MEMORANDUM

To: Mr. Marquand and the Montana Board of Medical Examiners

From: Craig D. Charlton on behalf of Montanans Against Assisted Suicide & For Living with Dignity (MAAS)

Re: Revised Position Statement No. 20

Date: May 2, 2012

I. OVERVIEW

On March 16, 2012, the Board of Medical Examiners adopted a revised position statement on assisted suicide, titled “Physician Aid in Dying.” The statement is now on the Board’s website as Position Statement No. 20.

The statement, which is a rule, was adopted without complying with notice and hearing requirements for rulemaking. This renders the statement invalid. The statement is also invalid because its subject matter exceeds the Board’s statutory authority and therefore its jurisdiction. The statement is invalid because it infringes on the role of the Legislature. With the statement invalid, it must be vacated and removed from the Board’s website.

II. FACTS

A. The Board of Medical Examiners

The Board of Medical Examiners is a thirteen member board authorized by § 2-15-1731,
MCA.\textsuperscript{1} Eleven of the thirteen members are required to be healthcare practitioners.\textsuperscript{2} The Board's function is to protect the public against the "unprofessional, improper, unauthorized or unqualified practice of medicine."\textsuperscript{3}

The Board is governed by the Administrative Procedure Act, §§ 2-4-101 to 2-4-711, MCA.\textsuperscript{4} The Board is also governed by statutes including § 37-1-307, MCA, which defines the authority of boards in general.\textsuperscript{5}

B. The Position Statement Request

In September 2011, Dr. Eric Kress and Dr. Stephen Speckart requested a position statement from the Board on physician-assisted suicide, which they termed "aid in dying."\textsuperscript{6} Specifically, they asked for guidelines in which a doctor would not be disciplined for assisting a suicide.\textsuperscript{7}

Dr. Kress and Dr. Speckart also claimed that assisted suicide is legal under \textit{Baxter v. State}, 354 Mont. 234 (2009).\textsuperscript{8} During a legislative hearing in 2011, however, Dr. Speckart conceded that assisted suicide is not legal. He testified: "[M]ost physicians feel significant dis-

\begin{enumerate}
\item § 2-15-1731 is attached hereto at A-1.
\item Id.
\item ARM 24.1.101(4)(a)(iii)(H).
\item The Administrative Procedure Act is attached hereto at A-2 through A-26.
\item § 37-1-307, MCA is attached hereto at A-27 to A-28.
\item See: Minutes for the Board's Medical/Hospital Committee meeting on September 13, 2011, listing an agenda item for "Physician Assisted Death" and referring to correspondence from "interested parties" (A-29 to A-30); and Letter from Dr. Kress and Dr. Speckart (A-31 to A-33).
\item Kress/Speckart letter, at A-31, ¶1.
\item Id.
\end{enumerate}
ease with the limited safeguards and possible risk of criminal prosecution after the *Baxter*
decision.  
9 His testimony was consistent with this analysis by attorneys Greg Jackson and Matt
Bowman:

[T]he Court's narrow decision didn't even "legalize" assisted
suicide. . . . After Baxter, assisted suicide continues to carry both
criminal and civil liability risks for any doctor, institution, or lay
person involved.  
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C. Objections to the Request

The Board received many objections to the position statement request. Reasons included
that the Board lacked authority to grant the relief and that assisted suicide is a recipe for elder
abuse.  
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On December 2, 2011, Bradley Williams, Coordinator for Montanans Against Assisted
Suicide & for Living with Dignity, submitted 355 pages of signed petitions against assisted
suicide into the Board's record.  
12 There were 3006 signatures (with some duplicates) against
assisted suicide.  
13 On December 7, 2011, he submitted another 33 signatures against assisted
suicide.  
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9 Transcript excerpt, attached at A-35.
10 Greg Jackson and Matt Bowman, “Analysis of Implications of the *Baxter* Case on Potential Criminal
11 See e.g., Letter from Bradley Williams to the Board, dated November 14, 2011, attached at A-36.
13 Id.
D. The Committee Meeting

On December 7, 2011, the Board’s Physician/Hospital Committee held a meeting in which members discussed four draft position statements, none of which had been provided to the public.\textsuperscript{15} Jean Branscum, representing the Montana Medical Association, asked for copies, which was denied.\textsuperscript{16} She also commented on \textit{Baxter}, as follows:

\begin{quote}
We believe the Court’s decision is vague, that physicians are still at risk of being held civilly liable or being criminally prosecuted.\textsuperscript{17}
\end{quote}

