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STATE OF MINNESOTA  
COUNTY OF RAMSEY

BEFORE THE MINNESOTA  
BOARD OF DENTISTRY

In the Matter of the Proposed  
Adoption of Rules of the Board  
of Dentistry Relating to Application  
and Examination Requirements, Grounds  
for Disciplinary Action, Fees, Specialty  
Practice Titles, Dental Hygienist  
Duties, and Editorial Changes

STATEMENT OF NEED  
AND REASONABLENESS

Pursuant to Minn. Stat. § 14.23 (1988), the Minnesota Board of Dentistry (hereinafter "Board"), hereby affirmatively presents the need for and facts establishing the reasonableness of the proposed amendments to Minn. Rules pt. 2100.0100 relating to definitions; part 3100.1400, relating to application for licensure by credentials; part 3100.2000, relating to fees; parts 3100.3300, subp. 4a, 3100.3400, subp. 3a, and 3100.3500, subp. 2a, relating to licensure and registration examinations of dentists, dental hygienists, and registered dental assistants, respectively; part 3100.4100, subpart 4, relating to continuing dental education exemptions; part 3100.6200 J and N, relating to conduct unbecoming a licensee or registrant in regards to correcting a cross citation to another section of the rules and adding as another grounds for discipline the failure to comply with Minn. Stat. § 144.335, regarding the access to and transfer of medical and dental records; part 3100.7000, subp. 1.B, C, and 1.F, relating to advertising a dental specialty practice; and part 3100.8700, subp. 1.B, relating to the permissible duties for dental hygienists.

In order to adopt the proposed rules, the Board must demonstrate that it has complied with all the procedural and substantive requirements of rulemaking. Those requirements are as follows: 1) there is statutory authority to adopt the rules; 2) the rules are needed; 3) the rules are reasonable; 4) the necessary procedural steps

have been taken; and 5) any additional requirements imposed by law have been satisfied. This statement demonstrates that the Board has met these requirements.

## I. STATUTORY AUTHORITY

The statutory authority of the Board to adopt these rules is as follows:

1. Minn. Stat. § 150A.04, subd. 5 (1988), authorizes the Board to promulgate rules necessary to carry out the provisions and purposes of the Minnesota Dental Practices Act, Minn. Stat. ch. 150A;

2. Minn. Stat. §§ 150A.04, subd. 5; 150A.06, subds. 1, 2, 2(a) and 4; 150A.08, subd. 3; and 214.06, authorize the Board to adopt fees by rule.

3. Minn. Stat. § 150A.08, subd. 1(6) (1988) authorizes the Board to establish grounds for disciplinary action based on conduct unbecoming a licensee or registrant or conduct contrary to the best interests of the public.

4. Minn. Stat. § 150A.10, subd. 1 (1988) authorizes the Board to promulgate rules necessary to establish the permissible duties of dental hygienists.

## II. COMPLIANCE WITH PROCEDURAL RULEMAKING REQUIREMENTS

### A. Requirements in General.

The Board at its meeting on Saturday, November 19, 1988, determined that the above-captioned rules 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 (1988), which provide for the adoption of noncontroversial rules without the holding of a public hearing.

Pursuant to Minn. Stat. § 14.23 (1988) the Board prepared this Statement of Need and Reasonableness and made it available to the public.

The Board will publish in the State Register the proposed rules and the Notice of Intent to Adopt Rules Without a Public Hearing. The Board will also mail copies of the Notice to persons registered with the Board pursuant to Minn. Stat.

§ 14.22 (1988), as well as to others whom the Board believes will have an interest in the rules. The notice will comply with the requirements of Minn. Stat. § 14.22 (1988) and Minn. Rules pt. 2010.0300 E (1989).

These rules will become effective five working days after publication of a notice of adoption in the State Register pursuant to Minn. Stat. § 14.27 (1988).

