

Clearinghouse Rule 15-078

STATE OF WISCONSIN
OPTOMETRY EXAMINING BOARD

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : OPTOMETRY EXAMINING BOARD
OPTOMETRY EXAMINING BOARD : ADOPTING RULES
: (CLEARINGHOUSE RULE)

PROPOSED ORDER

An order of the Optometry Examining Board to repeal Opt 3.03, 3.04, 3.05, 3.06, 3.09, 3.10, 3.11, 3.12, 5.04, 5.05, 5.06, 5.07, 5.08, 5.09, 5.10 (3) and (4), 5.11, 5.12, 5.13, 5.15 and 5.16; to consolidate, renumber and amend Opt 7.03 and 7.04; to amend Opt 5.01, 5.02 (3), 5.10 (1) (intro), 5.10 (2) and 5.14 (1); to repeal and recreate Opt 3.02, 3.07 and 7.05; and to create Opt 5.03, 5.045, 5.10 (1) (f), and 7.06 relating to exam, unprofessional conduct and renewal.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: ss. 449.04, 449.06, 449.07, 449.08

Statutory authority: ss. 15.08 (5) (b), 440.071, 440.08 (3) (b) and 449.25 (2)

Explanation of agency authority:

Each examining board shall promulgate rules for its own guidance and for the guidance of the profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular profession. s. 15.08 (5) (b)

The credentialing board may not require a person to complete any postsecondary education or other program before the person is eligible to take an examination for a credential the credentialing board grants or issues. s. 440.071(1), Wis. Stats.

The examining may promulgate rules requiring the holder of a credential who fails to renew the credential within 5 years after its renewal date to complete requirements in order to restore the credential, in addition to the applicable requirements for renewal under ch. 449, that the examining board determines are necessary to protect the public health, safety or welfare. The rules may not require the holder to complete educational requirements or pass examination requirements that must be completed in order to obtain an initial credential from the examining board. s. 440.08 (3) (b)

The board shall promulgate rules implementing informed consent standard. S. 449.25 (2).

Related statute or rule: N/A

Plain language analysis:

This proposed rule updates the Opt 3 and Opt 5 chapters

Section 2 indicates the requirements for an application rather than the requirements for examination. The change is necessitated by 2013 Act 114 which prohibits a postsecondary education or other program be completed before the person is eligible to take an examination.

Section 3 repeals examination provisions which are redundant or obsolete.

Section 4 repeals and recreates the passing scores provision in order to be more precise. The passing score on each examination is determined by the board and the board may adopt the recommended passing score.

Section 5 repeals examination provisions which are obsolete or redundant.

Section 6 amends the intent of the chapter to specify the actions the board may take against a licensee.

Section 7 clarifies grossly incompetent includes the failure to have working equipment to do a minimum eye exam.

Section 8 creates a numeration of items which constitute unprofessional conduct in a clear, concise and updated manner. As a result, Sections 9, 11, 15, 16 and 18 repeal provisions which are included in the new Opt 5.03.

Section 10 creates the informed consent reasonable optometrist standard required under 2013 Act 345.

Sections 12, 13 and 14 update the recordkeeping requirements. These sections are primarily clean-up language with the exception of the creation of a provision to reflect that documentation of obtaining informed consent is required in the patient's records.

Section 17 cleans-up language resulting from the new Opt 5.03.

Section 19 consolidates Opt 7.03 and 7.04 and updates the language to reflect that the renewal fee is no longer listed in statutes but determined by a statutory process.

Section 20 recreates the late renewal provisions to clarify the different requirements based upon whether the late renewal occurs within or after 5 years. Renewal within 5 years requires payment of the fees (renewal and late) and attesting to completion of the continuing education requirements. Renewal after 5 years requires payment of the renewal and late fees, and either

proof of an active license in another state or passing the national and state exams and completion of 30 hours of approved continuing education to ensure competency.

Section 21 creates a new provision relating to reinstatement of a credential. This provision pertains to a person who has not renewed their license for more than 5 years with unmet requirements from a previous disciplinary action or the license has been surrendered or revoked. A person may apply to have the credential reinstated by submitting evidence of completion of any applicable disciplinary requirements, rehabilitation or change in circumstances warranting reinstatement and if the person has not held a license in more than 5 years completion of the requirements for late renewal after 5 years.

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

The only federal regulation related to this rule is the Federal Trade Commission Rules 16 CFR 315.3 and CFR 456.02 requires the release of spectacle and contact lens prescriptions to the patient at no cost.

