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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Proposed Amendments to Rules Governing Minnesota
Department of Veterans Affairs, Minnesota Veterans Homes,
Minnesota Rules Chapter 9050

OAH DOCKET NO. 71-9054-37629

Met electronically via Microsoft Teams at
9:31 a.m. on January 31, 2022.

BEFORE: Judge Jessica Palmer-Denig

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1 JUDGE PALMER-DENIG: Good morning. I am
2 Administrative Law Judge Jessica Palmer-Denig, and I
3 want to welcome you to this rulemaking proceeding,
4 and thank you for taking your time to be here today.
5 If I could have the next slide in the presentation,
6 please.

7 Today is January 31, 2022, and it is 9:31
8 a.m. We're on the record for a public hearing In
9 the Matter of the Minnesota Department of Veterans
10 Affairs Proposed Amendments to Rules Governing the
11 Minnesota Veterans Homes, Minnesota Rules Chapter
12 9050. This proposed rule is assigned a revisor's ID
13 number: R-4384. And it's also assigned a docket
14 number here at the Office of Administrative
15 Hearings. That is OAH Docket Number 71-9054-37629.
16 And you're going to want to pay attention to that
17 number in particular as we go along. That will help
18 you navigate a little about making comments. As I
19 said before, and if you're just joining me, my name
20 is Jessica Palmer-Denig, and an Administrative Law
21 Judge with the Office of Administrative Hearings.
22 If I could have the next slide.

23 The Office of Administrative Hearings is
24 an independent state agency. It exists to provide
25 fair hearings in contested matters and also provides

1 legality review and rulemaking hearings in
2 rulemaking matters like this one. This office is
3 independent of the Minnesota Department of Veterans
4 Affairs, as well as any group or individual who's
5 participating in this proceeding. The role of our
6 office is to provide hearings in a way that are fair
7 and neutral to all parties. The purpose of this
8 particular hearing is to allow the agency to present
9 its case regarding the proposed rules and to hear
10 from the public regarding its proposal. If I could
11 have the next slide.

12 Among other directives from the
13 legislature, specifically those in Minnesota Statute
14 Chapter 14, rulemaking hearings are conducted so
15 that members of the public can be heard as part of
16 the rulemaking process. I am here to ensure
17 procedural fairness, to make sure that everyone is
18 courteous, and all interested parties can be heard.
19 And my goal is to draw knowledge from all sources
20 possible. An underlying assumption of the
21 rulemaking process in Minnesota is that we rely on
22 members of the public to provide wisdom and
23 perspective about a particular topic. We appreciate
24 that those of you who are here to comment today, and
25 those of you who do not want to comment but are here

1 to listen in and see what's going on, we appreciate
2 that you're here to participate. And we especially
3 appreciate the contribution of thoughts, experience,
4 and expertise in the formation of public policies
5 through rulemaking. Next slide, please.

6 This hearing is part of a statutory and
7 rule-based process through which rules are adopted
8 under the Minnesota Administrative Procedure Act.
9 During this rulemaking proceeding, the agency is
10 required to document its statutory authority to
11 adopt the rules, to demonstrate that it has
12 fulfilled all relevant legal and procedural
13 requirements of the law, and to demonstrate the need
14 for and reasonableness of each portion of the
15 proposed rules with an affirmative presentation of
16 facts. Those are the three big issues that I will
17 be reviewing as part of this proceeding. Some of
18 you may have thoughts that you wish to express about
19 this rulemaking generally or have rules about -- or
20 views about particular aspects of the proposed
21 rules, and it's helpful for the Department to hear
22 those -- that input from you. My job, it's
23 important to know, though, is not to rewrite the
24 rules based on the views of participants or to
25 select one set of proposed rules or policy

1 priorities over another. Rather, my job is to
2 ensure that the statutory requirements are met for
3 rulemaking and that the agency has demonstrated the
4 need and reasonableness of each part of the rule.
5 Next slide, please.

6 So here's what we're going to do today.
7 After I complete some introductory remarks about the
8 hearing procedures, I'm going to turn the
9 presentation over to the Minnesota Department of
10 Veterans Affairs representatives. And at that time,
11 we'll admit the agency's exhibits that it has
12 pre-filed in support of this rulemaking into the
13 record. The agency will also make a presentation
14 regarding the proposed rules. After that, I'm going
15 to turn to the public comment part of the
16 proceeding.

17 We do have a court reporter on the line
18 today and a transcript will be made of this
19 proceeding. So the court reporter is going to be
20 creating a record. Because we have a court
21 reporter, I am going to take breaks from time to
22 time to give the court reporter a break. I will
23 find spots in the hearing where it makes sense to do
24 that. I'll also ask that everyone speak very slowly
25 and clearly. It is possible that I -- because we're

1 using this form of technology, I might hear you fine
2 in your comment but it might not come out completely
3 clear on the court reporter's end of things. And so
4 if that happens, the court reporter may unmute
5 herself and break into the proceeding to ask for
6 clarification. So just be aware that that might
7 happen. It's also possible that I might not hear
8 you on my end, and so I might ask you for
9 clarification as well. Next slide, please.

10 So Minnesota law provides some particular
11 requirements for a rulemaking hearing, and those are
12 listed here. The essential aspects of these
13 standards require that the agency submit its
14 supporting evidence into the record, and also, it
15 may present oral evidence. And today, I am going to
16 hear from the agency. It's going to make a
17 presentation. Interested persons can comment and
18 commenters can question agency representatives,
19 though I may limit questions that are repetitive or
20 immaterial. Next slide, please.

21 So the agency is being represented today
22 by Dale Klitzke. Mr. Klitzke is the Deputy General
23 Counsel of the Minnesota Department of Veterans
24 Affairs. There are two other folks who are here
25 from the agency as well who are not making the

1 presentation today but they are here to answer
2 questions or provide additional content if
3 necessary. Those are: Simone Hogan is the
4 Minnesota Department of Veterans Affairs Healthcare
5 Service Director; and Nancy Curtis, who is a MDVA
6 Healthcare Business Analyst. Next slide, please.

7 The Minnesota Department of Veterans
8 Affairs has pre-filed its exhibits into the
9 docketing system here at the OAH. And as I said,
10 I'm going to a little bit later receive those
11 exhibits. I wanted to let you know that those
12 exhibits are also available to the public on the
13 rulemaking page of the Minnesota Department of
14 Veterans Affairs. I did check and they are up and
15 accessible. And so you can go to this website and
16 view the evidentiary support, including the SONAR,
17 the Statement of Need and Reasonableness that the
18 agency is putting into the record to support its
19 rulemaking. Next slide, please.

20 Most of our time together today will be
21 for public questions and comments. And that's
22 really a key reason why we're here. There are two
23 different essential ways that you can submit a
24 comment into the record. First, you can provide
25 oral comments today on the record that will be made

1 submitting written comments. So this is the part of
2 the website that's listed here with this link for --
3 and there's step-by-step instructions there about
4 how you can submit comments through eComments. We
5 have really strongly encouraged electronic
6 submission of information rather than, you know,
7 somebody coming into our lobby to drop something off
8 given the current status of the pandemic. So
9 eComments is the very best way that you can comment,
10 but I want you to know that your comment, if it's
11 received by mail or by fax, will be equally and
12 certainly your comments here on the record today
13 will be considered equally. All right. So next
14 slide, please.

15 To comment today, there are two different
16 ways that you can do it. One is by accessing the
17 chat icon, which is the little bubble with text in
18 it that's on your Microsoft Teams screen. If you
19 can type your first and last name in the chat to
20 indicate an interest in speaking, those chat
21 messages will be reviewed by agency staff. And
22 agency staff are standing by to put you in a queue,
23 and we're going to take you in the order that you
24 get into the queue.

25 If you were participating by telephone and

1 you would like to make a comment, all we have is
2 your phone number. We don't have your name so it
3 makes it a little bit more difficult to call on you.
4 Please dial *5 to raise and lower your hand. If
5 possible, also send an email. And there's an email
6 address: Tydon, T-Y-D-O-N, dot,
7 Samuels@state.mn.us. So that was Tydon, T-Y-D-O-N,
8 dot, Samuels@state.mn.us, to indicate an interest in
9 making a comment by phone. Please include in that
10 email your first and last name and the telephone
11 number you're calling from so that we can match you
12 up with where you are. And then we'll place you in
13 the queue and unmute your line when it's your turn.
14 There is the possibility that you can unmute your
15 own line if you dial *6. I would ask you not to do
16 that certainly until you're called on to make sure
17 that we don't have, sort of, interference or
18 background noise.

19 There's also a function *1 that gets you
20 to a tech help section. So *5 to raise or lower
21 your hand and email to tydon.samuels@state.mn.us.
22 And include your first and last name and the
23 telephone number you're calling from. All right.
24 Next slide, please.

25 Making some comments at today's hearing.

1 If you are here by Microsoft Teams and you are
2 participating by video, please turn your video on by
3 clicking the camera or video icon. I would like to
4 make sure that everyone is heard today. That's one
5 of the functions of the rulemaking hearing. I don't
6 know how many people are going to comment. In very,
7 very large rulemaking hearings, we do limit the
8 length of time that people can comment so that we
9 make sure that everyone has a chance. I have put in
10 this slide show and do ask that if you could limit
11 comments to five minutes, that's very helpful. You
12 can get back into the queue to make additional
13 comments after other people have spoken. But it is
14 in our interest and in the interest of public policy
15 to ensure that we hear from as many people as
16 possible with as many different views. And so I
17 would like you to focus your comments if possible
18 and be as brief as you can to make sure we get
19 through everyone. That said, I doubt that we'll
20 have so many people that I'll have to really stop
21 you. And so if you're running into, you know, six
22 minutes or seven minutes, I'm going to be courteous
23 to you, as I expect everyone else to be courteous,
24 and I'm going to let you go. But if it's going on
25 very, very long, I might break in and ask that you

1 wrap it up. Just so you know and are aware. All
2 right. Next slide, please.

3 When you are commenting orally, I'm going
4 to have you state and spell your first and last
5 name. And I will prompt you; you'll hear it over
6 and over again because we want to make sure that we
7 get you down on the record correctly. If you're
8 commenting on behalf of an organization, please
9 identify the organization. If that organization is
10 an acronym, please tell me what the acronym means.
11 Speak slowly, clearly, and loudly so that we can
12 make sure that we hear you. Please spell names,
13 technical terms, and again, I'll note that if you
14 don't come through on my end of the screen or on the
15 court reporter's end, we may jump in and ask you to
16 repeat yourself. And it's possible that I might
17 have clarification questions if there is something
18 that I want to follow up on. Next slide, please.

19 I'll note, and I'm sure everyone on this
20 Teams session is fully aware that this is a legal
21 proceeding, that it's important to respect other
22 speakers and time limits and listen for our court
23 reporter, and also, recording of this proceeding is
24 not permitted. We're making an official record
25 through the creation of a transcript. Next slide,

1 please.

2 Remember, if you do not get a chance to
3 comment today -- for instance, if you have a
4 technological issue and you are unable to resolve
5 that during the hearing and are not able to comment,
6 please remember that you can submit eComments, mail
7 or fax comments. Please also note that there is no
8 difference in how a comment is viewed. There is no
9 additional weight or lesser weight that attaches to
10 any particular comment based on how it comes into
11 the record. A comment that is offered at a public
12 hearing is viewed in exactly the same way as a
13 comment that is made by mail, by fax, or by
14 eComments. There's no difference; a comment is a
15 comment. Next slide, please.

16 So when you do make your comment, I want
17 to make sure you focus your attention on the three
18 key issues for this hearing, that is the agency's
19 authority to adopt the rules, whether the agency has
20 complied with legal and procedural requirements, and
21 whether or not the agency can demonstrate a need for
22 and reasonableness of the rules. If there is a
23 particular part of the rules that you are concerned
24 about -- and I have reviewed the comments that were
25 previously filed and I know that there were certain

1 specific issues that received a lot of comments. If
2 you're commenting on any particular part of the
3 rule, please identify it so that we can link your
4 comment to the specific concern in the rule. Next
5 slide, please.

