

Clearinghouse Rule 13-008

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

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IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : MEDICAL EXAMINING
MEDICAL EXAMINING BOARD : BOARD
: ADOPTING RULES
: (CLEARINGHOUSE RULE)

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PROPOSED ORDER

The Wisconsin Medical Examining Board proposes an order to repeal s. Med 10.02 (2); to amend Med 10.01 (1) (title); to repeal and recreate 10.02 (1); and to create Med 10.01 (1) and 10.03 (title) relating to unprofessional conduct.

Analysis prepared by the Department of Safety and Professional Services.

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ANALYSIS

Statutes interpreted:

Section 448.40 (1), Stats.

Statutory authority:

Sections 15.08 (5) (b), 227.11 (2) (a), and 448.40 (1), Stats.

Explanation of agency authority:

The legislature, via. ss. 15.08 (5) (b), and 227.11 (2) (a), Stats., conferred upon the Medical Examining Board general power to promulgate rules for the guidance of the profession and to interpret the provisions of statutes it enforces. Section 448.40 (1), Stats., authorizes the Board to promulgate rules that carry out the purposes of the Medical Practices sub chapter. Wis. Admin. Code ch. Med 10 Unprofessional Conduct is administered by the Medical Examining Board; as such the Board has statutory authority to revise Wis. Admin. Code ch. Med 10 for the purpose of providing guidance within the profession.

Related statute or rule:

Chapter Med 10

Plain language analysis:

This proposed rule seeks to modernize Wis. Admin Code Ch. Med 10 Unprofessional Conduct by overhauling the current version of the rules, adding language that specifically addresses new topic areas, delete outdated language of some provisions and augment others.

SECTION 1. amends the title of the authority provision.

SECTION 2. amends the rule by adopting an statement of intent that provides guidance on how the rules should be interpreted.

SECTION 3. repeals and recreates the definitions section adding several new terms.

SECTION 4. This section repeals the current definitions of unprofessional conduct.

SECTION 5. creates a new section defining unprofessional conduct.

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

There is no comparative existing or proposed federal rule.

Comparison with rules in adjacent states:

The following comparisons are the result of various internet searches:

Illinois: The grounds for administering disciplinary actions against physicians in Illinois are set forth in [225 ILCS 60/ 22 \(2012\)](#). The processes for administering the disciplinary proceedings are stated in the Illinois Code of Regulation Title 68: Professions and Occupations Chapter VII: Department of Financial and Professional Regulation Subchapter B: Professions and Occupations [PART 1285.200-1285.275 MEDICAL PRACTICE ACT OF 1987: Sections Listing](#)

Iowa: Grounds for disciplining health care professionals in Iowa are codified in Iowa Code § 147.55 and through the Iowa Administrative Code 653-23.1(272C). <http://www.legis.state.ia.us/aspx/ACODocs/DOCS/4-21-2010.653.23.pdf>

Michigan: The grounds for disciplinary action against health care professionals in Michigan are codified in the Public Health Code, Public Act 368 of 1978 (2010 PA 101, MCL 333.16221.

[http://www.legislature.mi.gov/\(S\(j4bg0h454voc1545vsjncnx\)\)/documents/mcl/pdf/mcl-333-16221.pdf](http://www.legislature.mi.gov/(S(j4bg0h454voc1545vsjncnx))/documents/mcl/pdf/mcl-333-16221.pdf)

Minnesota: The grounds for administering disciplinary action against physicians in Minnesota are stated in Minn. Stat. §147.091.

<https://www.revisor.mn.gov/data/revisor/statute/2009/147/2009-147.091.pdf>

Summary of factual data and analytical methodologies:

The Medical Examining Board approved a work group which was convened to gather information and consider unprofessional conduct rules from different states. The work group, over a series of board meetings, presented the full Medical Examining Board recommended language. The recommend language drafted by the work group was then considered by the full board. The work group also sought out input from stakeholders such as the Wisconsin Medical Society (WMS) and the Wisconsin Hospital Association (WHA). The full board compared and contrasted the work group language with language from WHA and WMS as well as recommended language from the Federation of State Medical Boards (FSMB). This collaboration resulted in a comprehensive review of the rules in their entirety. The board ensures the accuracy, integrity, objectivity and consistency of data were used in preparing the proposed rule and related analysis

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

The department finds that this rule will have no effect on small business as small business is defined in s. 227.114 (1), Stats.

