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WILLIAM H. TRICE III (1946-2014)

October 31, 2018

Via email and U.S. Mail
donna@arkleg.state.ar.us

Ms. Donna K. Davis, Committee Staff
Bureau of Legislative Research
State Capitol Building, Room 315
Little Rock, AR 72201

**RE: My Client: Arkansas State Medical Board
Proposed Amendment to Regulation 2.8 – Patient/Provider Relationships**

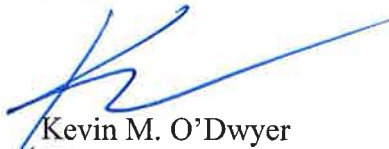
Dear Ms. Davis:

Enclosed please find the following:

1. Two copies of the completed Questionnaire and Financial Impact Statement.
2. Two copies of the Mark-Up Amendment.
3. Two copies of the Proposed Amendment (clean copy).
4. Two copies of a Summary.
5. Two copies of the Notice of Hearing that is being published, setting forth the public hearing for December 6, 2018.

Please let me know if you need anything further at this time.

Respectfully,



Kevin M. O'Dwyer
Attorney for the Arkansas State Medical Board

KMO/mel
Enclosures

cc w/encl.: Arkansas Secretary of State, register@sos.arkansas.gov
Amy Embry, Executive Director, amy.embry@armedicalboard.org

**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS
WITH THE ARKANSAS LEGISLATIVE COUNCIL**

DEPARTMENT/AGENCY Arkansas State Medical Board
DIVISION _____
DIVISION DIRECTOR Amy Embry, Executive Director
CONTACT PERSON Kevin M. O'Dwyer, Attorney
ADDRESS 211 S. Spring Street, Little Rock, Arkansas 72201
PHONE NO. (501) 372-4144 FAX NO. (501) 372-7480 E-MAIL kodwyer@htolaw.com
NAME OF PRESENTER AT COMMITTEE MEETING Kevin M. O'Dwyer
PRESENTER E-MAIL kodwyer@htolaw.com

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question **completely** using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

**Donna K. Davis
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201**

- 1. What is the short title of this rule? Amendment to Regulation 2.8 - Patient/Provider Relationships
Requiring minimum standards for establishing
- 2. What is the subject of the proposed rule? Patient/Provider relationships.

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No
If yes, please provide the federal rule, regulation, and/or statute citation. N/A

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act?
Yes No
If yes, what is the effective date of the emergency rule? N/A

When does the emergency rule expire? N/A

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act?
Yes No

5. Is this a new rule? Yes No
If yes, please provide a brief summary explaining the regulation. _____

Does this repeal an existing rule? Yes No
If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does. _____

Is this an amendment to an existing rule? Yes No
If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."** Attached.

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. ACA 17-95-303(2)

7. What is the purpose of this proposed rule? Why is it necessary? To replace the words "physician/physician assistant" with "Provider" and defining Provider as a person licensed by the ASMB.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). www.armedicalboard.org

9. Will a public hearing be held on this proposed rule? Yes No
If yes, please complete the following:

Date: December 6, 2018

Time: 8:35 a.m.

Place: Arkansas State Medical Board
1401 W. Capitol Ave., Suite 340, Little Rock, AR 72201

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

December 6, 2018

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

January 18, 2019

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. See attached; proof of publication will be provided upon receipt.

13. Please provide proof of filing the rule with the Secretary of State and the Arkansas State Library as required pursuant to Ark. Code Ann. § 25-15-204(e). Will provide after approval by the Governor.

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known. Arkansas Medical Society; Arkansas Osteopathic Association.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Arkansas State Medical Board

DIVISION _____

PERSON COMPLETING THIS STATEMENT Kevin M. O'Dwyer, Attorney

TELEPHONE (501) 372-4144 **FAX** (501) 372-7480 **EMAIL:** kodwyer@htolaw.com

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Amendment to Regulation 2.8 - physician/patient relationships

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

(a) How the additional benefits of the more costly rule justify its additional cost; N/A

(b) The reason for adoption of the more costly rule; N/A

(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and; N/A

(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain. N/A

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue N/A
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue N/A
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total N/A

Total N/A

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue N/A
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total N/A

Next Fiscal Year

General Revenue N/A
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total N/A

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

\$ N/A

Next Fiscal Year

\$ N/A

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

\$ N/A

Next Fiscal Year

\$ N/A

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

(c) The Chair of the Arkansas State Medical Board, the Vice Chair of the Arkansas State Medical Board, and the Secretary of the Arkansas State Medical Board shall have power to administer oaths for the purpose of performing their powers and duties.

(d) The board shall have a seal bearing the name "Arkansas State Medical Board".

History. Acts 1955, No. 65, § 2; 1979, No. 150, § 1; A.S.A. 1947, § 72-602.

A.C.R.C. Notes. The operation of the bond provision of subsection (a) of this section was suspended by adoption of a self-insured fidelity bond program for pub-

lic officers, officials and employees, effective July 20, 1987, pursuant to § 21-2-701 et seq. The section may again become effective upon cessation of coverage under that program. See § 21-2-703.

