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November 16, 2022

Jameson Whitney
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Comments submitted via email to jameson.whitney@wisconsin.gov

RE: Written comments submitted for November 16 public hearing on CR 22-063 amending Med 10, relating to performance of physical examinations

Dear Mr. Whitney and members of the Wisconsin Medical Examining Board:

On September 14, 2022, the Wisconsin Hospital Association (WHA) submitted a third set of written comments to help inform the Medical Examining Board's (the "Board's") preparation of an economic impact analysis of the current version of CR 22-063. Attorney Whitney reported to the Board at its September 21, 2022, meeting that WHA submitted the only comment letter for the current version of the rule language and that the letter shared "some concerns about what it might cost for implementation" of the proposed rule. The Board did not discuss the letter or those concerns.

However, Chair Wasserman did conclude the brief update provided by Attorney Whitney on September 21 by stating, "We look forward to working with the Wisconsin Hospital Association and of course the Wisconsin Medical Society in advance of this rule change." Since that meeting, no outreach to WHA has occurred. **Consistent with Chair Wasserman's statement of desire to work with stakeholders, WHA asks that before the Board approves a final version of the proposed rule, Chair Wasserman meets with WHA's Physician Leaders Council to specifically discuss the concerns identified by hospitals and their physician leaders regarding the current iteration of this proposed rule.**

The Board's stated benefit of the rule to "*promote* use of chaperones during sensitive examinations and *reduce* incidents of sexual misconduct." We welcome the opportunity to discuss alternatives to rulemaking that could achieve the stated benefit. If the Board's goal is to *promote* use of chaperones to *reduce* incidents of sexual misconduct, and not to establish and compel adherence to a standard, then such action should be undertaken by the Board not by compulsory rulemaking to define and enforce a new unprofessional conduct standard but instead through education and other non-prescriptive and less costly means.

To help inform additional discussions, WHA offers to the Board the following comments regarding CR 22-063.

I. <u>The core obligation on physicians in the proposed rule puts employers and hospitals in an unwelcomed role of establishing private "rules" subject to interpretation and enforcement by the Medical Examining Board.</u>

The proposed rule states: "A physician who practices in a hospital or works for any other employer shall comply with the rules established by their hospital or employer regarding chaperones or other observers in patient examinations."

As expressed in WHA's September 14, 2022, comment letter on the economic impact of the proposed rule, hospitals and health care employers have concerns about establishing private "rules" enforceable by the Medical Examining Board.

Establishing hospital and employer policies as private rules enforceable against a physician by the Medical Examining Board would put hospitals and employers in a very different and unwelcomed relationship with their physicians.

Employer policies would no longer simply govern the relationship between the employer and their employed physician; instead the *employer* policy would now have the effect of also affecting the relationship between the physician and the State regarding the physician's practice of medicine. As a practical matter, the proposed rule may have the opposite effect of "promoting" chaperones and instead encourage employers to not have a chaperone policy if their policy now governs more than simply the relationship between employee and employer.

Further, as also stated in WHA's economic impact comment letter, the proposed obligation that a physician comply with hospital and employer rules will result in costs to hospitals and employers and create additional clarity challenges. If CR 22-063 is enacted, it is highly likely that hospitals and employers of physicians will need to undertake a review and potential modification of their "rules" to attempt to ensure that their policies are clear and *not capable of being interpreted by the Medical Examining Board differently than the hospital, employer or their physicians*. Put a different way, the employer and employee may interpret the employer's policy one way, but the Board could interpret the employer policy a different way.

Such a technical, legal review of a hospital's or employer's policy will likely be demanded by physician employees and hospital staff given that the proposed rule appears to give the Medical Examining Board authority to investigate compliance with, and interpret, such internal employer or hospital "rules." The costs of such a review and potential modification of hospital and employer "rules" resulting from the proposed rule will be borne by the hospital or employer as such review will require internal hospital or employer staff time, potentially including organized medical staff input or action, as well as potentially external legal review costs.

II. The core obligation on physicians in the proposed rule is not compliant with Wisconsin's administrative procedure and rulemaking statutes as it violates the statutory prohibition on incorporation by reference in s. 227.21(2).

The proposed rule states: "A physician who practices in a hospital or works for any other employer shall comply with the rules established by their hospital or employer regarding chaperones or other observers in patient examinations."

Pursuant to this rule, the Board may investigate and discipline a physician for violation of a private rule that has not been established by the rulemaking process set forth in ch. 227, Wis. Stats. Such "incorporation by reference" is not permitted in ch. 227 except in a narrow circumstance expressed in s. 227.21(2), Wis. Stats., which includes a consent by the attorney general, that the incorporation by reference is only in a "rule of limited public interest," and that the "incorporated standards are readily available in published form."

On its face, even if such private rulemaking were permitted, this unprecedented rule encouraging (or requiring – the rule is unclear on that point) the creation of private "rules" that a physician would be obligated by MED 10 to comply with creates significant due process issues for the physician, the Board, the Department of Safety and Professional Services. For example, nothing in the proposed rule would prevent an employer or hospital from establishing a private rule applicable to only a single individual physician that the single physician have 10 chaperones paid for by the physician for all patient examinations by the physician. Pursuant to the proposed rule, the physician would be obligated under MED 10 to meet such rule. While such scenario is extreme, it highlights why the statutes permit incorporation of private standards as enforceable rules in only very narrow circumstances.