6 The comment period was open and then
7 closed. It's now reopening. So as of today,
8 eComments will be able to be received on our
9 website. There will be -- I am hereby extending the
10 hearing record for the full time that is allowed by
11 the statute, so I issue an order now on the record
12 that the hearing record will stay open for 20 days
13 after the end of the public hearing. So there will
14 be 20 calendar days starting today and proceeding
15 forward to February 22 of 2022 for you to make
16 comments into the rulemaking record. So comments
17 must be received by 4:30 p.m. on Tuesday, February
18 22, 2022. Next slide, please.

19 There is then a five-day rebuttal period.
20 And this is five business days, not five calendar
21 days so rebuttals must be received by 4:30 p.m. on
22 Tuesday, March 1, 2022. I want to note that the
23 rebuttal period is a different kind of comment
24 period from the initial comment period. The initial
25 comment period is the time for parties to raise any

1 issue that they want regarding the rule. The
2 rebuttal period is an opportunity for everyone to
3 comment on the comments that have already been made.
4 So it's a response to comments, not a section of
5 time in which we accept new issues or new ideas in
6 the comments. The agency will, during that rebuttal
7 period, will likely file a rebuttal to the comments
8 that are received or information about the weight
9 that -- you know, its perspective about the comments
10 that were received. And individual commenters,
11 those of you who are filing comments in the initial
12 comment period, you can also file rebuttal comments
13 into the record during this rebuttal period. Next
14 slide, please.

15 When the record closes, I will start
16 considering all of the submissions. I'll consider
17 all the agency's exhibits and all of the comments
18 that were received at all the different stages of
19 this process. And I will issue a report regarding
20 the legality of the rule. That report will be
21 issued within 30 days of the close of the record
22 unless an extension is granted. If an extension is
23 granted, it will be done by order of the chief
24 judge. That report, when it gets issued, will be
25 posted on the day that it comes out and it will be

1 available on the website of the Office of
2 Administrative Hearings, so the links to that are in
3 the PowerPoint presentation there. And you can also
4 go -- if you go to the Office of Administrative
5 Hearings website, you're going to be looking for the
6 opinion archive, and that's where it will be posted.
7 Next slide, please.

8 And this is just a helpful reminder. If
9 you are a lobbyist, you are required to register
10 with the Campaign Finance and Public Disclosure
11 Board. The OAH doesn't register lobbyists or track
12 any of that information. So if you are and if you
13 have any questions or if you are not sure whether
14 you need to register with the Board, please direct
15 those questions to the Board. All right. Next
16 slide, please.

17 So at this point, I'm going to turn over
18 the presentation to Mr. Klitzke. Mr. Klitzke, if I
19 could have you go ahead and unmute yourself and turn
20 your camera on and introduce yourself.

21 MR. KLITZKE: I thank you very much. My
22 name is Dale Klitzke. I'm the -- Klitzke, it's
23 K-L-I-T-Z-K-E. I'm the MDVA Deputy General Counsel.
24 Along with me today -- I'll be doing the main
25 presenting for the agency, but along with me today,

1 I have Simone Hogan, last name H-O-G-A-N. She's the
2 MDVA Healthcare Service Director; and also, Nancy
3 Curtis, C-U-R-T-I-S, and she's the MDVA Healthcare
4 Business Analyst.

5 Now, although there's only three of us at
6 the MDVA to present today, the number of people
7 within the agency relied upon to come up with the
8 final proposed rules are too many to identify today
9 and thank. It was a long and detailed process from
10 2016 to today, and I want to thank all that helped
11 within the agency and all the public for their
12 comments and interests in the proposed changes to
13 the 9050.

14 JUDGE PALMER-DENIG: Thank you very much.
15 And I'm going to admit the exhibits now before you
16 make your presentation. So the agency pre-filed the
17 required exhibits that -- there are a number of
18 exhibits that are statutorily required and required
19 under rule. The agency pre-filed Exhibits A through
20 L2. And Mr. Klitzke, are those the exhibits that
21 the agency intends to submit as part of its
22 affirmative presentation of evidence?

23 MR. KLITZKE: Yes, it is, Your Honor.

24 JUDGE PALMER-DENIG: All right. Exhibits
25 A through L2 are received into the rulemaking record

1 at this time.

2 All right. I think we can move to your
3 next slide, and Mr. Klitzke, you can take over at
4 this point.

5 MR. KLITZKE: Thank you, Your Honor. And
6 I'd also just like to remind the public that if they
7 would like to review any of the exhibits, they also
8 can find it on the MDVA webpage, which is located at
9 <https://mn.gov/mdva/about/reports.jsp>.

10 JUDGE PALMER-DENIG: And I'll note, if
11 someone from the agency could put that web address
12 into the chat, then people can use that to get to it
13 and bookmark that on their computers if they would
14 like to do that.

15 MR. KLITZKE: Thank you, Your Honor.

16 So for today's agenda, we're going to do a
17 quick overview of the Minnesota Department of
18 Veterans Affairs. I know that's usually uncommon
19 for these types of hearings, but because the
20 Veterans Affairs hasn't been in front of the OAH
21 regarding rulemaking in some time, I thought it
22 would be important for the public to understand the
23 internal structure of MDVA. Next, I will present a
24 brief history of the Minnesota Rule Chapter 9050 and
25 its as its unique as it's unique and can provide

1 some insight on how we came to the proposed changes
2 presented in Exhibits C of the exhibits. Next, I
3 will present an overview of the proposal of the
4 changes. Although I won't be able to address every
5 change we made, but I am trying to focus on specific
6 sections that were in the majority of the comments
7 we received. Finally, I will end with a summary of
8 the comments received and MDVA's suggested changes
9 to the proposed rules based on those comments. Next
10 slide, please.

11 Serving Minnesota veterans and their
12 families is the mission of MDVA. The mission is the
13 basis for all decisions at MDVA. Because MDVA has
14 more than 10 percent of its employees who are also
15 veterans, there is a constant reminder of how
16 important a successful outcome of MDVA's program is
17 to the agency and the veterans it serves. MDVA
18 accomplishes its mission by working with the U.S.
19 Department of Veterans Affairs but also focuses on
20 partnering with local and state entities, as well as
21 nonprofit veterans service organizations. The
22 ultimate goal is to use any available opportunity
23 and resources to help serve the almost 313,000
24 veterans in Minnesota. Next slide.

25 MDVA is organized into three divisions:

1 Program and Services, Central Office, and Health
2 Care. Program Services has three areas: the
3 veterans services, veterans program and memorial
4 affairs, and education and employment. All of these
5 areas under program and services are operated under
6 Chapter 196 -- Minnesota Chapter 196 and 197, and
7 Minnesota Rule 9055. Central Office provides
8 support to the business areas - program and
9 services, and health care - by having a central
10 location for HR, finance, legal, communications,
11 facility management, and IT. Health Care is the
12 division that operates under Minnesota Chapter 196
13 and 198 and Minnesota Rule 9050, the reason why we
14 are here today. In one form or another, the Health
15 Care Division for MDVA has served its veterans and
16 their families in Minnesota for over 130 years by
17 providing resources to assist in their mental,
18 physical, and spiritual wellbeing. MDVA Health Care
19 operates four long-term care facilities along with
20 the domiciliary program, and an adult day program.
21 MDVA's Health Care mission is to provide high
22 quality medical and primary psychological healthcare
23 with an additional focus to conditions unique to
24 veterans, such as TBI, or traumatic brain injury,
25 and post-traumatic stress. MDVA Health Care

1 services also include rehabilitation, alcohol and
2 chemical dependency counselling, recreational,
3 spiritual, and telehealth services, and much more.
4 In addition to the current five health care
5 facilities operated by MDVA in 2023, MDVA is
6 expected to open three new facilities in Bemidji,
7 Preston, and Montevideo. These three new facilities
8 will follow the MDVA's current model focusing on
9 high quality care in Minnesota for veterans and
10 their families. Next slide.

11 As you can see where this map indicates,
12 within the white homes, that's where we have the
13 current maps of all the long-term care facilities
14 and domiciliary programs in Minnesota. The white
15 flags indicate the current cemeteries operated by
16 Minnesota. The white star is our veteran service
17 building and our central office. And then the blue
18 homes and blue flags represent our future for MDVA,
19 the three homes in Bemidji, Montevideo and Preston,
20 and the future cemetery in Redwood Falls. Next
21 slide, please.

22 This slide has the breakdown of homes
23 currently operated by MDVA and the total licensed
24 beds per facilities. Minneapolis being our largest
25 and longest-operating home first established 1887

1 from veterans coming home from Civil War, it now
2 operates 300 skilled nursing facility beds and
3 operates one of the two VA certified adult day
4 centers in the nation.

5 The domiciliary program, located in
6 Hastings and Minneapolis, focuses on independent
7 living and provides medical management, mental
8 health care, sobriety management, and vocational
9 work therapy for its veterans. Next slide.

10 The Minnesota Veterans Homes were not
11 always operated by MDVA. In 1988, the Minnesota
12 legislature reorganized and separated the Veterans
13 Homes from MDVA and put them under the authority of
14 Minnesota Veterans Home Board. The Board was
15 established with nine members appointed by the
16 governor with instructions to restructure the homes
17 and turn them into high-quality health care
18 facilities with an additional requirement making
19 them veteran focused. In an effort to do that, the
20 Board executed the initial draft of 9050 by focusing
21 on residents' care; eligibility of admissions;
22 procedure for discharge, voluntary and involuntary;
23 cost of care calculations to includes costs for
24 residence determination; and notice of admission
25 requirements.

1 The Board addressed 9050 four more times
2 from 1992 to 2004, focusing on residents' rights,
3 facility services, the operation of the Veterans
4 Home, and procedures. The Board operated the five
5 homes up to 2007. When the Board was eliminated,
6 the duties and responsibilities of the Minnesota
7 Veterans Homes were again transferred back to MDVA.
8 Because of the lack of amendments in 9050 since the
9 MDVA took control in the operation of the homes in
10 2007, it has been the agency's goal to make the
11 rules current with health care standards, as well as
12 address necessary provisions that would provide
13 better protection and focus to the veterans and the
14 families it serves. Next slide.

15 The purpose of the proposed rules
16 amendments to Minnesota 9050.0030 to .1090 is to
17 continue to further clarify the authoritative basis
18 for internal functioning and operation of the
19 Minnesota Veterans Homes. These proposed rules
20 comprised the practice currently used at the
21 Minnesota Veterans Homes, as well as the practice
22 that will be implemented upon the promulgation of
23 these rules and are based upon the pre-existence of
24 state rules and laws. Additionally, the intent of
25 the rules amendment is to add new or modified

1 existing definitions, obtain compliance with
2 statutory changes, and make technical corrections to
3 existing rule language. Next slide.

4 In an attempt to define or to go through
5 the proposed rules, I've identified a few sections
6 that we're going to go through, the first one being
7 the definition section. With over 50 changes to
8 this subpart of 9050.0040, the main focus of these
9 proposed changes by MDVA was to update the
10 definition to reference common terminology in the
11 health care industry or to correct the definition by
12 updating statutory regulatory references. Within
13 this slide, I provide some examples of the -- some
14 of the 50 changes to the definition. It is MDVA's
15 opinion that the changes in the definition section
16 were necessary to create a consistent and updated
17 rule. Next slide.

18 Admissions standards are a very important
19 part within 9050, as it allows all applicants,
20 veterans and nonveterans, to clearly identify if
21 they are eligible for admissions to the Minnesota
22 Veterans Homes. Because the changes to statutory
23 reference were within this part, needed revisions
24 were required as well as to provide further
25 clarification of admission standards between a

1 veteran or a nonveteran. Therefore, the proposed
2 changes to 9050.0050 require a reorganization of the
3 part to clearly differentiate what admissions
4 standards apply to veterans and what admissions
5 standards apply to nonveterans. Because applying
6 for admission to any health care facility can be
7 cumbersome and complicated, the MDVA attempted to
8 focus and streamline the process inasmuch as it can
9 in all areas of the proposed amendment, but at the
10 same time, the focus is on retaining the resident's
11 rights when doing so.

