, it is exempt under Minn. Stat. § 14.115, subd. 7(b) (1984).

The Board is also exempt from the provisions of section 14.115 pursuant to its subdivision 7(c) which states that section 14.115 does not apply to "service businesses regulated by government bodies, for standards and costs, such as . . . providers of medical care." Dentists provide medical care and are regulated for standards and costs. The Board regulates the dentists for standards and the Minnesota Department of Human Services for costs.

The question might be raised as to whether the same government body has to regulate the service business for standards and costs in order for the exemption to apply. The Board's position is that the question should be answered in the negative. First, the provision specifically refers to regulation by "government bodies." Second, and most significantly, some of the examples of service businesses given in the subdivision where the rules governing them would be exempt from the conditions of section 14.115 actually would not qualify for the exemption if the same government body had to regulate for standards and costs. For example, nursing homes and hospitals are regulated by different government bodies for standards and costs. The Minnesota Department of Health

regulates them for standards and the Minnesota Department of Human Services for costs. If the legislature had intended to exempt from the scope of section 14.115 only those rules which address service businesses regulated by one government body for standards and costs, then it could not have included in its list of examples nursing homes and hospitals.

Based on the foregoing, it is clear that section 14.115 is not intended to apply to rules promulgated by the Board. However, because there is no determination addressing the issue from a court, the Attorney General's office, or Office of Administrative Hearings, the Board will briefly address the five methods listed in Minn. Stat. § 14.115, subd. 2 (1984) for reducing the impact of rules on small business.

The suggested methods are largely inapplicable to rules governing the services which dental auxiliary personnel may perform. These rules do not contain reporting requirements, compliance schedules or deadlines, or design or operational standards. The establishment of less stringent compliance requirements has no relevance to dental auxiliary personnel. The method which might arguably be applicable, the exemption of small business from any or all requirements of the rules, cannot be incorporated into the proposed amendments. To do so would be contrary to the statutory objectives that are the basis of the proposed rulemaking.

V. NEED FOR REASONABLENESS OF THE PROPOSED AMENDMENTS

A. General Need for and Reasonableness of the Proposed Amendments

The above-captioned amendments are primarily a result of a Board review of its rules which began in 1982. The purpose of the review was to determine which rules needed to be updated and otherwise improved. That is the main reason behind the proposed amendments.

The proposed amendments are in keeping with the provisions of Minn. Stat. ch. 150A (1984), and as the following rule by rule justification will demonstrate, are both needed and reasonable.

B. Rule by Rule Justification

1. Part 3100.8400-Assistants (formerly 7 MCAR §§ 3.031 and 3.032B)

a. Subpart 1. The amendments to subpart 1 are nonsubstantive and editorial in nature only.

b. Subpart 2. This subpart is being repealed. However, in reality, the substance of this subpart is merely being transferred to part 3100.8500, subpart 3. The changes in the rule and the reason for the transfer are contained in paragraph 2b below.

2. Part 3100.8500-Registered Dental Assistants (formerly 7 MCAR § 3.032 A and C)

a. Subpart 1.

(1) The standard of indirect supervision which a dentist must exercise over the services performed by a registered dental assistant which is added to the lead-in language of the subpart is merely a transfer of the existing standard from part 3100.8600.

(2) The use of the words "orthodontic bands" in subpart 1E limits excess cement removal to bands only. There are other types of orthodontic appliances that are now in use; therefore, the Board proposes that part 3100.8500, subpart 1E be amended to permit registered dental assistants to remove excess cement from orthodontic appliances rather than from just the bands.

(3) The proposed amendments to part 3100.8500, subpart 1F are nonsubstantive, editorial changes only.

b. Subpart 3. The substance of this subpart was originally contained in Board rules 7 MCAR § 3.032B which pertained to registered dental assistants. When the Revisor's Office reorganized and republished state agency rules in the 1983 publication of Minnesota Rules, the Revisor transferred this section to part 3100.8400 which pertains to assistants.

The Revisor's transfer was inappropriate. The Board does not mandate that assistants have any training or approval of the Board in order to work in a dentist office; and, accordingly, the duties they may perform are essentially limited to assisting the dentist, dental hygienist, or registered dental assistant in the actual performance of their work. There is no independent work that an assistant may perform on a patient. Registered dental assistants, on the other hand, must take Board-approved courses and a registration examination before they can perform the services authorized by Board rule. Likewise, allied health professionals who qualify to take dental radiographs under subpart 3 must take a Board-approved course and examination before they may take the dental x rays. Thus, these people receive a limited registration and thus the regulatory provisions relating to them should be placed under the parts pertaining to registered dental assistants.