III. Requirements in the proposed rule regarding the provision and posting of chaperone "rules and procedures" are unclear.

The proposed rule states: "A physician who practices in a hospital or works for any other employer shall comply with the rules established by their hospital or employer regarding chaperones or other observers in patient examinations….A copy of the rules and procedures regarding the physician's use of chaperones or other observers *shall be made available and accessible to all patients* and the rules and procedures *shall be posted in at least one location reasonably likely to be seen by all affected patients* [emphasis added]."

It is unclear based on the discussion at the Board's August 17 meeting and from the language of the proposed rule if the last sentence of proposed Med 10.03(2)(f)(4) requiring that a copy and posting of rules and procedures regarding the physician's use of chaperones or other observers applies only to the physicians specified in the second sentence – those physicians who are self-employed or are in other practice settings that do not involve hospitals or employers – or to all physicians including employed physicians and physicians practicing in hospitals.

If the third sentence of Med 10.03(2)(f)(4) does apply to physicians providing care in hospitals or facilities not operated by the physician, then the requirement for the posting of the hospital or employer's rules and processes regarding chaperones and observers will result in a cost borne solely by the hospital or facility and not the regulated physician. Such cost to the hospital or facility would include not only the material and labor costs to post the rules and processes, but likely additional compliance costs, including potential external legal advice, to determine where in the facility such posting would be required under the rule. In such hospitals and facilities, it is also likely that the printing and provision of the copy of the hospital or facility's rules and processes regarding chaperones to all patients would not be borne by the physician but by hospital and facility staff not employed by the physician.

Based on Board member discussions at the Board's August 17 meeting and other input received by WHA, it seems likely that physicians, hospitals, and physician employers will also have questions about how the rule applies in specific factual situations. For example, how does the rule and the posting requirements apply if a hospital or employer "rule" varies by department or scenario? How does the rule apply in an inpatient setting where multiple physicians round on the same patient? If a physician providing care in a hospital is employed by an entity different than the hospital, what must be provided or posted? There will also likely be questions about how to interpret the rule generally. For example, is posting or provision of a document required if the hospital or employer does not have a specific written rule or process regarding chaperones? Other questions will likely stem from the relationship between the definitional language for a "chaperone" and "observer" in the proposed rule that now appear to be divorced form the substantive provisions proposed in Med 10.03(2)(f)4. For example, must the applicable policy incorporate the rule's definition of chaperone and observer?

As a result, hospitals and physician employers will likely spend compliance staff time, and potentially spend resources on external legal review and opinions, to attempt to interpret what is and is not required by the rule as currently written. Like the other identified costs, while these costs are indeterminate and likely variable, the proposed rule change to the MED 10 - Unprofessional Conduct will result in cost to hospitals and physician employers that the Board has not captured in its analysis of its rule.

IV. The proposed rule's requirements for providing a copy of and physically posting the employer's or hospital's chaperone policy exceeds the Medical Examining Board's authority to promulgate rules for the guidance of the trade or profession in ss. 15.08(b) and s. 448.40 (1), Wis. Stats.

The proposed rule states: "A physician who practices in a hospital or works for any other employer shall comply with the rules established by their hospital or employer regarding chaperones or other observers in patient examinations….A copy of the rules and procedures regarding the physician's use of chaperones or other observers *shall be made available and accessible to all patients* and the rules and procedures *shall be posted in at least one location reasonably likely to be seen by all affected patients* [emphasis added]."

Page 144 of the agenda and materials for the August 17, 2022, Board meeting and posted on August 15, included proposed rule language that was slightly different than the above language. That draft instead stated "*A physician shall* [emphasis added] make a copy of the rules and procedures regarding the physician's use of chaperones or other observers available to patients and shall post their procedures or policy regarding chaperones or other observers in at least one location that is visible to all patients." During that meeting, one Board member raised a concern that physicians do not have authority as an employee or hospital medical staff member to post documents in their employer's facility or the hospital facility as such facility is not the physician's property. To address that concern, with the active drafting assistance of Division of Policy Development attorney Jamison Whitney, the Board then discussed and agreed to remove the "A physician shall" phrase highlighted above.

However, that change from the August 15 version to the current proposed version of the rule even more clearly illustrates that the burden and obligation to post and provide a copy of the employer's or hospital's policy is on the employer or hospital and not on the physician. Requiring an employer or hospital pursuant to a physician unprofessional conduct rule to provide their internal physician policies "to all patients" and to post such policies in their facility clearly exceeds the

board's statutory authority to regulate *physicians* and has no precedent in any of the existing MED 10 definitions of physician unprofessional conduct.

Further, as a general matter, neither of the statutory authorities stated in the CR 22-063 supporting the proposed language meet the requirements in s. 227.11(2)(a)2. and 3., Stats., that require "explicitly conferred" legislative authority in statute that does not rely on a description of the "the agency's general powers or duties" and that is not more restrictive than the standard contained in the statutory provision. Instead, the sole two statutes pointed to in CR 22-063 for the Board's authority to promulgate the proposed rule simply state:

"Section 15.08 (5) (b), Stats., provides each examining board '[s]hall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains. . .'"

