July 11, 2019

VIA EMAIL ONLY
Doreen Johnson
85 E 7th Pl Ste 125
Saint Paul, MN  55101
doreen.johnson@state.mn.us

Re:  In the Matter of the Proposed Amendments to Rules Governing Professional Conduct
     OAH 8-9038-35923; R-4449

Dear Ms. Johnson:

Enclosed please find the report of the Chief Administrative Law Judge in the above-entitled matter and the report of the Administrative Law Judge Eric L. Lipman. The Board may resubmit the rule to the Chief Administrative Law Judge for review after changing it or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Board does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects, the Board may follow the process under Minn. Stat. § 14.26, subd. 3(c) (2018).

If the Board chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, the agency must file the documents listed in Minn. R. 1400.2300, subp. 8 (2017), within 30 days of when the agency received written notice of the disapproval, as contained in Minn. Stat. § 14.26, subd. 2 (2018).

If you have any questions regarding this matter, please contact Ian Lewenstein at (651) 361-7857, ian.lewenstein@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,

IAN LEWENSTEIN
Legal Assistant

Enclosure
cc: Office of the Governor
    Office of the Revisor of Statutes
    Legislative Coordinating Commission
July 11, 2019

Representative Mike Freiberg
Chair
Government Operations Committee
509 State Office Building
St. Paul, MN 55155
rep.mike.freiberg@house.mn

Senator Mary Kiffmeyer
Chair
State Government Finance and Policy and
Elections Committee
95 University Avenue W
Minnesota Senate Bldg Room 3103
St. Paul, MN 55155
sen.mary.kiffmeyer@senate.mn

Re: In the Matter of the Proposed Amendments to Rules Governing Professional Conduct
OAH 8-9038-35923; Revisor R-4449

Dear Representative Freiberg and Senator Kiffmeyer:


Under Minnesota law, the Board may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Board does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects found, the Board may follow the process outlined in Minn. Stat. § 14.26, subd. 3(c).

Sincerely,

IAN LEWENSTEIN
Legal Assistant
Telephone: (651) 361-7857

Enclosure
Ian Lewenstein certifies that on July 11, 2019, he served a true and correct copy of the attached REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE AND REPORT OF THE ADMINISTRATIVE LAW JUDGE by courier service, by placing them in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

**VIA EMAIL ONLY**
Doreen Johnson  
85 E 7th Pl Ste 125  
Saint Paul, MN 55101  
doreen.johnson@state.mn.us

Legislative Coordinating Commission  
lcc@lcc.leg.mn

Representative Mike Freiberg  
Chair  
Government Operations Committee  
509 State Office Building  
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Senator Mary Kiffmeyer  
Chair  
State Government Finance and Policy and Elections Committee  
95 University Avenue W  
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sen.mary.kiffmeyer@senate.mn
The Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design (Board) has adopted the above-entitled rules without a hearing pursuant to Minn. Stat. § 14.26 (2018). On June 24, 2019, the Office of Administrative Hearings received the documents that must be filed by the Board under Minn. Stat. § 14.26; Minn. R. 1400.2310 (2017).

On July 8, 2019, the Administrative Law Judge issued the Order on Review of Rules under Minn. Stat. § 14.26. As set forth in the July 8, 2019, Order, the rules contained a defect.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and the July 8, 2019, Order,

**IT IS HEREBY ORDERED THAT:**

The findings of the Administrative Law Judge in the July 8, 2019, Order on Review of Rules, regarding the disapproval of the rules, are approved. The reasons for the disapproval of the rules and the changes recommended to correct the defects found are as set forth in the attached order.

Dated: July 11, 2019

s/William Marshall

WILLIAM J. MARSHALL
Acting Chief Administrative Law Judge
STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Professional Conduct

ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26

The Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design (Board) has adopted the above-entitled rules without a hearing pursuant to Minn. Stat. § 14.26 (2018).

On June 24, 2019, the Board filed documents seeking review and approval of the above-entitled rules under Minn. Stat. § 14.26; Minn. R. 1400.2310 (2017).

Based upon a review of the submissions, Minnesota Statutes, Minnesota Rules, and for the reasons in the memorandum,

IT IS HEREBY DETERMINED THAT:

Except as to proposed Minn. R. 1805.0650, subp. 2,

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

2. The rules were adopted in compliance with the procedural requirements of Minn. Stat. §§ 14.001-.69 (2018); Minn. R. 1400.2000-.8612 (2017).