B. Notice Of Intent To Solicit Information From Non-Agency Sources.

Minnesota Statute section 14.10 (1988) 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 June 30, 1986, page 2632, the Board published a notice entitled "Outside Information or Opinions Sought Regarding Existing Rules Including Those on Auxiliary Personnel and Proposed Rules Regarding General Anesthesia and Intravenous Conscious Sedation."

After publication of the notice, the Board's Rule Committee met on numerous occasions to review all the rules to determine which were in need of amendment, met with various interested individuals and representatives of groups or associations to hear their views regarding possible rule amendments, and considered written submissions. As a result of that process, the Committee drafted a number of specific proposals either amending existing rules or adding new provisions. These proposals were widely distributed among the dental profession and community. Thereafter, the Board conducted two open forums, one on June 25, 1988, and the other on July 26, 1988, and received a number of written and oral comments, which were considered by the Rules Committee at subsequent meetings. As a result of this process, the Board developed final proposals and divided them between noncontroversial provisions, which are being addressed in this Statement of Need and

Reasonableness, and those which will be presented at a public hearing in an entirely separate proceeding.

### III. 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. See Minn. Stat. § 14.07, subd. 4 (1988). The adoption of these rules will not require the expenditure of public money greater than \$100,000 by local public bodies in either of the two years following promulgation, nor do the rules have any impact on agricultural land. See Minn. Stat. § 14.11 (1988). A fiscal note as required by Minn. Stat. § 3.982 is not required because the proposed rules will not result in local agencies or school districts incurring costs mandated by the state. Pursuant to Minn. Stat. § 16A.128, subd. 2a, the Board sent a copy of the Notice of Intent to Adopt Rules Without a Public Hearing and the proposed rules to the chairs of the appropriations committee of the Minnesota House of Representatives and of the Minnesota Senate finance committee before the Board submitted the Notice to the State Register.

#### B. Approval Of The Commissioner Of Finance.

Pursuant to Minn. Stat. § 16A.128, subd. 1(a), if a fee is required to be fixed by rule, the Commissioner of Finance must approve the fee and the Commissioner's approval must be in the statement of need and reasonableness. The Commissioner's approval of the fees established in the proposed permit rules is contained in the attached addendum, which is incorporated into this Statement of Need and Reasonableness as Addendum A.

#### C. Small Business Considerations.

It is the position of the Board that Minn. Stat. § 14.115 (1988), relating to small business considerations in rulemaking does not apply to the rules it promulgates.

Minn. Stat. § 14.115, subd. 7(b) (1988), 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 for the purposes of public protection and not to the business aspects. This is graphically illustrated in recent dealings with nondentists who are involved with dental franchise offices. The Board has not taken the position prohibiting nondentist involvement in operating a dental business. Instead, the Board's position is that nondentists may not interfere with or have any control over the dentists 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) (1988).

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 dentists for standards and the Minnesota Department of Human Services regulates them 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 listed in subdivision 7(c) of service businesses 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 regulates them for costs. If the legislature had intended to exempt from the scope of section 14.115 only those rules addressing service businesses regulated by one government body for standards and costs, then it could not have included nursing homes and hospitals in its list of exemptions.

Based on the foregoing, it is clear that section 14.115 is not intended to apply to rules promulgated by the Board.

However, should these proposed rules in some way be construed as being subject to Minn. Stat. § 14.115, the Board notes below how the five suggested methods listed in section 14.115, subdivision 2, for reducing the impact of the rules on small businesses should be applied to the proposed amendments. The five suggested methods enumerated in subdivision 2 are as follows:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

(e) the exemption of small businesses from any or all requirements of the rule.

The feasibility of implementing each of the five suggested methods and whether implementing any of the five methods would be consistent with the statutory objectives that are the basis for this rulemaking are considered below.