Comparison with rules in adjacent states:

Illinois: Illinois lists the requirements for licensure (and not the requirements for examination). Illinois lists grounds for discipline including conviction, misrepresentation, professional incompetence or gross negligence, fraud, addiction to alcohol or drugs, discipline by another state, practice outside the scope, immoral conduct, failure to perform a minimum eye examination, gross and willful overcharging for professional services, and misleading advertising. Renewal of a license after three years requires payment of fees, proof of current certification in cardiopulmonary resuscitation, completion of continuing education requirements, evidence of education or experience of fitness to practice or passage of Part III of the national examination.

Iowa: Iowa lists the requirements for licensure (and not the requirements for examination). Iowa lists the grounds for discipline including fraud, professional incompetency, practice outside the scope of the profession, misleading advertising, habitual intoxication or addiction, diversion of drugs, falsification of records, negligence, conviction of a crime related to the profession, disciplinary action in another state; violation of board orders, and unethical conduct. A late renewal for five years or less requires verification of license in other jurisdictions and completion of 50 of continuing education within 2 years preceding renewal. A late renewal more than 5 years requires verification of license in other jurisdiction, completion of 100 hours of continuing education with 2 years of renewal or current CELMO certification and 50 hours of continuing education within 2 years of renewal. A license which has been revoked, suspended or surrendered must meet any unmet disciplinary requirements, provide evidence of facts sufficient to enable the board to determine that the basis no longer exists and it is the public interest for the license to be reinstated.

Michigan: Michigan lists the requirements for licensure (and not the requirements for examination). Michigan does not list unprofessional conduct activities. After a license has lapse, it can be renewed with the submission of fees, 40 hours of continuing education completed

within the 2 year period immediately preceding renewal and a minimum score of 75 on the Michigan laws and rules.

Minnesota: Minnesota lists the requirements for licensure (and not the requirements for examination). Minnesota does not list unprofessional conduct activities. Reinstatement of an expired license (late renewal) requires payment of renewal and penalty fees and proof of completion of continuing education. Reinstatement of a revoked or suspended license requires evidence of full rehabilitation from the offense and complies with all other reasonable conditions imposed by the board.

Summary of factual data and analytical methodologies:

The Board reviewed, updated and reorganized the chapters to remove obsolete provisions, reflect current practices and technologies and clarify provisions. In addition, the Board implemented 2013 Act 114 and 2013 Act 345.

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

Economic impact comments were solicited by posting the proposed rule for 14 days and 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 Eric.Esser@wisconsin.gov, or by calling (608) 267-2435.

Agency contact person:

Sharon Henes, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Board Services, 1400 East Washington Avenue, Room 151, P.O. Box 8366, Madison, Wisconsin 53708; telephone 608-261-2377; email at Sharon.Henes@wisconsin.gov.

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

Comments may be submitted to Sharon Henes, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Board Services, 1400 East Washington Avenue, Room 151, P.O. Box 8366, Madison, WI 53708-8366, or by email to Sharon.Henes@wisconsin.gov. Comments must be received at or before the public hearing to be held on October 29, 2015 to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. Ch. Opt 3 (title) is amended to read:

~~EXAMINATION FOR LICENSURE~~

SECTION 2. Opt 3.02 is repealed and recreated:

Opt 3.02 Application. An applicant for licensure as an optometrist shall submit all of the following:

- (1) An application and required fee under s. 440.05, Stats.
- (2) Official documentation of graduation from a program accredited by the Accreditation Council on Optometric Education (ACOE).
- (3) Verification of passage of parts I, II and III of the National Board of Examiners in Optometry examination.
- (4) Verification of passage of knowledge of state laws and administrative rules regarding the practice of optometry examination.
- (5) If the applicant has an arrest or conviction record, documentation necessary for the board to determine whether the circumstances substantially relate to the practice of optometry, subject to ss. 111.321, 111.322 and 111.335, Stats.

SECTION 3. Opt 3.03, 3.04, 3.05, and 3.06 are repealed.

SECTION 4. Opt 3.07 is repealed and recreated to read:

Opt 3.07. Passing scores. The passing score on each examination is determined by the board to represent minimum competence. The board may adopt the recommended passing score of the examination provider.

SECTION 5. Opt 3.09, 3.10, 3.11 and 3.12 are repealed.

SECTION 6. Opt 5.01 is amended to read:

Opt 5.01 Intent. The intent of the board in adopting the rules in this chapter is to establish minimum standards of conduct for optometrist and to specify reasons ~~for taking disciplinary action against a licensee~~ the board may reprimand, deny, limit, suspend or revoke any license or certificate of registration.

SECTION 7. Opt 5.02 (3) is amended to read:

Opt 5.02(3) “Grossly incompetent” ~~as that term is used in s. 449.07(1)(b), Stats.,~~ means the failure of a licensee or certificate holder to exercise that degree of care and skill which is

exercised by the average practitioner who holds the same type of license or certificate, acting in the same or similar circumstances. Grossly incompetent specifically includes ~~the inability to proficiently operate equipment and instruments described in s. Opt 5.07~~ the failure to have in good working order adequate equipment and instruments as are necessary to perform the minimum eye examination.