"Section 448.40 (1), Stats., provides that '[t]he board may promulgate rules to carry out the purposes of this subchapter, including rules requiring the completion of continuing education, professional development, and maintenance of certification or performance improvement or continuing medical education programs for renewal of a license to practice medicine and surgery.'"

V. The proposed rule's requirements for providing a copy of and physically posting at the hospital the hospital's chaperone policy violates s. 50.36, Wis. Stats., which gives the Department of Health Services the sole authority to "adopt and enforce rules and standards pertaining to hospitals."

As noted above, the rule creates a requirement that a hospital's policy regarding chaperones be made available to patients and be posted at the hospital. Notwithstanding the overall rulemaking authority concern raised above, such requirement explicitly conflicts with Wisconsin's Chapter 50 Hospital Regulation and Approval Act and would be an unauthorized rule in conflict with that statute. For good reason, except for general building code provisions maintained by the Department of Safety and Professional Services, the legislature has reserved rulemaking regarding standards pertaining to hospitals solely to the Department of Health Services and not to the multiple individual professional boards.

Section 50.36(1), Wis. Stats., states: "Except for the construction codes and standards of the department of safety and professional services and except as provided in s. 50.39 (3), the department shall be the sole agency to adopt and enforce rules and standards pertaining to hospitals." The proposed rule explicitly pertains to hospital policies, making hospital policies available to patients, and physically posting such policies in the hospital facility. As such, the Medical Examining Board's proposed rulemaking as it pertains to hospital policies is clearly prohibited by statute.

VI. The Economic Impact Analysis for the proposed rule fails to provide key detail and analysis required by s. 227.137.

Health care delivery is chronically overregulated and that overregulation is publicly identified as a significant contributor to workforce burnout and cost of care. Identifying and pushing back against regulations that that increase the cost of delivering high-quality care is an important to WHA and our members, and is a reason why WHA actively responds to the solicitation for economic impact comments for draft proposed rules as part of the s. 227.137 economic impact analysis procedure. WHA responded to all three solicitations for economic impact comments on various iterations of this rule, including the current iteration in which WHA was the sole entity to submit a comment letter. Those submitted economic impact comment letters are attached for reference.

A key public policy reason for the enactment of the economic impact analysis procedure in s. 227.137 was to help ensure that rulemaking agencies seek input from impacted entities to help inform those rulemaking agencies regarding the costs and impacts of proposed rules, and to help inform other entities involved in the rulemaking process including the Governor and Legislature of the costs of approved rules. WHA is concerned that there have been multiple failures in the economic impact analysis process regarding CR 22-063.

A. The Economic Impact Analysis fails to provide the required analysis and detailed quantification of the economic impact of the proposed rule.

Section 227.137(3)(b), Wis. Stats., requires that a rule's economic impact analysis include "An analysis and *detailed quantification* [emphasis added] of the economic impact of the proposed rule, including the implementation and

compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units and individuals that may be affected by the proposed rule."

Instead of conducting any analysis or detailed quantification of the economic impact of CR 22-063, the analysis submitted on September 22, 2022, simply concludes "$0" of economic impact and provides no response to question "14. Summary of Rule's Economic 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)." At best, this response and lack of analysis and detailed quantification demonstrates a lack of transparency – including to the Board who appears to have never been provided the economic impact public comment letters submitted for the proposed rule - but it also appears to fail the statutory requirement to include "an analysis and detailed quantification" of the economic impact of the rule, particularly when WHA submitted a comment letter identifying multiple economic impacts not on the regulated physicians but on hospitals and employers.

B. The Economic Impact Analysis fails to provide the required analysis and quantification of the policy problem that the proposed rule is intending to address.

Section 227.137(3)(a), Wis. Stats., requires that a rule's economic impact analysis include "An analysis and quantification of the policy problem that the proposed rule is intending to address." This is important information because it helps to quantify a cost-benefit of the proposed rule.

Instead, the economic impact analysis on line 11. "Policy Problem Addressed by the Rule" simply restates what the rule would do: "The proposed rule revises the Board's rules related to professional conduct related to the performance of physical examinations. Specifically, the rule requires physicians to follow policies they or their employers establish regarding the use of chaperones in physical examinations, and to make these policies available to patients."

This analysis avoids the question *why* this rule is needed, which is critical to understanding the cost-benefit of the rule and useful to create opportunities to identify alternatives to the rule. It also fails to provide the information required in an economic impact analysis pursuant to s. 227.137(3)(a), Wis. Stats.

Further, quantifiable data and analysis has been developed and shared but it did not well support the Board's previously expressed reason for the rulemaking to avoid repeated "he said, she said" situations in board investigations of sexual misconduct standards under existing MED 10.03(2)(f). Both WHA and the Wisconsin Medical Society shared information on April 8, 2022, quantifying the number of such potential situations based on a review of published orders and disciplinary actions and Board meeting minutes, as well as a summary of complaints alleging violations of Wisconsin's MED 10.03(2)(f) sexual misconduct rule requested and received by the Wisconsin Medical Society. In short, that quantifiable data was gathered and shared regarding the expressed problem the rule was previously stated to address, but it did not well support the expressed problem.

