

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)

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 include, with limited exceptions, failure to provide a chaperone during a breast, genital, or rectal examination, and failure to document in a patient’s health care record the rationale for an unchaperoned breast, genital, or rectal examination. “Chaperone” is defined to mean a clinical staff member who is present as a third person during a breast, genital, or rectal examination; is trained in the requirements of best clinical practices in the setting where the examination takes place; and is empowered to report concerning behavior through a process independent of the health care provider being chaperoned.

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 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:

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 Daniel.Hereth@wisconsin.gov, or by calling (608) 267-2435.

Agency contact person:

Kassandra Walbrun, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, P.O. Box 8366, Madison, Wisconsin 53708-8366; telephone 608-261-4463; email at DSPSAdminRules@wisconsin.gov.

TEXT OF RULE

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

Med 10.02 (2m) “Chaperone” means a clinical staff member as [WJD1] a third person present during a breast, genital, or rectal examination who is [trained [WKD2] in the responsibility to protect patient privacy, the confidentiality of health information, and the requirements of best clinical practices in the setting where the examination takes place; and is [empowered [WKD3] to report concerning behavior through a process independent of the health care [WKD4] provider being chaperoned. Medical students, residents or fellows may serve in the role of the chaperone. A patient’s family member may not serve as a chaperone. [WJD5]

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 a breast, genital, or rectal examination 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 *must/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. The Respondent 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)

DRAFT

American Medical Association - Code of Medical Ethics Opinion 1.2.4

Efforts to provide a comfortable and considerate atmosphere for the patient and the physician are part of respecting patients' dignity. These efforts may include providing appropriate gowns, private facilities for undressing, sensitive use of draping, and clearly explaining various components of the physical examination. They also include having chaperones available. Having chaperones present can also help prevent misunderstandings between patient and physician.

Physicians should:

1. Adopt a policy that patients are free to request a chaperone and ensure that the policy is communicated to patients.
2. Always honor a patient's request to have a chaperone.
3. Have an authorized member of the health care team serve as a chaperone. Physicians should establish clear expectations that chaperones will uphold professional standards of privacy and confidentiality.
4. In general, use a chaperone even when a patient's trusted companion is present.
5. Provide opportunity for private conversation with the patient without the chaperone present. Physicians should minimize inquiries or history taking of a sensitive nature during a chaperoned examination.

SUMMARY OF OTHER STATES – USE OF CHAPERONES FOR EXAMINATIONS

No requirements or guidance concerning the use of chaperones for adjacent states (Illinois, Iowa, Michigan, and Minnesota).

Alabama

The Alabama Administrative Code provides that “[a] physician should have a chaperone present during the examination of any sensitive parts of the body for the protection of both the patient and the physician. A physician should refuse to examine sensitive parts of the patient's body without a chaperon present if the physician believes the patient is sexualizing the examination.” (Alabama Administrative Code 540-X-9-.08, *Sexual Misconduct In The Practice Of Medicine: A Joint Statement Of Policy And Guidelines By The State Board Of Medical Examiners And The Medical Licensure Commission*)

Delaware

Delaware law contains provisions specific to the treatment or examination of minors:

§ 1769B. Treatment or examination of minors.

- (a) A parent, guardian or other caretaker, or an adult staff member, shall be present when a person licensed to practice medicine under this chapter provides outpatient treatment to a minor patient who is disrobed or partially disrobed or during an

outpatient physical examination involving the breasts, genitalia or rectum, regardless of sex of the licensed person and patient, except when rendering care during an emergency. When using an adult staff member to observe the treatment or examination, the adult staff member shall be of the same gender as the patient when practicable. The minor patient may decline the presence of a third person only with consent of a parent, guardian or other caretaker. The minor patient may request private consultation with the person licensed to practice medicine without the presence of a third person after the physical examination. Every hospital and long-term care facility that provides treatment to minors shall develop and implement policies regarding the treatment of minor patients that are consistent with the purposes of this section and will submit those policies for approval by the Department of Health and Social Services. Violations of approved policies will be treated as a violation of this section.

