

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

**IN THE MATTER OF RULEMAKING : REPORT TO THE LEGISLATURE
PROCEEDINGS BEFORE THE : CR 19-166
MARRIAGE AND FAMILY THERAPY, :
PROFESSIONAL COUNSELING, AND :
SOCIAL WORK EXAMINING BOARD :**

I. THE PROPOSED RULE:

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

II. REFERENCE TO APPLICABLE FORMS:

N/A.

III. FISCAL ESTIMATE AND EIA:

The Fiscal Estimate and EIA is attached.

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

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.

Changes include revising the chapter to prohibit discrimination in the provision of services on the basis of gender and gender identity, ethnicity, and biological sex.

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 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. Additionally, the rule codifies the duty of a credentialed person to cooperate with the section during investigations.

Finally, the rule creates a duty for supervisors to ensure that subordinate employees are properly supervised. Under the revised rule, supervisors would also be prohibited from unreasonably withholding documentation of an applicant's clinical training hours.

V. SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES, EXPLANATION OF MODIFICATIONS TO PROPOSED RULES PROMPTED BY PUBLIC COMMENTS:

The Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board held a public hearing on January 28, 2020. The following people either testified at the hearing, or submitted written comments:

Marc Herstand, representing NASW WI
Shelley Gregory, representing FORGE
Dr. Jennifer C. Cook
Miranda Hassett
Suzanne van Landingham
Mary Rowe
Evelyn Gildrie-Voyles
Julaine Appling, representing Wisconsin Family Action
Patricia Nowobielski
Jon Schussman
Wesley Mrowka
Carol Brown
Michael Holzman
Betty Campbell
Kristin Smies
Kurt August
Gordon and Eileen Oksnevad
Linda Mand
Sandra and Mike Andress
Christine Weidenbenner
Jan Volkmann
Melody Steinbart
Kenneth Kamps
Michael Levenhagen
Jolene Helbig
Charlotte and Michael Nordstrum
Daun Vick
Jean Holzman
Holly Kirchner
E. Lee Webster

Nancy G. Dierauer
Nancy Olsen
Nancy Olson
Anne Franczek
Jim and Ginny Maziarka
Amanda Ohlrich
Todd Schelfhout
Rhonda Thompson
R. Jest
Mark and Teresa Richter
Sandra Wisler
Beth Langteau
Mary Scott
Shelly Aslaksen
Janet Hurguy
Heath Perry
Pamela Bull
Samantha Sopata
Wisconsin DSPS, Division of Legal Services and Compliance

The Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board summarizes the comments received either by hearing testimony or by written submission as follows:

Marc Herstand - NASW WI commented on the following:

- NASW WI supports the proposed rule. Being gay, lesbian, bisexual or transgender is not a sickness or disorder, nor is there scientific evidence to suggest that sexual orientation change efforts are effective in “curing” someone from being LGBTQ.
- The NASW WI also expressed concerns that sexual orientation change efforts can pose significant health risks, particularly to LGBTQ children, including depression, confusion, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Shelley Gregory - FORGE commented on the following:

- FORGE supports the proposed rule. FORGE believes that changing the ethical standards for credential holders will protect LGBTQ+ people from the harm caused by conversion therapy, including the risk of depression, anxiety, shame, decreased self-esteem, social withdrawal, substance abuse, and suicidality.
- FORGE also points out that being LGBTQ+ is not a mental health disorder, nor is there evidence that treatments aimed at “conversion” are successful.

Miranda Hassett, Suzanne van Landingham, and Mary Rowe, commented on the following:

- Supports the proposed rule on the grounds that efforts to change gender identity or sexual orientation are harmful to the health of LGBTQ+ people.

Evelyn Gildrie-Voyles commented on the following:

- Expressed general support for the rule.

Dr. Jennifer Cook commented on the following:

- Color should not be removed as an impermissible basis for discrimination in the provision of services, as it is not obsolete. It is possible for individuals to discriminate against others based on the shade of their skin, unrelated to the person's racial or ethnic identity.
- Ethnicity should be added as an impermissible basis for discrimination in the provision of services. Ethnicity and race are connected, but not interchangeable terms.
- Sex should be retained as an impermissible basis for discrimination in the provision of services, and specified as biological sex. Biological sex assigned at birth is distinct from one's gender identity, and can result in discrimination separate from one's gender identity.

