

Title 12 Recodification Project
Stakeholder Meeting to Discuss Revisions of Common Provisions Proposals

September 5, 2018

10:00 a.m.

HCR 0109

Persons present:

Christy Chase, Office of Legislative Legal Services (OLLS)

Thomas Morris, OLLS

Jessica Wigent, OLLS

Karen McGovern, Dept. of Regulatory Agencies (DORA), Division of Professions and Occupations (DPO)

Michael Reynolds, DPO

Steve Conklin, National Society of Professional Engineers

Lara Lee Hullinghorst, American Acupuncture Council

Sharon Wilson, Engineer

Audio recording of the meeting is available [here](#).

Christy Chase and Tom Morris reviewed the work of the Title 12 Recodification Project and explained the purpose of today's meeting: To discuss and obtain feedback on OLLS' draft and redraft proposals to consolidate duplicative provisions contained in the laws in Title 12 governing professions and occupations regulated by DPO.

Review of Proposed Common Provisions

The general structure for each of the common provisions discussed at the meeting will be to first state the generally-applicable provision of law and then list the exceptions for the practice acts that are not governed by that provision. For redraft proposals, new changes appear in double-underlined type. Also, the group discussed the issue of whether to refer to mortuaries and crematories as "funeral establishments", and the consensus was to refer to those businesses as "mortuaries and crematories" in all of the proposals. The proposals will be updated accordingly.

Cease-and-desist Orders

After considering feedback received during the August 21st meeting, the decision was made to not use the phrase "laws governing the particular profession or occupation" to replace the phrase "this article", but instead to use "the part or article of this title 12 governing the particular profession or occupation". The change was agreed upon by all present. Additionally, Christy noted that since there is a separate proposal addressing judicial review of final agency actions, the redraft proposes to strike the specific language about where a person may seek review of a final cease-and-desist order and instead cross-reference the judicial review statute. Again, the group present agreed to this proposal

Judicial Review

Since the previous draft, a new provision was added, consistent with the proposed change to the cease-and-desist orders proposal, to include the judicial review of cease-and-desist orders in the judicial review section rather than in the cease-and-desist orders statute. The redrafted judicial review proposal lists the articles in Title 12 where, with regard to cease-and-desist orders, a district court of competent jurisdiction has initial jurisdiction to review a final action of a regulator that is subject to judicial review. If not specifically listed, the general rule is that cease-and-desist orders are reviewable in the court of appeals.

Disposition of Fines

More detail has been added in the redraft pertaining to the exceptions to the general rule that fines collected by the director or a board are wholly credited to the general fund. Rather than simply except certain practice acts from the general rule, the redrafted proposal includes a cross-reference to the statute that describes how the fines are distributed. The group agreed to this redrafted proposal.

Immunity

After receiving feedback at the previous meeting – that stakeholders would prefer, when listing out exceptions to the immunity common provision, to have more information – the name of the profession is now listed with the article number. As discussed at the previous meeting, independent contractors are not included in subsection (1). The group approved the redrafted proposal.

Injunctive Relief

The redraft proposal has restructured the previous draft, though much of the information is the same. Some questions that were considered:

1. Should passenger tramways be included as an exception in subsection (1)(b) of the draft? Those present discussed that two subsections in the passenger tramways

practice act deal with injunctive relief. The one that is duplicative of the common provision will be repealed in the reorganization, but the more specific provision will remain in the practice act.

2. Does the phrase "physical therapists" always include physical therapist assistants (PTAs)? Those present discussed that in some instances, PTAs are treated differently than physical therapists. To address the issue in this redraft proposal, the phrase "physical therapists" in the list of exceptions in subsection (1)(b) will be changed to "physical therapy".

The group approved the redrafted proposal, as modified.

Rule-making Authority

The first draft of the proposal was much broader; more specific language and exceptions are included in the redrafted proposal. Those articles excepted in subsection (2) have very specific rule-making provisions, instead of the more general rule-making authority to implement the practice act that is included in most other articles in Title 12. The group approved the redrafted proposal.

