



## CLIFFORD OTTE

WISCONSIN STATE REPRESENTATIVE  
27TH ASSEMBLY DISTRICT

October 30, 1998

To: The Members  
Assembly Committee on Consumer Affairs

From: Representative Clifford Otte, Chair *C.O.*

### MEMO

On October 30, 1998, the following clearinghouse rule was referred to the Assembly Committee on Consumer Affairs:

Clearinghouse Rule 98-107, relating to the issuance and use of administrative warnings.

The deadline for committee action on these rules is November 30, 1998. **If you are interested in requesting a hearing and/or submitting comments, please do so by November 16, 1998.**

A copy of the rule is attached.

*Assembly*

## **Committee Report**

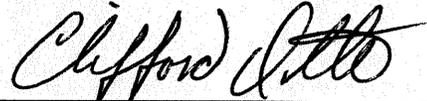
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The committee on **Consumer Affairs**, reports and recommends:

**Clearinghouse Rule 98-107**

Relating to the issuance and use of administrative warnings.  
Submitted by the Department of Regulation and Licensing.

November 30, 1998 - NO ACTION TAKEN



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Representative Clifford Otte  
Chair

Assembly

Record of Committee Proceedings

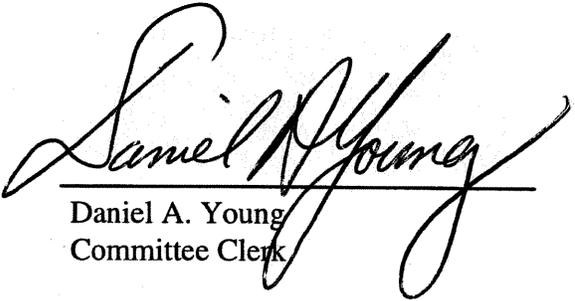
**Committee on Consumer Affairs**

**Clearinghouse Rule 98-107**

Relating to the issuance and use of administrative warnings.  
Submitted by the Department of Regulation and Licensing.

October 29, 1998      Referred to committee on Consumer Affairs.

November 30, 1998      **NO ACTION TAKEN**



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Daniel A. Young  
Committee Clerk

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

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**IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE  
PROCEEDINGS BEFORE THE : DEPARTMENT OF REGULATION AND  
DEPARTMENT OF REGULATION : LICENSING ADOPTING RULES  
AND LICENSING : (CLEARINGHOUSE RULE 98-107)**

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TO: Scott Jensen  
Speaker of the Assembly  
Room 211 West, State Capitol  
Madison, Wisconsin 53702

PLEASE TAKE NOTICE that the DEPARTMENT OF REGULATION AND LICENSING is submitting in final draft form proposed rules relating to the issuance and use of administrative warnings.

If you have any questions concerning the final draft form or desire additional information, please contact Pamela Haack at 266-0495.

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Tommy G. Thompson  
Governor

Marlene A. Cummings  
Secretary

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# Administrative Rules in Final Draft Form

## Department of Regulation and Licensing

### Rule: Chapter RL 8

### Relating to: Administrative Warnings

### Clearinghouse Rule: No. 98-107

Regulatory Boards

Accounting; Architects, Landscape Architects, Professional Engineers, Designers and Land Surveyors; Professional Geologists, Hydrologists and Soil Scientists; Auctioneer; Barbering and Cosmetology; Chiropractic; Controlled Substances; Dietitians; Funeral Directors; Hearing and Speech; Medical; Nursing; Nursing Home Administrator; Optometry; Pharmacy; Physical Therapists; Podiatry; Psychology; Real Estate; Real Estate Appraisers; Social Workers; Marriage and Family Therapists and Professional Counselors; and Veterinary.

Committed to Equal Opportunity in Employment and Licensing

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

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**IN THE MATTER OF RULE-MAKING : REPORT TO THE LEGISLATURE  
PROCEEDINGS BEFORE THE : ON CLEARINGHOUSE RULE 98-107  
DEPARTMENT OF REGULATION : (s. 227.19 (3), Stats.)  
AND LICENSING :**

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**I. THE PROPOSED RULE:**

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

**II. REFERENCE TO APPLICABLE FORMS:**

A form for use in issuing administrative warnings is included as an Appendix to the rule.

**III. FISCAL ESTIMATES:**

These rules will have no significant impact upon state or local units of government.

**IV. STATEMENT EXPLAINING NEED:**

Section 440.205, Stats., as created by 1997 Wisconsin Act 139, authorizes the issuance and use of administrative warnings by the Department of Regulation and Licensing, as well as by any board, examining board or affiliated credentialing board in the department. These proposed rules are submitted pursuant to the statute's requirement that it "promulgate rules establishing uniform procedures for the issuance and use of administrative warnings." Accordingly, the proposed rules would be available to all credentialing authorities referenced in chs. 440 to 480, Stats. This would include the Medical Examining Board which received the authority to issue administrative warnings by virtue of 1997 Wisconsin Act 311.

