

Report From Agency

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF REGULATION
DEPARTMENT OF REGULATION : AND LICENSING ADOPTING RULES
AND LICENSING : (CLEARINGHOUSE RULE 10-081)

PROPOSED ORDER

An order of the Department of Regulation and Licensing to repeal RL 7.07 (1) and Appendix I to ch. RL 7; to renumber RL 7.03 (6); to renumber and amend RL 7.03 (1) and (3) to (5); to amend ch. RL 7 (title), RL 7.01 (2), 7.02 (1) to (2b) and (7), 7.03 (2), 7.04 (1) (e), (f), (2) and (3), 7.05 (3), 7.07 (3) (a), (b) and (c), 7.08 (2) and 7.11 (1) (d) and (e); and to create RL 7.03 (1) and 7.07 (3) (e) and (4), relating to the Impaired Professionals Procedure.

Analysis prepared by the Department of Regulation and Licensing.

ANALYSIS

Statutes interpreted:

Section 440.03, Stats.

Statutory authority:

Sections 15.08 (5) (b), 51.30, 146.82, 227.11 (2) and 440.04, Stats.

Explanation of agency authority:

The Department of Regulation and Licensing is authorized under s. 440.03 (1), Stats., to promulgate rules defining uniform procedures to be used by the department and the attached boards, examining boards and affiliated credentialing boards.

Related statute or rule:

Ch. RL 7.

Plain language analysis:

These proposed rules modernize and clarify the language of ch. RL 7. Under the current rules, the Impaired Professionals Procedure is an alternative to the disciplinary process. Under the proposed rules, the renamed Professional Assistance Procedure may also be used in conjunction with the disciplinary process.

Summary of, and comparison with, existing or proposed federal regulation:

None.

Comparison with rules in adjacent states:

Illinois:

Each profession is managed independently of other professions. See also Ill. Admin Code tit. 68, s. 1285.235 of the Illinois Rules, Mandatory Reporting of Impaired Professionals by Health Care Institutions.

Iowa:

Iowa Admin. Code 653-14.1 to 653-14.11. Section 653-14.5 (272C) defines who is deemed ineligible to participate in the program.

Michigan:

Section 333, Public Health Code. The Health Professional Recovery Program (HPRP) is administered by a private contractor under the direction of the HPRP and Bureau of Health Professions in the Michigan Department of Community Health. It is funded by participants and insurers. Several professions are included.

Minnesota:

MN Statutes ss. 214.31 to 214-37 includes the following professions: chiropractors, dentists, marriage and family therapists, nurses, pharmacists, podiatrists, social workers, veterinarians.

Summary of factual data and analytical methodologies:

The Department of Regulation and Licensing created a Task Force consisting of various stakeholder organizations, including the Boards of Pharmacy, Nursing and Medicine, trade associations representing hospitals, doctors, nurses and pharmacists, the Wisconsin Association of Justice Representatives and experts in the treatment of alcohol and drug dependency. The Task Force met six times in 2009 to discuss improvements to the existing procedure. A committee of the Task Force then convened in 2009-2010 to draft the rule changes with the department. All aspects of the procedure were explored in the Task Force meeting, including its effectiveness, requirements for entry, confidentiality, length of participation, terminology, practice restrictions, therapist involvement, disciplinary action and oversight of treatment providers and facilities by department staff and board members. Reports on procedures in other states were presented to the Task Force, in addition to information relating to laboratory facilities and treatment resources.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

The department does not anticipate a significant fiscal impact on small businesses. The changes are revisions to a program that is in operation and is funded by participants and license holders.

Section 227.137, Stats., requires an “agency” to prepare an economic impact report before submitting the proposed rule-making order to the Wisconsin Legislative Council. The Department of Regulation and Licensing is not included as an “agency” in this section.

Anticipated costs incurred by the private sector:

The department finds that this rule has no significant fiscal effect on the private sector.

Fiscal estimate:

This rule change will have no fiscal impact on the state of Wisconsin or on local units of government.

Effect on small business:

After review by the department’s Small Business Review Advisory Committee, it was determined that these proposed rules will have no significant economic impact on a substantial number of small businesses, as defined in s. 227.114 (1), Stats. The Department’s Regulatory Review Coordinator may be contacted by email at hector.colon@drl.state.wi.us, or by calling (608) 266-8608.

