NOTICE IS HEREBY GIVEN of the time period for public comment on the economic impact of this proposed rule of the Medical Examining Board 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 June 13, 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 an observer is not present or 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 basic 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. “Observer” is defined to mean an individual chosen by the patient to be present during an examination, and is presumed to include an adult family member, legal guardian, or legal custodian if the patient is twelve years of age or under.

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

None.

**Comparison with rules in adjacent states:**

**Illinois:**


**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:**


**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 30 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 30 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.

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**TEXT OF RULE**

**SECTION 1.** Med 10.02 (2m) and (5m) are created to read:

**Med 10.02 (2m)** “Chaperone” means an individual whom a physician provides to be present during an examination or inspection that exposes the breasts, genitals, or rectal area. This may include any person who has received basic 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. This training may be in-person, remote, or recorded, and need not be of any specific duration. Clinic staff, medical students or other allied health professional students, residents, or fellows are presumed to be appropriately trained to serve as chaperones.

(5m) “Observer” means an individual chosen by the patient to be present during an examination or inspection that exposes the breasts, genitals, or rectal area. A patient’s adult family member, legal guardian, or legal custodian is presumed to be able to act as an observer if the patient 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 Board may make a rebuttable
presumption in favor of any facts alleged in a complaint 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 as defined in Med 10.02 (5m) 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. An 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.

6. The examination is being performed in relation to an incident of interpersonal
   violence, and the physician reasonably believes that the presence of a
   chaperone and/or counseling the patient regarding a chaperone will cause
   unnecessary trauma or is otherwise contraindicated. The examining physician
   shall document this determination in the patient record.

b. Notwithstanding the exceptions in par. a. of this subsection, the Board is not
   obligated to apply the presumption if it believes in its discretion that the
   application of the presumption would not be appropriate under the specific
   circumstances.

c. If the presumption under subsection (2)(f)4. a. is applied, it may be rebutted by
   presentation of sufficient evidence to convince the Board that it is more likely than not
   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)