C. The Economic Impact Analysis fails to provide the required statement as to why the agency choose a different approach than the federal government and neighboring states.

Section 227.137(3)(a), Wis. Stats., requires that a rule's economic impact analysis include "comparisons with the approaches used by the federal government and by Illinois, Iowa, Michigan, and Minnesota to address that policy problem. If the approach chosen by the agency to address that policy problem is different from those approaches, an economic impact analysis prepared by an agency shall include a *statement as to why the agency choose a different approach* [emphasis added]."

While the economic impact analysis on line 17. "Compare With Approaches Being Used by the Federal Government" and line 18. "Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)" does appropriately state that neither the federal government nor neighboring states "require the use of chaperones during physical examinations," that comparison does not include the required "statement as to why the agency chose a different approach."

This statutory requirement to explain *why* a rule is needed and *why* the agency choose to establish a rule different from the approaches taken by the federal government and neighboring states is not trivial. Wisconsin competes with other states.

If an agency chooses to promulgate a rule that imposes costs in addition to what is required in other states, that impacts Wisconsin's competitiveness and impacts the overall cost-benefit analysis of a proposed rule.

D. The Economic Impact Analysis fails to provide the required analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule is intended to address.

Section 227.137(3)(c), Wis. Stats., requires that a rule's economic impact analysis include "an analysis of the actual and quantifiable benefits of the proposed rule, including an assessment of how effective the proposed rule will be in addressing the policy problem that the rule is intended to address." Like other requirements in s. 227.137(3), Wis. Stats., this is important information because it helps to quantify a cost-benefit of the proposed rule.

Instead, the economic impact analysis on line 15. "Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule" simply states "The benefit to implementing the rule is to promote use of chaperones during sensitive examinations and reduce incidents of sexual misconduct." This basic statement fails to provide "quantifiable" benefits and *any assessment of how effective* the rule will be in addressing the policy problem as is required under s. 227.137(3)(c).

Further, the statement on line 15. that the benefit of rule is to "promote" use of chaperones is incongruous with establishing unprofessional conduct standards that must be met. If the Board's goal is simply to "promote" use of chaperones, and not to establish and compel adherence to a standard, then such action should be undertaken by the Board not by compulsory rulemaking to define and enforce a new unprofessional conduct standard but instead through education and other non-prescriptive means.

E. The Economic Impact Analysis fails to provide the required analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule.

Section 227.137(3)(d), Wis. Stats., requires that a rule's economic impact analysis include "An analysis of alternatives to the proposed rule, including the alternative of not promulgating the proposed rule." Like other requirements in s. 227.137(3), Wis. Stats., this is important information because it helps to quantify a cost-benefit of the proposed rule.

The economic impact analysis on line 15. "Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule" simply states "The benefit to implementing the rule is to promote use of chaperones during sensitive examinations and reduce incidents of sexual misconduct." This is non-responsive to the requirement that an analysis of alternatives to the proposed rule by provided, including an alternative of not promulgating the proposed rule. The lack of such analysis also limits the ability to quantify a cost-benefit of the proposed rule.

The lack of a stated alternative to the proposed rule in the economic impact analysis cannot be solely attributed to the lack of alternatives to the proposed rule. As noted in the section above, one alternative to "promote" the use of chaperones could be through education and other non-prescriptive means. But other alternatives have been discussed and presented to the Board while the scope statement for this rule has been open.

With Division of Policy Development staff present, WHA suggested a significantly more tailored alternative to a subcommittee of the Board on April 8, 2022, called to discuss alternatives to a prior iteration of the currently proposed rule. That prior iteration of the proposed rule would have established a rebuttable presumption that a physician had engaged in impermissible sexual conduct with a patient unless the patient offered the patient a chaperone.

In raising concerns with the cost and breadth of that proposal, WHA and the Wisconsin Medical Society presented the subcommittee with information on the number of disciplinary actions taken against physicians by the Board for violation of MED 10.03(2)(f) sexual misconduct rules, and information that the Board had not required the use of chaperones as a condition of continued practice for such physicians found by the Board to have violated such sexual misconduct rules. That analysis was gathered by reviewing published orders and disciplinary actions and Board meeting minutes, as well as a summary of complaints alleging violations of Wisconsin's MED 10.03(2)(f) sexual misconduct rule requested and received by the Wisconsin Medical Society.

Based on that information, WHA suggested that as an alternative to the presumption of sexual misconduct proposed rule, that the Board could instead apply a chaperone requirement as part of a disciplinary order for physicians found by the

Board to have violated the MED 10.03(2)(f) sexual misconduct rules. Although the subcommittee of the Board immediately dismissed that alternative proposal, it nonetheless is an alternative proposal that would have been a change in current Board policy and would have been significantly more targeted at those physicians that have a demonstrated risk of sexual misconduct rather than impacting all practicing physicians in Wisconsin.

In closing, thank you for your service on the Medical Examining Board. We look forward to future work with the Board to discuss alternatives to the proposed rulemaking.