SECTION 8. Opt 5.03 is created to read:

Opt 5.03 Unprofessional Conduct. Unprofessional conduct by an optometrist includes any of the following:

- (1) Engaging in any practice which constitutes a danger to health, welfare or safety of a patient or the public.
- (2) Engaging in conduct in the practice of optometry which evidences a lack of knowledge or ability to apply professional principles or skills.
- (3) Practicing or attempting to practice beyond the scope of practice.
- (4) Practicing in a manner which demonstrates the optometrist is grossly incompetent.
- (5) Obtaining a license through fraud.
- (6) Obtaining or attempting to obtain anything of value by fraudulent representation in the practice of optometry.
- (7) Practicing or attempting to practice while the ability to perform services is impaired by physical, mental or emotional disorder, drugs or alcohol.
- (8) Practicing while knowingly having an infectious or contagious disease.
- (9) Any conduct of a character likely to deceive or defraud the public.
- (10) Loaning of an optometric license or certificate to anyone.
- (11) Splitting or dividing any fee for optometric service with any person, except an associate licensed optometrist.
- (12) Using the title "Doctor", or the initials "Dr.", in printed form unless the optometrist has been granted the title of doctor of optometry by an optometric college and unless the optometrist indicates in printing in the same communication that he or she is an optometrist.
- (13) Failing to notify the board of any change in address or change in location of practice within 30 days.
- (14) Failing to furnish to the board upon request information concerning the mode and location of practice.
- (15) Failing to permit the board or a board representative to inspect his or her office, equipment and records during regular office hours.
- (16) Failing to have in good working order adequate equipment and instruments as are necessary to perform the minimum eye examination specified in s. Opt. 1.02 (5).
- (17) (a) Except as provided in par. (b), failing to perform the minimum eye examination at any of the following:
 1. The patient's initial examination with the optometrist.
 2. Any examination conducted more than one year after a minimum eye examination.
 3. An examination for the fitting of contact lens.(b) It shall not be unprofessional conduct to fail to perform the minimum eye examination in any of the following instances:
 1. Where the patient refuses or is unable to participate in any procedure of the minimum eye examination.

2. At an examination for the diagnosis and management of eye disease or for the removal of superficial foreign bodies from an eye or from an appendage to the eye.
3. Where written verification of all examination findings has been received from a licensed optometrist or an ophthalmologist, as defined in s. Opt 1.02(5)l, for the patient within the 6 month period immediately preceding the date of the patient's visit.
4. Where a limited eye screening is performed.

(18) Advertising in a manner that is false, fraudulent, misleading, or deceptive including any of the following:

- (a) Statements creating false, fraudulent, or unjustified expectations of favorable results including advertising professional superiority or the performance of professional services in a superior manner.
- (b) Making comparisons with other optometrists which are false, fraudulent, misleading or deceptive.
- (c) Statements containing representations that would be likely to cause a reasonable person to misunderstand or be deceived.
- (d) Seeking to obtain patients by advertising or other forms of solicitation in a manner that is false, fraudulent, misleading, or deceptive.

(19) Delegating the prescribing of pharmaceutical agents or the removal of foreign bodies from an eye or from an appendage to the eye, to an unlicensed person.

(20) Delegating the performance of tasks related to the practice of optometry to an unlicensed person that exceeds that person's competence, education, training, or experience.

(21) Failing to exercise supervision over an unlicensed person, as provided under s. Opt 1.03.

(22) Failing to record and include in each patient's record the information required under s. Opt 5.10.

(23) Failing to provide a written disclosure to any patient receiving extended-wear contact lenses under s. Opt 5.14.

(24) Failing to release, at no cost to the patient, a copy of the patient's spectacle lens prescription or contact lens prescription following release of the patient from contact lens fitting and initial follow-up care.

Note: Federal Trade Commission Rules 16 CFR 315.3 and CFR 456.02 require the release of spectacle and contact lens prescriptions.

(25) Failing to release a patient's records in accordance with s. 146.83, Stats.

(26) Failing to obtain informed consent under s. Opt 5.045.

(27) Violating any provision of ch. 449, Stats. or any rule of the board.

SECTION 9. Opt 5.04 is repealed.

SECTION 10. Opt 5.045 is created to read:

Opt 5.045. Informed Consent. (1) Any optometrist who treats a patient shall inform the patient about the availability of reasonable alternate modes of treatment and about the benefits and risks of these treatments. The reasonable optometrist standard is the standard for informing a patient under this section. The reasonable optometrist standard requires disclosure only of information that a reasonable optometrist would know and disclose under the circumstances.

