

# Surviving a Rule Challenge

# What is a rule?

Texas Gov't Code 2001.003 (6) "Rule":

(A) means a state agency statement of general applicability that:

- (i) implements, interprets, or prescribes law or policy; or
- (ii) describes the procedure or practice requirements of a state agency;

(B) includes the amendment or repeal of a prior rule; and

(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

► **APA Rule promulgation includes:**

- Notice
- Publication
- Public Comment
- Adoption

Purpose of the process is to assure notice to the public and affected persons and an opportunity to be heard on matters that affect them.

If agencies follow that roadmap and avoid unauthorized deviations, the rulemaking process should run smoothly with few challenges to agency rules and even fewer successful legal challenges.

# Proper Promulgation & Creating a Record

# Rule Challenges under the APA

A declaratory judgment may be issued by a court to determine the validity or applicability of any agency rules, including emergency rules.


# Types of Challenges

## Validity challenges

1. Agencies must possess statutory authority to adopt rules and a rule may not exceed that statutory authority
2. An agency rule must comport with constitutional provisions.
3. An Agency rule must be adopted in accordance with proper APA procedures.

## Applicability Challenges

- ▶ In a case that involves only the *applicability* of a rule, the plaintiff must show why:
  - ▶ The plaintiff falls outside the reach of the rule
  - ▶ The rule was not designed to apply to the plaintiff

The background of the slide is composed of several overlapping, semi-transparent green geometric shapes, primarily triangles and quadrilaterals, creating a modern, abstract design. The colors range from a light lime green to a darker forest green. The text is positioned on the left side of the slide, set against a white background that is partially obscured by the green shapes.

# Required Rule Writing v. Permissive Rule Writing

- ▶ Does the agency have authority to adopt such a rule?
- ▶ Are you required to write a rule?
- ▶ What do I need the rule to say?
- ▶ What are the stakeholder considerations?
- ▶ What are the benefits of this rule?
- ▶ What are the implications of such a rule?

## Factors to Consider Before Drafting Rules

## Required Rule Writing

If there is a “shall” in the statute  
- then rule writing is necessary -  
BUT CONSIDER

- ▶ Is the statute comprehensive?
- ▶ Does the statute need clarifying?
- ▶ Is the statute missing details?
- ▶ Do you have rules already in place to address any of the details that are missing?



# Permissive Rule Writing

- ▶ If there is no “shall” but a “may”, then ask:
  - ▶ Do you need a rule or is the statute comprehensive?
  - ▶ What purpose will the rule serve?
  - ▶ Will a rule address a common issue or is it a one-off or isolated and rare issue?
  - ▶ Can clarification/implementation/interpretation be accomplished by other means?

# Example of restating the statute = UNNECESSARY

## Statute

Sec. 155.010. EXPEDITED LICENSING PROCESS FOR PHYSICIANS SPECIALIZING IN PSYCHIATRY.

- (a) The board by rule **shall** create an expedited licensing process for an applicant who:
  - (1) holds an unrestricted license to practice medicine issued by another state;
  - (2) is board certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Neurology and Psychiatry; and
  - (3) is not ineligible under Section 155.003(e).
- (b) The expedited licensing process must include a procedure for the board to screen applications under this subtitle to determine whether an applicant would be eligible for the expedited licensing process under this section....
- (e) This section expires January 1, 2022.

## Rule

Texas Administrative Code 163.13

(b) Applications for licensure by certain psychiatrists shall be expedited by the board's licensure division.

(1) To be eligible, the applicant must meet the following criteria:

*(A) holds an unrestricted license to practice medicine issued by another state;*

*(B) is board certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Neurology and Psychiatry; and*

*(C) is not ineligible for licensure under §155.003(e) of the Medical Practice Act.*

*(2) The board's licensure division shall review all applications upon receipt to determine whether an applicant is eligible for expedited licensure.*

*(3) Subsection (b) of this section is effective September 1, 2017, and expires on January 1, 2022.*

# SHALL - Consider referencing the statute in the Rule

## Statute

### Sec. 155.010. EXPEDITED LICENSING PROCESS FOR PHYSICIANS SPECIALIZING IN PSYCHIATRY.

- (a) The board by rule shall create an expedited licensing process for an applicant who:
  - (1) holds an unrestricted license to practice medicine issued by another state;
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  - (3) is not ineligible under Section 155.003(e).
- (b) The expedited licensing process must include a procedure for the board to screen applications under this subtitle to determine whether an applicant would be eligible for the expedited licensing process under this section....
- (e) This section expires January 1, 2022.