This limited registration is in keeping with Minn. Stat. § 150A.10, subd. 2 (1984) which permits the Board to authorize differing levels of dental assistance. The amendments propose that an applicant for a limited registration for the purpose of being authorized to take dental radiographs pass a Board-approved examination and submit an application fee in addition to the existing requirements that they submit an application and take a Board-approved course, all of which is statutorily permitted by Minn. Stat. § 150A.06, subd. 2a (1984). The proposed amendments specify exactly what type of course and examination must be taken. Registration of people to perform a technical function potentially harmful to patients is meaningless without requiring appropriate education and examination in that area to assure the Board, and thus the public, that the applicant is fit to perform the function for the safety of the public and to conform to the proposed federal radiation guidelines as contained in the Standards of Accreditation of Educational Programs for and the Credentialing of Radiologic Personnel, 48 Fed. Reg. 31,966 (1983). To require that applicants for limited registration take a course equivalent to, and an

examination identical to, that taken by registered dental assistant applicants with respect to dental radiographs is both logical and reasonable because the function being authorized is the same, i.e., the taking of dental radiographs.

Aside from the foregoing changes, the rule is essentially the same in content as existing part 3100.8400, subpart 2, and part 3100.8600. The remaining modifications are editorial in nature only. Part 3100.8600 just states the standard of supervision that a dentist must exercise over a limited registrant. That standard is restated in proposed part 3100.8500, subpart 3.

3. Part 3100.8700-Dental Hygienists (formerly 7 MCAR § 3.034)

The existing rule lists six functions that may be performed by dental hygienists under the "general supervision" of a dentist. The Board is proposing another function, which is explained below, that may be performed under the "indirect supervision" of a dentist. Therefore, it is recommended that the six functions in the existing rule become subpart 1. and that the new function with its different level of supervision be placed in subpart 2. For consistency with part 3100.8500, it is recommended that subpart 1 be entitled "permissible duties" and subpart 2 entitled "other duties."

The proposed amendment in part 3100.8700 B changes the word "filling" to "restoration" since that is the word most commonly used in the dental profession. Fillings pertain to only one type of restoration. Using the term "restoration" would also include crowns on which dental hygienists are certainly capable of performing a prophylaxis and a scaling.

The Board also proposes that existing part 3100.8700 E be deleted since that function is permitted under part 3100.8700 A. The Board further proposes that the final statement in existing 3100.8700 be repealed because the substance of the rule has been moved to other places within the part. The statement regarding the level of supervision has been moved, for clarity purposes, to the lead-in paragraph of the rule. The substance

of the examination and diagnosis statement is included within the prohibition of proposed part 3100.8700, subpart 3. In addition, Minn. Stat. § 150A.10, subd. 1 (1984) already prohibits a dental hygienist from establishing a final diagnosis or treatment plan.

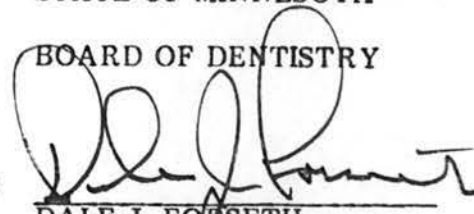
Additionally, the Board proposes that subpart 2 be added to permit dental hygienists to remove marginal overhangs under the indirect supervision of a dentist. A dental hygienist can be trained to remove some marginal overhangs without adverse effect to the public. However, in some instances, the situation must be assessed by the dentist to determine whether the marginal overhangs could be removed or another procedure employed. The indirect level of supervision, with the dentist authorizing the procedure and being available while the procedure is being performed, allows for the appropriate involvement of both dentist and dental hygienist.

Proposed part 3100.8700, subpart 3, is to make it clear that dental hygienists may not perform any service except those authorized by Board rules. The Board's authority to adopt this rule is contained in Minn. Stat. §§ 150A.04, subd. 5, and 150A.10, subd. 1 (1984), the latter which permits dental hygienists to perform only those services authorized by the Board.

Dated: August 6, 1985.

STATE OF MINNESOTA
BOARD OF DENTISTRY

By:


DALE J. FORSETH
Executive Secretary