1. It would not be feasible to incorporate any of the five suggested methods into these proposed rules.

Methods (a) to (c) of subdivision 2 relate to lessening compliance or reporting requirements for small businesses either by (a) establishing less stringent requirements, (b) establishing less stringent schedules or deadlines for compliance with the requirements, or (c) consolidating or simplifying the requirements. Since the Board is not proposing any compliance or reporting requirements for either small or large businesses, it follows that there are no such requirements for the Board to lessen with respect to small businesses. If, however, these proposed rule amendments are viewed as compliance or reporting requirements for businesses, then the Board finds that it would be unworkable to lessen the requirements for those dentists, dental hygienists, and registered dental assistants who practice in a solo or clinic setting of fewer than 50 employees, since that would include at a minimum the vast majority of licensees and registrants, and probably all of them. Method (d) suggests replacing design or operational standards with performance standards for small businesses. The Board's rule amendments do not propose design or operational standards for businesses and therefore there is no reason to implement performance standards for small businesses as a replacement for design or operational standards that do not exist. Finally, method (e) suggests exempting small businesses for any or all requirements of the rules. The application of this provision would exempt virtually all licensees and registrants from the purview of the rules, a result which would be absurd.

2. Reducing the impact of the proposed amendments on small businesses would undermine the objectives of the Minnesota licensing law for dentists.

Pursuant to the Minnesota licensing law for dentists, dental hygienists, and registered dental assistants, Minn. Stat. §§ 150A.01 to 150A.12, the Board was created for the purpose of establishing requirements for licensure and registration and

adopting standards for disciplinary action to govern the practices or behavior of all licensees and registrants. Pursuant to Minn. Stat. § 150A.04, subd. 5, the Board is specifically mandated to promulgate rules as may be "necessary to carry out and make effective the provisions and purposes of sections 150A.01 to 150A.12." Given these statutory mandates, it is the Board's duty to establish licensure and registration qualifications and disciplinary standards which apply to and govern all applicants, licensees, and registrants, regardless of the nature of their practice. As it has been stated above, it is the Board's position that the proposed amendments will not affect small businesses and certainly do not have the potential for imposing a greater impact on dental professionals in a solo or small practice than on those practices large enough to remove them from the definition of small business, if indeed there are any practices that large. It has also been explained above that the Board considers it infeasible to implement any of the five suggested methods enumerated in subdivision 2 of the small business statute. Nonetheless, to the extent that the proposed rules may affect the business operation of a dentist or group of dentists and to the extent it may be feasible to implement any of the suggested methods for lessening the impact on small businesses, the Board believes it would be unwise, absurd, and contrary to the purposes to be served by these rules for the Board to exempt one group of dentists - indeed, the vast majority of dentists and perhaps the entire profession - from the requirements of these rules. Similarly, the Board believes it would be unwise, absurd, and contrary to its statutory mandate for the Board to adopt one set of standards for those dentists (which may consist of a nonexistent class) who work in a large business setting and adopt another, less stringent, set of standards to be applied to those dentists who practice in a solo or small clinic practice. It is the Board's view that these rules must apply equally to all dentists if the public whom they serve is to be adequately protected.



It should be noted that the fee for licensure and registration verification will in virtually all instances be paid by businesses and not by individual licensees or registrants. However, the businesses paying this fee will rarely be small businesses as the usual request is from insurance companies, hospitals and clinics. Only a relatively few requests for a verification will come from a "small business" as defined in section 14.115. Since the fee is only \$5, the impact will be negligible.

Licensees, regardless of whether they are considered as individuals or small businesses, have had and will continue to have an opportunity to participate in the rulemaking process for these proposed amendments. As stated in Section II.B of this Statement of Need and Reasonableness, the Board has used a very open process to draft these rules. The Board has kept the various dental associations well informed of the rule proposals as they were developed and the associations have in turn informed their constituents. In addition, the Board gave anyone who wanted to make a presentation the opportunity to do so in the two public forums or hearings it has held and which were extremely well attended. The Board will also include a statement pursuant to Minn. Stat. § 14.115, subd. 4(a) (1988) in its rulemaking Notice although the Board believes that it is not required to do so.