Sincerely,
/s/
Ann Zenk
Senior Vice President, Workforce & Clinical Practice

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September 14, 2022

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Comments submitted via email to jameson.whitney@wisconsin.gov

RE: Invitation to provide comment on the economic impact of the proposed rule of the Medical Examining Board relating to physical examinations dated August 25, 2022

Dear Mr. Whitney and members of the Wisconsin Medical Examining Board:

The Medical Examining Board invited stakeholders to comment on the economic impact of the Medical Examining Board's revised proposed rule dated August 25, 2022, relating to physical examinations pursuant to statement of scope SS 012-21. The Wisconsin Hospital Association appreciates that invitation. We offer the following limited comments in the context of aiding the Board's preparation of its Economic Impact Analysis as it develops the proposed rule. Additional comments on the proposed rule are reserved for the full s. 227.17 public hearing following publication of a proposed rule in the Administrative Register.

WHA's membership includes over 140 member hospitals and integrated health systems working directly with their physicians and the support staff for those physicians. Our mission is to advocate for the ability or our members to lead in providing high quality, affordable, and accessible health care services, resulting in healthier communities.

To help aid the Board as it develops its economic impact analysis of the rule as drafted or contemplates changes to the rule, we encourage the Board to include the following considerations in its analysis. These comments should not be construed as support for or opposition to the rule, but are offered in response to the Board's solicitation for information from entities that may be affected by the proposed rule as the Board prepares its economic impact analysis of the draft proposed rule.

Establishment of a licensure obligation on physicians to comply with hospital or employer policies regarding chaperones or other observers in patient examinations.

As a consequence of creating an obligation in the Wisconsin Administrative Code and enforceable by the Board that a physician "shall comply" with the physician's hospital or employer's "rules" regarding chaperones or other observers in patient examinations, it is likely that hospitals and employers of physicians will undertake a review and potential modification of their "rules" to ensure that their policies are clear and not capable of being interpreted by the Medical Examining Board differently than the hospital, employer or their physicians. Such a review will likely be demanded by physician employees and hospital staff given that the proposed rule appears to give the Medical Examining Board authority to investigate compliance with, and interpret, such internal employer or hospital "rules."

Thus, such a review and potential modification of hospital and employer "rules" resulting from the proposed rule will require internal hospital or employer staff time, potentially including organized medical staff input or action, as well as potentially external legal review costs. While indeterminate and likely variable across organizations, the proposed rule

change to the MED 10 - Unprofessional Conduct will result in cost to hospitals and physician employers that the Board should incorporate into its Economic Impact Analysis of the proposed rule.

Provision and posting of chaperone "rules and procedures"

It is unclear based on the discussion at the Board's August 17 meeting and from the language of the proposed rule if the last sentence of proposed Med 10.03(2)(f)(4) requiring that a copy and posting of rules and procedures regarding the physician's use of chaperones or other observers applies only to the physicians specified in the second sentence – those physicians who are self-employed or are in other practice settings that do not involve hospitals or employers – or to all physicians including employed physicians and physicians practicing in hospitals.

If the third sentence of Med 10.03(2)(f)(4) does apply to physicians providing care in hospitals or facilities not operated by the physician, then the requirement for the posting of the hospital or employer's rules and processes regarding chaperones and observers will result in a cost borne solely by the hospital or facility and not the regulated physician. Such cost to the hospital or facility would include not only the material and labor costs to post the rules and processes, but likely additional compliance costs, including potential external legal advice, to determine where in the facility such posting would be required under the rule. In such hospitals and facilities, it is also likely that the printing and provision of the copy of the hospital or facility's rules and processes regarding chaperones to all patients would not be borne by the physician but by hospital and facility staff not employed by the physician.

While these costs are indeterminate and likely variable across organizations, the proposed rule change to the MED 10 - Unprofessional Conduct will result in cost to hospitals and physician employers that the Board should incorporate into its Economic Impact Analysis of the proposed rule.

Additional costs to interpret the proposed rule

Based on Board member discussions at the Board's August 17 meeting and other input received by WHA, it seems likely that physicians, hospitals, and physician employers will have questions about how the rule applies in specific factual situations. For example, how does the rule and the posting requirements apply if a hospital or employer "rule" varies by department or scenario? How does the rule apply in an inpatient setting where multiple physicians round on the same patient? If a physician providing care in a hospital is employed by an entity different than the hospital, what must be provided or posted? There will also likely be questions about how to interpret the rule generally. For example, is posting or provision of a document required if the hospital or employer does not have a specific written rule or process regarding chaperones?

As a result, hospitals and physician employers will likely spend compliance staff time, and potentially spend resources on external legal review and opinions, to attempt to interpret what is and is not required by the rule as currently written. Like the other identified costs, while these costs are indeterminate and likely variable, the proposed rule change to the MED 10 - Unprofessional Conduct will result in cost to hospitals and physician employers that the Board should incorporate into its Economic Impact Analysis of the proposed rule.

Again, we offer the above limited comments in the context of aiding the Board's preparation of its Economic Impact Analysis as it develops the proposed rule. Additional comments on the proposed rule are reserved for the full s. 227.17 public hearing following publication of a proposed rule in the Administrative Register. We hope that the information provided in this response to the Board's solicitation for comment on economic impact will be useful to the Board in its development of its Economic Impact Analysis.

