

**STATE OF WISCONSIN
MEDICAL EXAMINING BOARD**

**IN THE MATTER OF RULEMAKING :
PROCEEDINGS BEFORE THE : REPORT TO THE LEGISLATURE
MEDICAL EXAMINING BOARD : CR 22-063
:**

I. THE PROPOSED RULE:

The proposed rule, including the analysis and text, is attached.

II. REFERENCE TO APPLICABLE FORMS: N/A

III. FISCAL ESTIMATE AND EIA:

The Fiscal Estimate and EIA is attached.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

The objective of the proposed rule is to assess standards of care and conduct for physical examinations, specifically including breast, pelvic, and rectal examinations. As a result of this review and assessment, the Board may create rules establishing minimum standards for the performance of physical examinations, update its rules concerning unprofessional conduct to specifically address conduct related to physical examinations, or both.

V. SUMMARY OF PUBLIC COMMENTS AND THE BOARD’S RESPONSES, EXPLANATION OF MODIFICATIONS TO PROPOSED RULES PROMPTED BY PUBLIC COMMENTS:

The Medical Examining Board (“Board”) held a public hearing on November 16, 2022. The following people either testified at the hearing, or submitted written comments:

- Wisconsin Medical Society
 - Mark Grapentine, JD, Chief Policy & Advocacy Officer
- Wisconsin Hospital Association
 - Matthew Stanford, JD, MHA, General Counsel
 - Ann Zenk, RN, BSN, MHA, Senior Vice President, Workforce and Clinical Practice
- Karolyn Wanat
- Ashlynn Clark
- Darrin Rotman
- Neelam Vashi
- Shawna Flanagan
- Paul Bostrom

- Olga Demidova
- Sarah Jensen

The Board summarizes the comments received either by hearing testimony or by written submission as follows:

- The Wisconsin Medical Society expressed its support for the rule.
- The Wisconsin Hospital Association submitted the following comments:
 - The rule would subject hospitals and employers in the position of establishing private rules to be enforced by the Board;
 - The rule impermissibly incorporated standards by reference;
 - The rule was unclear concerning requirements for the provision and posting of chaperone rules and procedures;
 - The rule exceeded the Board’s authority by imposing a requirement on individuals or organizations not regulated by the Board;
 - The rule’s Economic Impact Analysis lacked key details and analysis.
- The remaining commenters submitted identical comments objecting to the expense of hiring a chaperone, referring to provisions in earlier versions of the rule that are no longer included in the final version.

The Board explains modifications to its rule-making proposal prompted by public comments as follows:

- Amend Med 10.03 (2) (fm) 1 to instead allow failure to follow the rules established by a hospital or employer to be considered by the board in determining whether alleged misconduct occurred.
- Amend Med 10.03 (2) (fm) 4 to clarify that a physician shall not be found in violation of this section because of the failure of a third party to create a policy regarding chaperones, or to allow posting or notification of any policy regarding chaperones.
- Amend the sections “Explanation of agency authority” and “Plain language analysis” to expressly state that the Board does not intend to impose a requirement upon any person or entity over whom the Board does not have jurisdiction.

VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:

Comment: 2a. “In SECTION 2 of the proposed rule, creating s. Med 10.03 (2) (f) 4., the proposed text is placed as a subdivision of par. (f). Each subunit of a section should relate to a particular subset of subject matter within the section’s larger subject matter.

Paragraph (f) relates to engaging in sexual behavior with patients, and its existing subdivisions address details of that behavior. Because the proposed provision does not specifically relate to that topic, consider placing it in a separate paragraph instead of as a subdivision of par. (f). [s. 1.09 (2) (b), Manual.] If the agency keeps the insertion as a subdivision, then the insertion of a subdivision is designated by a number followed by a period. [s. 1.10 (1) (b) 5., Manual.]”

Response: The Board is rejecting comment #2a, because the proposed provision does specifically relate to sexual behavior with patients. The purpose of a chaperone is to monitor the physician's conduct to help ensure it is appropriate in the context of Med 10.03 (2) (f).

Comment: 2b. "In SECTION 2 of the proposed rule, creating s. Med 10.03 (2) (f) 4., the incorporation by reference of standards should be reviewed for compliance with s. 1.14 of the Manual. Prospective incorporation by reference should be avoided, as it raises questions of due process and improper delegation of authority. [s. 1.14 (5), Manual.] In particular, as presently drafted, questions may arise due to the manner in which the proposed rule appears to adopt prospective changes to chaperone and observer policies without additional agency oversight or future rulemaking. Additionally, compliance with the Attorney General's role in incorporation by reference should be documented in the rule analysis.

Response: The Board is rejecting comment #2b, because no standards are being adopted by this rule. The Board is also modifying the provision in Med 10.03 (2) (fm) 1 to further clarify that the Board will not be enforcing rules or policies created by a third party through this rule.

All of the remaining recommendations suggested in the Clearinghouse Report have been accepted in whole.

VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS: N/A

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

IN THE MATTER OF RULEMAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : MEDICAL EXAMINING BOARD
MEDICAL EXAMINING BOARD : ADOPTING RULES
: (CLEARINGHOUSE RULE CR 22-063)
:

PROPOSED ORDER

An order of the Medical Examining Board to create Med 10.02 (2m), (4m), and 10.03 (2)(fm), 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.”

The board expressly does not intend to impose or attempt to impose requirements upon any person or entity that does not fall under the board’s jurisdiction through this project.

Related statute or rule:

Chapter Med 21 provides minimum standards for patient health care records. The proposed changes to chapter Med 10 are related in that they involve actions and decisions that a physician will need to properly document.

Plain language analysis:

The proposed rule expands unprofessional conduct to require that physicians either follow the policies established by their employers for the use of chaperones during physical examinations, or that physicians establish policies and follow them. Physicians will also be required to make their policy regarding the use of chaperones accessible to all patients.

“Chaperone” is defined to mean an individual whom a physician requests to be present during a clinical examination who can serve as a witness to the examination taking 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. The distinction between the two is that a chaperone is arranged for or requested by the physician on the patient’s behalf and must be able to serve as a witness, whereas an observer is directly chosen by the patient.

Nothing under this rule is intended to impose a requirement upon any person or entity that the board does not have jurisdiction over.

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 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.

Effect on small business:

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.

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) and (4m) are created to read:

Med 10.02 (2m) “Chaperone” means an individual whom a physician requests to be present during a clinical examination that exposes the breasts, genitals, or rectal area, and who can serve as a witness to the examination taking place should there be any misunderstanding or concern for sexual misconduct.

(4m) “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) (fm) is created to read:

Med 10.03 (2) (fm) 1. If a physician who practices in a hospital or works for any other employer fails to comply with the rules established by their hospital or employer regarding chaperones or other observers in patient examinations, then the failure to follow such rules during an exam in which a violation of par. (f) is alleged may be considered by the board in determining whether the alleged misconduct occurred.

2. Physicians who are self-employed or in other practice settings that do not involve hospitals or employers shall establish written procedures for the use of chaperones or other observers in patient examinations and shall comply with these procedures once established.

3. A copy of any rules and procedures, or a summary thereof, regarding the physician’s use of chaperones or other observers shall be made available and accessible to all patients who are likely to receive a non-emergency examination of the breasts, genitals, or rectal area.

4. A physician shall not be found in violation of this section because of the failure of a third party to create a policy regarding chaperones, or to allow posting or notification of any policy regarding chaperones.

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 2/23/2023


Board Chairperson or Secretary

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis <input type="checkbox"/> Original <input checked="" type="checkbox"/> Updated <input type="checkbox"/> Corrected	2. Date September 22, 2022
3. Administrative Rule Chapter, Title and Number (and Clearinghouse Number if applicable) Med 10	
4. Subject Physical Examinations	
5. Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S	6. Chapter 20, Stats. Appropriations Affected
7. Fiscal Effect of Implementing the Rule <input checked="" type="checkbox"/> No Fiscal Effect <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Increase Costs <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Indeterminate <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Could Absorb Within Agency's Budget	
8. The Rule Will Impact the Following (Check All That Apply) <input type="checkbox"/> State's Economy <input type="checkbox"/> Specific Businesses/Sectors <input type="checkbox"/> Local Government Units <input type="checkbox"/> Public Utility Rate Payers <input type="checkbox"/> Small Businesses (if checked, complete Attachment A)	
9. Estimate of Implementation and Compliance to Businesses, Local Governmental Units and Individuals, per s. 227.137(3)(b)(1). \$0	
10. Would Implementation and Compliance Costs Businesses, Local Governmental Units and Individuals Be \$10 Million or more Over Any 2-year Period, per s. 227.137(3)(b)(2)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
11. Policy Problem Addressed by the Rule 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.	
12. Summary of the Businesses, Business Sectors, Associations Representing Business, Local Governmental Units, and Individuals that may be Affected by the Proposed Rule that were Contacted for Comments. Hospitals, hospital associations, physicians	
13. Identify the Local Governmental Units that Participated in the Development of this EIA.	
14. Summary of Rule's Economic and Fiscal 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)	
15. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule The benefit to implementing the rule is to promote use of chaperones during sensitive examinations and reduce incidents of sexual misconduct.	
16. Long Range Implications of Implementing the Rule The long range implication of implementing the rule is promotion of the use of chaperones during sensitive examinations and reduction of incidents of sexual misconduct.	
17. Compare With Approaches Being Used by Federal Government None	
18. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota) Illinois:	

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

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19. Contact Name

Jameson Whitney

20. Contact Phone Number

(608) 266-8098

This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
- Less Stringent Schedules or Deadlines for Compliance or Reporting
- Consolidation or Simplification of Reporting Requirements
- Establishment of performance standards in lieu of Design or Operational Standards
- Exemption of Small Businesses from some or all requirements
- Other, describe:

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

5. Describe the Rule's Enforcement Provisions

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes No
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