12 One area that the Health Care Division of
13 MDVA wanted to correct with its proposal was the
14 cumbersome process of an applicant applying to two
15 separate waiting lists, an active and inactive. The
16 intent of the proposed amendment to 9050.0055 is to
17 change two separate lists, active and inactive, to
18 one list, the admission list, but continue to retain
19 the applicant's information, protection, and
20 priority status. The proposed language to amend it
21 to one list still allows the identification of the
22 applicant and allows the agency to monitor priority
23 status, but will do so by maintaining one admission
24 list per facility.

25 The proposed amendments to 9050.0080 are

1 needed to clarify the requirement within this part.
2 It is important that all applicants understand the
3 process when applying to MDVA's health care
4 facilities and clearly recognize any rights they may
5 have when receiving a denial to admission. The
6 proposed changes amend this part by clearly
7 identifying when a request for review or
8 reconsideration or denial must be made and who it
9 should be sent to. It also provides a time frame of
10 when a final decision of the reconsideration must be
11 issued by the administrator and received by the
12 applicant. Next slide.

13 Because MDVA operates facilities are --
14 because MDVA's operating facilities are part of the
15 State Veterans Home program for which the U.S.
16 Department of Veterans Affairs must certify a
17 facility and assure they continue to meet VA
18 standards, MDVA must adhere to VA regulations and
19 policies of the program. Therefore, some of the
20 proposed changes in 9050 are an attempt to continue
21 the compliance with the VA. One example is the
22 proposed change to 9050.0150, subpart 4, which adds
23 language that specifies the allowable number of days
24 per year a resident at MDVA facilities can take
25 therapeutic leave. The proposed change is needed

1 for MDVA to comply with the federal per diem rate as
2 provided under 38 CFR 51. Next slide.

3 The discharge process for MDVA has been
4 within the rules since the first draft by the
5 Minnesota Veterans Home Board. Although the current
6 rules have served the Veterans Homes to ensure the
7 safety and rights of the resident, updates to the
8 parts of 9050.0200 and 9050.0220 were needed to
9 identify additional process rights for the
10 residents, as well as to add safety protection to
11 the residents and staff. Within the proposed
12 amendment to 9050.0200, MDVA proposed a new type of
13 discharge to address the safety issue for the
14 resident, other residents, and staff when an
15 immediate threat is present. The addition of an
16 immediate discharge type within the proposed
17 amendments are consistent with other health care
18 facilities and in compliance with Minnesota Health
19 Care Bill of Rights under Minnesota Statute 144.651.
20 Next slide.

21 The proposed amendments to 9050.0220,
22 involuntary discharge process, provides additional
23 protection and oversight by MDVA when involuntary
24 discharge is recommended by the facility. One of
25 the proposed amendments by the agency requires

1 additional review of the involuntary discharge
2 recommendation by the facility by adding the
3 required review by a neutral administrator or
4 neutral designee, see 9050.0220, subpart 3. The
5 proposed language provides a separate and
6 independent review of the discharge by another
7 administrator or designee within MDVA not involved
8 in the initial recommendation of discharge. The
9 additional layer of review will assist with the
10 verification and validity of the recommendation of
11 involuntary discharge and afford the resident
12 additional procedural protection by presenting his
13 or her case to another neutral MDVA representative.

14 The proposed addition to subpart 7 to
15 Minnesota Rule 9050.0220 establishes the requirement
16 and process for an immediate discharge. An
17 involuntary discharge because of an immediate threat
18 has always been an option for the facility, see the
19 current Rule 9050.0220, subpart 3, item E, which is
20 proposed for repeal. However, the lack of
21 documented proper procedure and guidance has limited
22 the MDVA in its application by the agency when the
23 threat to the resident or other residents or staff
24 presents itself are immediate. The proposed
25 additional item to C -- to part 9050.0200, subpart 2

1 identifies when a resident can be immediately
2 discharged from a facility operated by MDVA. The
3 proposed addition to subpart 7 of 9050.0220
4 identifies the internal decision process by the
5 facility, notice requirements to the resident, the
6 procedure to be implemented to assure resident
7 rights, as well as the required appeal process.
8 This proposed amendment ensures the facility can
9 maintain safety within its operation as well as
10 provide due process to the rights of the resident
11 when an immediate threat is present. Next slide.

12 With an application of a health care
13 facility, the amount of obligations on the resident
14 is always on the forefront of any applicant or
15 current resident of the facility. The cost of care
16 used to determine the maintenance charge of a
17 resident is an annual process and is a vital part of
18 the operation of MDVA facilities. The proposed
19 amendments to 9050.0500 provides additional
20 clarification how the direct costs and indirect
21 costs are defined in compliance with the Center for
22 Medicaid and Medicare Services. The proposed
23 amendments to 9050.0550 assure MDVA and its Veterans
24 Homes maximizes the benefits and resources available
25 to its resident by clarifying what type of asset the

1 applicant or resident will be required to make
2 available when applying and residing at the
3 facility. The proposed amendments provide clarity
4 to the applicants and residents to what assets are
5 considered available when determining the
6 maintenance charge and how assets will be
7 calculated.

8 9050.0600 establishes the general
9 treatment of property when determining the
10 maintenance charge while being a resident at the
11 Veterans Home. One property in which the applicant
12 or the resident has actual interests and which is
13 actually available or can be made available is
14 considered according to this subpart. For the
15 purpose of clarity, the original drafters found it
16 necessary to define the nature and extent of
17 property interests which will be considered and to
18 do so in a manner consistent with the actual
19 practice as opposed to theory.

20 One proposed change that garnered a lot of
21 response was the addition to the actual evaluation
22 standard to a life estate. Under the current rule,
23 the life estate value was evaluated by law.
24 However, this direction in the current version
25 provided confusion to applicants as well as MDVA

1 staff when determining the value of that life estate
2 available property. Therefore, a change was needed
3 to provide direct evaluation standards. Next slide,
4 please.

5 There were two new parts added to 9050 in
6 the proposal. The new part 9050.1080 establishes
7 the applicability and eligibility requirements for
8 the adult day health care program. MDVA's current
9 operate -- currently operates an adult day program
10 at the Minnesota Veterans Home in Minneapolis. The
11 program was established and operated under authority
12 provided to the Commissioner under Minnesota Statute
13 196.05 in its general duties and Minnesota Statute
14 198.006, supplemental programs. The addition of
15 this new rule part is necessary to identify the
16 program and clearly identify the process
17 applicability and eligibility of the program.

18 Another new part proposed was to 9050 --
19 was 9050.1090, pharmaceutical services. Rather than
20 contracting with the pharmaceutical services, the
21 MDVA has created a centralized pharmacy program and
22 provides services to all Minnesota Veterans Homes.
23 Providing such a centralized pharmaceutical service
24 helps ensure that facility residents' medication and
25 needs are met in a timely and most cost-effective

1 manner. New part 9050.1090 establishes the
2 applicability and eligibility requirements for
3 operating this pharmaceutical program. Next slide.

4 The drafting of the proposed amendments
5 had been a long process for MDVA. Because the
6 mission of MDVA is to focus on Minnesota veterans
7 and their families and more than 10 percent of the
8 agency staff are veterans, the proposed amendments
9 went through many changes and updates to the
10 original draft to remain vigilant to its mission.
11 As no comments were received from external groups or
12 individuals during the request for comments back in
13 January 2016, the final version was the work of a
14 wide range of internal comments from each business
15 area within the health care division of MDVA.
16 However, after the dual notice was filed, MDVA
17 received comments from 47 different participants.
18 After reviewing the comments in detail, the MDVA has
19 determined that additional changes to the proposed
20 amendments are needed.

21 One of the first suggested changes or
22 revisions to Minnesota proposed rules is under
23 Minnesota Rule 9050.0040, subpart 26B, which
24 provides a deletion of proposed language or another
25 department employee who has delegated authority from

1 the Commissioner. So therefore, the definition --
2 the requested definition of Commissioner should be:
3 Commissioner means the Commissioner of the Minnesota
4 Department of Veterans Affairs. This suggested
5 proposal change will make the definition of
6 Commissioner consistent with the definition of
7 Commissioner under Chapter 198, Veterans Home,
8 specifically 198.001, Subdivision 5.

9 The second suggested revision is to
10 Minnesota Rule 9050.0050, subpart 3A, which will
11 remove the proposal language to section A that
12 requires a person to rent, own, maintain or occupy
13 residency, and replace it with: physically reside.
14 The intent of the change is to address the concerns
15 that MDVA's proposed amendment is excluding homeless
16 veterans from becoming residents at the Minnesota
17 Veterans Home. The original proposed language
18 intent was to identify the criteria to establish
19 Minnesota residence, not to exclude homeless
20 applicants to its facilities. With these suggested
21 changes, MDVA believes that accomplishes that
22 intent. Next slide.

23 The last suggested revision to the
24 proposed amendments to Minnesota Rule 9050 is
25 9050.0600, subpart 1. Although the intent of the

1 proposed rule was to identify values of the real
2 property that is determined available to the
3 applicant and resident, it was not the intent to
4 make the part more confusing and less applicable.
5 Therefore, the agency is suggesting removing the
6 reference to DHS manual and place it with the IRS
7 actuarial tables as it pertains to licensing, as it
8 was requested by the comments. Additionally, it
9 will remove the proposed language referencing
10 ownership and joint tenancy shall be treated as
11 ownership as tenants in common from the proposed
12 rule.

13 I want to thank the public for their
14 comments, and I can assure you the agency has
15 reviewed each and every comment it received in
16 preparation for this hearing. Next slide.

17 I want to specifically thank all employees
18 of MDVA that assisted in the drafting of these
19 proposed amendments to Minnesota Rule 9050. It has
20 been a long and detailed process to get to the
21 current proposed and suggested provisions. I also
22 would like to thank the public for their interest in
23 the proposed rule by their comments and their
24 attendance today. I would like also to remind that
25 all documents filed with OAH today are on the MDVA

1 website, which are in the comments page.

2 Judge Palmer-Denig, that concludes MDVA's
3 presentation. Thank you.

4 JUDGE PALMER-DENIG: Thank you very much,
5 Mr. Klitzke. If I could have, actually, two slides
6 forward, please.

7 So we are going to take -- this is a
8 natural, sort of, breaking point for us to take a
9 very short break before we get into the comments.
10 We did have some folks join after the very initial
11 period where we talked about how to make comments.
12 So I want to remind everybody, if you've just joined
13 or if you've been thinking about it and now you've
14 decided you really do want to make a comment, if you
15 are here through Teams by video, please put a note
16 in the chat box. That's the little bubble with text
17 in it icon on your Teams application. And please
18 note that, give your name and note that you would
19 like to speak. If you are here by phone and you
20 would like to speak, please press *5, and then email
21 Tydon, T-Y-D-O-N, dot, Samuels. That was T-Y-D-O-N,
22 dot, samuels@state.mn.us, to be placed into the
23 queue. And in that email, if you could provide your
24 first and last name and your phone number, that will
25 help us link you up with who you're appearing as

1 with your phone number here in the Teams
2 application.

3 So I'm going to take a brief break. Let's
4 come back at 10:20. In the meantime, if you have
5 just joined and haven't had a chance to put your
6 information in the chat, please do that. The agency
7 is compiling a queue, and then we'll be able to
8 start taking comments immediately after the break.
9 So we are on an intermission until 10:20. If I
10 could go back one slide, the intermission slide.
11 Thank you very much. So 10:20 we're going to
12 resume.

13 (A recess was taken from approximately 10:15-10:20 a.m.)

14 JUDGE PALMER-DENIG: We are back on the
15 record in the rulemaking hearing. We took a short
16 break to get situated for public comments. But at
17 this stage, we're going to go forward and the agency
18 has posted the first three individuals who got
19 themselves on the list to comment. The first of
20 those -- and I apologize in advance if I
21 mispronounce your name. I'm going to have you state
22 it and spell it, and then I'll get it right.