Sincerely,
/s/
Ann Zenk
Senior Vice President, Workforce & Clinical Practice

Cc: Dan Hereth, Secretary-designee, Department of Safety and Professional Services

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June 13, 2022

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Comments submitted via email to jameson.whitney@wisconsin.gov

RE: Invitation to provide comment on the economic impact of the proposed rule of the Medical Examining Board relating to physical examinations dated May 3, 2022

Dear Mr. Whitney and members of the Wisconsin Medical Examining Board:

The Medical Examining Board invited stakeholders to comment on the economic impact of the Medical Examining Board's revised proposed rule dated May 3, 2022, relating to physical examinations pursuant to statement of scope SS 012-21. The Wisconsin Hospital Association appreciates that invitation. We offer the following limited comments in the context of aiding the Board's preparation of its Economic Impact Analysis as it develops the proposed rule. Additional comments on the proposed rule are reserved for the full s. 227.17 public hearing following publication of a proposed rule in the Administrative Register.

WHA's membership includes over 140 member hospitals and integrated health systems working directly with their physicians and the support staff for those physicians. Our mission is to advocate for the ability or our members to lead in providing high quality, affordable, and accessible health care services, resulting in healthier communities.

WHA appreciates the Board's review of Wisconsin's unprofessional conduct rules to ensure Wisconsin has the necessary rules in place to terminate the licensure of physicians such as Michigan's Larry Nassar who engage in sexual abuse of their patients.

However, WHA continues to receive concerns from our members that the proposed rule, including the latest May 3, 2022, version of the proposed rule has an unnecessarily and unreasonably broad impact on care delivery that will significantly exacerbate current critical health care workforce shortage challenges and substantially increase health care staffing costs.

Based on information received from our members, the proposed rule as drafted would likely result in the need for several hundred new staff statewide with new statewide annual staffing costs of several million dollars.

To help aid the Board as it develops its economic impact analysis of the rule as drafted or contemplates changes to the rule to more precisely tailor the rule to address the extraordinarily rare occurrences of physicians who engage in impermissible sexual conduct with their patients, we encourage the Board to include the following considerations in its analysis.

Number of additional FTEs statewide to provide trained chaperones

Simply adding additional chaperone duties existing staff or students is not operationally feasible. Existing clinical and administrative staff or students do not have "extra" time in their workday to serve as chaperones to observe physicians providing care to their patients. Thus, additional Full Time Equivalent (FTE) positions will be necessary to provide the

chaperone oversight of physician practice in the scenarios contemplated by the rule. We encourage the Board's economic impact analysis to include a calculation of total new FTEs statewide that would be added to provide the chaperone services contemplated by the rule to avoid a presumption violation of MEB 10.03(2)(f).

Total additional FTE expenditures

We encourage the Board's economic impact analysis to include an estimate of statewide additional FTE expenditures as a result of the proposed rule. Based on discussions by the Board and among our member organizations, it is likely that new staff hired to provide the contemplated chaperone observation of physician practice will be trained medical assistants or similar staff. Utilizing an estimate of total FTEs and average per FTE wage and benefit expenses for such staff, the Board's economic impact analysis should include a statewide total annual additional wage and benefit expense anticipated as a result of the rule.

Impacts of health care workforce shortages

It is important to note that Wisconsin and the United States are currently experiencing severe health care workforce challenges. Creating an additional widespread need for health care staff FTEs to provide the contemplated chaperone services will further exacerbate health care workforce shortages. It is currently unlikely that many organizations, large and small, will be able to hire the new FTE positions contemplated by the rule, resulting in even costlier overtime expenses for existing, and already stressed, staff.

Additional implementation costs

In addition to the additional new FTE wage and benefit expenses, other less easily calculated costs should be considered by the Medical Examining Board in its economic impact analysis.

The rule imprecisely specifies training requirements for chaperones in order for physicians to be protected from the presumption of violation of the existing MED 10.03(2)(f) sexual misconduct rules. Such training will add to the cost of implementing of the rule. Additional costs would include new "counseling," documenting and informed consent requirements required of physicians, which will add additional non-clinical time to physicians' work day. Consideration should also be given to costs resulting from deferred medical examinations resulting from the rule.

We encourage the Medical Examining Board to fully consider, calculate and address these additional implementation costs in its economic impact analysis as well.

Impacts of discretion the Board is granting to itself in the proposed rule

Unlike the October 2021 version of the proposed rule that the Medical Examining Board previously solicited economic impact comments on, the current version of the proposed rule grants to the Medical Examining Board unbounded discretion in subd. b. to not apply the new rule in individual cases.

The fact that the new rule draft explicitly grants the Board unspecified discretion to not apply its rule does give one pause to consider whether the standards in the proposed rule as a whole have been carefully crafted to ensure a physician is not unreasonably subjected to discipline by the Board. But regardless of whether such discretion is wise policy, neither the addition of such explicit discretion to the Board to not apply its own rule, nor the inclusion of a "rebuttable presumption" rather than a "presumption" of conduct that would be a violation of the existing MED 10.03(2)(f) sexual misconduct rules, should affect the Board's economic impact analysis of the rule as a whole.

As a practical matter, physicians will be risk averse in how they implement the rule, and the impact of the rule will be that physicians will seek to be within the "safe harbor" of the proposed rule's standard directing that their care be observed by a chaperone or authorized observer in the situations that could be subject to the rule. It is clearly the Board's goal of the proposed rule that all physicians have their care observed during sensitive exams, and the Board's economic impact analysis of the proposed rule must reflect that practical intent.