Unauthorized Practice

OLLS staff provided two versions of redrafts of the unauthorized practice common provision – to get feedback to determine which has the most user-friendly language and makes most clear that the law isn't changing. While the bulk of professions and occupations have the same penalty of unauthorized practice, they've each been listed separately in these new redrafts. Given the length of the proposal and the exceptions to the general penalty rule for unauthorized practice, as well as the importance in each profession of the rule against practicing without the required license, certification, or registration, Mr. Conklin asked whether it was appropriate to create a common provision on this topic. The group discussed this issue and agreed to proceed with the proposal but continue the discussion of appropriateness for inclusion in common provisions when we have meetings with individual practice groups next month.

Those present agreed that Version 2 was the best choice.

Christy assured those present that stakeholders in each profession and occupation will see an example of their practice act, with the sections and subsections being moved to the common provisions in strike-type, to ensure that all can see exactly how their practice act will appear once those provisions are removed. These documents will be available at upcoming meetings held for individuals from specified professions and occupations. See the schedule of these upcoming meetings [here](#).

Some discussion ensued about upcoming sunset reviews, and that these reviews will now need to address both the common provision regulating the practice act, as well as the organic statute. Any sunset recommendations that affect the practice act, whatever those recommendations are, would be in a single bill – and will amend both the common provision and the practice act

Disciplinary Authority

Christy and Tom walked those present through each subsection of the common provision, and the questions they had concerning the difference in the language between some practice acts --- for instance, in some, DORA can deny, revoke, or suspend a license, certification, or registration, but there is no reference to the authority to "refuse to renew". In practice, Ms. McGovern explained, DORA does not refuse to renew, because they would move to revoke or suspend. Those without the same exact language will now be listed separately as exceptions.

With regard to the waiting period after a license, certification, or registration is revoked or surrendered, Christy explained that some practice acts do not refer to "surrender" in lieu of discipline in the waiting period provision. Accordingly, in the redraft of the proposal, Christy will specify the practice acts where the waiting period applies when a person surrenders the license, certification, or registration.

Christy also noted that there is language within five practice acts specifying that an application made after the waiting period is treated as a "new" application. Ms. McGovern noted that whether the provision states that or not, an application after revocation or surrender is a new application. Thus, the group agreed it was not necessary to include that provision in the proposal.

The proposal also indicates that three practice acts specify that the waiting period applies when a license to practice a given profession or occupation is revoked by another legally qualified board. This provision is not "common" so will remain in those practice acts.

The group also discussed notifications sent by certified mail, and how some practice acts require that form of notification (though DORA also always sends an e-mail as well). Ms. McGovern explained that when DORA sends other timely documents, such as initial decisions, they are required to send the decision by first-class mail. She also explained that sometimes there are inconsistent notification requirements within the same practice act. The group then discussed whether there should be a general provision stating that transmission of documents to respondents by the regulator must be sent by first-class, not certified, mail. The question was then whether this should be a separate common provision or a subsection in another common provision, like Disciplinary Procedures. Christy and Tom will present a proposal on transmissions from regulators at the next meeting.

Finally, the disposition of fines common provision will be added as a subsection into the Disciplinary Authority common provision.

Disciplinary Procedures

Christy explained that the draft is just the general proposal, without exceptions listed, but after discussion among those present, it became clear that exceptions were not needed. While not all practice acts have the same exact language regarding investigative authority and the powers to hold hearings and issue subpoenas, the "Administrative Procedure Act" (APA), article 4 of Title 24, is the umbrella and grants regulators these powers. The only difference is when a practice act requires something in addition to the APA. For instance, some practice acts state that the director or the regulator has the power to "employ" an administrative law judge, but the APA uses the language "appoint". These are important distinctions, and the decision was made to retain the language about employing an administrative law judge in the practice act. Additionally, Ms. McGovern explained that in the new nontransplant tissue banks law, which passed in the 2018 session, the subpoena powers granted in that bill do not extend to "investigations" so the common provision will need to be modified to reflect that distinction.

Next Meeting

The next meeting is scheduled for Wednesday, September 12th at 10:00 a.m. in HCR 109. The meeting will cover revisions to common provisions proposals presented at this meeting (e.g., Disciplinary Authority and Disciplinary Procedures), a draft proposal on transmissions from regulators, and draft proposals to relocate common provisions applicable to health care professions and occupations.