#### IV. NEED FOR AND REASONABLENESS OF THE PROPOSED RULES

##### A. Statement Of Need For Proposed Rules.

In order to amend administrative rules, an agency must demonstrate that the proposed rules are needed and reasonable. The proposed changes more clearly delineate the provisions of the Minnesota Dental Practices Act and have a rational basis in law and dentistry as is detailed below.

1. 3100.0100. Definitions. The amendments to part 3100.0100 are all editorial in nature and do not result in any substantive change in meaning. Subpart 21, which defines various levels of supervision, is being totally reorganized. The Board

receives numerous questions concerning levels of supervision applicable to auxiliary duties and how they are to be applied. When referred to existing rules, it becomes confusing because the levels of supervision are currently listed alphabetically rather than in more logical and easier to follow ascending or descending levels of restriction. By structuring subpart 21 as proposed, it should be clearer as to what level of supervision is most restrictive through the least restrictive level thereby eliminating most confusion.

2. 3100.1400 D. Application for Licensure by Credentials. This amendment corrects an oversight in the originally promulgated rule by making the basis for licensure of dental hygienists by credentials the same as it is for dentists. The amendment provides that a dental hygienist applicant may use United States governmental services besides active practice in another state or a Canadian province to fulfill the active practice requirement. Minn. Rules pt. 3100.1400 C permits dentist applicants to use United States governmental services to meet the practice requirement. The Board intended to include the same right within part 3100.1400 D but it was mistakenly left out. This proposal corrects that oversight.

3. 3100.2000. Fees. Budgets for fiscal years 1990 and 1991 have been adopted. The budgets, as the following figures illustrate, cannot be supported based on existing fees:

	<u>FY 1990</u>	<u>FY 1991</u>	<u>Total</u>
Total Costs	\$521,000	\$521,000	\$1,042,000
Receipts (based on current fee schedule)	<u>\$464,000</u>	<u>\$464,000</u>	<u>\$928,000</u>
Deficit	(\$57,000)	(\$57,000)	(\$114,000)

Given the past expenditure patterns and projecting costs on this basis, remedial action must be taken for FY 1990 and FY 1991 fees to avoid a dramatic deficit. Additionally,

it is necessary to increase fees to assure that revenues and expenditures match as closely as possible as mandated by Minn. Stat. §§ 16A.128, subd. 1(a) and 214.06, subd. 1.

Pursuant to Minn. Stat. § 16A.128, subd. 1(a), the approval of the Commissioner of Finance of the Board's proposed fees is attached hereto as Addendum A and made a part hereof. Fees charged for initial licensure or registration, duplicate licenses and licensure by credentials have not been adjusted for five years. Board costs to verify licensure and registration applications, establish the initial licensure or registration record and issue initial license or registration certificates have increased along with other costs thereby necessitating an increase. Duplicate licenses and certificates are more costly to procure, engross and deliver. The cost to process licensure by credentials applications requires more staff and Board time.

Licensure and registration verification has become a time consuming and costly activity. One staff person devotes 15% of her time to written verification of licenses and registration of dentist, dental hygienist and registered dental assistant credentials. Most verifications are requested by insurance companies, hospitals and clinics in response to federal regulations requiring such verification and to ensure only licensed individuals are submitting claims for dental services. Benefit is attributed to the organization requesting verification; therefore, cost of providing such a service should be borne by the business which will benefit by the information it receives from the Board.

4. 3100.3300, subp. 4(a), 3100.3400, subp. 3(a), 3100.3500, subps. 2(a) and 3 Additional Educational Requirements After Two Failures of Examinations for Dentists, Dental Hygienists and Registered Dental Assistants.