3. The record demonstrates that the rules are needed and reasonable.

IT IS HEREBY ORDERED THAT:

1. The proposed revisions to Minn. R. 1805.0650, subp. 2, are DISAPPROVED.

2. Except as to proposed Minn. R. 1805.0650, subp. 2, the rules are APPROVED.

Dated: July 8, 2019

ERIC L. LIPMAN
Administrative Law Judge
MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These include circumstances in which the proposed rule is illegal, is not self-executing, or otherwise does not meet the definitional requirements of a “rule” under Minn. Stat. § 14.02, subd. 4.

I. Substantive Defects under Minn. R. 1400.2100

In Minn. R. 1805.0650, subp. 2, the Board proposes an ethics rule that relates to licensees and certificate holders observing local and state laws. The Board’s stated purpose is to carry forward the provisions of rule 1.2 of the National Council of Architectural Registration Boards’ Model Rules of Conduct into Minnesota rules. The proposed rule reads:

In providing professional services, a licensee or certificate holder shall take into account applicable state and local laws and regulations. While a licensee or certificate holder may rely on the advice of other professionals as to the intent and meaning of such regulations, once having obtained the advice, the licensee or certificate holder shall not violate such laws and regulations.

A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. “If the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies,” the law must take effect “upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.”

In this circumstance, however, the meaning of the proposed rule is ambiguous. It is unclear from the text whether taking local laws and regulations “into account” requires actual compliance with those laws and regulations. For example, an architect could “take into account” the provisions of state law at the very time that the architect was violating that law.

Similarly, it is unclear whether the phase “once having obtained the advice,” in the second sentence of the proposed rule, operates as a limitation on the ethics requirement. One reading of the rule is that the ethical obligation to abide by these other laws occurs only after one requests advice about the law and is informed that the particular conduct is illegal.

1 Minn. R. 1400.2100.
2 Exhibit (Ex.) D at 13.
3 Cullen v. Kentucky, 407 U.S. 104, 110 (1972); Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980).
4 Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); accord. Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964).
While the Administrative Law Judge doubts that the Board intended either of these results, as written, the proposed rule is either unlawful (because the Board may not authorize its licensees to avoid other requirements of the law) or impermissibly vague, or its terms are so conditional that it does not qualify as a rule at all. Any of these shortcomings renders the proposed rule defective.

To cure these defects, the Administrative Law Judge recommends that the language of Minn. R. 1805.0650, subp. 2, be modified so as to clarify both the obligation to follow other state and local laws and the role that subjective awareness of the law plays in the ethics requirements. For example, such a revision of the subpart might read:

**When providing professional services, a licensee or certificate holder shall not knowingly violate applicable state and local laws and regulations.**

**Notwithstanding the duty of licensees and certificate holders to follow the law, in proceedings before the Board, the Board shall consider whether a licensee’s or certificate holder’s violation follows from incorrect advice on the meaning of a statute or regulation. In such a circumstance, the Board shall consider the reasonableness of the licensee’s or certificate holder’s reliance on the incorrect advice.**

Such a revision would bring the proposed rule closer to the text of rule 1.2 of the National Council of Architectural Registration Boards’ Model Rules and the statutory goal of preventing “gross negligence, incompetency or misconduct” in the professions supervised by the Board. Further, these changes would not make the rule substantially different than the original proposal of the Board and are needed and reasonable.

II. Technical Corrections

The Board’s proposals include a few rules that have either a multifactor test or a set of conditions that must be present before the rule applies. The Board’s need to be both inclusive and precise in its ethics rules has led to some proposals having very long sentences. A special danger of having long sentences in rule texts, particularly when there is a wide separation between the subject and the verb, is that the meaning of the sentence can become obscured.

To clarify the Board’s intended meanings, the Administrative Law Judge recommends a series of technical corrections for the Board to consider. Technical corrections are not legal defects in the rules. The suggested revisions are only

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5 See Minn. Stat. § 326.06 (2018) (“The board shall . . . make all rules, not inconsistent with law, needed in performing its duties.”).
6 Minn. Stat. § 14.02, subd. 4 (“‘Rule’ means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”) (emphasis added).
7 Minn. Stat. § 326.11, subd. 1 (2018).
recommendations. The agency may choose to adopt the suggestions, if it sees fit, to aid in administering the rules.