23 Cathryn Reher is the first person. Ms.
24 Reher, if I can have you unmute yourself, turn on
25 your camera. Hello. You are still muted. If I

1 could have you -- if you could unmute yourself. See
2 if you can. Perhaps -- can I have someone from the
3 agency unmute. If you look -- Ms. Reher, if you
4 look and it's the little microphone button that
5 might be at the top of your screen. Try on your
6 end, and if I can have the agency try to unmute you
7 as well. I think that would be great. And I will
8 look and see if there is anything I can do about
9 that.

10 MR. KLITZKE: Your Honor, I just want to
11 confirm. We took her off, so we were able to enable
12 her. I can see that we enabled her microphone so
13 that appears to be enabled, and her camera. I'm not
14 sure what the issue is on their end. I know we have
15 our IT person available. Maybe Kathryn can contact
16 the IT person and work through that issue. We can
17 move to the next. The IT contact is Sophanna York.
18 And Sophanna, if you could contact and send an IM to
19 Ms. Reher and see if you can work through the
20 issues. Maybe you guys can talk on the phone and we
21 can move on to the next.

22 JUDGE PALMER-DENIG: And I just want to
23 confirm. So Ms. Reher, on our end, Ms. Reher's
24 permissions are enabled so that she should be able
25 to unmute herself on her end. And I see you shaking

1 your head that you're not able to do that. I just
2 want to make sure that there is no function that we
3 need to do on our end to give you that authority
4 once we can figure it out. Is every -- so she
5 should be able to unmute herself? Because I don't
6 see a way for me to unmute her from the interface
7 that I have.

8 MR. KLITZKE: Yep. So we -- for each
9 person, we have to disable -- we have to enable the
10 mike and enable the camera. We've done that. And
11 we've walked through this before, so it appears it
12 works. So hopefully we can continue. I'll see if
13 Sophanna can help her out at all, and then maybe we
14 move on to Suzanne and see if that one works.

15 MS. PALMER-DENIG: All right. So Ms.
16 Reher, I'm going to have you work with IT to try to
17 get yourself unmuted. I did look, and on my end, it
18 looks like you are not muted. There's a button for
19 mute participant, that it's not engaged. And then
20 there's also a button for disable mike, which is not
21 engaged. And so it's not disabled as far as I can
22 tell. So if we can work on Ms. Reher's issue and
23 get her up and running, then in the meantime, I'm
24 going to go to Ms. Scheller, Suzanne Scheller, and
25 ask that you unmute yourself and turn on your

1 camera.

2 MS. SCHELLER: I believe both are unmuted
3 and turned on. Can you hear me?

4 MS. PALMER-DENIG: Yes, absolutely. Thank
5 you. So if you could go ahead and state your name,
6 spell your first and last, please.

7 MS. SCHELLER: Suzanne Scheller,
8 S-U-Z-A-N-N-E; last name, S-C-H-E-L-L-E-R.

9 MS. PALMER-DENIG: All right. Thank you
10 very much, and you can proceed about your comment.

11 MS. SCHELLER: Thank you very much. I
12 will note that I am the Chair of the Legislative
13 Committee for the Minnesota State Bar Association's
14 elder law section. I am not bringing my comments
15 specifically on their behalf but I did want to note
16 to Your Honor my involvement with that organization.

17 My comments, I will list some general
18 comments first and then some specific comments, Your
19 Honor. First, I would in general question whether
20 the SONAR presented is adequate for Your Honor to
21 decide that the proposed rules should be allowed.
22 In general, when I'm reading the comments and the
23 proposed rules, I believe it fails to identify the
24 problem that exists for many of the proposed
25 changes. It fails to identify how the solution

1 addresses that problem. And I'm also concerned that
2 it fails to assess the differences between the
3 proposed rule and existing federal regulations and
4 also state regulations on point, as well as
5 detailing the cost for veterans as well as the
6 various agencies involved. So I did want to note
7 that.

8 I should back up because I first wanted to
9 thank the MDVA for bringing the proposed rules. I'm
10 understanding from Mr. Klitzke's comments, there's a
11 lot of work that has gone into this. I know from
12 Ms. Reher and others that the Minnesota State Bar
13 Association was unaware, or at least the elder law
14 section, unaware for some time about them. And so
15 we are thankful for the opportunity for those who
16 have interest of sharing comments. But I did at
17 least want to thank MDVA for certain for all their
18 work.

19 We don't -- I don't know that 1989 rules,
20 anyone would dispute that they need some updating.
21 I think the question is whether or not there's
22 enough stakeholder input to get the best rules out
23 there for the veterans and those who are staff and
24 employees and directing those homes. So I do draw
25 Your Honor to the recent assisted living rule

1 adoption as instructive in this matter, Minnesota
2 Rules 4659. There was extensive stakeholder process
3 from providers and consumers related to the
4 development of those rules. And while no rule is
5 perfect, we certainly believe that the rules are
6 better for all of that effort that went through
7 prior to the presentation of the rules and during
8 the comment on the rules. And so it is maybe
9 instructive in this matter.

10 The particular comments, the specific
11 comments that I wish to make relate to the
12 foundation on which the rules, the proposed changes
13 are made. It is concerning that they are not
14 reflecting the medical model that the Veterans Homes
15 are. And notably, in Minnesota Rule -- in the
16 proposed Rule 9050.0030, it talks about the
17 requirement under which the Veterans Homes are
18 operated, and it does not include things like 42 CFR
19 483 or Minnesota Rules 4658, both state and federal
20 rules and laws on point to skilled nursing
21 facilities, which again, the MDVA proposed changes
22 does add in .0040, subpart 105A, the definition of a
23 skilled nursing facility as a facility licensed by
24 the Commissioner of Health, and it indicates the
25 rules for boarding care homes and generally Statute

1 Section 144A. But it leaves out Rules 4658 as well
2 as some particular sections of 144A that don't
3 comport with this definition they're making of
4 skilled nursing facility. So I first want to draw
5 Your Honor's attention to concern related to the
6 definition of skilled nursing facility, the laws
7 under which they're operating, and particularly how
8 they form the foundation of the medical model of
9 meeting the needs of veterans and nonresident
10 veterans. So that would be point number 1.

11 That is played out, then, in several
12 sections. So for instance, under .0050, subpart 2
13 and subpart 3, there is a definition of veterans and
14 nonveterans, the criteria for to reside in the
15 facilities. And in both of those subparts, it
16 states that the person must also provide current
17 evidence of medical need for admission and final
18 information as specified in parts 9050.0800 to
19 .0900. And when you look at those parts it's
20 referencing, those are about financial information
21 and authorization forms. Again, where is the
22 assessment, where is review of a criteria for
23 medical need. In our other long-term care world, we
24 may have assessment, we may have a MnCHOICES
25 assessment, we may have some type of determination

1 of medical need, which forms an important and
2 critical basis for the services that will be
3 provided in the medical facility, the long-term care
4 facility. But I'm not seeing the medical need --
5 evidence of medical need defined within the parts
6 specified in this subpart for the criteria admission
7 for veterans and nonveterans. So again, I believe
8 an important part is missing for how are we
9 establishing the medical need.

10 The next comment would be related to what
11 could potentially be a conflict of interest in
12 developing any of those determinations of care and
13 services, notably in .0040, subpart 107, there is a
14 definition of a staff physician. And then in
15 subpart 58B, there is a definition of
16 interdisciplinary staff. And both of those include
17 staff members employed and are on contract with
18 MDVA. The medical director is defined as one who is
19 employed by MDVA, but also this staff physician and
20 interdisciplinary staff. Again, it could be
21 concerning that those who are employed or under
22 contract by MDVA are setting the standards and basis
23 for admission, for changes in services, and for
24 discharge. So I just want to draw on the fact that
25 in our other long-term care models, we typically

1 have a greater separation of independent providers
2 giving information because this could be seen as a
3 conflict of interest in the other procedures here
4 under the rules.

5 Another comment would be that, similarly,
6 under the .0040, subpart 115, the utilization
7 review, I don't believe that's a new definition, but
8 I believe it also plays into a new definition of
9 subpart 115a, utilization review committee. And
10 that committee is defined as a committee appointed
11 by the administrator to conduct utilization reviews.
12 Again, under either of those definitions in subpart
13 115 and 115a, we have things pointing back to the
14 Commissioner, and appointed by the Commissioner,
15 this committee is not seeing the criteria for the
16 quality of services. For instance, the utilization
17 review is supposed to include an ongoing evaluation
18 for the quality of services. And by the
19 administrator appointing the committee without
20 criteria related to quality of services, that seems
21 to lack some definition and concerns of the scope
22 and nature of those who are being chosen for that
23 review committee. This utilization review
24 committee, by the way, goes forward in many aspects
25 of the rules as to them being decision-maker.

1 The next comment would be related to the
2 involuntary discharge procedures. Again, we see how
3 these base definitions come into play in other
4 pieces of the rules. So under 9050.0220, under
5 involuntary discharge procedures, there is a
6 recommendation for discharge by the utilization
7 review committee and/or facility financial staff or
8 facility social services staff. So typically when
9 we have a discharge, yes, it could be based on lack
10 of payment perhaps. But typically it's related to
11 the level of services needed and whether or not that
12 facility can meet that level of service need. But
13 it allows for a recommendation from this committee
14 who is appointed by the administrator without
15 qualification for nursing, et cetera. Now, you
16 would assume that part of that would be in that
17 utilization committee, but it's not stated in the
18 rules. And then secondly, it also allows the
19 facility social service staff alone, it appears, to
20 make a recommendation for discharge. And that's not
21 in any long-term care regulation that I'm aware of
22 that a social services individual, as skilled and
23 qualified as they are, would make a recommendation
24 for discharge based on medical need. That is a
25 concern.

1 Two other small points related to the idea
2 of the medical model here and whether or not our
3 rules are properly forming the basis would be under
4 subpart -- excuse me, definition .0040, subpart 21,
5 related to a care plan that includes the concept of
6 -- there is a change in that care plan and it
7 references back to assessment, but the language in
8 the care plan, what's to be the care plan, is
9 different than what is in the assessment language,
10 which I believe was unchanged. So I believe there's
11 some vagueness here between care part in subpart 21
12 and assessment, which I believe would be in subpart
13 10 of .0040. Those should be lined up. The
14 assessment forms the basis of the care plan.

15 And then also in new subpart 88b from
16 .0040, there is a definition of a patient
17 classification system. And again, it's fairly
18 vague. It's a basis of certain care needs, and it
19 doesn't -- you know, you may have a level in skilled
20 nursing facilities, a daily rate that's all based
21 on, again, assessments, medical need. But it
22 appears that it's fairly vague and it would be
23 unclear to the veteran or those serving the veteran
24 what exactly is going into that patient
25 classification system. And that, again, forms the

1 basis of costs and other needs being met.

2 I am just going to review here. I do
3 think, Your Honor, that is the comments I have at
4 this point in time. I just in general wanted to
5 discuss first the foundation of the rules to meet
6 the needs of veterans and nonresident veterans and
7 in their care needs that are presented. Thank you.

8 JUDGE PALMER-DENIG: Thank you very much.
9 And I will note for everyone who is participating
10 today, to the extent that you have more extensive
11 comments that you would like to share, please also
12 -- I want -- you can do it either/or oral comments
13 or written comments. Please also file written
14 comments addressing it, and if you would -- if you
15 have prepared remarks that you're making today and
16 you would like to file those as a comment, you can
17 certainly do that as well. So I encourage you to
18 comment as many ways as you can. And you can
19 comment in different ways, and I will consider all
20 of your comments no matter how they are received.
21 Excuse me. Seems that we may have dealt with our
22 technical issue. I don't know if it's "Raher" or
23 "Reyer," I heard from the last person. So possibly
24 I was getting it wrong.

25 MS. REHER: Hello. Are you able to hear

1 me now?