Under Minn. Stat. § 150A.06, subds. 1, 2, and 2a, an applicant is ineligible to

retake the clinical examination for licensure or registration after failing it twice until he or she obtains further education and training as specified by the Board by rule. However, the Board has not previously implemented this provision. These amendments remedy that void by providing a specific process to be followed by applicants who have twice failed the licensure or registration examination. The legislation requiring additional education and training recognizes that the failure of the examination may demonstrate a lack of skills which should be addressed through formal education before the applicant is permitted to retake the examination and be licensed.

In these proposed rules the Board has developed and adopted fair and reasonable requirements and a specific process whereby applicants will be required to subject themselves to a needs assessment by an educational institution accredited by the Commission on Accreditation. That institution will certify to the Board the areas in which the applicants are deficient and state which courses were given to correct the deficiency before the applicants will be allowed to retake the examination. The Board believes that this is necessary and reasonable in order to protect the public and ensure proper dental treatment. (The requirement that the assessment and courses be taken at an institution accredited by the Commission on Accreditation is consistent with the Board's requirement for institutions at which applicants must take their basic training. See Minn. Rules pts. 3100.1100, subp. 1B; 3100.1200 D; and 3100.1300 B.)

In addition, the correction of the word "content" for "contract" is also needed for clarity in the Registered Dental Assistant rule, part 3100.3500, subp. 3.

5. 3100.4100, subp. 4. Exemptions from Continuing Education.

The change to this rule is of an editorial nature only. There is no change to the

substance as the three conditions in the existing rule under which a licensee or registrant could be exempt from complying with the continuing dental education are all covered by the summary statement of the amendment. The amended rule will be easier to understand.

6. 3100.6200 J. Conduct Unbecoming a Licensee or Registrant.

The existing rule contains an incorrect citation to another part of the Board rules. This amendment corrects the erroneous citation.

7. 3100.6200 L. Conduct Unbecoming a Licensee or Registrant.

The Board receives numerous complaints from the public over the last several years concerning the refusal of dentists to transfer a patient's dental and medical records to another dentist or to provide them directly to the patient pursuant to Minn. Stat. § 144.335. The Board currently has authority to deal with a refusal to comply with section 144.335 under Minn. Stat. § 150A.01, subd. 13 as a just cause for discipline related to the practice of dentistry. However, given the frequency of complaints received by the Board regarding this matter, it is appropriate to list it as a specific grounds for discipline.

In proposing this rule, it is the Board's position that the patients' legal rights to the access and transfer of their medical and dental records as established in Minn. Stat. § 144.335 supersede the rights of dentists to hold them because patients owe them money inasmuch as other business and legal remedies are available to dentists for collecting unpaid debts. This balancing of competing interests by the legislation and as further implemented by the Board is reasonable. The proposal is also reasonable because dentists may usually be able to provide copies of the records thus enabling them to keep the originals and have them in case professional liability issues arise or where they may be needed to resolve accounts receivable issues through legal proceedings.

8. 3100.7000, subp. 1B, C, and F. Advertising Dental Specialty Practice. The amendment corrects and updates the titles of the specialty dental practices of oral and maxillofacial surgery (oral surgeon/oral maxillofacial surgeon) and of pediatric dentistry (pediatric dentist) for use for advertising purposes.

9. 3100,8700, subp. 1A and B. Dental Hygienists' Permissible Duties. The change to subpart 1A is editorial. It corrects a citation to another part of the Board rules.


The change to subpart 1B removes the expanded function of soft tissue curettage from the permissible duties of a dental hygienist. Current dental research indicates that scaling and root planing remove the causative agents of periodontal disease and that soft tissue curettage is a secondary outcome of root planing and periodontal scaling and not a separate function. Not only has soft tissue curettage become an obsolete dental procedure, but in addition, current dental insurance policies have stopped reimbursement for the procedure.

It is the Board's judgment that all of the proposed amendments are both needed and reasonable and in the best interest of the dental profession and the public.

Dated: July 25, 1989

STATE OF MINNESOTA

BOARD OF DENTISTRY



DOUGLAS R. SELL  
Executive Director