Agency contact person:

Pamela Haack, Paralegal, Department of Regulation and Licensing, 1400 East Washington Avenue, Room 116, P.O. Box 8935, Madison, Wisconsin 53708; telephone 608-266-0495; email at pamela.haack@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Pamela Haack, Paralegal, Department of Regulation and Licensing, 1400 East Washington Avenue, Room 116, P.O. Box 8935, Madison, Wisconsin 53708-8935, or by email to pamela.haack@wisconsin.gov. Comments must be received on or before August 9, 2010, to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. Ch. RL 7 (title) is amended to read:

CHAPTER RL 7

(title) ~~IMPAIRED PROFESSIONALS~~ PROFESSIONAL ASSISTANCE PROCEDURE

SECTION 2. RL 7.01 (2) is amended to read:

RL 7.01 (2) The intent of the department in adopting rules in this chapter is to protect the public from credential holders who are impaired by reason of their abuse of alcohol or other drugs by promoting early identification of chemically dependent professionals and encouraging rehabilitation. This goal will be advanced by providing an option ~~to~~ that may be used in conjunction with the formal disciplinary process for qualified credential holders committed to their own recovery. This procedure is intended to apply when allegations are made that a credential holder has practiced a profession while impaired by alcohol or other drugs or whose ability to practice is impaired by alcohol or other drugs or when a credential holder contacts the department and requests to participate in the procedure. ~~It is not intended to apply~~ may be used in conjunction with the formal disciplinary process in situations where allegations exist that a credential holder has committed misconduct, negligence or violations of law, other than practice while impaired by alcohol or other drugs, which are substantial. The procedure may then be utilized ~~in selected cases~~ to promote early identification of chemically dependent professionals and encourage their rehabilitation. Finally, the department's procedure does not seek to diminish the prosecution of serious violations but rather it attempts to address the problem of alcohol and other drug abuse within the enforcement jurisdiction of the department.

SECTION 3. RL 7.02 (1) to (2b) and (7) are amended to read:

RL 7.02 (1) "Board" means any board, examining board or affiliated credentialing board attached to the department ~~and the real estate board~~.

(2) "Board liaison" means the board member designated by the board or the secretary or the secretary's designee as responsible for approving credential holders for the ~~impaired professionals~~ professional assistance procedure under s. RL 7.03, for monitoring compliance with the requirements for participation under s. RL 7.04, and for performing other responsibilities delegated to the board liaison under these rules.

(2a) "Coordinator" means a department employee who coordinates the ~~impaired professionals~~ professional assistance procedure.

(2b) "Credential holder" means a person holding any license, permit, certificate or registration granted by the department or any board. For purposes of this

chapter, “credential holder” includes a person with a pending application for a credential for a period not to exceed one year from the date the application for the credential was submitted to the department.

(7) “Procedure” means the ~~impaired professionals~~ professional assistance procedure.

SECTION 4. RL 7.03 (1) is renumbered RL 7.03 (3) and is amended to read:

RL 7.03 (3) All informal complaints involving allegations of impairment due to alcohol or chemical dependency shall be screened and investigated pursuant to s. RL 2.035. After investigation, informal complaints involving impairment may be referred to the procedure along with a summary of the investigative results in the form of a draft statement of conduct to be used as a basis for the statement of conduct under s. RL 7.05 (1) (a) and considered for eligibility as an alternative to for the procedure or for formal disciplinary proceedings under ch. RL 2. The credential holder shall be provided with a written explanation of the credential holder’s options for resolution of the matter through participation in the procedure and of the formal disciplinary process pursuant to ch. RL 2.

SECTION 5. RL 7.03 (1) is created to read:

RL 7.03 (1) A credential holder who contacts the department and requests to participate in the procedure shall be referred to the board liaison and the coordinator for determination of acceptance into the procedure.

SECTION 6. RL 7.03 (2) is amended to read:

RL 7.03 (2) A credential holder who has been referred to the procedure and considered for eligibility shall be provided with an application for participation, ~~a summary of the investigative results in the form of a draft statement of conduct to be used as a basis for the statement of conduct under s. RL 7.05 (1) (a), and a written explanation of the credential holder’s options for resolution of the matter through participation in the procedure or through the formal disciplinary process pursuant to ch. RL 2.~~

SECTION 7. RL 7.03 (3) to (5) are renumbered RL 7.03 (4) to (6) and are amended to read:

RL 7.03 (4) Eligibility for the procedure shall be determined by the board liaison and coordinator who shall review all relevant materials including investigative results and the credential holder’s application for participation. Eligibility shall be determined upon criteria developed by ~~each credentialing authority which shall include at a minimum the credential holder’s past or pending criminal, disciplinary or malpractice record, the circumstances of the credential holder’s referral to the department, the seriousness of other alleged violations and the credential holder’s prognosis for recovery~~ the coordinator in consultation with the disciplinary authority. The decision on eligibility shall be consistent with the purposes of these procedures as described in s. RL 7.01 (2).

Credential holders who have committed violations of law may be eligible for the procedure. The board liaison shall have responsibility to make the determination of eligibility for the procedure.

(5) ~~Prior to the signing of an agreement for participation the~~ The credential holder shall obtain a comprehensive assessment for chemical dependency from a treatment facility or individual therapist approved under s. RL 7.06. The credential holder shall arrange for the treatment facility or individual therapist to file a copy of its assessment with the board liaison or coordinator. ~~The assessment shall include a statement describing the credential holder's prognosis for recovery.~~ The board liaison and the credential holder may agree to waive this requirement. The obtaining of the assessment shall not delay admission into the procedure.