(b) When a minor patient is to be disrobed, partially disrobed or will undergo a physical examination involving the breasts, genitalia or rectum, a person licensed to practice medicine under this chapter shall provide notice to the person providing consent to treatment of the rights under this section. The notice shall be provided in written form or be conspicuously posted in a manner in which minor patients and their parent, guardian or other caretaker are made aware of the notice. In circumstances in which the posting or the provision to the patient of the written notice would not convey the right to have a chaperone present, the person licensed to practice medicine shall use another means to ensure that the patient or person understands the right under this section.

(c) For the purposes of this section, “minor” is defined as a person 15 years of age or younger, “adult staff member” is defined as a person 18 years of age or older who acting under the direction of the licensed person or the employer of the licensed person or who is otherwise licensed under this chapter, “hospital” has the meaning prescribed by Chapter 10 of Title 16, and “long-term care facility” has the meaning prescribed by Chapter 11 of Title 16.

(d) The person licensed under this chapter that provides outpatient treatment to a minor pursuant to this section shall, contemporaneously with such treatment, note in the child’s medical record the name of each person present when such treatment is being provided.

Georgia

Georgia Administrative Code includes “[c]onducting a physical examination of the breast and/or genitalia of a patient of the opposite sex without a chaperone present” in its definition of physician unprofessional conduct (Rule 360-3-.02 - Unprofessional Conduct Defined).

No definition of chaperone in code.

New Jersey

An Appendix to the New Jersey Administrative Code (*Policy Statement Regarding Sexual Activity Between Physicians and Patients and in the Practice of Medicine*) provides “a licensee shall provide notice to a patient, or any other person who is to be examined, of the right to have a chaperone present during breast and pelvic examinations of females and during genitalia and rectal examinations of both males and females. In all other instances, consistent with promoting patient privacy, licensees should inform patients of the option of having a chaperone present during examination and should provide a chaperone when requested by a patient.” The policy statement indicates it is meant as an advisory to licensees to guide professional behavior.

Ohio

The Ohio State Medical Board’s Administrative Rules concerning sexual misconduct and impropriety defines sexual impropriety as including “[f]ailing to offer the patient the opportunity to have a third person or chaperone in the examining room during an intimate examination and/or failing to provide a third person or chaperone in the examining room during an intimate examination upon the request of the patient.”

A chaperone is defined as “a third person who, with the patient's consent, is present during a medical examination.” (Ohio Administrative Code 4731-26-01 – Definitions)

Tennessee

In its *Policy Regarding Sexual Misconduct*, the Tennessee Board of Medical Examiners encourages and strongly recommends the following:

“A patient agreement should be obtained for the presence of any persons in the room while dressing, undressing, or being examined. The physician should consider having a chaperone present during any physical examination. The request, whether by the patient or physician, for a chaperone during physical examination should be accommodated.”

Prepared by: Dale Kleven and Kassandra Walbrun, Administrative Rules Coordinators

Johns Hopkins University – Chaperone Policy

Definition of a chaperone: Clinical staff member, or other trained individual as determined by hospital policy at the Participating Organization, unrelated to the patient who has knowledge of the role of the Chaperone and acts as an impartial observer of the examination, therapy, or procedure

https://www.hopkinsmedicine.org/suburban_hospital/for_physicians/docs/chaperone-policy.pdf

University of Michigan

<https://www.uofmhealth.org/patient-visitor-guide/patients/use-chaperones-during-sensitive-examinations-and-procedures>

III. DEFINITIONS

A. Chaperone

1. **A chaperone is a person who acts as a witness for a patient and a health professional during a medical examination or procedure.** A chaperone should stand in a location where he or she is able to assist as needed and observe the examination, therapy or procedure.
2. **A chaperone may be a health care professional or a trained unlicensed staff member. This may include medical assistants, nurses, technicians, therapists, residents and fellows.** A student enrolled in a health profession's school/program may serve as a chaperone IF: The student has completed a Michigan Medicine approved chaperone training module AND the student formally chooses to be a chaperone by attestation. In certain circumstances (i.e, assisting with equipment or a complicated examination), a health care provider may choose to have a separate chaperone in addition to the student. Students that choose not to be a chaperone will not be penalized in any fashion.
3. Whenever possible, but not required, the chaperone should be the gender that the patient feels most comfortable with. A chaperone may also assist the health professional or provide support to the patient with personal hygiene, toileting or undressing/dressing requirements if requested or needed by the patient.
4. Family members or friends of an adult patient should not be expected to undertake any chaperoning role in normal circumstances. A family member may be present during sensitive examinations or procedures if it is the expressed desire of the patient but should not serve as a chaperone for the purposes of this policy. For vulnerable adult patients, an accompanying caregiver, social worker,

or group home escort can be present along with a Michigan Medicine chaperone to alleviate potential stress to the patient.