Julaine K. Appling - Wisconsin Family Action, Samantha Sopata, Rhonda Thompson, Daun Vick, Charlotte and Michael Nordstrum, Kenneth Kamps, Gordon and Eileen Oksnevad, Jon Schussman, Melody Steinbart commented on the following:

- Does not support replacing sex with gender and gender identity. Sex is one's biological makeup, not gender or gender identity.

Michael Levenhagen, Pamela Bull, Beth Langteau, Sandra Wisler, Mark and Teresa Richter, R. Jest, Todd Schelfhout, Amanda Ohlrich, Nancy Olsen, E. Lee Webster, Jean Holzman, Daun Vick, Joleen Helbig, Sandra and Mike Andress, Linda Mand, Gordon and Eileen Oksnevad, Kurt August, Kristin Smies, Betty Campbell, Carol Brown, Patricia Nowobielski commented on the following:

- Individuals should have the freedom to seek all forms of assistance in their mental health treatment, including conversion therapy if they desire. People should be free to determine for themselves the role of same-sex sexuality in their lives and identity.

Heath Perry, Rhonda Thompson commented on the following:

- LGBT individuals often struggle with mental health issues, which in some cases is caused by their sexuality, and banning conversion therapy may cause them physical and emotional harm.

Nancy Olsen, E. Lee Webster commented on the following:

- Gender transition is a permanent decision. If given a chance, many people with gender dysphoria will pass through that phase and become satisfied with the gender of their birth.

Heath Perry, Kurt August, Wesley Mrowka, and Linda Mand commented on the following:

- If there is to be a ban on conversion therapy, it should be legislative.

Julaine K. Appling – Wisconsin Family Action, Janet Hurguy, Shelley Aslaksen, Beth Langteau, Mark and Teresa Richter, R. Jest, Amanda Ohlrich, Jim and Ginny Maziarka, Anne Franczek, Rhonda Thompson, Jean Holzman, Daun Vick, Charlotte and Michael Nordstrum, Kenneth Kamps, Jan Volkmann, Mike and Sandra Andress, Linda Mand, Gordon and Eileen Oksnevad, Kristin Smies, Carol Brown, Wesley Mrowka, Jon Schussman, Patricia Nowobielski, Melody Steinbart, Christine Weidenbenner commented on the following:

- Counselors should have the professional and religious freedom to use the methods they deem appropriate in treating clients.

Nancy G. Dierauer commented on the following:

- A ban on conversion therapy would violate the American Psychological Association's Code of Conduct because it would prevent clients' access to the benefits of psychology, would diminish trust between practitioner and the client, and infringes on a client's right to self-determination.

Mary Scott, Pamela Bull, Gordon and Eileen Oksnevad commented on the following:

- Expressed general opposition to homosexuality or transgenderism.

Nancy Olson commented on the following:

- Children do not need to be educated on trans issues. They can learn about this as an adult if interested.

E. Lee Webster, Kurt August, Michael Holzman commented on the following:

- Minors should not be encouraged in a therapeutic setting to make irreversible decisions regarding their sexual development.

James and Ginny Maziarka, Holly Kirchner commented on the following:

- Expressed general opposition to making conversion therapy unprofessional conduct.

Christine Weidenbenner commented on the following:

- The rule applies regardless of whether money or services are exchanged. There should be a provision so the rule only applies to services provided in exchange for consideration.

Mike and Sandy Andress commented on the following:

- The stated purpose of the rule is to bring the chapter into line with current professional standards, however none of our surrounding states specifically prohibit conversion therapy as unprofessional conduct.
- The rule should have been publicized more widely.
- Informed consent in MPSW 20 (12) is too vague and less protective of the client.

DSPS Division of Legal Services and Compliance commented on the following:

- There is no definition of “client” or “authorized representative” in the preliminary rule draft for MPSW 20. Please consider adding a definition for clarity and consistency among the three sections.
- Consider adding a specific time period for notification in MPSW 20.02 (20). Example: Failing to notify the Board within 30 days of the imposed discipline. Without a specific time limit, it will be difficult to determine when the failure to notify occurred. In addition, clarification is needed concerning if the requirement for notification applies only to the affected credential holder who was disciplined; or, whether any credential holder has a duty to inform the board/section about discipline to any credential holder.
- Consider beginning MPSW 20.02 (31) with “Unreasonably...”

The Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board explains modifications to its rule-making proposal prompted by public comments as follows:

The Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board made the following changes:

- The word “sex” in s. MPSW 20.02 (8) is retained and revised to read as “biological sex.”
- The word “color” in s. MPSW 20.02 (8) is retained.
- The word “ethnicity” in s. MPSW 20.02 (8) is added.
- A 30-day period in which notification is required is added to MPSW 20.02 (20).
- The word “Unreasonably” is added to the beginning of MPSW 20.02 (31).

The Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board did not make modifications for the reasons below:

- The board will not amend MPSW 20.01 to add definitions for “client” or “authorized representative.” The meaning of these terms as they are used within the rule is sufficiently clear, and definition is not necessary.
- The board will not amend MPSW 20.02 (20) to clarify that the credential holder only has a duty to inform the board of pending discipline against the credential holder’s own credentials, and not the credentials of another person. The rule specifically states that it is unprofessional conduct not to inform the board of disciplinary action taken against a credential previously issued to “the credential holder.” This language is sufficiently clear.
- The board will proceed with including gender and gender identity in s. MPSW 20.02 (8) as this language is consistent with the current scientific literature and industry practice.
- The board will proceed with its proposed changes to s. MPSW 20.02 (12). Simply requiring informed consent prior to treatment, as opposed to the current non-exhaustive list of required disclosures, is more inclusive and will ensure the client is provided with all the information necessary to make important healthcare decisions.
- The board will proceed with including s. MPSW 20.02 (25) in the rule draft for the following reasons:

- It is within the statutory authority of the board to make rules regarding the professional conduct and standards of practice for the professionals it regulates. Further, this rule project has followed all the required procedures for rulemaking under Wisconsin law, including notice and hearing requirements.
- It is not accurate that clients and counselors would no longer be able to discuss sexual orientation or gender identity issues. A counselor will still, for example, have the ability to provide support to a client undergoing a gender transition and assistance in identity exploration or development, so long as the purpose of the counseling is not to attempt to change the client's sexual orientation or gender identity.
- The board rejects the suggestion to add a provision making the rule applicable only to services provided to minors. The board also rejects suggestions that the rule should only apply where the credentialed person is accepting consideration in exchange for providing the service. Gender dysphoria, gender nonconformity, and homosexuality are not mental health disorders requiring treatment. Neither the client's age nor whether the client is paying for the service are relevant. It is unprofessional conduct to attempt to treat mental health disorders that do not exist, especially with ineffective and potentially harmful treatments, regardless of the client's age or whether money is changing hands.
- The board is not persuaded by the suggestion that because surrounding states do not expressly consider this practice to be unprofessional conduct, this means that it is an acceptable practice within the profession. The consensus within the profession is that gender dysphoria, gender nonconformity, and homosexuality are not mental health disorders requiring treatment. Further, although our surrounding states do not expressly make the practice unprofessional conduct, other states do.
- Credentialed individuals are not entitled to use treatment methods that are ineffective, harmful, and not aimed toward treating an actual mental health disorder. Nor are clients entitled to receive these services from credential holders. Clients who are interested in receiving these services are not restricted from consulting with other individuals, such as clergy or other counselors not credentialed by this board.
- This rule change would not violate the principles of the APA's code of professional conduct. The APA applies to psychologists, not marriage and family therapists, professional counselors, or social workers. Even if the principles did govern, the APA's code of conduct requires that practitioners not harm their clients or engage in fraud or intentional misrepresentation of fact. So called "conversion therapy" treatments have the potential to cause clients great harm. Furthermore, there is no evidence these treatments are effective, nor is there actually an underlying mental health disorder that they seek to treat.

VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:

The recommendations suggested in the Clearinghouse Report have been accepted in whole.

VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS:

The rule was sent to SBRRB on 12/30/19. No objections or concerns have been raised.

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 19-166)

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.

Changes include revising the chapter to prohibit discrimination in the provision of services on the basis of gender and gender identity, ethnicity, and biological sex.

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 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. Additionally, the rule codifies the duty of a credentialed person to cooperate with the section during investigations.

Finally, the rule creates a duty for supervisors to ensure that subordinate employees are properly supervised. Under the revised rule, supervisors would also be prohibited from unreasonably withholding documentation of an applicant's clinical training hours.

