

STATE OF WISCONSIN
DENTISTRY EXAMINING BOARD

IN THE MATTER OF RULEMAKING	:	ORDER OF THE
PROCEEDINGS BEFORE THE	:	DENTISTRY EXAMINING BOARD
DENTISTRY EXAMINING BOARD	:	ADOPTING RULES
	:	(CLEARINGHOUSE RULE 25-052)

ORDER

An order of the Dentistry Examining Board to **renumber and amend** DE 14.03; to **amend** DE 14.01 (2) and 14.02; and to **create** DE 5.02 (29) and 14.03 (1) to (3) relating to informed consent.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: Section 447.40, Stats.

Statutory authority: Sections 15.08 (5) (b), 227.11 (2) (a), 447.02 (2), and 447.02 (2) (i), Stats.

Explanation of agency authority:

Section 15.08 (5) (b), Stats., provides that an 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 227.11 (2) (a), Stats., provides that “[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.”

Sections 447.02 (2) and 447.02 (2) (i), Stats.: “The examining board shall promulgate rules specifying all of the following: (i) Provisions implementing s. 447.40.”

Related statute or rule: None.

Plain language analysis:

Informed consent regulations for dentists and dental therapists are in Wis. Admin. Code ch. DE 14. The proposed rule adds detail to the regulations for a dentist or dental therapist to obtain informed consent from a patient. It clarifies that the dentist or dental therapist must obtain the patient’s informed consent to all services, treatments, or procedures in the treatment plan. For

recordkeeping of the patient's informed consent, it requires that the dentist or dental therapist document:

- (1) The patient's informed consent to the treatment plan.
- (2) The patient's acknowledgment of reasonable alternate modes of treatment.
- (3) The patient's acknowledgment of the benefits and risks involved in the treatment plan and the benefits and risks involved with reasonable alternate modes of treatment.

The proposed rule also adds a provision to ch. DE 5, Unprofessional Conduct, to state that it is unprofessional conduct for a dentist or dental therapist to fail to obtain informed consent or fail to document that informed consent was obtained. The board believes this rule is important for patient safety and protection, and that current informed consent rules are not adequate.

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: In Illinois, medical patients have “The right of each patient to care consistent with sound nursing and medical practices, to be informed of the name of the physician responsible for coordinating his or her care, to receive information concerning his or her condition and proposed treatment, to refuse any treatment to the extent permitted by law, and to privacy and confidentiality of records except as otherwise provided by law” [410 Illinois Compiled Statutes 50/3(a)]. This applies to dental patients.

Iowa: Iowa law requires informed consent as follows: “*Informed consent.* Dental records shall include, at a minimum, documentation of informed consent that includes discussion of procedure(s), treatment options, potential complications and known risks, and patient's consent to proceed with treatment” [650 Iowa Administrative Code 27.11 (1) (e)]. It does not specify whether verbal or written informed consent is required, so it is presumed that verbal informed consent is allowed.

Michigan: In Michigan, at the inception of care for a patient, both of the following must occur: “Each dentist, dental therapist, dental assistant, registered dental assistant, and registered dental hygienist shall identify himself or herself to the patient as a dentist, dental therapist, dental assistant, registered dental assistant, or registered dental hygienist,” and “the patient shall be provided with a written consent for treatment” [Michigan Administrative Rules R 338.11103].

Minnesota: In Minnesota, the dental records for each patient must include a notation that: “the dentist, advanced dental therapist, dental therapist, dental hygienist, or licensed dental assistant discussed with the patient the treatment options and the prognosis, benefits, and risks of each treatment that is within the scope of practice of the respective licensee” and “the patient has consented to the treatment chosen” [Minnesota Administrative Rules 3100.9600]. It does not specify

whether verbal or written informed consent is required, so it is presumed that verbal informed consent is allowed.

Summary of factual data and analytical methodologies:

The Board reviewed Wisconsin Administrative Code chapters DE 5, 8, and 14 to determine where changes were needed to update regulations on informed consent.

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

The proposed rules were posted for a period of 14 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals. No comments were received.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis are 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 Jennifer.Garrett@wisconsin.gov, or by calling (608) 266-2112.

Agency contact person:

Jake Pelegrin, 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 608-267-0989; email at DSPSAdminRules@wisconsin.gov.

TEXT OF RULE

SECTION 1. DE 5.02 (29) is created to read:

DE 5.02 (29) A dentist or dental therapist failing to obtain informed consent from a patient or failing to document that informed consent was obtained, including all the information under s. DE 14.03.

SECTION 2. DE 14.01 (2) is amended to read:

DE 14.01 (2) PURPOSE. The purpose of the rules is to define the obligation of a dentist or dental therapist to communicate alternate modes of treatment to a patient and to obtain informed consent.

SECTION 3. DE 14.02 is amended to read:

DE 14.02 Informed consent. Any dentist or dental therapist 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 prior to treating the patient. The reasonable dentist standard is the standard for informing a patient under this section. The reasonable dentist standard requires

disclosure only of information that a reasonable dentist would know and disclose under the circumstances. The dentist or dental therapist shall obtain the patient's informed consent to all services, treatments, or procedures in the treatment plan.

SECTION 4. DE 14.03 is renumbered to DE 14.03 (intro.) and amended to read:

DE 14.03 Recordkeeping. A dentist's or dental therapist's patient record shall include documentation that alternate modes of treatment have been communicated to the patient and informed consent has been obtained from the patient. This shall include documentation of all of the following:

SECTION 5. DE 14.03 (1), (2), and (3) are created to read:

DE 14.03 (1) The patient's informed consent to all services, treatments, or procedures in the treatment plan.

(2) The patient's acknowledgment of reasonable alternate modes of treatment.

(3) The patient's acknowledgment of the benefits and risks involved with all services, treatments, or procedures in the treatment plan and the benefits and risks involved with reasonable alternate modes of treatment.

SECTION 6. 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)

Dated _____

Chair
Dentistry Examining Board