

Clearinghouse Rule 19-166

STATE OF WISCONSIN
MARRIAGE AND FAMILY THERAPY, PROFESSIONAL
COUNSELING AND SOCIAL WORK EXAMINING BOARD

IN THE MATTER OF RULEMAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : MARRIAGE AND FAMILY THERAPY,
MARRIAGE AND FAMILY THERAPY, : PROFESSIONAL COUNSELING, AND
PROFESSIONAL COUNSELING, AND : SOCIAL WORK EXAMINING BOARD
SOCIAL WORK EXAMINING BOARD : ADOPTING RULES
: (CLEARINGHOUSE RULE)

PROPOSED ORDER

An order of the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board to amend MPSW 20.02 (intro.), (8), (10) (c), (12), (13), (14), (18), (20), and (23); to repeal and recreate MPSW 20.02 (11) and (16); and to create MPSW 20.02 (13g), (13r), (24), (25), (26), (27), (28), (29), (30), and (31) relating to unprofessional conduct.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: Section 457.03 (2), Stats.

Statutory authority: Sections 15.08 (5) (b) and 457.03 (2), Stats.

Explanation of agency authority:

Section 15.08 (5) (b), Stats., states that each examining board “[s]hall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.”

Section 457.03 (2), Stats., states that the board shall “Upon the advice of the social work section, marriage and family therapist section, and professional counselor section, promulgate rules establishing a code of ethics to govern the professional conduct of certificate holders and licensees...”

Related statute or rule: None.

Plain language analysis:

This rule project revises ch. MPSW 20 to update the rules of professional conduct for marriage and family therapists, professional counselors, and social workers to bring them into line with current professional standards, and revises existing provisions for conciseness and clarity.

Substantive changes include revising the chapter to prohibit discrimination on the basis of gender (as opposed to sex) and gender identity, and removes “color” as an unlawful basis of discrimination.

The rule also expands upon what shall be considered inappropriate sexual behavior with a client, and imposes a ban on any romantic relationship with a client, regardless of the amount of time elapsed since the clinical relationship has terminated. The rule creates a provision forbidding a credentialed person from taking unfair advantage of any professional relationship, or exploiting clients, supervisees, or students. The rule also prohibits practitioners from employing or promoting any intervention or method that has the purpose of attempting to change a person’s sexual orientation or gender identity. Further, the rule prohibits the development of any personal relationship with a client, or former client, within two years of the termination of the clinical relationship, if that relationship might impact the credentialed person’s objectivity.

The rule also codifies the duty of a credentialed person to cooperate with the section during investigations, and a duty for supervisors to ensure that subordinate employees are properly supervised.

Finally, the rule provides a duty to notify the appropriate section within 48 hours of a criminal conviction, a duty to comply with mandatory child abuse reporting requirements under state law, and requires that credential holders obtain written informed consent from a client or the client’s legal representative prior to taping, recording, or filming clinical sessions.

Summary of, and comparison with, existing or proposed federal regulation: None.

Summary of public comments received on statement of scope and a description of how and to what extent those comments and feedback were taken into account in drafting the proposed rule: None.

Comparison with rules in adjacent states:

Illinois: Illinois law does not prohibit sexual contact with former clients beyond two years after the termination of treatment for social workers and marriage and family therapists, and five years for professional counselors. Although Illinois law does not explicitly prohibit practitioners from employing or promoting any intervention or method that has the purpose of attempting to change a person’s sexual orientation or gender identity, Illinois prohibits practitioners from engaging in any action that diminishes the civil or legal rights of clients, or results in the sexual exploitation of clients.

Illinois prohibits discrimination on the basis of gender rather than sex, and does not mention “color” as a forbidden grounds of discrimination. Illinois additionally prohibits discrimination based on “choice of lifestyle.”

Illinois law further requires practitioners to provide adequate supervision to subordinates, and requires practitioners to seek supervision or other assistance when necessary.