2 MS. PALMER-DENIG: I am. Thank you very
3 much, and thanks to the tech folks who worked on
4 that problem. I really appreciate it. Please go
5 ahead and state and spell your first and last names,
6 and we'll take your comment now.

7 MS. REHER: Yes, my name is Cathryn,
8 C-A-T-H-R-Y-N, and the last is pronounced Reher,
9 R-E-H-E-R.

10 JUDGE PALMER-DENIG: I did have a 50
11 percent chance to get it right, get it wrong, and
12 then I learn my lesson. All right, Ms. Reher, thank
13 you. You can proceed with your comment.

14 MS. REHER: Thank you. Just by way of
15 background, I am an elder law attorney, and I've
16 been working in this area for over 30 years. And I
17 am a faculty and presenter on a regular basis for
18 the elder law section in areas of veterans'
19 benefits, the Minnesota Veteran Homes, and Medicaid.
20 So I'm very familiar with the interplay and the
21 impact of these rules. And it's difficult when
22 you're only seeing one piece of the rule at a time
23 as to what the implications are for other pieces.

24 I appreciate the opportunity to be able to
25 speak today. Just actually turning on my timer so

1 I'll know when I should move on.

2 I just want to say that I was involved
3 with the 2003 changes and worked extensively with
4 the Board on those changes. The character of that
5 process was that the elder law section was
6 approached. We spent several months reading the
7 proposed rules. We did markup. We had
8 conversations. We were explaining why from an end
9 of working with clients of why certain rules work
10 and not work. And it was a very communal process
11 and it was very respectful. And that was the last
12 time that the Board was involved with the rule
13 changes.

14 And I have a couple comments in that
15 regard because I think they are pertinent to today's
16 hearing. One of them is that then-serving staff
17 counsel Marcy Harris replied to me when I asked why
18 are these rules so much more favorable than
19 Medicaid? And she said it was because they wanted
20 to afford veterans and their spouses with, you know,
21 a similar financial status when they went into the
22 Veterans Homes as they had before. And the reason
23 for that was because of their service to the
24 country. And so we're not looking at these proposed
25 rule changes without looking at the mission and the

1 values behind why we're serving veterans. And I
2 feel that has been partly lost and the way we're
3 going to see that come out is through the testimony
4 of other elder law attorneys that will be presenting
5 on various portions of the rules. And I just wanted
6 to introduce that subject, but unfortunately, was
7 not able to do that before Suzy Scheller spoke. But
8 I want to highlight that, that I think the
9 reasonableness and necessity of the proposed rule
10 changes has to be evaluated in light of our mission
11 of how we want to serve veterans and how we want
12 them to make -- how we want them to be supported
13 when they have long-term support needs.

14 Another thing I want to follow up then is
15 the difference in character of the involvement of
16 the elder law section from the 2003 to the current
17 proposed rule changes. And many years ago, I was
18 contacted by attorney Julian Zweber who was with the
19 elder law section because Mr. Klitzke had contacted
20 him about how the elder law section might want to be
21 involved with these new set of proposed rule
22 changes. And Dale was referred over to both Mary
23 Frances Price, who is going to be speaking in a
24 little bit, as well as myself, and we reached out to
25 him and we actually talked on the phone at different

1 times about our interest in having involvement in
2 this process, and we never heard from him again.
3 When I was looking for information on the three new
4 homes that are going to be opening and went onto the
5 MDVA website, I decided I would just see if there
6 was anything about proposed rule changes out there
7 knowing that this discussion had happened several
8 years ago and saw that 9055 had had proposed -- or
9 had had rule changes. And I asked my law clerk to
10 investigate whether anything had been published.
11 There was nothing coming out. And at that point, I
12 reached out to the MDVA contact and said, Is there
13 anything happening in this area? And it was at that
14 point that we ended up hearing from Mr. Klitzke and
15 told us that the rules were going to be published
16 the following month and that we would receive them
17 at that time. So I was bit surprised when I ended
18 up reading in the SONAR when it was published and
19 available, and that is on page 7 of the SONAR under
20 the public participation and stakeholder involvement
21 in paragraph three, that it said that the MDVA
22 conducted outreach activities while developing these
23 rule amendments. And it said that the MDVA has
24 communicated with specific groups about amending the
25 rules and finishes with: As requested, the MDVA

1 will ensure that these groups receive the draft
2 rules when they become available. So when I looked
3 at what the date was on the proposed rules, it was
4 April of 2021. And so was the SONAR. But the first
5 time that we saw them was when they were published.
6 And so I feel --- I feel I'm concerned about the
7 integrity of the entire proposed rule process and
8 the fact that there should have been opportunities
9 well in advance of coming up with final published
10 rules to have input from the stakeholders well
11 beyond just the elder law section as the necessary
12 updates and changes were made for consideration by
13 the public at large. And so that's an additional
14 comment that I would like to just say that the
15 reasonableness and the necessity of these rules is
16 called into question by the lack of input from the
17 stakeholders.

18 In the remaining -- I guess that my time
19 is up. And I was going to try to comment on the
20 real property provisions, as the person who was
21 supposed to speak was not able to present today. I
22 will go back into the queue on that unless you'd
23 like me to just complete those comments as well.

24 JUDGE PALMER-DENIG: Ms. Reher, there are
25 not so many people speaking that I'm terribly

1 concerned about time. I'd like to use your time
2 effectively as well, so why don't you go ahead and
3 make those comments now.

4 MS. REHER: Sure. I appreciate the MDVA
5 hearing our comments initially with the objections
6 regarding the real property. And I'm going to try
7 to modify my comments based upon that to some extent
8 but I would like to highlight some of the ongoing
9 concerns that are there.

10 Under the existing rule 9050.0600, subpart
11 1a, the law currently provides for treatment of a
12 nonhomestead life estate according to law. It's
13 that simple. And the veteran has the ability to
14 submit evidence that the children don't want to sell
15 the property and obtain two licensed professionals
16 that selling the life estate would not be
17 successful, and then the interests is not salable
18 and it's excluded. It was a simple rule. It worked
19 really well. We all knew how to use it. And it
20 enabled the law to be used to assess the specific
21 real property matter before it.

22 And what's happening is that under the
23 proposed rule change, you have no way to prove
24 nonsalability. And that's under 9050.0600, subpart
25 2, paragraph E. And it's lines 52.10 through 24 of

1 the proposed rule changes. So there is no way to
2 show that property is not salable. And anybody that
3 works in the area of real property knows that there
4 are times when property is not salable. But life
5 estate has to be perpetually listed for sale. So
6 there's no mechanism by which to show that there is
7 no value in doing that, that somebody, let's say,
8 who is 90 years old and has a life estate and the
9 remainder holders are refusing to sell, that
10 interest isn't going to be salable because nobody's
11 going to want to buy it. And so we're put into a
12 position of having to perpetually list when it's
13 really not going to serve any purpose. And again,
14 these are all under the same subpart that I just
15 referenced.

16 In order to exclude the life estate, it
17 has to be listed for sale for the current property
18 tax evaluation. And that's at line 53.4. And we
19 have the same issue here, that valuation of property
20 can vary wildly from what's on the assessed value if
21 you have toxic waste or if you have a septic system
22 that's not working or the property is in disrepair,
23 for whatever reason that might be. And we have
24 almost an almost irrebuttable presumption here that
25 we're supposed to use one value that's based upon a

1 tax statement without other evidence being
2 submittable.

3 I appreciate that the life estate would
4 now be determined under the Internal Revenue Code.
5 The problem with the Medicaid provision on valuation
6 was it's significantly higher and was a fixed
7 percentage that hadn't changed in years, whereas the
8 Internal Revenue Code floats on the market.

9 And one of the things that I want to say
10 about that, though, is that even though we've now
11 chosen the IRC as the mechanism for this, that there
12 are many different ways to value a life estate that
13 may have been valued by the parties to the
14 agreement. And so there is no room for contractual
15 changes that might be there or have been but might
16 undergird how the life estate remainderances were
17 set up. So you can value a life estate by what a
18 willing buyer and a willing seller are willing to
19 pay at an arm's length transaction. And that
20 actually is the best representation of fair market
21 value, not some arbitrary amount. The life estate
22 remainder holders can contract for what that value
23 is and have had that set up long before they ever
24 entered the Veterans Home. Of course, we have the
25 Internal Revenue Code as an option, and it's

1 limiting and it seems to be arbitrary and capricious
2 to chose one mechanism that's going to apply to
3 everybody when real estate transactions are so fact
4 specific and where the existing rule was working
5 remarkably well for a very long time to enable us to
6 address these unusual life estate interests that are
7 there.

8 I'm happy to hear that the joint tenancy
9 provisions have been removed, and that's very
10 helpful and we're appreciative of that change.

11 The other thing that I just wanted to
12 highlight, the last point, is that where there is a
13 failure to attempt to meet all of these new
14 requirements, the current property tax valuation
15 must be used to determine the resident's maintenance
16 charge or the spouse allowance. So you have a real
17 property interest that's not liquid. And if you
18 can't pay and you're going to be charged the maximum
19 charge because you haven't complied with these, then
20 the next thing that's going to happen is you're
21 going to get discharged.

22 So I think that the overall feedback is
23 that these types of issues, because they have so
24 many pieces to them, really needed to be sussed out
25 more fully in all the different sections that are

1 impacted in the rules to come up with a system that
2 is workable and manageable for the veteran who's
3 looking at admission. And so we would like the
4 current proposed rules not to be approved as
5 drafted.

6 Thank you for your additional time.

7 JUDGE PALMER-DENIG: Thank you very much.
8 Our next speaker on the list is -- I'm pulling up
9 the chat function. You probably know who you are
10 because you've been watching. Maisie Blaine, if you
11 could unmute yourself and turn on your camera,
12 please.

13 MS. BLAINE: All right. Can you hear me?

14 JUDGE PALMER-DENIG: Hello. Please state
15 and spell your first and last names for the record.

16 MS. BLAINE: You bet. Good morning, Your
17 Honor. My name is Maisie, M-A-I-S-I-E; Blaine,
18 B-L-A-I-N-E. And I'm here today representing the
19 Office of Ombudsman for Long-Term Care. I'd like to
20 lead by thanking the OAH for the opportunity to
21 speak today.

22 The Office of Ombudsman for Long-Term Care
23 is a service of the Minnesota Board on Aging,
24 authorized by the federal Older Americans Act. We
25 have a vested interest in these proposed rules as we

1 work to enhance the quality of life and services for
2 more than 100,000 individuals receiving long-term
3 care service and supports in Minnesota, including
4 those residing in or seeking services in the five
5 Minnesota State Veterans Homes.

6 Representatives from the Office of
7 Ombudsman have a unique perspective as they're out
8 in facilities on-site with residents advocating
9 alongside them to enhance their quality of life and
10 combat substandard care and rights violations that
11 unfortunately occur all too often in these settings.
12 Our role is to always keep the resident voice at the
13 center of all that we could. This includes direct
14 advocacy, education, and of course, systems
15 advocacy, which is why we're here today.

16 We're grateful that the veterans of
17 Minnesota have the five Minnesota Veterans Homes to
18 consider as placement options when needing long-term
19 care services. And we understand the importance of
20 the rules to govern operations at these facilities
21 and the weight that they carry. So today we'll
22 highlight some of the elements from our written
23 comments dated November 19. We ask for our written
24 comments to be adopted in their entirety, but we'll
25 call particular attention to a couple of items

1 today. I did take out a couple of my 9050 rule
2 citation references in the interest of time, but I
3 plugged a few of those back in.

4 So first, we would echo the comments of
5 Ms. Scheller outlining the lack of detail in the
6 SONAR, as well as noncompliance with Minnesota
7 Administrative Rules 4658 for skilled nursing
8 facilities and 4655 for board and care homes.