In that same meeting, the Committee voted to create a new statement to be presented to the full Board.\textsuperscript{18} On January 12, 2012, that statement, “Physician Aid in Dying Final Draft,” was sent to interested parties.\textsuperscript{19}

E. The Board Meeting

On January 20, 2012, the full Board held its regularly scheduled meeting and amended the proposed statement. The Board’s amendments included that it would evaluate a complaint related to aid-in-dying “as it would any other medical treatment or intervention.”\textsuperscript{20} This language had not been provided to interested parties prior to the meeting.\textsuperscript{21} The Board then adopted the

\begin{itemize}
\item Transcript excerpt, at A-48, lines 6 to 17.
\item Transcript excerpt at A-50, lines 8 to 11.
\item Transcript excerpt at A-51, lines 19 to 25; A-52, lines 1-6.
\item Copy attached at A-53.
\item The amendments are described in the Transcript, at A-54 to A-56.
\item Per Bradley Williams.
\end{itemize}
amended statement as a "final statement."\textsuperscript{22}

During the meeting, Ian Marquand, Executive Director of the Board, commented on the lack of notice to the public. He said:

This is . . . the first time that a statement has come before the full Board. And in fact, this is the first actual statement that has been entered before either a committee – officially entered before the committee or the full Board for discussion.

I would just suggest that up until the release of the final statement, all of the public comment has been on the concept of a statement. There actually has been much less comment on this statement itself. And I would urge you, for the sake of public participation, to consider that there may be some additional comment on this statement that has not been heard.\textsuperscript{23}

F. Position Statement No. 20

After the meeting, the final statement was posted on the Board’s website as Position Statement No. 20.

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\textsuperscript{22} The text of the final statement is set forth below and attached at A-59:

\textbf{Physician Aid in Dying}

"In Baxter v State of Montana, 354 Mont. 234, 224 P.3d 1211, the Montana Supreme Court ruled that the Rights of the Terminally Ill Act, 50-9-101, MCA, et.seq., and the consent defense found in 45-2-211, MCA shield a physician from liability for acting in accordance with a patient’s end-of-life wishes if an adult, mentally competent terminally ill patient consents to the physician’s aid-in-dying. As a result of this decision, the Montana Board of Medical Examiners has been asked if it will discipline physicians for participating in such aid-in-dying. This statement reflects the Board’s position on this controversial question.

The Board recognizes that its mission is to protect the citizens of Montana against the unprofessional, improper, unauthorized and unqualified practice of medicine by ensuring that its licensees are competent professionals. 37-3-101, MCA. In all matters of medical practice, including end-of-life matters, physicians are held to professional standards. If the Board receives a complaint related to physician aid-in-dying, it will evaluate the complaint on its individual merits and will consider, as it would any other medical procedure or intervention, whether the physician engaged in unprofessional conduct as defined by the Board’s laws and rules pertinent to the Board.

\textsuperscript{23} Transcript, attached at A-57, lines 15 to 25; A-58, lines 1-3.
G. The Solicitation Letter

On March 8, 2012, Dr. Speckart and Dr. George Risi mailed a letter to Montana doctors encouraging them to engage in assisted suicide. The letter features Position Statement No. 20 as a legal basis to do so.

H. The Request to Vacate

On March 12, 2012, Montanans Against Assisted Suicide filed a request to vacate and remove Position Statement No. 20 from the Board’s website. The request consisted of a letter and legal memorandum by attorney Craig Charlton. The request was supported by 40 plus letters from elected officials, doctors, a law professor and other members of the public.

I. The Revised Statement

On March 16, 2012, the Board held its regularly scheduled meeting and voted to revise Position Statement No. 20. The revised statement, like the Board’s prior statement, says that the Board will evaluate a complaint related to aid-in-dying “as it would any other medical treatment or intervention.” The term, “aid in dying,” is not defined. “Aid-in-dying” is a euphemism for

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26 See Letter attached at A-63 and Memo, page 1, attached at A-64. To review the memo in its entirety, go to http://www.montanansagainstassistedsuicide.org/2012/03/medical-examiner-board-statement-is.html.

27 E-mail from Ian Marquand to Bradley Williams, et. al., 3/20/12 (attaching documents).

28 The revised statement says:

The Montana Board of Medical Examiners has been asked if it will discipline physicians for participating in aid-in-dying. This statement reflects the Board’s position on this controversial question.