(2) The optometrist's duty to inform the patient under this section does not require disclosure of any of the following:

- (a) Detailed technical information that in all probability a patient would not understand.

- (b) Risks apparent or known to the patient.
- (c) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- (d) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- (e) Information in cases where the patient is incapable of consenting.
- (f) Information about alternate modes of treatment for any condition the optometrist has not included in his or her diagnosis at the time the optometrist informs the patient.

SECTION 11. Opt 5.05, 5.06, 5.07, 5.08, and 5.09 are repealed.

SECTION 12. Opt 5.10 (1) (intro) is amended to read:

Opt 5.10 (1) (intro) ~~It shall be unprofessional conduct for an~~ An optometrist ~~to fail to~~ shall record and include in each patient's record all of the following information:

SECTION 13. Opt 5.10(1)(f) is created to read:

Opt 5.10 (1) (f) Documentation that alternate modes of treatment have been communicated to the patient and that informed consent has been obtained from the patient.

SECTION 14. Opt 5.10 (2) is amended to read:

Opt 5.10 (2) ~~It shall be unprofessional conduct to fail to maintain patient~~ Patient records shall be maintained for at least 6 years.

SECTION 15. Opt 5.10 (3) and (4) are repealed:

SECTION 16. Opt 5.11, 5.12 and 5.13 are repealed.

SECTION 17. Opt 5.14 (1) is amended to read:

Opt 5.14 (1) ~~It shall be unprofessional conduct for an~~ An optometrist ~~to fail to~~ shall provide to any patient receiving extended-wear contact lenses a separate, written disclosure in not less than 12 point type, which includes the following language: "As with any drug or device, the use of extended-wear contact lenses is not without risk. A small, but significant, percentage of individuals wearing extended-wear lenses develop potentially serious complications which can lead to permanent eye damage. If you have any unexplained eye pain or redness, watering of the eye or discharge, cloudy or foggy vision, decrease in vision or sensitivity to light, remove your lenses and make arrangements to see your eye-care professional before wearing your lenses again. Regular inspection by a licensed eye-care professional is important to evaluate your eyes' tolerance of extended wear lenses."

SECTION 18. Opt 5.15 and 5.16 are repealed.

SECTION 19. Opt 7.03 and 7.04 are consolidated, renumbered Opt 7.03 and amended to read:

Opt 7.03 Renewal of certificate of registration. Persons practicing optometry shall on or before December 15 of each odd-numbered year renew their certificates of registration by registering with the department, certifying completion of the continuing education hours required under s. Opt 8.02 and paying the renewal fee ~~specified in s. 440.08(2)(a), Stats.~~ determined by the department under s. 440.03(9)(a), Stats. ~~Opt 7.04 Failure to renew.~~ An optometrist who fails to renew a certificate of registration ~~by the renewal date~~ may not practice optometry until the certificate is renewed under s. Opt 7.05.

SECTION 20. Opt 7.05 is repealed and recreated:

Opt 7.05. Late Renewal. (1) RENEWAL WITHIN 5 YEARS. A person may renew his or her certificate of registration by paying the renewal fee determined by the department under s. 440.03(9)(a), Stats., pay a late renewal fee and attesting to completion of the continuing education required under Opt 8.02.

(2) RENEWAL AFTER 5 YEARS. A person who failed to renew a certificate of registration within 5 years after the renewal date holds an expired license and may not reapply for the license using the initial application process. This subsection does not apply to license holders who have unmet disciplinary requirements or whose license or certificate has been surrendered or revoked. A certificate of registration may be renewed after 5 years by complying with all of the following:

- (a) Payment of the renewal fee required under s. 440.03(9)(a) and the late renewal fee.
- (b) Evidence of one of the following:

- 1. Holding an active license in good standing in another state.
- 2. Verification of all of the following occurring within the last 2 years:
 - a. Passage of parts I, II and III of the National Board of Examiners in Optometry examination.
 - b. Passage of knowledge of state laws and administrative rules regarding the practice of optometry examination.
 - c. 30 hours of approved continuing education.

SECTION 21. Opt 7.06 is created to read:

Opt 7.06 Reinstatement. A license holder who has unmet disciplinary requirements and failed to renew the certificate of registration within 5 years or whose license or certificate has been surrendered or revoked may apply to have the license or certificate reinstated in accordance with all of the following:

- (1)** Evidence of completion of the requirements in Opt 7.05 (2) if the license has not been active within 5 years.
- (2)** Evidence of completion of the disciplinary requirements, if applicable.
- (3)** Evidence of rehabilitation or change in circumstances, warranting reinstatement.

SECTION 22. 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)