(6) If a credential holder is determined to be ineligible for the procedure, the credential holder ~~shall~~ may be referred to the division for prosecution.

SECTION 8. RL 7.03 (6) is renumbered RL 7.03 (7).

SECTION 9. RL 7.04 (1) (e), (f), (2) and (3) are amended to read:

RL 7.04 (1) (e) Submit random monitored ~~blood or urine samples~~ physiological specimens for the purpose of screening for alcohol or controlled substances provided by a drug testing program approved by the department under s. RL 7.11, as required.

(f) Execute releases valid under state and federal law ~~in the form shown in Appendix I~~ to allow access to the credential holder's counseling, treatment and monitoring records.

(2) If the board liaison or department determines, based on consultation with the person authorized to provide treatment to the credential holder or monitor the credential holder's enrollment or participation in the procedure, or monitor any drug screening requirements or restrictions on employment under sub. (1), that a credential holder participating in the procedure has failed to meet any of the requirements set under sub. (1), the board liaison may ~~request that the board dismiss~~ refer the credential holder ~~from the procedure to the division.~~ A failure to maintain abstinence is considered a relapse and shall be reviewed by the board liaison to determine whether the credential holder should be referred to the division. The board ~~shall~~ liaison may review the complete record in making this determination. ~~If the credential holder is dismissed the matter shall be referred to the division.~~

(3) If a credential holder violates the agreement and ~~the board does not dismiss and refer the credential holder to the division~~ no referral to the division occurs, then a new admission under s. RL 7.05 (1) (a) shall be obtained for relapses and for misconduct, negligence or violations of law which are substantial. If a new admission is not obtained, then a referral to the division by the coordinator shall occur.

SECTION 10. RL 7.05 (3) is amended to read:

RL 7.05 (3) The board or board liaison may include a promise of confidentiality that all or certain records shall remain closed and not available for public inspection and copying. Any promise is subject to s. RL 7.08 and ends upon a referral to the division. Information and records may be made available to staff within the department on an as-needed basis, to be determined by the coordinator.

SECTION 11. RL 7.07 (1) is repealed.

SECTION 12. RL 7.07 (3) (a), (b) and (c) are amended to read:

RL 7.07 (3) (a) Credential holders participating in the procedure who ~~are dismissed for failure~~ fail to meet the requirements of their rehabilitation program ~~or who otherwise engage in behavior which should be referred to prevent harm to the public.~~

(b) Credential holders who apply and who are determined to be ineligible for the procedure where the board liaison is in possession of information indicating misconduct, negligence or a violation of law.

(c) Credential holders who do not complete an agreement for participation where the board liaison is in possession of information indicating misconduct, negligence or a violation of law.

SECTION 13. RL 7.07 (3) (e) and (4) are created to read:

RL 7.07 (3) (e) Credential holders who request early termination of an agreement for participation. In making the decision if a referral should occur, the board liaison shall consider whether the credential holder's therapist approves the early termination and whether this opinion is supported by a second therapist selected by the department who shall always be consulted and shall concur.

(4) The board liaison shall refer credential holders who relapse in the context of the work setting to the division for investigation and prosecution. A credential holder referred under this subsection who has not been dismissed from the procedure may continue to participate in the procedure.

SECTION 14. RL 7.08 (2) is amended to read:

RL 7.08 (2) AVAILABILITY OF PROCEDURE RECORDS FOR PUBLIC INSPECTION. Any requests to inspect procedure records shall be made to the custodian. The custodian shall evaluate each request on a case by case basis using the applicable law relating to open records and giving appropriate weight to relevant factors in order to determine whether public interest in nondisclosure outweighs the public interest in access to the records, including the reputational interests of the credential holder, the importance

of confidentiality to the functional integrity of the procedure, the existence of any ~~pledge~~ promise of confidentiality, statutory or common law rules which accord a status of confidentiality to the records and the likelihood that release of the records will impede an investigation. The fact of a credential holder's participation in the procedure and the status of that participation may be disclosed to credentialing authorities of other jurisdictions.

SECTION 15. RL 7.11 (1) (d) and (e) are amended to read:

RL 7.11 (1) (d) The program shall maintain a nationwide ~~800-number~~ toll-free access or an internet website that is operational 24 hours per day, 7 days per week to inform participants of when to provide specimens and is able to document the date and time of contacts by credential holders.

(e) The program shall maintain and make available to the department and treatment providers through an internet website data that are updated on a daily basis verifying the date and time each participant was notified after random selection to provide a specimen, the date, time and location each specimen was collected, the results of drug screen and whether or not the participant complied as directed.

SECTION 16. Appendix I to ch. RL 7 is repealed.

(END OF TEXT OF RULE)

The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, pursuant to s. 227.22 (2) (intro.), Stats.

Dated _____

Agency _____

Celia M. Jackson, Secretary
Department of Regulation and Licensing