The Board recognizes that its mission is to protect the citizens of Montana against the unprofessional, improper, unauthorized and unqualified practice of
euthanasia and assisted suicide. 29

The revised statement was subsequently posted on the Board’s website as a new Position Statement No. 20.

J. Representative Barrett and Senator Blewett

On March 20, 2012, Representative Dick Barrett and Senator Anders Blewett wrote the Board objecting to the revision of Position Statement No. 20 without public notice. 30 During the 2011 legislative session, both legislators had introduced bills to legalize assisted suicide, which failed. 31 During a hearing on Senator Blewett’s bill, he conceded that assisted suicide is not legal under Baxter. Senator Blewett said: “[U]nder current law, ‘... there’s nothing to protect the doctor from prosecution.’” 32

III. ISSUES

A. Whether the revised statement is a rule, which is invalid due to the Board’s failure to follow required notice and hearing procedures?

medicine by ensuring that its licensees are competent professionals. 37-3-101, MCA. In all matters of medical practice, including end-of-life matters, physicians are held to professional standards. If the Board receives a complaint related to physician aid-in-dying, it will evaluate the complaint on its individual merits and will consider, as it would any other medical procedure or intervention, whether the physician engaged in unprofessional conduct as defined by the Board’s laws and rules pertinent to the Board.

Letter from Ian Marquand to Craig Charlton, March 20, 2012 (attached at A-65).

29 See link to the Model Aid-in-Dying Act at http://www.uiowa.edu/~sfklaw/euthan.html. (Note the letters “euthan” in the link.)


31 Representative Barrett’s bill was not advanced. Senator Blewett’s bill, SB 167, was defeated in the Senate Judiciary hearing the day after it was heard.

B. Whether the revised statement, which exceeds the Board's statutory authority and is therefore outside the Board's jurisdiction, must be vacated as null and void?

C. Whether the revised statement is invalid because it infringes on the role of the Legislature?

D. Whether the revised statement, which implies that assisted suicide and/or euthanasia is a "medical treatment or intervention," puts doctors and the public at risk, which is contrary to the Board's mission "to protect the public"?

IV. ARGUMENT

A. The Revised Statement is a "Rule"

Under the Administrative Procedure Act, a "rule" is defined as a "statement of general applicability" that prescribes "policy."\(^33\) The Act states:

"Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.\(^34\)

Here, the revised statement is a rule under this definition for at least two reasons. First, the statement is a "statement of general applicability" as to what the Board will do if presented with a complaint related to "aid in dying."\(^35\) The revised statement is not limited to the

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\(^{33}\) § 2-4-102(11)(a), MCA, attached at A-4.

\(^{34}\) Id.

\(^{35}\) See revised statement at A-65.
adjudication of a particular case.\textsuperscript{36} This point alone renders the revised statement a rule.\textsuperscript{37}

Second, the revised statement is a rule because it prescribes Board “policy,” that the Board will evaluate a complaint related to aid in dying “as it would any other medical procedure or intervention.”\textsuperscript{38} Once again, the revised statement is a “rule” under the above definition.

**B. The Revised Statement, a Rule, is Invalid Due to the Board’s Failure to Comply with Required Notice and Hearing Provisions**

Once a rule is adopted, its validity depends on whether there has been “substantial compliance” with noticing and hearing provisions in §2-4-302 through §2-4-306, MCA.\textsuperscript{39} These provisions require a finding of “reasonable necessity” for the rule and also the filing of a notice with the secretary of state for the purpose of publication.\textsuperscript{40} Here, the Board did not even attempt to comply with these provisions. The Board’s revised statement, a rule, is therefore invalid. The statement must be vacated and removed from the Board’s website.

\begin{itemize}
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Cf. *Ohio Nurses Association v. State Board*, 44 Ohio St.3d 73, 75, 540 N.E.2d 1354, 1356 (1989)(finding a rule where it was “readily apparent that the position paper [was] intended to have a uniform application to all LPNs in the state”).
  \item \textsuperscript{38} Revised statement, 2nd ¶, at A-65.
  \item \textsuperscript{39} § 2-4-305(7), MCA states:

    A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section . . . The measure of whether an agency has adopted a rule in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has provided notice of the proposed rule, standing alone, but rather must be based on an analysis of the agency’s compliance with 2-4-302, 2-4-303, or 2-4-306 and this section. (Attached at A-11.)
  \item \textsuperscript{40} See: § 2-4-302(1)(a), MCA (“Prior to the adoption . . . of any rule, the agency shall give written notice of its proposed action. The proposal notice must include . . . the reasonable necessity for the proposed action . . .”); and § 2-4-302(2)(a)(i), MCA (“The proposal notice must be filed with the secretary of state for publication in the register, as provided in 2-4-312”) The full text for both of these provisions can be viewed at A-7.
\end{itemize}
C. The Revised Statement Exceeds the Board's Statutory Authority and Jurisdiction