9 We -- we're going to propose the --
10 oppose, excuse me, the proposed admission criteria
11 citing that a person own, maintain, or occupy a
12 residence for 90 days in order to be considered for
13 admission. As MDVA acknowledged this morning, we
14 believe that this would exclude homeless veterans
15 and also potentially impact anyone transitioning to
16 Minnesota from another state. And while we do
17 appreciate the effort this morning stated by Mr.
18 Klitzke to remedy this with a modification, we still
19 believe that this would not be sufficient. We know
20 veterans as a population are highly mobile, and if
21 someone needs long-term care, lives in another state
22 or wishes to get to Minnesota and be considered for
23 eligibility, this proposed modification would still
24 exclude them. Think about a snow bird with lifelong
25 ties to Minnesota or an aging person wishing to get

1 closer to their family, and they'd be forced to come
2 here, potentially interrupt their current long-term
3 services and supports and establish residency for 90
4 days to even be considered.

5 We also oppose any language where the
6 proposed 9050 changes or the existing language is in
7 direct violation with state and federal law. In
8 addition to the protections that exist under
9 Minnesota Statute 144A, as now federally-certified
10 CMS sites, the Minnesota Veterans Homes are subject
11 to federal conditions of participation, including 42
12 CFR 483 and 38 CFR 51. We cited numerous examples
13 in our written comments of where the proposed rules
14 are not in compliance with those regulations, but we
15 will share a few examples this morning.

16 First, the MDVA proposes in 9050.0070,
17 subpart 3, in item C, and then also in 9050.0070,
18 subpart 4, item B, that if a resident has not
19 specified a provider, the provider must be a
20 Minnesota Veterans Home staff physician. This
21 language is in direct violation of 42 CFR 483.10 (d)
22 and 38 CFR 51.70, which ensures residents a choice
23 of physician.

24 Another example is in 9050.1070, subpart
25 11, where the MDVA offers a method for establishing

1 visiting hours, which is actually prohibited under
2 state law for skilled nursing facilities. So we
3 would propose the MDVA either extend the important
4 protections afforded to skilled nursing facility
5 residents to those living in the domiciliary, or if
6 they choose not to do that, it would be necessary in
7 the rule to separate out the rights and protections
8 afforded to each category of resident based on which
9 part of the building they reside in, as is
10 applicable and differentiated under federal and
11 state law.

12 So federal requirements also require that
13 dignity, choice, and person-centered care are at the
14 core of service delivery in these settings. There
15 are numerous sections of the proposed rules that
16 propose an overly-paternalistic approach to
17 assessment or service delivery that is not
18 consistent with supporting person-centered planning,
19 self-directed care, and most importantly, resident
20 rights afforded under the rule. Examples of these
21 include: Requiring those with mental illness to
22 undergo additional scrutiny for admission, which is
23 outlined in 9050.0070, subpart 3, both items D and
24 E. In addition, 9050.0070, subpart 4, item D,
25 requires a demonstrated history of cooperation and

1 care and treat to even be considered for admission,
2 which includes the potential waiving of people's
3 rights in order to gain entry in the building. In
4 9050.1030, subpart 1A, section B, requiring all care
5 and treatment plans by an external or non-MDVA
6 provider to be approved by the MDVA medical director
7 is an egregious overreach of the role as it's
8 defined in statute and also takes away any
9 resident's right to be able to coordinate care with
10 their own physician. We proposed amendments in our
11 written comments that would enable the MDVA to have
12 oversight responsibility without violating resident
13 rights, and we would ask the OAH to consider that.

14 In 9050.1070, subpart 5, requiring a
15 signature to acknowledge receipt of a resident
16 handbook is absolutely unnecessary and punitive and
17 does not need to be enshrined in state law.

18 In 9050.1070, subpart 32, requiring a
19 signature to leave campus also is punitive, violates
20 residents' rights, and is not reasonable or
21 necessary to be enshrined in state law. There are
22 provisions that already exist for the MDVA to be
23 able to safely know who is in and out of their
24 building. And certainly, we can appreciate policies
25 and procedures in place, but having this enshrined

1 in law is not necessary or reasonable.

2 And I did take some citations out here in
3 the interest of time, but threatening discharge for
4 failure to report income changes accurately and
5 timely as a reasonable stand-alone reason for
6 discharge is not appropriate.

7 And then, you know, additionally, we would
8 argue that the restrictive policies that exist for
9 both on-site smoking and the work therapy program
10 could be remedied with the proposed language we
11 suggested in our comments, which is both reasonable
12 and necessary to ensure resident rights are
13 protected.

14 Finally, discharge complaints are
15 consistently the most frequent complaint handled by
16 the Ombudsman Office and representatives year after
17 year in Minnesota. Discharges, as you know, are
18 immensely disruptive and cause great stress for
19 residents and their families as they consider how
20 and where they might move. They expose residents to
21 the risk of transfer trauma and so much more. This
22 is also one of the areas that we're most concerned
23 with as it relates to inconsistencies between the
24 proposed rules and federal and state statute.

25 So to address Mr. Klitzke's comments

1 today, first, an immediate discharge is not a type
2 of discharge recognized either in state or federal
3 law, but rather, is a timeline for discharge. And
4 under Minnesota Statute 144A and both 42 CFR 43 and
5 38 CFR 51, as well as the accompanying rules, the
6 facility can already expedite a discharge to less
7 than 30 days in situations where health or safety of
8 residents is at risk. And they've done so, because
9 we've handled case work in this regard. This is in
10 addition to, you know, the laws that already allow
11 this to happen. It is not reasonable or necessary
12 to add to this rule. It is a process that's already
13 afforded under state and federal law. So we would
14 oppose that and, again, have proposed remedies to
15 that in our written comments.

16 In 9050.0200, subpart 2, sections B and C,
17 there are numerous inconsistencies with state and
18 federal law that we have outlined in our comments.
19 In addition, there is no delineating or separation
20 of rights for residents based on the setting in
21 which they reside. And the domiciliary and the
22 skilled nursing facility are separate entities and
23 need to be treated as such under the law. So we
24 would, again, ask that either the rights afforded to
25 skilled nursing facility residents be extended to

1 the domiciliary residents or there is a
2 differentiation in 9050 about what that looks like.

3 An inaccurate definition of voluntary
4 discharge is applied in multiple sections of the
5 proposed rules, namely 9050.0210, subpart 1. We did
6 propose a remedy to this in our written comments.
7 And then, again, no distinction in several sections
8 is offered by MDVA between discharge rights for
9 those in the skilled nursing and domiciliary,
10 despite nursing facility residents having additional
11 rights under the law.

12 So the MDVA also wishes to add language in
13 9050.0100, subpart 1, citing that a resident
14 refusing to transfer to another facility or setting
15 upon the recommendation of their provider or
16 utilization committee could result in discharge.
17 This is not a legal reason for discharge supported
18 under the law, and it violates resident rights to
19 decline care or treatment. So we adamantly oppose
20 that and, again, have proposed language to remedy
21 that in our comments.

22 There are proposed repeals of sections in
23 the rules that we cited, discharge important federal
24 protections for residents. They take them out of
25 the written rule, and we would oppose that.

1 And then several proposed amendments do
2 not contain accurate language related to required
3 contents of the discharge notice that complies with
4 state and federal law, which we've also cited in
5 multiple sections of our written comments.

6 Lastly, I would just say, we have heard
7 repeatedly from residents and family members that
8 they had no knowledge of these proposed rule
9 amendments. We would also echo the comments of Ms.
10 Reher that we were listed as an involved stakeholder
11 in the SONAR but were not involved in the drafting
12 of these comments -- excuse me, rules, nor invited,
13 to our knowledge, to give any input. In fact,
14 despite our regional representatives repeatedly
15 asking about the proposed rules and what was
16 contained in them beyond the little bit that's found
17 in the public register, we were not made aware of
18 any of the proposed changes until the posting of the
19 rules. Mr. Klitzke stated that no comments were
20 received in 2016. And this is no surprise since in
21 2016, as in 2021 and the time in between, there was
22 little transparency about notifying anyone about
23 these rules through any of the means that MDVA has
24 at their disposal. They send Friday newsletters;
25 they send monthly updates. And none of those

1 contained, to my knowledge, to our knowledge, any
2 reference to the rules, where to find them on the
3 website. We believe that the MDVA's failure to
4 notify stakeholders in their publications and other
5 means as outlined in our comments is in
6 noncompliance with Minnesota Statute 1414, which
7 states: Each agency shall make reasonable efforts
8 to notify persons or classes of persons who might be
9 significantly affected by the rule being proposed by
10 giving notice of its intention in newsletters,
11 newspapers or other publications, or through other
12 means of communication. We have not seen any
13 evidence that this occurred either prior to
14 publication of the rule, during the comment period,
15 or in the time since the comment period closed and
16 the hearing was scheduled.

17 We note a lack of significant stakeholder
18 input as it relates to these rules, clear violations
19 of resident rights, and a lack of adherence to
20 federal and state law in the proposed rules. We
21 hope the MDVA is listening carefully to the
22 stakeholder input. We'd be happy to partner with
23 them to bring these rules into compliance and ensure
24 that residents and their families are afforded the
25 autonomy, dignity, and choice they deserve in

1 receiving care. If the OAH moves forward with the
2 adoption of these rules, we ask that they ensure
3 MDVA makes the recommended changes that we outlined
4 to protect resident rights, maintain compliance with
5 federal and state laws, and either individually as
6 an agency or through the convening of a stakeholder
7 work group, we would assist in this process.

8 We thank you again for the opportunity to
9 speak today.

10 JUDGE PALMER-DENIG: Sorry, I was muted.
11 I want to check with the court reporter and just
12 make sure that there are no questions. There were a
13 lot of different numbers and rules in your
14 presentation, Ms. Blaine. I want to make sure, Kat,
15 did you get everything that you needed?

16 THE COURT REPORTER: Yep, I did; thank
17 you.

18 JUDGE PALMER-DENIG: Perfect. Thank you
19 very much, Ms. Blaine. Our next speaker is Francis
20 White. If you could unmute yourself and turn on
21 your camera, please.

22 MR. WHITE: Good morning. Thank you,
23 Your Honor.

24 JUDGE PALMER-DENIG: Very good. Please
25 state your name, spell your first and last name.

1 MR. WHITE: Yes. F-R-A-N-C-I-S,
2 W-H-I-T-E. And I must say that Ms. Blaine is going
3 to be a hard act to follow, but I will do my best.

4 JUDGE PALMER-DENIG: All right. You can
5 proceed with your comment.

6 MR. WHITE: Thank you, Your Honor. I only
7 want to speak to a couple of things because Ms.
8 Blaine handled a lot of the things that I intended
9 to address. But I wanted to speak to a couple of
10 things specifically.

11 Specifically, I want to speak to
12 9050.0210, subpart 7, which is immediate voluntary
13 discharge. And I will quote the language because I
14 have a tendency to do that. When a resident's
15 behavior poses an immediate threat to the health and
16 safety of the resident, other residents, or staff of
17 a facility operated by the Commissioner as
18 determined by the utilization review committee,
19 according to part 9050.0070, subpart 3 or 4, and
20 confirmed by the facility administrator, a resident
21 can be immediately and involuntarily discharged from
22 the facility. I'm very concerned that the term
23 "immediate threat" is void for vagueness,
24 particularly because the rules that it cites to,
25 specifically 9050.0070, subpart 3 and 4, are rules

1 that regard admission to facilities, not rules that
2 involve discharge from facilities.

3 One portion of that rule, in particular in
4 subpart 3, section F, I'm concerned with language
5 that's in there: Residents must be advised that
6 exercising their right to refuse care may lead to
7 their discharge if the facility is unable to care
8 for them. Now, that may run counter to statutory
9 law. MN Stat 12.39, subdivision 1, allows Minnesota
10 residents to refuse treatment specifically. And as
11 an entity of the State, this particular statute
12 would be binding on MDVA and would not allow them to
13 discharge somebody for failing to comply with
14 something which they are statutorily allowed to do
15 so.

16 Furthermore, in section -- or subpart 4,
17 section D, it says: A person must demonstrate a
18 history of cooperation with an individual care or
19 treatment plan prescribed by the attending
20 physician. I happen to know for a fact that care
21 plans are generally drafted by nurses. And care
22 plans may actually include, because they don't
23 always take into account an individual's desires,
24 may include a treatment that the veteran is
25 statutorily committed to refuse to state.