Illinois does not expressly provide for a duty to comply with Board investigations, inform the Board of any criminal convictions, or not to aid or abet unlicensed practice.

(Ill. Admin Code ss. 1283.100, 1470.96, and 1375.225).

Iowa: Social worker professional standards for conduct are determined and administered by the Iowa Board of Social Work. Rules allow for the discipline of a practitioner who negligently delegates duties or supervision of employees. The rules do not appear to expressly restrict sexual contact with a client or past client, prohibit discrimination, prohibit employing or promoting any intervention or method that has the purpose of attempting to change a person’s sexual orientation or gender identity, or require notice to the board after conviction of a crime, although there is a provision requiring social workers to conform to the minimal standard of acceptable and prevailing practice within the state. (IAC s. 645.283.2).

The Iowa Board of Behavioral Science regulates professional counselors and marriage and family therapists. The rules require notification of a criminal conviction and cooperation with the Board. The rules also require the licensee not to aid or abet unlawful practice. Further, a licensee may not engage in sexual contact with a current client, or a former client for 5 years, or indefinitely, if the client has a history of any physical, emotional, or sexual abuse, or has been diagnosed with any form of psychosis or personality disorder, or if the client is likely to continue to need therapy for a chronic condition. Although the Board’s rules do not expressly prohibit discrimination based on traditionally unlawful grounds, the rules do prohibit unethical conduct generally. (IAC s. 645.33.2).

Michigan: Michigan statute provides a list of provisions, the violation of which would result in penalties to a person credentialed under the Michigan Occupational Code, including social workers, professional counselors, and marriage and family therapists:

- (a) Practices fraud or deceit in obtaining a license or registration.
- (b) Practices fraud, deceit, or dishonesty in practicing an occupation.
- (c) Violates a rule of conduct of an occupation.
- (d) Demonstrates a lack of good moral character.
- (e) Commits an act of gross negligence in practicing an occupation.
- (f) Practices false advertising.
- (g) Commits an act which demonstrates incompetence.
- (h) Violates any other provision of this act or a rule promulgated under this act for which a penalty is not otherwise prescribed.

- (i) Fails to comply with a subpoena issued under this act.
- (j) Fails to respond to a citation as required by section 555.
- (k) Violates or fails to comply with a final order issued by a board, including a stipulation, settlement agreement, or a citation.
- (l) Aids or abets another person in the unlicensed practice of an occupation.

(MCL s. 339.604).

Additionally, professional counseling and marriage and family therapist licensees are prohibited by rule from performing any acts, tasks, or functions within the practice of their occupation unless trained to perform the task, act, or function in question. (MCL s. 333.18511, 333.18105).

Minnesota: Minnesota's social work statute prohibits discrimination on the same grounds as Wisconsin, except they have not removed "color" as an unlawful basis. (Minn. Stats. 148E.215). Although the professional counselor administrative rules do not expressly prohibit discrimination on the traditionally unlawful grounds or prohibit employing or promoting any intervention or method that has the purpose of attempting to change a person's sexual orientation or gender identity, there is a provision requiring professional counselors to conform to minimum standards of acceptable and prevailing practice. (Minn. Admin R. 2150.7600).

Personal relationships between social workers, professional counselors, and marriage and family therapists and clients are prohibited if it would create a risk of client harm or of impairing a credential holder's objectivity or judgment. Personal relationships with former clients are prohibited if a reasonable and prudent social worker would conclude that either the former client or social worker is emotionally dependent on the other. Minnesota also prohibits sexual contact with a client, and sexual contact with a former client for at least two years after the conclusion of the professional relationship. Sexual contact with a former client is never allowed if the social worker engaged in diagnosing, counseling, or treating a client with a mental, emotional, or behavioral disorder; unless the social worker can demonstrate that they have not intentionally or unintentionally coerced, exploited, deceived, or manipulated the client, has not suggested to the client that sexual conduct is consistent with or part of the former client's treatment, and neither the client nor the social worker are emotionally dependent on each other. (See Minn. Stats. 148E.220, Minn. Admin R. 2150.7540).