5. Family members CANNOT act as the chaperone for adolescent patients nor can family members opt out of a chaperone on behalf of their adolescent child.
6. **EXCEPTION:** A family member, parent or legal guardian may serve as a chaperone for a pediatric patient (age 0-10) examination except for examinations or procedures where there is placement of finger(s), speculum, swabs, or any other instruments into the vagina or rectum or if there is a suspicion of abuse

B. Sensitive Examination or Procedure

1. A sensitive examination or procedure for the purposes of this policy includes the physical examination of, or a procedure involving the genitalia, rectum, (regardless of gender) or female breast or the breast of a patient who identifies as female.
2. Sensitive nursing care or procedures for the purposes of this policy includes care that involves placement of finger(s), swabs, or medications / medical equipment on or into the vagina, penis, urethra or rectum.
 1. **EXCEPTION:** Nursing care that includes perineal cleansing and care as a part of everyday personal hygiene assistance (e.g. diaper changes, incontinence care, bathing) or perineal checks/care that do not involve cervical assessment for dilation.
3. In acknowledgement of the fact that a patient's personal and cultural preferences may broaden their own definition of a sensitive examination, chaperones will always be provided for other examinations if requested by a patient, parent or legal guardian.

C. Types of Consent Policies

1. OPT IN Policy: A chaperone will be provided if requested by a patient for any examination or procedure.
2. OPT OUT Policy: A chaperone will be present during the examination or procedure unless declined by the patient.
 1. Documentation in the patient's record, including the name of the chaperone is required using a dot phrase such as:
 1. "The sensitive parts of the examination were performed with xx as a chaperone". [MICHART dot phrase: .CHAPERONE]
 2. The patient does have a right to opt-out of having a chaperone present for certain examinations, procedures and care. This refusal should be documented in the patient's record and it is recommended that the following documentation is used:
 1. "A chaperone was offered for this sensitive examination, but the patient requested that a chaperone not be present." [MICHART dot phrase: .CHAPREFUSE]

3. If the health professional is uncomfortable with the patient's request for no chaperone (e.g., male health professionals performing gynecological exam, female health professionals performing a scrotal exam, patients who exhibit seductive behavior, etc.), the purposes of this policy to protect their interests should be explained to the patient. If the patient continues to decline a chaperone, the health professional may refuse to perform the exam/care and can consider contacting their supervisor or the Office of Clinical Affairs.
3. **MANDATORY POLICY:** A chaperone must be present or the examination or procedure should not be performed.

D. Health Professional

1. A Medical Staff Member, Clinical Program Trainee, Advanced Practice Nurse, Certified Nurse Midwife, Imaging Technologist, Therapist, Physician Assistant, Registered Nurse, Licensed Registered Nurse, and unlicensed assistive personnel (e.g. nursing techs, nursing assistants, medical assistants).

E. Patient

1. A patient is a person who requires medical care, who is receiving medical treatment or is under a health professional's care for a particular disease or condition.
 1. Pediatric patient: Age 0 – 10 years
 2. Adolescent patient: Age 11 – 17 years
 3. An adult patient is a person who has attained the age of majority (18 yrs.) and is therefore regarded as independent, self-sufficient, and responsible.
 4. A vulnerable patient is defined as: anyone under the age of 18 or a person who lacks the capacity to give informed consent or is unable to protect him or herself from abuse, neglect or exploitation. This includes those who only lack momentary capacity due to sedation.

IV.POLICY STANDARDS

An adult or pediatric patient or their parent or legal guardian may request a chaperone for any examination or procedure. It is good practice to discuss with patients the different options to have a chaperone present during sensitive examinations and procedures as defined above.

1. **Opt-In Exams/Procedures:** For the following exams, a chaperone can be offered but is not required
 1. Examination of or procedures to the urethra in both males and females are considered OPT-IN and do not require a chaperone unless requested by the patient.
 2. Examination of or procedures to the urethra in both males and females are considered OPT-IN and do not require a chaperone unless requested by the patient.