## Rule

### Texas Administrative Code 163.13

(b) Applications for licensure by certain psychiatrists shall be expedited by the board's licensure division **if the applicant meets the criteria set forth in Texas Occupations Section 155.010.**

~~(1) To be eligible, the applicant must meet the following criteria:~~

~~—— (A) holds an unrestricted license to practice medicine issued by another state;~~

~~—— (B) is board certified in psychiatry by the —— American Board of Psychiatry and Neurology or —— the American Osteopathic Board of Neurology and Psychiatry; and~~

~~—— (C) is not ineligible for licensure under §155.003(e) of the Medical Practice Act.~~

~~(2) The board's licensure division shall review all applications upon receipt to determine whether an applicant is eligible for expedited licensure.~~

~~(3) Subsection (b) of this section is effective September 1, 2017, and expires on January 1, 2022.~~

# Example of exceeding the statute

## Statute

### Sec. 155.104. TEMPORARY LICENSES.

(b) The board may issue a faculty temporary license to practice medicine to a physician as provided by this section. The physician:

(1) must hold a current medical license that is unrestricted and not subject to a disciplinary order or probation in another state or a Canadian province or have completed at least three years of postgraduate residency;

(2) may not hold a medical license in another state or a Canadian province **that has** any restrictions, disciplinary orders, or probation;

## Rule

### Rule 172.8

(j) An applicant is not eligible for a faculty temporary license if:

(1) the applicant holds a medical license that is currently restricted for cause, canceled for cause, suspended for cause, or revoked by a state of the United States, a province of Canada, or a uniformed service of the United States;

(2) the applicant holds a medical license **that has been** subject to disciplinary action in another state, territory, or Canadian province;

- a penalty matrix used by agency staff to recommend sanctions
- advisory letters to members of the regulated community about whether electronic machines were illegal gambling devices;
- an agency decision in a contested Office of the Attorney General case;
- notices that simply restated published rules;
- statements or applications of law that are restatements of a statute; and
- internal policies establishing the appearance of certain driver's licenses.

What is not  
a rule?

# Considerations other than Rulemaking

Consider guidance documents or publications on your website

Texas Government Code section 2001.007 provides that a state agency, in addition to rules, shall make available through a generally accessible Internet site:

- any material, such as a letter, opinion, or compliance manual, that explains or interprets one or more of its rules and that the agency has issued for general distribution to persons affected by one or more of its rules.

# Factors considered by the Courts in determining that a statement is a Rule

1. The statement must be an authorized, official statement that represents the position of the agency.
2. The agency statement must purport to have generic application.
3. The agency statement must purport to be binding on the regulated community.

# The Mix-Master

- ▶ Refrain from a statement or letter that contains language that amends an existing rule or interprets a statute by effectively imposing different requirements or standards than what had been set forth in the text of the existing statute or rule, that is likely a rule (ad hoc rule making).

## ALSO

- ▶ Refrain from issuing such letters or statements out to, for example, trade associations of your regulated community who notify the regulated community, it has the effect of being generally applicable to everyone in the regulated community and therefore, will likely be deemed a “rule” that was not properly promulgated.



# Do's and Don'ts

## Do

- ▶ Carry out your agency functions and enforce your existing rules and statutes
- ▶ send or post guidance documents if they can rely or cite to the language in the rules or statutes

## Don't

- ▶ Use guidance in lieu of rule making
- ▶ Rely on guidance documents as a basis for asserting a violation
- ▶ Impose new interpretations of existing rules on your regulated community with guidance documents

# Key Takeaways

Analyze whether you need a rule

If it is required:

- Promulgate the rule correctly

- Draft the rule accurately

- Don't exceed statutory authority

If a rule is not necessary, consider alternatives for guidance

Make sure your guidance documents don't cross a line and begin to look like a rule that was not properly promulgated

# Thank You!

Wendy A. Pajak  
Assistant General Counsel  
Texas Medical Board