Anticipated costs incurred by the private sector:

The department finds that this rule will incur no additional cost to the private sector.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis are attached.

Effect on small business:

The department finds that this rule will have no effect on small business as small business is defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted at Greg.Gasper@wisconsin.gov or by calling (608) 266-8608.

Agency contact person:

Shawn Leatherwood Department of Safety and Professional Services, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708; telephone 608-261-4438; email at Shancethea.L Leatherwood@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Shawn Leatherwood Department of Safety and Professional Services, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708-8935, or by email to Shancethea.L Leatherwood@wisconsin.gov. Comments must be received on or before XX/XX/XX, to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. Med. 10.01 (title) is amended to read:

MED 10.01 (title) Authority and purpose intent. The definitions of this chapter are adopted by the medical examining board pursuant to the authority delegated by ss. 15.08 (5), 227.11, and 448.40, Stats., for the purposes of ch. 448, Stats.

SECTION 2. Med 10.01 (1) is created to read:

(1) Physicians Act with a high level of independence and responsibility, often in emergencies. Every physician represents the medical profession in the community and must do so in a manner worthy of the trust bestowed upon the physician and the profession. The minimally competent practice of medicine and surgery require that care of the patient is paramount. Physicians must therefore act with honesty, respect for the law, reasonable judgment, competence and respect for patient boundaries.

SECTION 3. MED 10.02 (1) is repealed and recreated to read:

Med 10.02 Definitions. For the purposes of these rules:

(1) “Adequate supervision” means supervision by a physician whose license is in good standing and requires that the supervising physician has knowledge of the subordinate’s training, skill and experience pertaining to the acts undertaken; the supervising physician is competent and credentialed to perform the act; and there is adequate physician-to-subordinate ratio, taking into consideration the training, skill and experience of the subordinate, risk of harm to the patient due to the nature of the procedure, and risk of harm due to characteristics of the patient.

(2) “Board” means the medical examining board.

(3) “Direct, immediate, one-to-one supervision” means supervision with face-to-face contact between the person being supervised and the supervisor throughout the patient contact, with the supervisor assisting the person being supervised.

(4) “Direct, on-premises supervision” means the supervising physician is physically present on the same premises as the person being supervised, with face-to-face contact as necessary.

(5) “General supervision” means indirect, off-premises, supervision with direct, on-premises or direct face-to-face contact between the supervisor and the person being supervised as necessary. Between direct contacts the supervisor is required to maintain indirect, off-premises telecommunication contact such that the person being supervised can, within a period of time necessary to avoid unacceptable risk of harm to the patient, establish direct telecommunication with the supervisor.

(6) “Intimate parts” has the meaning set forth in s. 939.22 (19), Stats.

(7) “License” means any license, permit, certificate, or registration issued by the board or by any other credentialing jurisdiction with the authority to grant credentials to practice medicine and surgery, or any other practice authorized within ch. 448, Stats.

(8) “Patient health care records” means a health care record as set forth in s. 146.82 (4), Stats.

(9) “Sexual contact” means contact as defined in s. 948.01 (5), Stats.

(10) “Sexually explicit conduct” means conduct as defined in s. 948.01 (7), Stats.

SECTION 4. MED 10.02 (2) is repealed.

SECTION 5. MED 10.03 (title) is created to read:

Med 10.03 (title) Unprofessional conduct. The term “unprofessional conduct” is defined to mean and include, but not be limited to, the following or aiding or abetting the same:

Med 10.03 (1) DISHONESTY AND CHARACTER. (a) Violating or attempting to violate any term, provision, or condition of any order of the board.

(b) Knowingly engaging in fraud or misrepresentation or dishonesty in applying, procuring or by examination for a medical license, or in connection with applying for or procuring periodic renewal of a medical license, or in otherwise maintaining such licensure.