Under the Administrative Procedure Act, a board is allowed to adopt substantive rules. “Substantive rules” consist of “legislative rules,” which have the force of law, and “adjective or interpretive rules” which do not have the force of law.\(^{41}\) To be valid, both types of rules must be adopted by “clear and specific” statutory authority. The Act states:

A substantive rule may not be proposed or adopted unless:

(a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or

(b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking extends. (Emphasis added).\(^{42}\)

Here the Board’s revised statement purports to allow physicians to engage in aid in dying, \(i.e.,\) assisted suicide and/or euthanasia as a medical treatment or intervention. There is no “clear and specific” statutory authority allowing the Board to do this. Indeed, the bills proposed by Representative Barrett and Senator Blewett, which might have provided the necessary authority, failed.

The Board’s revised statement, a rule, exceeds the Board’s statutory authority and therefore exceeds the Board’s jurisdiction. For this reason also, the rule is invalid and must be vacated.

D. A Legislative Function

The revised statement can also be read as expanding a physician’s scope of practice to

\(^{41}\) See § 2-4-102(13), MCA, attached at A-4.

\(^{42}\) See § 2-4-305(3), MCA, attached at A-10.
include assisted suicide and/or euthanasia. It is the function of the Legislature, not the Board, to expand a physician’s scope of practice. Consider for example, *Board of Optometry v. Florida Medical Association*, 463 So.2d 1213, 1215 (1985), which states:

The BOARD fails to comprehend the limits of its power. It may only adopt rules consistent with Chapter 463 and for the purpose of carrying out the terms of the statute. § 463.005. It may adopt standards of practice for licensed optometrists. Id. But it may not adopt standards which exceed or attempt to expand the scope of optometry as defined by Section 463.002(4) . . . the power to do so rests with the legislature not the BOARD.

With the Board having acted outside of its regulatory function, the revised statement is invalid.

E. **The Revised Statement Puts Doctors and the Public at Risk and Implicates Board Liability**

The Board’s invalid statement puts doctors at risk due to its description of assisted suicide and/or euthanasia as a medical treatment or intervention. Doctors relying on the statement to assist a suicide or directly kill a patient could find themselves sued by an unhappy family member and/or charged with homicide.\(^43\) The statement also puts the public at risk, especially the elderly. Consider this comment by Bradley Williams:

[Legal assisted suicide] would allow heirs to pressure and abuse older people to cut short their lives. Why would the Board risk our older citizens by going forward with regulations or in any way...

\(^43\) In Montana, a physician who causes or fails to prevent a suicide can be held civilly liable. See *Krieg v. Massey*, 239 Mont. 469, 472-3 (1989) and *Nelson v. Driscoll*, 295 Mont. 363, ¶¶ 32-33 (1999). These cases were not overruled by *Baxter*. See also *Edwards v. Tardif*, 240 Conn. 610, 692 A.2d 1266 (1997) (affirming a civil judgment against a physician who prescribed an "excessively large dosage" of barbiturates to a suicidal patient who killed herself with the barbiturates). For another example, see William Dotinga, "Grim Complaint Against Kaiser Hospital," at http://www.courthousenews.com/2012/02/06/43641.htm. ("[Son] sued Kaiser Foundation Hospitals and affiliates, a doctor and two social workers on behalf of his father, Victorino Noval, who died in May 2010 after a "terminal extubation." The doctor and others had relied on consent given by the patient’s daughters which the son claims is invalid.

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implying that assisted suicide is legal in Montana.\footnote{Letter from Bradley Williams to the Board, 11/28/11, attached at A-36.}

As noted above, the Board’s authorized function is to "protect the public."\footnote{ARM 24.1.101(4)(a)(iii)(H).} The Board’s statement violates this function. Moreover, with the revised statement enacted outside of the Board’s jurisdiction, the Board itself is subject to potential liability.

V. CONCLUSION

The Board’s revised statement, a rule, was adopted without complying with notice and hearing requirements for rulemaking. The statement is outside of the Board’s statutory authority and therefore outside of its jurisdiction. The statement infringes on the role of the Legislature. The statement violates the Board’s function to protect the public.

For each of these reasons, the revised statement is invalid. The statement must be vacated and removed from the Board’s website.