1 I myself am a VA-accredited attorney,
2 which means I am permitted by the Office of General
3 Counsel for the U.S. Department of Veteran Affairs
4 to represent veterans in both their appeals and in
5 their request for benefits. And another part of
6 this language that concerns me is in 9050.0760 --
7 excuse me, .0770, where it states that: A legal
8 representative must apply for the maximum of every
9 benefit which the applicant or resident may be
10 eligible that will increase the income or eligible
11 benefit of the applicant or resident.

12 I'm going to tell you a story. It's
13 anecdotal, and I'm not going to name any names. I
14 had a veteran client who I represented in an appeal
15 whose unlicensed county veteran service officer
16 decided that he wanted to increase his benefits. He
17 was at 60 percent disability and applied for an
18 increase. Because the absurdity of the increase he
19 asked for, within two years, that veteran's benefits
20 were reduced to 20 percent. I was able to solve the
21 problem and I got the veteran up to 100 percent.

22 But the problem with language like this
23 is, sometimes, oftentimes when you attempt to
24 increase a benefit, you open up the benefit for
25 review by the Department of Veteran Affairs, the

1 U.S. Department of Veterans Affairs. And then they
2 look at not just what you're asking for but they
3 look at other things. Once a veteran has received
4 benefits for 10 years, the benefit -- the service
5 connection of that benefit cannot be taken away.
6 But the amount of the benefit can. When the veteran
7 has received a benefit for 20 years, absent fraud,
8 that benefit and the benefit amount is permanent.
9 One must be very careful when one decides that they
10 want to open up a veteran benefit decision because
11 there is no telling what the U.S. Department of
12 Veterans Affairs is going to do with that. My
13 veteran who is deaf suddenly had improved hearing,
14 and went from 60 percent to 20 percent because
15 somebody did not know what they were doing. And if
16 somebody in compliance with this rule tries to do
17 the same thing, they could end up actually creating
18 a severe detriment to the veteran.

19 Furthermore, I am concerned that this
20 language interferes with an attorney's
21 representation and intrudes upon the bar by
22 requiring a legal representative to take a certain
23 action. You are in and of yourself perhaps prac --
24 engaged in the unlicensed practice of law. And it's
25 not structured to go to what the veteran, the

1 client, actually needs. So I'm concerned about
2 that.

3 I also would like to make a point that I
4 am not here representing the mil-veteran section of
5 the MSBA. I don't know if anybody here is
6 representing it. I am a member, but I do not speak
7 for the mil-vet section. Thank you, ma'am.

8 JUDGE PALMER-DENIG: Thank you very much.
9 Our next speaker is Mary Frances Price. If I can
10 have you unmute yourself and turn your camera on,
11 please.

12 MS. PRICE: Thank you, Your Honor. Okay.
13 I think we're there. Can you hear me all right?

14 JUDGE PALMER-DENIG: I can hear you and
15 see you. Thank you very much. All right. Please
16 state and spell your first and last name, or in your
17 case, all three names.

18 MS. PRICE: First name, Mary Frances,
19 M-A-R-Y, space, capital F, R-A-N-C-E-S, and last
20 name Price, P-R-I-C-E.

21 Thank you for the opportunity to be here
22 today. Just a little about my background. I've
23 been a VA-accredited attorney since 2008. I have
24 authored the chapter numerous years for Minnesota
25 continuing legal education on veteran benefits. I

1 have served hundreds of families in the state of
2 Minnesota and also been a speaker on a national and
3 state level helping to educate other attorneys that
4 want to practice in the area. I just want to speak
5 to two main points.

6 One, I'm pleased to hear that MDVA has
7 reconsidered its language at 9050.0050 regarding
8 persons eligible for admission.

9 A couple of other people have already
10 touched on this but I do want to highlight, Your
11 Honor, at 9050, particularly in the proposed rules
12 at line 14.16, the imposition of a durational
13 residency requirement. Similar issues have been
14 evaluated by the Minnesota Supreme Court, also the
15 United States Supreme Court, and have been found to
16 be unconstitutional. You know, I believe this is an
17 unconstitutional residency requirement imposing the
18 requirement of having to be present in Minnesota for
19 90 days. There is well-settled law that finds this
20 is a violation of the Equal Protection Clause of the
21 United States Constitution, most specifically the
22 right to be treated like other citizens as it
23 relates to interstate travel. A reduction of
24 benefits, or in this case a prohibition of even
25 putting yourself on the wait list for access to the

1 Minnesota Veterans Home 18 to 30 months later by
2 requiring somebody to be present in our state for at
3 least 90 days, I think arguably is unconstitutional,
4 and there is well-settled law to support this. I
5 would draw Your Honor's attention to Schatz,
6 S-C-H-A-T-Z, versus Interfaith Care Center, a
7 Minnesota Supreme Court decision from 2012 that can
8 be found at 811 N.W. 2d 643, supporting this
9 position that this is an unconstitutional imposition
10 of a durational requirement as it relates to just
11 simply going on the wait list for one of our
12 Minnesota Veteran Homes.

13 The second part of the proposed rules I'd
14 like to speak to today can be found at 9050.0750 as
15 it relates to a deduction for voluntary support of a
16 dependent spouse or household. There are only a
17 handful of attorneys in this state that practice in
18 the area of nonservice-connected pensions. Cathryn
19 Reher being one that I can say with certainty that
20 would support this. But what we're really talking
21 about here is a -- if you look at the law and
22 compare and contrast it with Medicaid eligibility,
23 we are taking a situation where we're asking a
24 spouse to choose between their right to marital
25 income and their ability to retain savings,

1 retirement savings.

2 So I want to put forth an example. If a
3 veteran and a wife have a home and 300,000 of liquid
4 assets and they have shared marital income, this
5 rule would require a spouse to reduce assets to a
6 level that is less than what the Medicaid program in
7 Minnesota provides or, you know, not receive spousal
8 income.

9 So specifically, I'm looking at the
10 proposed rules starting at line 60.9. First,
11 there's a technical ambiguity here. This, the
12 proposed language refers to a medical rating known
13 as Aid and Attendance. I believe the Department was
14 referring to the nonservice-connected pension when
15 it wrote these rules. But still, that is a lack of
16 clarity that is concerning. The eligibility rules
17 for the nonservice-connected pension underwent broad
18 and sweeping changes effective October of 2018. At
19 that time, there was an imposition of an asset
20 threshold at the federal level for the
21 nonservice-connected pension. That threshold is
22 currently \$138,489, meaning that a veteran or the
23 surviving spouse of a wartime veteran who is
24 applying for the nonservice-connected pension can
25 have no more than \$138,489 of combined income for VA

1 purposes and available assets. This is not just
2 available assets. So what that calculation does for
3 the nonservice-connected pension is it looks at
4 income for VA purposes, which is gross income less
5 qualifying medical expenses, and adds that to a
6 veteran and a veteran spouse's available asset pool.
7 So it's not really 138,489 in available assets; it's
8 something even less. Our current numbers in
9 Minnesota for Medicaid eligibility for a spouse and
10 a veteran -- and veteran and a spouse would be
11 140,400. So this is really a punitive rule.

12 I would suggest that many times, the
13 majority of beds at the Minneapolis VA Medical
14 Center are for males. So it is very common to see a
15 situation where the male veteran wants to become a
16 resident. He may have a spouse whose income is far
17 less. I see numbers as low as 5- or \$600 a month of
18 available Social Security for the spouse who is
19 going to continue to live in the community. This
20 would force a spouse to choose between retirement
21 savings and spousal income. And sadly, it really
22 encourages divorce. In fact, in many cases, after
23 assessing this rule, it would be more advantageous
24 for a veteran and their spouse to divorce and divide
25 the property. That particular community spouse

1 would come out further ahead as it relates to the
2 availability of marital income and, also, the
3 allocation of retirement savings assets. I just
4 think this particular rule is very concerning. It
5 is against the intention and spirit that -- since I
6 came into the practice in 2005, I had always
7 understood that the Veterans Home rules were
8 distinguished from Medicaid partly on the basis of
9 this being an earned benefit. And this certainly
10 would make it so punitive and not a benefit at all.
11 In fact, in most cases, getting a divorce or going
12 into a Medicaid facility would produce a far better
13 outcome. And I just think it's a really devastating
14 rule that was not well -- well researched. It's
15 ambiguous; it is punitive.

16 I want thank you again for the opportunity
17 to be heard today and will follow-up with a summary
18 in the written form as well. Thank you.

19 JUDGE PALMER-DENIG: Thank you very much.
20 So I want to note, our next speaker -- I'm going to
21 tell who the next two speakers are so that we can
22 get folks ready to go. The next speak is Brian
23 Lewis. If you can unmute yourself and turn on your
24 video. I want to note, the speaker after that is
25 coming from a phone number. The number that we

1 have, the last four digits are 5555. I understand
2 that an email has not been received with the name of
3 that person. So if your phone number ends in 5555,
4 you are going to be the number two speaker after Mr.
5 Lewis, and we will work with you to get you on. If
6 you want to send an email to Tydon, T-Y-D-O-N,
7 Samuels, S-A-M-U-E-L-S, @state.mn.us, we can get
8 your name connected with that telephone number as
9 well.

10 In the meantime, I'm going to turn to Mr.
11 Lewis. Please state your name, spell your first and
12 last.

13 MR. LEWIS: Good morning, Your Honor.
14 Brian Lewis, B-R-I-A-N, L-E-W-I-S. And thank you
15 for giving us the opportunity to make comment today.

16 I do want to state at the outset that I am
17 a VA-accredited attorney. I do a lot of work for
18 out-of-state veterans regarding claims. And I want
19 to briefly touch on a point that Ms. Blaine made
20 regarding the fact that this rule would encourage
21 divorce. While it would -- while it does have the
22 potential to do that, the only ground in this state
23 for divorce is an irretrievable breakdown of the
24 marriage relationship. So the rule that Ms. Blaine
25 was concerned about, if enacted, could potentially

1 lead to some fraudulent divorce because the divorce
2 would not have the irretrievable breakdown. It
3 would simply be for financial sake.

4 But moving on from that, I want to touch
5 back to the immediate and voluntary discharge. It's
6 subpart 7. The Department never defines what poses
7 an immediate threat to the health or safety of the
8 resident, other residents, or staff of a facility
9 operated by the Commissioner. That needs to be
10 clearly defined in order not to have that section be
11 considered void for vagueness. When a person has an
12 interest in being in these homes, having gone
13 through the admission process, not having a clearly
14 defined term as to what constitutes void for -- what
15 constitutes immediate and -- immediate threat to the
16 health or safety doesn't put the resident adequately
17 on notice as to what can constitute the right to
18 take that away.

19 The -- another consideration is that the
20 Department wants to have the reconsideration
21 hearings conducted by telephone. I've done these
22 hearings. And the last thing that could really
23 happen would be to take time to get all the evidence
24 exchanged to do these hearings and to try to do it
25 over telephone where nobody is seeing -- where

1 nobody is seeing each other, where nobody is
2 actually exchanging. If the Commissioner wants to
3 keep that, the far better solution and the one that
4 would be reasonable under the circumstances would be
5 either by Zoom or some other platform such as
6 Microsoft Teams. The fact that the Department
7 didn't explain why the telephone hearing was
8 necessary as opposed to video or some other mode --
9 some other mechanism is kind of troubling, to say
10 the very least.

11 I'd also like to touch on the requirements
12 that the Department laid out in the revised
13 9050.0770. And they state that if the facility
14 staff determines an applicant is not able to manage
15 personal financial affairs, the facility staff shall
16 recommend that the facility be authorized. But the
17 problem with that is that it intrudes upon federal
18 law 38 CFR Section 13.100 et sequent defines how the
19 VA fiduciary hub shall make appointments. And this
20 rule unreasonably intrudes on the -- on the
21 relationship between the veteran and the federal
22 Department of Veterans Affairs. As Ms. Blaine said
23 very eloquently, whole sections of this law appear
24 to not to have been -- or, whole sections of this
25 rule appear to not have been written in consultation

1 with subject matter experts. And to try to overstep
2 the federal Department of Veterans Affairs is really
3 something that's inappropriate at best.