Minnesota requires social workers to report criminal convictions to the Board within 90 days. Social workers also have a duty under Minnesota law to comply with state reporting requirements relating to duty to warn, maltreatment of minors, and maltreatment of vulnerable adults. (Minn. Stats. 148E.240). Social workers are also obligated to fully cooperate with board investigations. (Minn. Stats. 148E.250).

Finally, social workers have an affirmative duty to seek supervision or consult when appropriate or necessary for competent practice, and an affirmative duty not to delegate

tasks that a supervisor reasonably should know the individual is not competent to perform. (Minn. Stats. 148E.200).

Summary of factual data and analytical methodologies:

The Marriage and Family Therapy, Professional Counseling and Social Work Examining Board performed a comprehensive review of chapter MPSW 20. There had not been a comprehensive review of this code chapter since 2002. This rule project reflects the Board's efforts to revise the chapter for clarity, remove obsolete provisions, and ensure the chapter is current with professional standards and practices.

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

This rule will be posted for 14 days for comments relating to the economic impact of the rule.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business:

The preliminary rule draft was posted on the department's website for 14 days to solicit economic impact comments. None were received.

Agency contact person:

Jon Derenne, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, 4822 Madison Yards Way, P.O. Box 8366, Madison, Wisconsin 53708; telephone 608-266-0955; email at DSPSAdminRules@wisconsin.gov.

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

Comments may be submitted to Jon Derenne, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, 4822 Madison Yards Way, P.O. Box 8366, Madison, WI 53708-8366, or by email to DSPSAdminRules@wisconsin.gov. Comments must be received on or before the hearing scheduled for 11:00 AM on January 28, 2020 to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. MPSW 20.02 (intro.), (8) and (10) (c) are amended to read:

MPSW 20.02 Unprofessional conduct related to the practice under a credential issued under ch. 457, Stats., includes, ~~but is not limited to,~~ engaging in, attempting to engage in, or aiding or abetting the following conduct:

(8) Discriminating on the basis of age, race, ~~color, sex~~gender, gender identity, religion, creed, national origin, ancestry, disability or sexual orientation by means of service provided or denied.

(10) (c) If necessary to prevent injury to the client or another person, or to report suspected abuse or neglect of a child, or threatened abuse or neglect of a child, including mandatory reports under state or federal law.

SECTION 2. MPSW 20.02 (11) is repealed and recreated to read:

MPSW 20.02 (11) Engaging in sexual contact, sexual conduct, or any other behavior which could reasonably be construed as seductive, romantic, harassing, or exploitative, with:

(a) A client.

(b) A former client, regardless of the amount of time that has passed since the termination of professional services.

(c) A person to whom the credentialed person is providing teaching, supervisory, or other instructional services.

SECTION 3. MPSW 20.02 (12) and (13) are amended to read:

MPSW 20.02 (12) ~~Failing to provide~~obtain the informed consent of the client or client's authorized representative prior to providing treatment ~~a description of what may be expected in the way of tests, consultation, reports, fees, billing, therapeutic regimen or schedule.~~

(13) ~~Failing to avoid dual relationships or relationships that may impair the credentialed person's objectivity or create a conflict of interest. Dual relationships prohibited to credentialed persons include the credentialed person treating the credentialed person's employers, employees, supervisors, supervisees, close friends or relatives, and any other person with whom the credentialed person shares any important continuing relationship.~~

SECTION 4. MPSW 20.02 (13c) and (13g) are created to read:

MPSW 20.02 (13g) Developing a personal relationship with a former client that would impact the credentialed person's objectivity. This restriction shall apply for two years following the termination of the credential holder-client relationship.

(13r) Taking unfair advantage of any professional relationship, or exploiting clients, students, or supervisees.

SECTION 5. MPSW 20.02 (14) is amended to read:

MPSW 20.02 (14) Failing to conduct an assessment, evaluation, or diagnosis as a basis for treatment ~~consultation~~.