(c) Knowingly giving false, fraudulent, or deceptive testimony while serving as an expert witness.

(d) Employing illegal or unethical business practices.

(e) Knowingly, negligently, or recklessly making any false statement, written or oral, in the practice of medicine and surgery which creates an unacceptable risk of harm to a patient, the public or both.

(f) Engaging in any act of fraud, deceit, or misrepresentation, including acts of omission to the board or any person acting on the board's behalf.

(g) Obtaining any fee by fraud, deceit or misrepresentation.

(h) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, unless allowed by law. This prohibition does not preclude the legal functioning of lawful professional partnerships, corporations or associations.

(i) Representing or claiming as true the appearance that a physician possesses a medical specialty, certification by a board recognized certifying organization, such as the American Board of Medical Specialties, or the American Osteopathic Association, if it is not true.

(k) Engaging in uninvited in-person solicitation of actual or potential patients who, because of their particular circumstances, maybe vulnerable to undue influence. Engaging in false, misleading or deceptive advertising.

Med 10.03 (2) DIRECT PATIENT CARE VIOLATIONS.

(a) Negligence in the practice of medicine.

1. A certified copy of any document demonstrating that a court or a panel, established under s. 655.02, Stats., has found the physician negligent in the course of practicing medicine and surgery shall be conclusive evidence of a violation of this subsection.

2. A certified copy of a relevant decision by a state or federal agency charged with making relevant legal determinations shall be conclusive evidence of findings of facts and conclusions of law contained therein.

(b) Practicing or attempting to practice under any license when unable or unwilling to do so with reasonable skill and safety.

1. A certified copy of an order issued by a court of competent jurisdiction finding that a person is mentally incompetent is conclusive evidence that the physician was, at the time the order was entered, unable to practice medicine and surgery with reasonable skill and safety.

(c) Departing from or failing to conform to the standard of minimally competent medical practice which creates an unacceptable risk of harm to a patient or the public whether or not the act or omission resulted in actual harm to any person.

(d) Prescribing, ordering, dispensing, administering, supplying, selling, giving, or obtaining any prescription medication in any manner that is inconsistent with the standard of minimal competence and that creates an unacceptable risk of harm to a patient.

(e) Performing or attempting to perform any surgical or invasive procedure on the wrong patient, or at the wrong anatomical site, or performing the wrong procedure on any patient.

(f) Administering, dispensing, prescribing, supplying or obtaining controlled substances as defined in s. 961.01 (4), Stats., other than in the course of legitimate professional practice, or as otherwise prohibited by law.

1. Except as otherwise provided by law, a certified copy of a relevant decision by a state or federal court or agency charged with making legal determinations shall be conclusive evidence of findings of facts and conclusions of law contained therein.

2. A certified copy of any document demonstrating the entry of a guilty, nolo contendere plea or deferred adjudication, with or without expungement, of a crime substantially related to the practice of medicine and surgery is conclusive evidence of a violation of this section.

(g) Engaging in sexually explicit conduct, sexual contact, exposure, gratification or other sexual behavior with or in the presence of a patient, a patient's immediate family or a person responsible for the patient's welfare.

1. Sexual motivation may be determined from the totality of the circumstances and shall be presumed when the physician has contact with a patient's intimate parts without legitimate medical justification for doing so.

2. For the purpose of this subsection, an adult receiving treatment shall continue to be a patient for 2 years after the termination of professional services.

3. If the person receiving treatment is a child, the person shall continue to be a patient for the purposes of this subsection for 2 years after termination of services or for 2 years after the patient reaches the age of majority, whichever is longer.

4. A physician engaging in any sexual contact or conduct with or in the presence of a patient or a former patient who lacks the ability to consent for any reason, including, but not limited to, medication or psychological or cognitive disability.

(h) Engaging in repeated or significant disruptive behavior or interaction with physicians, hospital personnel, patients, family members, or others that interferes with patient care or could reasonably be expected to adversely impact the quality of care rendered.