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Open Meetings Under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268 (1984).

CASE NOTES

Cited: *Miller v. Reed*, 234 Ark. 850, 355 S.W.2d 169 (1962); *Heard v. Payne*, 281 Ark. 485, 665 S.W.2d 865 (1984).

17-95-303. Powers and duties.

The Arkansas State Medical Board shall:

(1) Make and adopt all rules, regulations, and bylaws not inconsistent with the laws of this state or of the United States and necessary or convenient to perform the duties and to transact the business required by law;

(2) Have authority to promulgate and put into effect such rules and regulations as are necessary to carry out the purposes of the Arkansas Medical Practices Act, § 17-95-201 et seq., § 17-95-301 et seq., and § 17-95-401 et seq., and the intentions expressed therein;

(3)(A)(i) Have authority to employ attorneys to represent the board in all legal matters for a compensation approved by the board.

(ii) Contracts for employment of attorneys shall be filed by the Executive Director of the Arkansas State Medical Board with the Legislative Council.

(B) The board shall further have authority to request the assistance of the Attorney General and the prosecuting attorneys of Arkansas in such manner as it deems necessary and proper;

(4) Have the authority to employ an executive director and a deputy director to carry out the purposes and the mandates of the board and to supervise the other employees of the board;

(5) Have the authority to employ a medical director, who shall hold a valid license to practice medicine in this state, to evaluate medical issues and to assist in investigations pending before the board;

(6) Have the power and authority to employ such secretarial and administrative assistance as may be necessary to carry out the provisions of the Arkansas Medical Practices Act, § 17-95-201 et seq., § 17-95-301 et seq., and § 17-95-401 et seq., and the duties of the board to protect the people of the State of Arkansas;

(7) Have the power and authority to employ one (1) or more inspectors as may be necessary to carry out the provisions of the Arkansas Medical Practices Act, § 17-95-201 et seq., § 17-95-301 et seq., and § 17-95-401 et seq., and the duties of the board to protect the people of the State of Arkansas;

(8) Examine, as is provided for by law, all applicants for a license to practice medicine in this state;

(9) Consider and give deference to data, studies, consensus documents, and conclusions issued by the Centers for Disease Control and Prevention or the National Institutes of Health whenever their data, studies, consensus documents, and conclusions are relevant to any decision made pursuant to the board's powers and duties under the Arkansas Medical Practices Act, § 17-95-201 et seq., § 17-95-301 et seq., and § 17-95-401 et seq.;

(10) Have the power and authority to collect practice data from licensees; and

(11) Promulgate rules limiting the amount of Schedule II narcotics that may be prescribed and dispensed by licensees of the board.

History. Acts 1955, No. 65, § 2; 1957, No. 198, § 18; 1977, No. 15, § 4; 1979, No. 150, § 1; 1983, No. 365, § 5; A.S.A. 1947, §§ 72-602, 72-618; Acts 1992 (1st Ex. Sess.), No. 38, § 2; 2001, No. 464, § 4; 2003, No. 1716, § 1; 2011, No. 1010, § 1; 2017, No. 69, § 2; 2017, No. 820, § 5.

A.C.R.C. Notes. Acts 2007, No. 655, § 1, provided: "The Arkansas State Board of Health's regulatory authority over radiologist assistants and radiology practitioner assistants pursuant to § 17-106-105(a)(1)(C) is transferred to the

Arkansas State Medical Board."

Amendments. The 2017 amendment by No. 69 substituted "legal matters for" for "legal matters at" in (3)(A)(i); substituted "Executive Director" for "Executive Secretary" in (3)(A)(ii); and substituted "executive director and a deputy director" for "executive secretary" in (4).

The 2017 amendment by No. 820 added (11).

Cross References. Lists of practitioners to be made and filed, § 17-80-101.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Professions, Occupations, Busi-

nesses, Deference to Data from National Sources, 26 U. Ark. Little Rock L. Rev. 456.

CASE NOTES

Cited: Miller v. Reed, 234 Ark. 850, 355 S.W.2d 169 (1962); Heard v. Payne, 281 Ark. 485, 665 S.W.2d 865 (1984).