Consideration of alternatives to the proposed rulemaking

When WHA commented on the prior version of the proposed rule released for economic impact analysis comments on October 29, 2021, WHA indicated in its comments that there may be an alternative that could greatly reduce the economic impact of the rule and that we and our members appreciate the goal of the Medial Examining Board to protect patients from physicians that violate the existing sexual conduct prohibitions in MED 10.03(2)(f). Specifically, WHA explored an option to craft the proposed rule in a way so that it would only apply to physicians that have repeated allegations of violation of the existing sexual conduct prohibitions in MED 10.03(2)(f).

However, in doing subsequent due diligence on such option, WHA and others discovered legal opinions and statutory language in s. 440.20, Wis. Stats., establishing due process standards that would appear to prohibit rulemaking that creates an alternative burden of proof in a disciplinary proceeding. Specifically, sub. (3) of that section gives specific direction to all examining and credentialing boards: "The burden of proof in disciplinary proceedings before the department or any examining board, affiliated credentialing board or board in the department is a *preponderance of the evidence*."[1] The current proposed rule establishing a "rebuttable presumption" standard deviates from the "preponderance of evidence" standard. As such, while changing the disciplinary procedure in the extraordinary circumstance that a physician has had repeat allegations of, but not Board discipline for, violation of the sexual conduct prohibition in MED 10.03(2)(f) would have a drastically reduced economic impact and may be public policy to explore, a pathway for making such change via rule rather than statute does not appear possible under current law.

However, an option that does potentially remain possible is for the Board to require the use of a chaperone as part of discipline for a physician that the Board *has* found by a preponderance of evidence – as required by s. 440.20(3), Wis. Stats. - has violated the prohibitions in existing MED 10.03(2)(f). It appears that is a disciplinary policy that the Board has not regularly utilized in the past, but could be implemented by the Board to target those extraordinarily rare occurrences when a physician engages in impermissible sexual conduct with their patients.

WHA and our members appreciate the goal of the Medical Examining Board to protect patients from physicians that violate the existing sexual conduct prohibitions in MED 10.03(2)(f). We hope that the information provided in this response to the Board's solicitation for comment on economic impact will be useful to the Board's rulemaking considerations.

Sincerely,
/s/
Ann Zenk
Senior Vice President, Workforce & Clinical Practice

Cc: Dan Hereth, Assistant Deputy Secretary, Department of Safety and Professional Services

[1] Separately, §440.20(5), Wis. Stats. provides a narrow exception to this general due process standard, allowing a board to take action against a credential holder who fails to respond to a credentialing board "within 30 days to a request for information from the department, credentialing board, or other board in the department in connection with an investigation of alleged misconduct of the credential holder." It is that narrow statutory provision in sub. (5) that section allows for the "rebuttable presumption" in Med 10.03(3)(g) that a credential holder has failed to cooperate in a timely manner if the credential holder "takes longer than 30 days to respond to a request of the board."

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November 15, 2021

Jameson Whitney
Attorney
Division of Policy Development
Department of Safety and Professional Services
PO Box 8366
Madison, WI 53708-8935
jameson.whitney@wisconsin.gov

Comments submitted via email to jameson.whitney@wisconsin.gov

RE: Invitation to provide comment on the economic impact of the proposed rule of the Medical Examining Board relating to physical examinations

Dear Mr. Whitney:

The Medical Examining Board invited stakeholders to comment on the economic impact of the Medical Examining Board's proposed rule relating to physical examinations pursuant to statement of scope SS 012-21. The Wisconsin Hospital Association (WHA) appreciates that invitation. We offer the following limited comments in the context of aiding the Board's preparation of an Economic Impact Analysis as it develops the proposed rule; additional comments on the proposed rule are reserved for the full s. 227.17 public hearing following publication of a proposed rule in the Administrative Register.

WHA's membership includes over 140 member hospitals and integrated health systems working directly with their physicians and the support staff for those physicians. Our mission is to advocate for the ability of our members to lead in providing high quality, affordable, and accessible health care services, resulting in healthier communities.

WHA appreciates the Board's goal to review Wisconsin's unprofessional conduct rules to identify additional safeguards Wisconsin could take to identify and terminate the licensure of physicians such as Michigan's Larry Nassar who engaged in a pattern of sexual abuse of his patients.

However, WHA has received concerns that as currently drafted, the proposed rule would significantly exacerbate current critical health care workforce shortage challenges, and substantially increase health care staffing costs assuming necessary staff could even be hired to fill the new staffing positions contemplated by the rule. Based on information received from our members, the proposed rule as drafted would likely result in the need for several hundred new staff statewide with new statewide annual staffing costs of several million dollars.

We believe that the draft proposed rule could be revised to address the Board's goals and intents more precisely, and address much of the staffing and cost concerns. As the Board develops its economic impact analysis and moves into the next steps in the rulemaking process, WHA welcomes further discussion with the Board, including potential modifications of the proposed rule.