**V. NOTICE OF PUBLIC HEARING:**

A public hearing was held on September 15, 1998. Rick Staff, Madison, representing the Wisconsin Realtors Association registered in support of the proposed rules. There were no other appearances at the hearing nor were any written comments received.

**VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:**

Comments in paragraph 1.b. of the Clearinghouse Report were considered in reviewing the definitions of "first occurrence" and "minor violation" in s. RL 8.02. Statements by legislators who were involved in the final amendments to Assembly Bill 547 support the interpretation expressed in s. RL 8.02

All of the remaining recommendations suggested in the Clearinghouse Report have been accepted in whole.

**VII. FINAL REGULATORY FLEXIBILITY ANALYSIS:**

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

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10/12/98

STATE OF WISCONSIN  
DEPARTMENT OF REGULATION AND LICENSING

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IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE  
PROCEEDINGS BEFORE THE : DEPARTMENT OF REGULATION AND  
DEPARTMENT OF REGULATION : LICENSING ADOPTING RULES  
AND LICENSING : (CLEARINGHOUSE RULE 98-107)

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PROPOSED ORDER

An order of the Department of Regulation and Licensing to *create* chapter RL 8 and Appendix I of ch. RL 8, relating to the issuance and use of administrative warnings.

Analysis prepared by the Department of Regulation and Licensing.

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ANALYSIS

Statutes authorizing promulgation: s. 227.11 (2), Stats., and s. 440.205, Stats., as created by 1997 Wisconsin Act 139.

Statutes interpreted: s. 440.205, Stats.

Section 440.205, Stats., as created by 1997 Wisconsin Act 139, authorizes the issuance and use of administrative warnings by the Department of Regulation and Licensing, as well as by any board, examining board or affiliated credentialing board in the department. These proposed rules are submitted pursuant to the statute's requirement that it "promulgate rules establishing uniform procedures for the issuance and use of administrative warnings." Accordingly, the proposed rules would be available to all credentialing authorities referenced in chs. 440 to 480, Stats. This would include the Medical Examining Board which received the authority to issue administrative warnings by virtue of 1997 Wisconsin Act 311.

Section RL 8.01 sets forth the authority and scope of the rule establishing uniform procedures for the issuance and use of administrative warnings by the department and credentialing authorities established under chs. 440 to 480, Stats.

Section RL 8.02 provides definitions of several key terms within the statute and under the rule. One of the primary requirements under the statute for permitting the issuance of an administrative warning is that the matter must involve "a first occurrence of a minor violation."

Section RL 8.02 (5) defines a "first occurrence" as one in which the credential holder has not previously been: (a) the subject of a disciplinary proceeding pursuant to a formal complaint; (b) the subject of an informal complaint from the public alleging the same or similar conduct; or (c) the subject of formal disciplinary action in Wisconsin or another jurisdiction.

Section RL 8.02 (6) defines the included phrase "minor violation" as one in which: (a) no significant harm was caused by the credential holder's conduct; (b) continued practice would cause no immediate danger to the public; (c) the likely result of any disciplinary proceeding brought against the credential holder would be a reprimand or educational limitation; and (d) the credential holder has not previously received an administrative warning.

Section RL 8.03 requires that an administrative warning may only be issued following a determination by the issuing credentialing authority that there is specific evidence of misconduct respecting a minor violation [as defined in s. RL 8.02 (6)], which is a first occurrence [as described under s. RL 8.02 (5)], and which, if issued, will adequately protect the public. These criteria are set forth in the rule to reflect the findings required under the language contained within 1997 Wisconsin Act 139.

Section RL 8.04 sets forth the form and procedure for notifying a credential holder respecting the issuance of an administrative warning.

Sections RL 8.06 and 8.06 address the procedures by which a credential holder may obtain a review of the administrative warning issued by a credentialing authority. Respectively, they provide the credential holder with 20 days to request a review of the administrative warning, and for the disciplinary authority to notify the credential holder of the time and place for the review within 45 days of the receipt of the request. Section RL 8.06 (2) to (5) set forth general procedures applicable to handling the review process.

Section RL 8.07 addresses the applicable fees for obtaining a transcript of the review conducted for appeal or other purposes.

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#### TEXT OF RULE

SECTION 1. Chapter RL 8 is created to read:

#### CHAPTER RL 8

#### ADMINISTRATIVE WARNINGS

RL 8.01 AUTHORITY AND SCOPE. Rules in this chapter are adopted under the authority of s. 440.205, Stats., to establish uniform procedures for the issuance and use of administrative warnings.

RL 8.02 DEFINITIONS. As used in s. 440.205, Stats., and in this chapter:

(1) "Credential" means a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480, Stats.

