

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

IN THE MATTER OF RULEMAKING : AMENDED NOTICE OF TIME PERIOD
PROCEEDINGS BEFORE THE : FOR COMMENTS FOR THE
MEDICAL EXAMINING BOARD : ECONOMIC IMPACT ANALYSIS
:

NOTICE IS HEREBY GIVEN of the time period for public comment on the economic impact of this proposed rule of the (Board or Department) relating to Physical Examinations, including how this proposed rule may affect businesses, local government units and individuals. The comments will be considered when the Department of Safety and Professional Services prepares the Economic Impact Analysis pursuant to § 227.137. Written comments may be submitted to:

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

The deadline for submitting economic impact comments is January 3, 2022.

PROPOSED ORDER

An order of the Medical Examining Board to create Med 10.02 (2m) and 10.03 (2)(f)4.a, relating to performance of physical examinations.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted:

Section 448.015 (4) (am) 1., Stats.

Statutory authority:

Section 15.08 (5) (b) and 448.40 (1), Stats.

Explanation of agency authority:

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.”

Related statute or rule:

Chapter Med 21 provides minimum standards for patient health care records.

Plain language analysis:

The proposed rule expands unprofessional conduct to create a permissible rebuttable presumption against a licensee accused of unprofessional conduct under Med 10.03(2)(f), if a licensee does not provide a chaperone during a breast, genital, or rectal examination, and does not document in a patient’s health care record the rationale for an unchaperoned breast, genital, or rectal examination. If the Board applies the presumption, the licensee may rebut the presumption by proving by a preponderance of evidence that the misconduct did not occur. “Chaperone” is defined to mean an appropriately trained third person who has received formal training in the responsibility to protect patient privacy, the confidentiality of health information, and the requirements of clinical practice in the setting where the examination or inspection takes place. For a patient who is twelve years of age or under, a patient’s adult family member, legal guardian, or legal custodian may serve as a chaperone.

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

None.

Comparison with rules in adjacent states:

Illinois:

Rules of the Illinois Department of Financial and Professional Regulation establish standards of conduct for physicians licensed in Illinois [68 Ill. Adm. Code 1285.110]. The rules do not require the use of chaperones during physical examinations.

Iowa:

Rules of the Iowa Board of Medicine provide the Board with authority to impose disciplinary sanctions for certain acts and offenses (653 IAC 23.1). The rules do not require the use of chaperones during physical examinations.

Michigan:

The Michigan Public Health Code establishes grounds for discipline of licensees and registrants (MCL 333.16221). The Code does not require the use of chaperones during physical examinations.

Minnesota:

The Minnesota Statutes provide the grounds for disciplinary action against a physician (2020 Minnesota Statutes, Section 147.091). These provisions do not require the use of chaperones during physical examinations.

Summary of factual data and analytical methodologies:

The proposed rules were developed by obtaining input and feedback from the Medical Examining Board.

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

The proposed rules will be posted for a period of 60 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals.

Effect on small business:

The proposed rules will be posted for a period of 60 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals.

Agency contact person:

Jameson R. Whitney, Attorney, Department of Safety and Professional Services, Division of Policy Development, P.O. Box 8366, Madison, Wisconsin 53708-8366; telephone 608-266-8098; email at DSPSAdminRules@wisconsin.gov.

TEXT OF RULE

SECTION 1. Med 10.02 (2m) is created to read:

Med 10.02 (2m) “Chaperone” means an appropriately trained third person present during an examination or inspection that exposes the breasts, genitals, or rectal area who has received formal training in the responsibility to protect patient privacy, the confidentiality of health information, and the requirements of clinical practice in the setting where the examination or inspection takes place. Medical students, residents or fellows may serve in the role of the chaperone. Regardless of training, a patient’s adult family member, legal guardian, or legal custodian may serve as a chaperone for a patient who is twelve years of age or under.

SECTION 2. Med 10.03 (2)(f)4 is created to read:

Med 10.03 (2)(f)4. a. Regardless of the setting in which an examination or inspection that exposes the breasts, genitals, or rectal area takes place, or the sex or gender of the person performing the examination, the Medical Examining Board may presume that misconduct has occurred based on an allegation made under Med 10.03 (2)(f), unless one of the following applies and is properly documented in the patient record:

1. The examination is overseen by a chaperone as defined in Med 10.02 (2m) or another observer chosen by the patient.
2. Failure to examine the patient would likely result in significant and imminent harm to the patient, including during a medical emergency.

3. After being adequately counseled on the use of a chaperone, the patient refuses a chaperoned examination. Any concerns a patient has may be elicited and addressed by the physician, where feasible. A signed informed consent document should be signed by the patient.
4. If, after counseling, the patient refuses a chaperone and signs an informed consent document, physicians are to respect the patient's decision and document the details of the counseling, decision, consent document, and detailed reasons in the patient's medical record.
5. If, after counseling, the patient refuses a chaperone and refuses to sign an informed consent document, a physician may refuse to perform the examination. Physicians must document the details of the counseling, decision, and detailed reasons in the patient's medical record.

b. A licensee may rebut the presumption under subsection (2)(f)4. a. by proving by a preponderance of the evidence that the alleged misconduct did not occur.

SECTION 3. 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 10/29/2021 Agency Sheldon Wasserman, M.D.
Board Chairperson or Secretary