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:

The rule was posted for 14 days to solicit comments relating to the economic impact of the rule. No comments were received.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business:

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at Daniel.Hereth@wisconsin.gov, or by calling (608) 267-2435.

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) 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, biological sex, gender, gender identity, religion, creed, national origin, ancestry, ethnicity, disability or sexual orientation by means of service provided or denied.

(10) Revealing facts, data, information, records or communication received from a client in a professional capacity, except in any of the following circumstances:

(a) With the informed consent of the client or the client's authorized representative;

(b) With notification to the client prior to the time the information was elicited of the use and distribution of the information;

(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.

(d) Pursuant to a lawful order of a court of law;

(e) Use of case history material for teaching, therapeutic or research purposes, or in textbooks or other literature, provided that proper precautions are taken to conceal the identity of the client;

(f) When required pursuant to federal or state statute.

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), (20) and (23) are 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.~~

(20) Failing to notify the board within 30 days 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 8. 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 9. 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)

This Proposed Order of the Marriage and Family Therapy, Professional Counseling and Social Work Examining Board is approved for submission to the Governor and Legislature.

Dated 2/24/2020

Kathleen Miller
Chair

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ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

<p>1. Type of Estimate and Analysis <input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected</p>	<p>2. Date December 26, 2019</p>
<p>3. Administrative Rule Chapter, Title and Number (and Clearinghouse Number if applicable) MPSW 20</p>	
<p>4. Subject Unprofessional Conduct</p>	
<p>5. Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input checked="" type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S</p>	<p>6. Chapter 20, Stats. Appropriations Affected 20.165(1)(g)</p>
<p>7. Fiscal Effect of Implementing the Rule <input type="checkbox"/> No Fiscal Effect <input type="checkbox"/> Increase Existing Revenues <input checked="" type="checkbox"/> Increase Costs <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Indeterminate <input type="checkbox"/> Decrease Existing Revenues <input checked="" type="checkbox"/> Could Absorb Within Agency's Budget</p>	
<p>8. The Rule Will Impact the Following (Check All That Apply) <input type="checkbox"/> State's Economy <input type="checkbox"/> Specific Businesses/Sectors <input type="checkbox"/> Local Government Units <input type="checkbox"/> Public Utility Rate Payers <input type="checkbox"/> Small Businesses (if checked, complete Attachment A)</p>	
<p>9. Estimate of Implementation and Compliance to Businesses, Local Governmental Units and Individuals, per s. 227.137(3)(b)(1). \$0</p>	
<p>10. Would Implementation and Compliance Costs Businesses, Local Governmental Units and Individuals Be \$10 Million or more Over Any 2-year Period, per s. 227.137(3)(b)(2)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>	
<p>11. Policy Problem Addressed by the Rule The board did a comprehensive review of its professional standards rule and revised the chapter to bring it into line with current professional standards and to enhance conciseness and clarity.</p>	
<p>12. Summary of the Businesses, Business Sectors, Associations Representing Business, Local Governmental Units, and Individuals that may be Affected by the Proposed Rule that were Contacted for Comments. This rule was posted for economic comments and none were received. The Board is not aware of any licensees whose practice may be economically impacted by the change in the unprofessional conduct rules.</p>	
<p>13. Identify the Local Governmental Units that Participated in the Development of this EIA. None.</p>	
<p>14. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred) None.</p>	
<p>15. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule The benefit of implementing the rule is that the Board's rules relating to professional conduct will be brought into conformity with current practice. The alternative of implementing the rule is to leave the code in its unrevised state, not reflecting current standards and expectations of practitioners credentialed by the board.</p>	
<p>16. Long Range Implications of Implementing the Rule The long range implication of implementing the rule is to update the code to ensure it truly reflects current practice.</p>	
<p>17. Compare With Approaches Being Used by Federal Government The federal government does not regulate professional conduct standards for social workers, professional counselors and marriage and family therapists.</p>	
<p>18. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)</p>	

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

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.
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ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

(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).

19. Contact Name Jon Derenne, Administrative Rules Coordinator	20. Contact Phone Number (608) 266-0955
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This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
- Less Stringent Schedules or Deadlines for Compliance or Reporting
- Consolidation or Simplification of Reporting Requirements
- Establishment of performance standards in lieu of Design or Operational Standards
- Exemption of Small Businesses from some or all requirements
- Other, describe:

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

5. Describe the Rule's Enforcement Provisions

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes No
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