SECTION 6. MPSW 20.02 (16) is repealed and recreated to read:

MPSW 20.02 (16) In the conduct of research, failing to obtain the informed consent of a study participant, failing to protect participants from physical or mental discomfort, harm or danger, or failing to detect and remove any undesirable consequences to the participants resulting from research procedures.

SECTION 7. MPSW 20.02 (18) is amended to read:

MPSW 20.02 (18) Failing to maintain adequate records relating to services provided to a client in the course of a professional relationship. ~~A credential holder providing clinical services to a client shall maintain records documenting an assessment, a diagnosis, a treatment plan, progress notes, and a discharge summary. All clinical records shall be prepared in a timely fashion. Absent exceptional circumstances, clinical records shall be prepared not more than one week following client contact, and a discharge summary shall be prepared promptly following closure of the client's case.~~ Clinical records shall be maintained for at least 7 years after the last service provided, unless otherwise provided by state or federal law.

SECTION 8. MPSW 20.02 (20) and (23) are amended to read:

MPSW 20.02 (20) Failing to notify the board that a ~~license, certificate or registration~~ credential ~~for~~ permitting the practice of any profession previously issued to the credential holder has been revoked, suspended, limited, ~~or~~ denied, surrendered under investigation, or subject to any other disciplinary action by the authorities of any jurisdiction.

(23) Having a ~~license, registration, or certificate~~ credential permitting the practice or use of a title related to ~~of~~ marriage and family therapy, professional counseling, or social work revoked, suspended, limited, denied, surrendered under investigation, or, or authorizing the use of the title "marriage and family therapist," "professional counselor," "social worker", or similar terms, subject to discipline ~~revoked, suspended, limited, or subjected to any other discipline,~~ by any other jurisdiction.

SECTION 9. MPSW 20.02 (24), (25), (26), (27), (28), (29), (30), and (31) are created to read:

(24) Failing to notify the appropriate section in writing within 48 hours after the entry of a judgment of conviction for a felony or misdemeanor against the credentialed person, including the date, place, and nature of the conviction or finding. Notice shall include a copy of the judgment of conviction and a copy of the complaint or other information

which describes the nature of the crime in order that the section may determine whether the circumstances of the crime of which the credential holder was convicted are substantially related to the credential holder's practice.

(25) Employing or promoting any intervention or method that has the purpose of attempting to change a person's sexual orientation or gender identity, including attempting to change behaviors or expressions of self or to reduce sexual or romantic attractions or feelings toward individuals of the same gender. This does not include counseling that assists a client who is seeking to undergo a gender transition or who is in the process of undergoing a gender transition, or counseling that provides a client with acceptance, support, understanding, or that facilitates a client's coping, social support, and identity exploration or development. Nor does it include counseling in the form of sexual orientation-neutral or gender identity-neutral interventions provided for the purpose of preventing or addressing unlawful conduct or unsafe sexual practices, so long as the counseling is not provided for the purpose of attempting to change the client's sexual orientation or gender identity.

(26) Knowingly aiding, assisting, or advising in the unlawful practice of marriage and family therapy, professional counseling, or social work.

(27) Failing to comply with mandatory child abuse reporting requirements under state or federal law.

(28) Failing to obtain written, informed consent from the client or client's legal representative prior to the use of electronic taping, recording, or filming procedures, unless the electronic taping, recording, or filming is necessary as part of a legal investigation or proceedings.

(29) Failing to exercise an adequate degree of supervision over subordinates.

(30) Refusing to cooperate in a timely manner with the section's investigation of a complaint lodged against a credentialed person. Credentialed persons taking longer than 30 days to respond shall have the burden of demonstrating that they have acted in a timely manner.

(31) Withholding documentation, or approval for submission, of a supervisee's clinical experience hours required to obtain a credential.

SECTION 10. EFFECTIVE DATE. 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.

(END OF TEXT OF RULE)
