

**STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING**

**IN THE MATTER OF RULE-MAKING : REPORT TO THE LEGISLATURE
PROCEEDINGS BEFORE THE : ON CLEARINGHOUSE RULE 10-081
DEPARTMENT OF REGULATION : (s. 227.19 (3), Stats.)
AND LICENSING :**

I. THE PROPOSED RULE:

The proposed rule, including the analysis and text, is attached.

II. REFERENCE TO APPLICABLE FORMS:

No new or revised forms are required by these rules.

III. FISCAL ESTIMATES:

The department finds that this rule has no significant fiscal effect on the private sector. This rule change will have no fiscal impact on the state of Wisconsin or on local units of government.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

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 procedure, the Professional Assistance Procedure, may also be used in conjunction with the disciplinary process.

The department 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.

V. NOTICE OF PUBLIC HEARING:

A public hearing was held on August 6, 2010. Written comments were accepted until August 9, 2010.

Judy Warmuth, Vice President, Wisconsin Hospital Association, appeared and provided testimony at the hearing and also provided written comments. Written comments were submitted by the Wisconsin Board of Nursing, the Wisconsin Nurses Association and Prosecuting Attorney Arthur Thexton from the Division of Enforcement, Department of Regulation and Licensing.

There was no other testimony presented and no further written comments were received.

Summary of Public Hearing Comments and Written Comments:

Judy Warmuth's oral testimony and written comments on behalf of the Wisconsin Hospital Association (WHA) were supportive of the rule changes. A suggested change was to allow other state licensing boards to be informed that a licensee is enrolled in the procedure. The WHA believes that this change would help to ensure protection of the public.

The Wisconsin Board of Nursing (BON) commented that some of the proposed revisions were consistent with the BON goals, but there were some areas of concern. The foremost concern was that information about participants in the procedure should be available to other state licensing boards, especially to states that participate with the BON in the Multistate Nurse Licensure Compact. The BON expressed concern that this was essential to protection of the public and consistent with guidelines for alternative programs being developed by the National Council of State Boards of Nursing (NCSBN). The BON also had a number of recommendations primarily as to admission to the procedure criteria and discharge from the procedure criteria which would be consistent with the NCSBN guidelines being developed. The BON suggested that the promulgation of the rules be reconsidered or postponed until the NCSBN guidelines are released in final form or in the alternative that there be a separate agreement between the BON and the department that the BON would be allowed to establish admission and discharge criteria and be able to share information on participants with other state licensing boards.

The Wisconsin Nurses Association (WNA) expressed general support for the effort to improve these rules. The WNA raised a number of issues including adequate training for the board liaisons, inclusion of admission and discharge criteria making reference to the draft NCSBN guidelines, whether non-credentialed holders should be allowed to apply, and raising the issue of whether certain wording in the rules is an expansion of disciplinary authority. The WNA understands the concept of using the procedure in conjunction with discipline, but still wanted assurance that the language did not broaden the scope of the disciplinary authority.

Attorney Thexton recommended that the current admission criteria be retained. The current draft of the rule places responsibility for the criteria with the coordinator and removes the responsibility from the boards. Mr. Thexton commented that the revised rules may divert more licensees into the procedure and therefore reduce public information about who is under an agreement or order. He would like to provide more flexibility to release information about procedure participants, especially to sister state boards. Mr. Thexton commented about the lag in enrolling a participant into the procedure. He would like to see a rule requiring updates to applications. He would also like to see a rule-making violation of a procedure agreement to be unprofessional conduct, but acknowledges this is not possible in this rule-making. Finally, Mr. Thexton would seek to have the procedure expanded to include mental, physical and health conditions. He commented that six other prosecutors in the Division of Enforcement authorized him to state that they were in agreement with his comments.

Department Response to Public Hearing Comments and Written Comments:

After review of the public hearing comments and the written comments, the department made the following changes to the proposed rules:

A sentence has been added to s. RL 7.08 (2) to address the protection of the public concerns raised regarding the need to be able to release participation and status information about participants in the procedure to licensing boards in other jurisdictions. This need is particularly critical to the BON as a participant in the Multistate Nurse Licensure Compact. Section RL 7.08 (2) has been 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.

The second sentence of s. RL 7.03 (4) will be amended to address concerns raised about eligibility criteria being developed by the coordinator without any input by the disciplinary authorities. Amended s. RL 7.03 (4) reads:

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 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.

The other comments received were carefully considered, but did not result in further changes to the rules for a number of reasons. Adequate training for board liaisons is not a rule issue, but a program issue to be addressed by the department. Allowing non-credential holders to apply for a period of one year from the date of application for a credential is considered by the department to be another means of protecting the public. The concern about whether there is an expansion of the disciplinary authority is unnecessary to address as the rules do not and could not expand the authority of boards to impose discipline. The lag time in enrolling participants may be addressed by procedure oversight and is not necessary to address by rule. The issue of making violation of the procedure agreement unprofessional conduct is beyond this rule-making. The expansion of the program to include mental, physical and health conditions is also beyond the scope of this rule-making. Reconsidering or postponing action on the rules until the NCSBN acts on its draft guidelines for alternative programs needlessly delays important rule changes applicable to all disciplinary authorities to an unknown date in the future. Additionally, many issues addressed in the NCSBN guidelines may be addressed with modifications to future participant agreements which are prepared by the procedure coordinator and do not require rule changes.

VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:

Comment 5.e. In s. RL 7.07 (3) (e), the agency might consider replacing the second sentence of the paragraph with the following: In making the decision if a referral should occur, the board liaison shall consider whether the credential holder's therapist and a therapist selected by the department approve the early termination."

Response: The department discussed s. RL 7.07 (3) (e) at length prior to submitting the proposed rule to the Clearinghouse, and will not be changing the language as suggested.

All of the other recommendations in the clearinghouse report were accepted in whole.

VII. FINAL REGULATORY FLEXIBILITY ANALYSIS:

These rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1), Stats.