


David Ferleger
ATTORNEY

August 20, 2013

TO: Anne Barry
Steve Alpert
Scott Ikeda
Shamus O'Meara
Patricia Carlson
Dr. Richard Amado
Roberta Opheim
Dr. Colleen Wieck

Cc: Hon. Donovan W. Frank

FROM: David Ferleger 

SUBJECT: Rule 40, 245D and Waiver Amendments

Requests to Parties. I write regarding DHS' overdue analysis and implementation plan regarding Rule 40 matters, including implementation plans,¹ and the effect on the just-published proposed Waiver amendments. I request DHS to provide promptly the analysis and implementation plan.

I also request Plaintiffs to advise the Court and myself whether Plaintiffs object to adoption of the proposed Waiver amendments in the absence of resolution of any conflicts or inconsistency between the Rule 40 Advisory Committee recommendations (which DHS has committed to implement) and the 245D statute.

Also, I request *both* DHS and Plaintiffs to identify immediately any inconsistencies, conflicts or tensions between the *Rule 40 Advisory Committee Recommendations* and the 245D statute.

Finally, would DHS and Plaintiffs advise me whether any action by the Court is appropriate with respect to these matters.

¹ The Department responded to the *Rule 40 Advisory Committee Recommendations* by committing to

Develop an implementation plan that adopts the recommendations of the Advisory Committee, including a phased implementation plan that provides for the necessary training and technical assistance to support best practices, and a plan for the oversight and monitoring of provider practices and any emergency use of restraint or seclusion.
Rule 40 Advisory Committee Recommendations at 40 (July 2, 2013)

Background. We all recall both the last-minute disagreements on the 245D bill and the question of whether 245D was consistent with the recommendations of the Rule 40 Advisory Committee. The Court referenced that situation in its Order of April 25, 2013 at 5 (Dkt. 212). The Department has now issued proposed federal Waiver amendments for a 30 day comment period which ends September 11, 2013.²

On June 21, 2013, DHS reported to the Court and to me that a side-by-side comparison of Rule 40 Advisory Committee recommendations, the statute 245D, the relevant provisions of the Settlement Agreement would be provided by July 31, 2013. Additionally, by the same date, DHS committed that we would be provided with "the implementation plan associated with implementation the recommendations of the Rule 40 Advisory Committee and the provision of the 245D legislation." *Letter from Steven Alpert to Court and Court Monitor* (June 21, 2013)

We have received neither the promised side-by-side analysis nor the implementation plan.

The proposed Waiver amendments will have wide effect. The Waiver amendments fully incorporate the 245D statutory provisions. I do not see in the Waiver amendments any reference to the Rule 40 Advisory Committee recommendations or any plan to implement those recommendations.

While I understand and support Waiver amendments which are consistent with the Settlement Agreement and the Rule 40 process under the settlement, it appears that we are still in the midst of the "confusion about the relationship" among the Settlement, Rule 40 Committee Report, and 245D (DHS' words in Mr. Alpert's June 21, 2013 letter). The absence of the benefit of DHS' analysis and Rule 40 implementation plan continues that confusion.

I will not set a due date at this time. Please treat the above requests with urgency.

Thank you for your consideration.

² The notice states:

To: All interested parties

From: BI, CAC, CADI and DD Waiver policy staff

Comment Period Begins: Tuesday, Aug. 13, 2013

Comment Period Ends: 4 p.m. Wednesday, Sept. 11, 2013

Purpose of E-mail: Publish proposed changes to the Brain Injury, Community Alternative Care, Community Alternatives for Disabled Individuals and Developmental Disabilities waiver plans

Submit Comments to: DSD.PublicComments@state.mn.us

View [30-day public comment on proposed federal waiver plan amendments announcement](#).