AMENDMENT TO REGULATION NO. 2.8

8. ~~**Requiring minimum standards for establishing physician/physician assistant/patient~~ **Patient/Provider** relationships. **Provider is defined as a person licensed by the Arkansas State Medical Board.** A ~~physician/physician assistant~~ **Provider** exhibits gross negligence if he provides and/or recommends any form of treatment, including prescribing legend drugs, without first establishing a proper ~~physician/physician assistant-patient~~ **Patient/Provider** relationship.
- A. For purposes of this regulation, a proper ~~physician/physician assistant/patient~~ **Patient/Provider** relationship, at a minimum requires that:
1. A. The ~~physician/physician assistant~~ **Provider** performs a history and an “in person” physical examination of the patient adequate to establish a diagnosis and identify underlying conditions and/or contraindications to the treatment recommended/provided, OR
 - B. The ~~physician/physician assistant~~ **Provider** performs a face to face examination using real time audio and visual telemedicine technology that provides information at least equal to such information as would have been obtained by an in-person examination; OR
 - C. The ~~physician/physician assistant~~ **Provider** personally knows the patient and the patient’s general health status through an “ongoing” personal or professional relationship;
 2. Appropriate follow-up be provided or arranged, when necessary, at medically necessary intervals.
- B. For the purposes of this regulation, a proper ~~physician/physician assistant/patient~~ **Patient/Provider** relationship is deemed to exist in the following situations:
1. When treatment is provided in consultation with, or upon referral by, another ~~physician/physician assistant~~ **Provider** who has an ongoing relationship with the patient, and who has agreed to supervise the patient’s treatment, including follow up care and the use of any prescribed medications.
 2. On-call or cross-coverage situations arranged by the patient’s treating ~~physician/physician assistant~~ **Provider.**
- C. Exceptions – Recognizing a ~~physician/physician assistant’s~~ **Provider’s** duty to adhere to the applicable standard of care, the following situations are hereby excluded from the requirement of this regulation:

AMENDMENT TO REGULATION NO. 2.8

8. **Requiring minimum standards for establishing Patient/Provider relationships. Provider is defined as a person licensed by the Arkansas State Medical Board. A Provider exhibits gross negligence if he provides and/or recommends any form of treatment, including prescribing legend drugs, without first establishing a proper Patient/Provider relationship.
- A. For purposes of this regulation, a proper Patient/Provider relationship, at a minimum requires that:
1. A. The Provider performs a history and an “in person” physical examination of the patient adequate to establish a diagnosis and identify underlying conditions and/or contraindications to the treatment recommended/provided, OR
 - B. The Provider performs a face to face examination using real time audio and visual telemedicine technology that provides information at least equal to such information as would have been obtained by an in-person examination; OR
 - C. The Provider personally knows the patient and the patient’s general health status through an “ongoing” personal or professional relationship;
2. Appropriate follow-up be provided or arranged, when necessary, at medically necessary intervals.
- B. For the purposes of this regulation, a proper Patient/Provider relationship is deemed to exist in the following situations:
1. When treatment is provided in consultation with, or upon referral by, another Provider who has an ongoing relationship with the patient, and who has agreed to supervise the patient’s treatment, including follow up care and the use of any prescribed medications.
 2. On-call or cross-coverage situations arranged by the patient’s treating Provider.
- C. Exceptions – Recognizing a Provider’s duty to adhere to the applicable standard of care, the following situations are hereby excluded from the requirement of this regulation:
1. Emergency situations where the life or health of the patient is in danger or imminent danger.
 2. Simply providing information of a generic nature not meant to be specific to an individual patient.
 3. This Regulation does not apply to prescriptions written or medications issued for use in expedited heterosexual partner therapy for the sexually transmitted diseases of gonorrhea and/or chlamydia.

4. This Regulation does not apply to the administration of vaccines containing tetanus toxoid (e.g., DTaP, DTP, DT, Tdap, Td, or TT) or inactive influenza vaccines.

History: Adopted June 17, 1976; Amended March 13, 1997; Adopted December 3, 1998; Adopted April 6, 2001; Amended February 7, 2002; Amended April 3, 2008; Amended April 12, 2012; Amended December 14, 2015; Amended June 9, 2016, Effective September 6, 2016; Amended April 5, 2018, Effective August 8, 2018.

Summary

Proposed Amendment to Regulation 2.8 governing Physician/Patient Relationships – replacing the words “physician/physician assistant” with “Provider” and defining “Provider” as a person licensed by the Arkansas State Medical Board.

To be published three times on November 6, 13, and 20, 2018 in the Daily Record:

Bill to:

Amy Embry, Executive Director
Arkansas State Medical Board
1401 W. Capitol Ave, Suite 340
Little Rock AR 72201
Telephone (501) 296-1802

Send proof of publication to:

Kevin M. O'Dwyer
Attorney for the Arkansas State Medical Board
211 Spring Street
Little Rock, AR 72201
Telephone (501) 372-4144

NOTICE OF PUBLIC HEARING

In compliance with ACA §25-15-204, the Arkansas State Medical Board gives notice that it will conduct a public hearing at 8:35 a.m. on the 6th day of December, 2018, at the offices of the Arkansas State Medical Board, 1401 W. Capitol Ave., Suite 340, Little Rock, Arkansas 72201. The public hearing will involve the adoption of an Amendment to Regulation 2.8 governing physician/patient relationships.

All individuals desiring to attend said hearing may do so. All individuals desiring to address the Board should contact Amy Embry, the Executive Director of the Arkansas State Medical Board, (501) 296-1802. Individuals desiring a copy of the proposed Amendment to Regulation 2.8, as referred to herein, may contact Amy Embry, the Executive Director, at the above number.