3. Echocardiograms will be considered OPT-IN and do not require a chaperone unless requested by a patient.
4. Standard patient care protocols such as listening to the heart or lungs or placing EKG leads will be considered OPT-In and do not require a chaperone unless requested by a patient.
5. In all patient care scenarios, the patient should be appropriately draped and the drape utilized as a barrier between the patient and the health professional. Every effort should be made to maintain the patient's dignity and physical privacy.
2. **Opt-Out Exams/Procedures:** For the following exams/procedures in non-vulnerable adults, a chaperone must be present unless declined by the patient:
 1. Breast examination of a post-pubertal female patient or the breast of a patient that identifies as female
 2. Palpation of the external genitalia
 3. Placement of finger(s), speculum, swabs, or any other instruments into the vagina or rectum
3. **Mandatory Exams/Procedures:** A chaperone is mandatory during a sensitive examination or procedure as listed in Section IV.B for all vulnerable patients as defined in Section III.E.d.
4. **Emergency Situation:** Emergency care should not be impeded by this policy

V. PROCEDURE ACTIONS

1. Clinical sites and patient and procedure units will staff their clinical areas to appropriately accommodate this policy.
2. Confidential clinician/patient communication should generally take place before or after the sensitive examination or procedures (i.e., without the chaperone present) unless the patient or health professional requests otherwise.
3. For sensitive examinations or procedures, the following practices should be followed:
 1. The scope of the examination and the reasons for examination should be explained to the patient. If appropriate, written information clearly stating why and how the procedure is to be performed should be available for patient education.
 2. If a patient with decision-making capacity declines a part of or the whole examination, it should not be done. The refusal should be noted in the chart
 3. The health professional should provide privacy for a patient to dress and undress.
 4. The health professional should generally not assist with removing or replacing the patient's clothing, unless the patient is having difficulty and/or requests assistance. The chaperone may also be available for such assistance.
 5. A patient must be provided with an adequate gown or drape.
 6. All exams should follow established UMHS standards for infection control.
4. A chaperone has the right to stop a sensitive procedure, examination or care if they feel that the health professional's behavior is inappropriate or unacceptable. A chaperone who witnesses inappropriate or unacceptable behavior on the part of the health professional will immediately report this to their manager or another senior manager, even if they did not stop the procedure while it was ongoing.
5. It is the responsibility of the health professional to ensure that accurate records are kept of the clinical contact, which also includes records regarding the use or refusal of a chaperone (see Section III.C. above).

6. If the health professional is in a department that has a separate policy regarding sensitive examinations or procedures that exceeds this policy, those policies should be followed. Specific policies tailored to a department must receive ECCA approval prior to implementation.
7. Health professional non-compliance with this chaperoning policy should be reported to the Medical Director, Service Chief, or Chair. The Patient Relations & Clinical Risk should also be notified. If anonymity is desired, the Compliance Hotline can also be called at 866-990-0111, or submit an online report (<http://www.compliancehotline.umich.edu/>).

VI. EXCEPTIONS

A. Virtual Visits

1. Virtual visits are currently covered under the provisions of the policy, as typically no physical contact will occur. However, there will be times that the genital, breast and rectal area will require virtual examination and these situations should warrant the same care respect afforded to sensitive physical exams. A chaperone can be offered to and made available to the Patient, or be present at a Patient's request. A Health Care Professional can still require a chaperone be present in order to complete the examination if he/she is uncomfortable performing the virtual examination without one present.
2. The chaperone can be a third party, witnessing the virtual examination via split screens or can be present with the Health Care Professional or the Patient.
3. Documentation should occur as usual within the patient record

B. Home Health Care Visits

1. Visits made to a patient within the patient's home by a visiting Health Care Professional are exempt from this policy

Medical Chaperone Training

Summary

The goal of a medical chaperone is to serve independently as a responsible, neutral, and objective third-party during clinical encounters. This course is designed to provide the knowledge and skills necessary for one to serve as an effective chaperone, a valued member of the healthcare team. Through their presence, effectively trained chaperones can:

- Protect the interests and well-being of patients
- Verify the content of clinical conversations and physical exams

- Provide documentation regarding clinical encounters

2 CE hours, \$20 course: <https://pbieducation.com/courses/ctp-2/>

<https://professionalboundaries.sharefile.com/share/view/s5e0110f5b17476fa>