4 I also want to go back and touch on
5 maximizing the benefit. Right now in the state of
6 Minnesota, we have a situation where unlicensed and
7 untrained laypersons, who we laughingly call veteran
8 service officers, are now going to be asked to
9 maximize veterans' benefits without having an
10 appropriate basis of knowledge upon which to
11 evaluate whether a maximize benefit should be
12 applied for. And that's -- that's intruding
13 substantially on the practice of law and interfering
14 with the bar's prerogatives. The reality is that
15 these people, these unlicensed and untrained
16 laypersons essentially act as a de facto arm of the
17 Minnesota Department of Veterans Affairs and should
18 not be permitted to be mandated to apply for a
19 maximum benefit if they're truly independent
20 practitioners, which we pretty much know they
21 aren't.

22 The final thing I want to touch on going
23 back is the neutral administrator for an immediate
24 discharge. And that's in subpart 1A of the revised
25 9050.0220. The neutral administrator within the

1 involuntary or immediate discharge process be an
2 administrator of one of the Minnesota Veteran Homes
3 but not the current -- not the home the veteran's
4 at, or an identified neutral designee within the
5 involuntary or immediate discharge process must be
6 the Department's Senior Director of Healthcare,
7 Deputy Commissioner Chief of Staff. The problem
8 with that is, these are not truly independent and
9 neutral people. These are people handpicked by the
10 Commissioner to run these facilities or to operate
11 these lines of care. And it would be -- it would be
12 a stretch of logic to say that these persons are
13 neutrals when in fact they're commissioned to do
14 these things relies on the Commissioner's
15 appointment. I've done a case where the Chief of
16 Staff was the designated neutral, and it was
17 apparently obvious that he was not a designated --
18 he was not a neutral in any sense of the word.

19 And the far better process, if we're
20 trying to guarantee some measure of due process, is
21 to ask the -- or, ask the Department of
22 Administrative Hearings to appoint an ALJ that can
23 do these hearings. Keeping it within the Department
24 tramples on the due process rights of Minnesota
25 veterans.

1 So, Your Honor, in conclusion, the
2 overriding theme that we've been hearing this
3 morning is, these rules were not consulted with
4 subject matters experts in the field. And it's
5 relying on unlicensed and untrained laypersons,
6 laughingly called VSOs, to make benefit decisions
7 and then go out and apply for them regardless of the
8 damage that it does to Minnesota veterans. On all
9 the bases that you have been hearing this morning,
10 it's my hope that you would not uphold these rules.

11 And I should note that I am also a member
12 of the MSBA mil-vet section, although none of my
13 comments are to be associated with that section of
14 the bar or, indeed, with the bar association as a
15 whole. Thank you, Your Honor.

16 JUDGE PALMER-DENIG: I'm so sorry. Mr.
17 Lewis, if you're still there. I apologize; I was on
18 mute. It's hard. You'd think after two years, you
19 know, we'd all know when we were muted.

20 Mr. Lewis, if I could have you turn your
21 camera back on if you're still there and your
22 microphone back on. I have one clarification point
23 I want to ask about. On the CFR cite that you
24 listed relating to the making of appointments, if
25 you could just give me that cite one more time. I

1 don't think I caught it all.

2 MR. LEWIS: Yes, Your Honor. That is 38
3 CFR Section 13.100, and it goes on from there. It's
4 -- I think it's like section 100 through section
5 110, if I'm not mistaken.

6 JUDGE PALMER-DENIG: Perfect. Thanks so
7 much. I appreciate the clarification.

8 MR. LEWIS: Yes, Your Honor.

9 JUDGE PALMER-DENIG: All right. If you
10 are a phone commenter and you're -- the last five
11 numbers of your phone number are 5555, you are next
12 on the list. And I wonder if there is a way to
13 unmute that person by agency staff. And if there's
14 not, for that person, please press *6 to unmute
15 yourself.

16 MR. WERMERSKIRCHEN: Hello, Your Honor.

17 JUDGE PALMER-DENIG: Hello. Perfect. It
18 sounds like we've got you. All right. Can you
19 state your name and spell your first and last names,
20 please.

21 MR. WERMERSKIRCHEN: First name is Mark,
22 last name is W-E-R-M-E-R-S-K-I-R-C-H-E-N.

23 JUDGE PALMER-DENIG: All right. Let me
24 just check with the court reporter. Did you get
25 that?

1 THE COURT REPORTER: I got the last name,
2 but is Mark with a C or a K?

3 MR. WERMERSKIRCHEN: With a K. I'm sorry.

4 JUDGE PALMER-DENIG: All right. Thank
5 you. You can proceed with your comment.

6 MR. WERMERSKIRCHEN: Thank you, Your
7 Honor. I'm an elder law attorney in outstate
8 Minnesota, and I'd like to comment on the real
9 estate changes that are being proposed.

10 Usually an agency is entitled to deference
11 when that deference is warranted. Here, the
12 deference is not warranted because the agency's
13 proposed rule on property rights has resulted in the
14 agency misapplying Minnesota law governing
15 conveyances. I believe it's Section 55.4-55.6. Mr.
16 Klitzke talked about some changes. I believe that
17 was not one of the changes. So as I understand the
18 situation we're in right now, the proposed change is
19 that a deed would be effective only upon recording,
20 or a real estate document would be effective only
21 upon recording.

22 I'd like to supply you with some
23 information regarding Minnesota law on deeds and
24 their effective date. In order to transfer title in
25 Minnesota, deed must be delivered. The date of

1 delivery is ordinarily presumed to be the date of
2 the deed. There is a case called Stone v. Jetmar,
3 J-E-T-M-A-R, Properties, LLC, 733 N.W. 2d 480 (Minn.
4 App. 2007). The central elements of delivery are
5 surrender of control by the grantor and intent to
6 convey title. Minnesota law, there is a case on
7 that: Slawik, S-L-A-W-I-K, v. Loseth, L-O-S-E-T-H,
8 207 Minn. 137, 290 N.W. 2nd 228, that's a 1940 case.
9 Physical delivery is not necessary. The grantor
10 must merely show a present unconditional intention
11 to part with ownership. And that was a more recent
12 case by the Minnesota Supr -- or, by the Minnesota
13 Court of Appeals in Mollico, M-O-L-L-I-C-O, v.
14 Mollico, 628 N.W. 2d 641 (Minn. App. 2001). Here,
15 the agency is changing the rules to say that
16 transfer date for real property will now be the date
17 that the deed or document is recorded. As I just
18 indicated and demonstrated to you, there's numerous
19 court cases. This is well established in Minnesota
20 law that it's not the recording date, Your Honor.

21 So this change, basically a
22 one-size-fits-all, clearly violates Minnesota law.
23 And why should the agency be allowed to have a rule
24 that clearly violates Minnesota law? I believe that
25 the agency has acted in an arbitrary and capricious

1 manner, and I would hope that the agency, based upon
2 the comments of others and myself and hopefully the
3 report, will change this aspect to comply with
4 Minnesota law and not have a rule that says that
5 it's only effective or -- yeah, that it's only
6 effective upon recording.

7 Thank you, Your Honor.

8 JUDGE PALMER-DENIG: Thank you very much.
9 I will ask agency staff, is there anyone else in the
10 queue who has asked for an opportunity to speak?

11 UNIDENTIFIED SPEAKER: No, there is not,
12 Your Honor.

13 JUDGE PALMER-DENIG: All right. So with
14 that, if you are participating in this hearing and
15 have not previously indicated an intention to speak,
16 if you have been thinking about it and have decided
17 that you're interested, if you've heard another
18 comment from someone else that has caused you to
19 think that you would like to make a comment, you
20 still can. Please put a note in the chat indicating
21 an interest in speaking. Or if you are
22 participating by phone, please press *5 and email
23 Tydon, T-Y-D-O-N, dot, Samuels@state.mn.us. I'm
24 going to pause for a moment and see if anybody
25 indicates an interest. And then if we don't have

1 anyone -- a new commenter who indicates an interest
2 and if you have previously commented and are still
3 with us and you would like another turn, if you have
4 an issue that hasn't come up that you would like to
5 make a record on here, if there is something that
6 another commenter has noted that has spurred you to
7 think of something additional that you would want to
8 offer, there is an opportunity for you as well.

9 So I'm not seeing anybody else who hasn't
10 spoken yet start raising their hand to speak. Is
11 there anybody among you who have already commented
12 who would like to come back for another round or add
13 anything to the comments that you previously made,
14 if you could put your name in the chat as well.

15 I'll note that we run the rule hearing
16 until everyone has been heard or until the
17 concluding time. So if no one else steps forward to
18 speak, then we would end fairly soon. So I want to
19 make sure that I give everybody a full opportunity
20 to speak. So if you have not commented yet or if
21 you already have commented and you would like to
22 jump back into the queue, I'm just going to give you
23 a couple seconds to get your name on the list.

24 All right. So I am not seeing anybody who
25 is doing that. Let me turn, actually, to Mr.

1 Klitzke for a moment then. Mr. Klitzke, is there
2 anything further that the agency would want to offer
3 while we're on the record today?

4 MR. KLITZKE: Nothing further, Your Honor.

5 JUDGE PALMER-DENIG: All right. Thank you
6 very much.

7 And then I will also note that we very
8 much appreciate, if you commented today and you have
9 written comments, you may have already submitted
10 written comments in the past, you can submit written
11 comments again. I encourage you to follow up with a
12 written comment summarizing the information that you
13 provided here today, a copy of your prepared remarks
14 if you had them, or an additional comment. If you
15 have something in addition, a fuller comment than
16 what you made today, I would very much appreciate
17 it. And I think public policy is best served if you
18 also file that into the rulemaking record as a
19 written comment.

20 All right. If I could get the next slide,
21 please. All right. So I want to note, if you are
22 going to make those comments, those initial comments
23 must be received by 4:30 p.m. on February 22 of
24 2022. Rebuttals must be received by 4:30 p.m. on
25 March 1, 2022. If you are making comment on

1 eComments, you will make it within the record of
2 this particular rulemaking. You'll go search for
3 this rulemaking number, and then you'll make your
4 comment. It will automatically show up there. It
5 will also automatically be available to the agency.
6 If you are commenting by fax or by U.S. Mail, please
7 include the docket number. Please put my name on it
8 so that it gets to me and include the docket number:
9 71-9054-37629. Again, that's 71-9054-37629.

10 And if we could go on to the next slide,
11 please. That is our thank you slide. So that is
12 the concluding slide. I want to thank everyone for
13 participating in the rulemaking today. I thank the
14 agency for its submission of evidence and for its
15 presentation. I also thank the agency for its
16 technological work to ensure that this rulemaking
17 could come off technologically. There was also a
18 MN-IT staff person who was here to assist, and
19 that's very, very helpful. So I want to thank all
20 the folks who are working in the background to make
21 this work. I also very much appreciate all of the
22 comments that were made and the comments that have
23 previously been filed and that will be filed in this
24 rulemaking record. Please note that when all of the
25 comments have been received and the rebuttal period

1 closes, that is when I will start my review of the
2 rules and you can expect my order within 30 days
3 after that, unless an extension is granted by the
4 chief judge.

5 So thank you very much, all of you, for
6 participating. Thanks to the court reporter. And
7 we are adjourned. Take care.

8 (The hearing concluded at 11:37 a.m.)

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1 STATE OF MINNESOTA)
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3 COUNTY OF HENNEPIN)
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6 I, Katriina Hendrickson, do hereby certify that
7 the above and foregoing transcript consisting of the
8 preceding 93 pages is a true and correct transcript
9 of the video-conferenced proceedings to the best of
10 my ability.

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Dated: February 3, 2022.

/s/ Katriina Hendrickson
KATRIINA HENDRICKSON
Registered Professional Reporter

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