To help aid the Board as it develops its economic impact analysis of the rule as drafted or contemplates changes to the rule to more precisely tailor the rule to address repeated complaints of misconduct, we encourage the Board to include the following considerations in its analysis.

Number of additional FTEs statewide to provide trained chaperones

It is likely that trained chaperone staff will be hourly employees. Adding additional chaperone duties to existing hourly staff is not always feasible and will require additional Full Time Equivalent (FTE) positions to provide such chaperone services. We encourage the Board's economic impact analysis to include a calculation of total new FTEs statewide that would be added to provide the chaperone services contemplated by the rule to avoid a presumption violation of MEB 10.03(2)(f).

Total additional FTE expenditures

We encourage the Board's economic impact analysis to include an estimate of statewide additional FTE expenditures as a result of the proposed rule. Based on discussions by the Board and among our member organizations, it is likely that new staff hired to provide the contemplated chaperone services will be trained medical assistants or similar staff. Utilizing an estimate of total FTEs and average per FTE wage and benefit expenses for such staff, the Board's economic impact analysis should include a statewide total annual additional wage and benefit expense anticipated as a result of the rule.

Impacts of health care workforce shortages

It is important to note that Wisconsin and the United States are currently experiencing severe health care workforce challenges. Creating an additional widespread need for ancillary health care staff to provide the contemplated chaperone services will further exacerbate health care workforce shortages.

Additional implementation costs

In addition to the additional new FTE wage and benefit expenses, other less easily calculated costs should be considered by the Medical Examining Board in its economic impact analysis. The rule would require unspecified training for chaperones and those costs should be included in the analysis. Additional costs that should be included in an analysis also include new informed consent requirements and additional documentation requirements required of physicians, which will add additional non-clinical time to physicians' workday.

Again, WHA and our members appreciate the goal of the Medical Examining Board to protect patients from physicians that violate the existing sexual conduct prohibitions in MED 10.03(2)(f). We hope that the information provided in this response to the Board's solicitation for comment on economic impact will be useful to the Board's rulemaking considerations.

Sincerely,
/s/
Ann Zenk
Senior Vice President, Workforce & Clinical Practice

From: Whitney, Jameson - DSPS
To: Hardin, Nilajah - DSPS
Subject: FW: Oppose medical chaperone requirements in WI!
Date: Wednesday, November 16, 2022 8:59:55 AM

-----Original Message-----
From: Ashlynne Clark <>
Sent: Wednesday, September 28, 2022 6:30 AM
To: Whitney, Jameson - DSPS <>
Subject: Oppose medical chaperone requirements in WI!

Dear Mr. Whitney,

As a board-certified dermatologist practicing in Wisconsin, I am extremely concerned about the economic impact of the proposed medical chaperone rule.
Full body skin exams are an important part of many dermatology visits. It is estimated that Wisconsin will have 2,170 new cases of melanoma in 2022, the deadliest type of skin cancer. Other skin cancers, such as basal cell and squamous cell carcinoma, are also commonly detected during full body skin exams.
Most dermatologists who practice in the office setting may be forced to hire a medical chaperone in order to protect oneself from claims that the medical assistant could not oversee the encounter while scribing. This would create an enormous financial burden on dermatology practices.

[Open Box for Additional Text]

Lastly, applying guidelines adopted by the American College of Obstetrics and Gynecology to the practice of Dermatology for full body skin exams is an overreaching proposal that does not benefit dermatology patients. Adding a third staff member to stand in the room during a patient exam could create patient anxiety and discomfort. Medical professionals who behave inappropriately should be disciplined by the board; however, this represents a vast minority of practicing medical professionals. I urge the Board to withdraw this proposal due to the unintended consequences.

Sincerely,
Ashlynne Clark
Cedar Rapids, IA 52403

Wisconsin Medical Society

TO: State of Wisconsin Medical Examining Board
Sheldon Wasserman, MD – Chair

FROM: Mark Grapentine, JD – Chief Policy and Advocacy Officer

DATE: November 16, 2022

RE: Support for Clearinghouse Rule 22-063 – MED 10 and physical examinations

Thank you for this opportunity to share the Wisconsin Medical Society's support for the current version of Clearinghouse Rule 22-063, amending MED 10 of the state's administrative code to draw attention to patients' potential access to a chaperone during a sensitive physical exam.

The Society heard from a significant number of its members on this issue as we reported on its creation and progression through the rulemaking process. We appreciate the Medical Examining Board (MEB) taking that feedback into consideration and further evolving the rule into the language before us today. The Society stands with the MEB in the desire to eliminate inappropriate encounters in the exam room; even a small number of violators can unfairly tarnish the profession's overall reputation.

We also appreciate the MEB's discussion about the potential discipline physicians could face for noncompliance when their employer does not post chaperone policy as described in the last sentence of Section 2 of the proposed rule. During discussion of this potential situation, both MEB staff and its members essentially said that such situations would be considered falling outside of the individual physician's conduct and therefore not subject to discipline. While that discussion was reassuring, the MEB may wish to memorialize this sentiment in the rule to ensure that future Medical Examining Boards and Wisconsin-licensed physicians understand that the current MEB did not intend to punish employed physicians for policy posting decisions they could not make.

Thank you again for this opportunity to comment on Clearinghouse Rule 22-063 and for your commitment to protecting the public.