None of the editorial revisions would render the proposals substantially different than the rule originally proposed by Board, and each revision is needed and reasonable.

A. Minn. R. 1805.0100, Subpart 1 – Purpose

When describing the reach of its ethical rules, the Board proposes to substitute a particular statutory citation with the phrase “and the title use of certified interior design.” Yet, this phrasing is awkward. A better wording, and one that is like that used in Minn. Stat. § 326.02, subd. 4b (2018), is “and use of the title use of certified interior design.”

B. Minn. R. 1805.0100, Subpart 3(A) – Professional Responsibility

When describing the required minimums for ethical practice, the Board proposes a rule that provides “The professional conduct of a licensee or certificate holder must accord with this chapter.” This phrasing is also awkward. Better formulations of the same idea are “The professional conduct of a licensee or certificate holder must be in accordance with this chapter,” or “The professional conduct of a licensee or certificate holder must meet the standards of accordance with this chapter. . . .”

C. Minn. R. 1805.0200, Subpart 1a – Credit

The Board proposed an ethics rule that obliges licensees and certificate holders to accurately represent themselves, their affiliates, and their work to members of the public. The proposed rule provides:

A licensee or certificate holder shall accurately represent the qualifications, education, training, or experience and the scope of responsibility in connection with work for which the licensee or certificate holder is claiming credit, as well as that of their employer, employees, or associates.

While mindful of the challenge of combining all the hoped-for elements of the regulation into a sentence or two, the Board’s proposal is difficult to read. A better formulation of the same ideas would be as follows:

In connection with the work for which the licensee or certificate holder is claiming credit, the licensee or certificate holder shall accurately represent his or her own qualifications, education, and scope of responsibility for the particular work. The licensee or certificate holder shall also accurately represent the qualifications, education and scope of responsibility of any employer, employees or associates who perform work.
D. Minn. R. 1805.0300, Subpart 1 – Employment

The Board proposed an ethics rule that obliges licensees and certificate holders to remain free of conflicts of interest. The Board should consider whether the phrase “[a] licensee or certificate holder shall not accept a project where duty to the client or the public would conflict with the personal interest of the licensee or certificate holder or the interest of another client,” would be clearer if the letter “a” was inserted before the word “duty.” “A duty” is a commonplace phrasing in such a context.

E. Minn. R. 1805.0300, Subpart 2 – Compensation

The Board proposed an ethics rule that limits the receipt of compensation by licensees and certificate holders from more than one party. Under the proposed rule, three conditions must be present. Yet, the Board’s proposal does not clearly highlight those requirements. The proposed rule reads:

A licensee or certificate holder shall not accept compensation for services relating or pertaining to the same project from more than one party unless there is a unity of interest between or among the parties to the project and unless the licensee or certificate holder makes full disclosure and obtains the express consent of all parties from whom compensation will be received.

A better phrasing of the same ideas would be:

A licensee or certificate holder shall not accept compensation for services relating or pertaining to the same project from more than one party unless:
(a) there is a unity of interest between or among the parties to the project;
(b) and unless the licensee or certificate holder makes full disclosure;
(c) and the licensee or certificate holder obtains the express consent of all parties from whom compensation will be received.

F. Minn. R. 1805.0300, Subpart 3 – Gifts

The Board proposed an ethics rule that proscribes the receipt of gifts from contractors, vendors, and suppliers on projects without the knowledge and approval of the relevant client or employer. To clarify this regulation, the Administrative Law Judge recommends moving the key phrase “without the knowledge and approval of the client or the employer,” from the end of the regulation to the beginning. This change, which provides needed context for the rule and improves its readability, would read:

Without the knowledge and approval of the client or the employer, a licensee or certificate holder shall not, directly or indirectly, solicit or accept any compensation, gratuity, or item of value from contractors, their agents, material or equipment suppliers, or other persons dealing with the client or employer in connection with the work for which the licensee or certificate holder has been retained without the knowledge and approval of the client or the employer.
As noted, none of these revisions would make the revised rules substantially different from the original proposal of the Board, and each revision is needed and reasonable.

E. L. L.