(2) "Department" means the department of regulation and licensing.

(3) "Disciplinary authority" means the department or an attached examining board, affiliated credentialing board or board having authority to reprimand a credential holder.

(4) "Division" means the division of enforcement in the department.

(5) "First occurrence" means any of the following:

(a) The credential holder has never been charged as a respondent in a formal complaint filed under ch. RL 2.

(b) Other than the matter pending before the disciplinary authority, no informal complaint alleging the same or similar misconduct has been filed with the department against the credential holder.

(c) The credential holder has not been disciplined by a disciplinary authority in Wisconsin or another jurisdiction.

(6) "Minor violation" means all of the following:

(a) No significant harm was caused by misconduct of the credential holder.

(b) Continued practice by the credential holder presents no immediate danger to the public.

(c) If prosecuted, the likely result of prosecution would be a reprimand or a limitation requiring the credential holder to obtain additional education.

(d) The complaint does not warrant use of prosecutorial resources.

(e) The credential holder has not previously received an administrative warning.

(7) "Misconduct" means a violation of a statute or rule related to the profession or other conduct for which discipline may be imposed under chs. 440 to 480, Stats.

#### RL 8.03 FINDINGS BEFORE ISSUANCE OF AN ADMINISTRATIVE WARNING.

Before issuance of an administrative warning, a disciplinary authority shall make all of the following findings:

(1) That there is specific evidence of misconduct by the credential holder.

(2) That the misconduct is a first occurrence for the credential holder.

(3) That the misconduct is a minor violation of a statute or rule related to the profession or other conduct for discipline may be imposed.

(4) That issuance of an administrative warning will adequately protect the public.

RL 8.04 ISSUANCE OF AN ADMINISTRATIVE WARNING. (1) An administrative warning shall be substantially in the form shown in Appendix I.

(2) An administrative warning may be issued to a credential holder by mailing the administrative warning to the last address provided by the credential holder to the department. Service by mail is complete on the date of mailing.

RL 8.05 REQUEST FOR A REVIEW OF AN ADMINISTRATIVE WARNING. A credential holder who has been issued an administrative warning may request the disciplinary authority to review the issuance of the administrative warning by filing a written request with the disciplinary authority within 20 days after the mailing of the administrative warning. The request shall be in writing and set forth:

(1) The credential holder's name and address.

(2) The reason for requesting a review.

RL 8.06 PROCEDURES. The procedures for an administrative warning review are:

(1) Within 45 calendar days of receipt of a request for review, the disciplinary authority shall notify the credential holder of the time and place of the review.

(2) No discovery is permitted. A credential holder may inspect records under s. 19.35, Stats., the public records law.

(3) The disciplinary authority or its designee shall preside over the review. The review shall be recorded by audio tape unless otherwise specified by the disciplinary authority.

(4) The disciplinary authority shall provide the credential holder with an opportunity to make a personal appearance before the disciplinary authority and present a statement. The disciplinary authority may request the division to appear and present a statement on issues raised by the credential holder. The disciplinary authority may establish a time limit for making a presentation. Unless otherwise determined by the disciplinary authority, the time for making a personal appearance shall be 20 minutes.

(5) If the credential holder fails to appear for a review, or withdraws the request for a review, the disciplinary authority may note the failure to appear in the minutes and leave the administrative warning in effect without further action.

RL 8.07 TRANSCRIPTION FEES. (1) The fee charged for a transcript of a review under this chapter shall be computed by the person or reporting service preparing the transcript on the following basis:

(a) If the transcript is prepared by a reporting service, the fee charged for an original transcription and for copies shall be the amount identified in the state operational purchasing bulletin which identifies the reporting service and its fees.

(b) If a transcript is prepared by the department, the department shall charge a transcription fee of \$1.75 per page and a copying charge of \$.25 per page. If 2 or more persons request a transcript, the department shall charge each requester a copying fee of \$.25 per page, but may divide the transcript fee equitably among the requesters. If the department has prepared a written transcript for its own use prior to the time a request is made, the department shall assume the transcription fee, but shall charge a copying fee of \$.25 per page.

(2) A person who is without means and who requires a transcript for appeal or other reasonable purposes shall be furnished with a transcript without charge upon the filing of a petition of indigence signed under oath.

SECTION 2. Appendix I of Chapter RL 8 is created to read:

APPENDIX I

State of Wisconsin

DEPARTMENT OF REGULATION AND LICENSING  
[DISCIPLINARY AUTHORITY]  
ADMINISTRATIVE WARNING

This administrative warning is issued by the {disciplinary authority} to {credential holder} pursuant to s. 440.205, Stats. The {disciplinary authority} makes the following findings:

- wit:
- 1) That there is evidence of professional misconduct by {credential holder}, to
  - 2) That this misconduct is a first occurrence for {credential holder}.
  - 3) That this misconduct is a minor violation of {statute or rule}.
  - 4) That issuance of this administrative warning will adequately protect the public and no further action is warranted.

Therefore, the {disciplinary authority} issues this administrative warning and hereby puts the {credential holder} on notice that any subsequent violation may result in disciplinary action. The investigation of this matter is hereby closed.

Date: \_\_\_\_\_  
Signature of authorized representative  
For {Disciplinary Authority}

**Right to Review**

**You may obtain a review of this administrative warning by filing a written request with the {disciplinary authority} within 20 days of mailing of this warning. The review will offer the credential holder an opportunity to make a personal appearance before the {disciplinary authority}.**

*The record that this administrative warning was issued is a public record.  
The content of this warning is private and confidential.*

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(END OF TEXT OF RULE)  
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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 \_\_\_\_\_

Marlene A. Cummings, Secretary  
Department of Regulation and Licensing

### FISCAL ESTIMATE

1. The anticipated fiscal effect on the fiscal liability and revenues of any local unit of government of the proposed rule is: \$0.00.
2. The projected anticipated state fiscal effect during the current biennium of the proposed rule is: \$0.00.
3. The projected net annualized fiscal impact on state funds of the proposed rule is: \$0.00.

### FINAL REGULATORY FLEXIBILITY ANALYSIS

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

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10/21/98

WISCONSIN LEGISLATIVE COUNCIL STAFF



***RULES CLEARINGHOUSE***

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Madison, WI 53701-2536  
FAX: (608) 266-3830

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**CLEARINGHOUSE REPORT TO AGENCY**

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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 98-107**

AN ORDER to create chapter RL 8 and Appendix I of chapter RL 8, relating to the issuance and use of administrative warnings.

Submitted by **DEPARTMENT OF REGULATION AND LICENSING**

08-03-98 RECEIVED BY LEGISLATIVE COUNCIL.

08-21-98 REPORT SENT TO AGENCY.

RS:DD:jal;kjf

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached      YES       NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached      YES       NO

# WISCONSIN LEGISLATIVE COUNCIL STAFF

## RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 98-107

### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]**

#### 1. Statutory Authority

a. It is assumed that the rule also serves as an interpretation of s. 448.02 (8), Stats., and is in compliance with s. 448.40 (2) (f), Stats., both as affected by 1997 Wisconsin Act 311. [See SECTIONS 5 and 13 of Act 311.] The rule should so indicate.

b. The definitions of "first occurrence" and "minor violation," combined with the required findings of s. RL 8.03 represent a narrow reading of s. 440.205, Stats. For example, for an occurrence of a minor violation to be considered a second or subsequent violation does not even require that a previous administrative warning have been issued; rather, merely a previous charge in a formal complaint or allegation in an informal complaint is sufficient. Further, a first occurrence of a minor violation refers to any type of previous misconduct, not the particular type of misconduct currently at issue. Thus, a prior allegation of misconduct by informal complaint, for example, would constitute a prior occurrence, regardless of the outcome of the allegation or of the type of misconduct, no matter how unrelated to the current allegation. (In the latter regard, note that the form in Appendix I informs the credential holder that any subsequent *similar* violation may result in disciplinary action. The use of "similar" in the form is inconsistent with the rule.) While the statute can be read this narrowly, the department may wish to review the rule to determine if it meets the department's and Legislature's intent.

#### 2. Form, Style and Placement in Administrative Code

a. The department's analysis fails to summarize the substance of the rule; it merely abstractly describes what the rule is intended to accomplish.

- b. It appears that in the introductory clause of s. RL 8.02 (5), "any of the following" should precede the colon.
- c. In the introductory clause of s. RL 8.02 (6), "all of the following" should precede the colon.
- d. In s. RL 8.02 (7), "may" should be substituted for "could."

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. It appears that s. RL 8.02 (6) (e) is in need of clarification: how and by whom was the credential holder previously warned about the same or similar conduct? If the paragraph refers to a previous administrative warning, that does not appear possible, given the definition of "first occurrence." As drafted, the rule does not appear to permit more than one administrative warning.

b. In s. RL 8.03 (3), "of a statute or rule" may be too limiting. Compare the definition of "misconduct" in s. RL 8.02 (7), which refers to violation of a statute or rule or "other conduct for which discipline may be imposed."

c. In s. RL 8.06 (5), the word "their" should be replaced by the word "the."



## CLIFFORD OTTE

WISCONSIN STATE REPRESENTATIVE  
27TH ASSEMBLY DISTRICT

October 30, 1998

To: The Members  
Assembly Committee on Consumer Affairs

From: Representative Clifford Otte, Chair *C.O.*

### MEMO

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The deadline for committee action on these rules is November 30, 1998. **If you are interested in requesting a hearing and/or submitting comments, please do so by November 16, 1998.**

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