(i) Knowingly, recklessly or negligently divulging a privileged communication or other confidential patient health care information except as required or permitted by state or federal law.

(j) Subject to and limited by s. 448.30, Stats., performing an act constituting the practice of medicine and surgery without required informed consent.

(k) Aiding or abetting the practice of medicine by an unlicensed, incompetent, or impaired person or allowing another person or organization to use his or her license to practice medicine.

1. This provision does not prohibit a Wisconsin physician or any other practitioner subject to this rule from providing outpatient services ordered by a physician licensed in another state. If the physician who wrote the order saw the patient in the state in which the physician is licensed and the physician who wrote the order remains responsible for the patient.

(L) Violating the standard of minimal competence to practice medicine and surgery while serving as a medical director or physician who delegates and supervises services performed by non-physicians as set forth in s. BC 2.03, including aiding or abetting any person's violation of s. BC 2.03.

(m) Prescribing controlled substances to oneself as defined in s. 961.38 (5), Stats.

(n) Practicing medicine in another state or jurisdiction without appropriate licensure. A physician has not violated this subsection if, after issuing an order for services that complies with the laws of Wisconsin, his or her patient requests that the services ordered are provided in another state or jurisdiction.

(o) Patient abandonment occurs when an active professional relationship between physician and patient is terminated by the physician and any of the following occur:

1. The physician fails to give the patient notice at least 30 days in advance of the date on which the physician's withdrawal becomes effective.

2. The physician fails to allow for patient access or transfer of the patient's health care record as required by law.

3. If necessary to avoid unacceptable risk of harm, the physician fails to provide for continuity of prescription medications.

4. The physician fails to provide for emergency care during the period between the notice of intent to withdraw from the physician-patient relationship and the date on which the physician-patient relationship ends.

Med 10.03 (3) LAW VIOLATIONS, ADVERSE ACTION AND REQUIRED REPORTS TO THE BOARD.

(a) Failing, within 30 days, to report to the board any final adverse action taken against the licensee's authority to practice medicine and surgery by another licensing jurisdiction concerned with the practice of medicine and surgery.

(b) Failing, within 30 days, to report to the board any adverse action taken by the Drug Enforcement Administration against the licensee's authority to prescribe controlled substances within the federal government.

(c) Having any credential pertaining to the practice of medicine and surgery or any act constituting the practice of medicine and surgery become subject to adverse action by any agency of this or another state, or by any agency or authority within the federal government.

(d) Failing to comply with state and federal laws regarding access to patient health care records.

(e) Failing to establish and maintain timely patient health care records, including records of prescription orders, as required by s. Med 21, or as otherwise required by law.

(f) Violating the duty to report as defined in s.448.115, Stats.

(g) After a request by the board, failing to cooperate in a timely manner with the board's investigation of a complaint filed against a license holder. There is a rebuttable presumption that a credential holder who takes longer than 30 days to respond to a request of the board has not acted in a timely manner.

(h) Failing, within 30 days of conviction of any crime, to provide the board with certified copies of the criminal complaint and judgment of conviction.

(i) Except as provided in s.10.03 (3) (j), a violation or conviction of any federal or state law or rule that may relate to the practice of medicine and surgery.

(1) Except as otherwise provided by law, a certified copy of a relevant decision by a state or federal court or agency charged with making legal determinations relevant to this subsection is conclusive evidence of findings of facts and conclusions of law contained therein.

(2) The department has the burden of proving that the circumstances of the crime are substantially related to the practice of medicine and surgery.

(j) Violating or being convicted of any of the following so listed in Table 10.03, any successor statute criminalizing the same conduct, or if in another jurisdiction, any act which, if committed in Wisconsin would constitute a violation of any of the following:

**Table 10.03
Violations or Convictions
Cited by Statute**

Statute Section	Description of Violation or Conviction
940.01, Stats.	First degree intentional homicide
940.02, Stats.	First degree reckless homicide
940.03, Stats.	Felony murder
940.05, Stats.	Second degree intentional homicide
940.12, Stats.	Assisting suicide
940.19 (2), (4), (5) and (6)	Battery, substantial battery, or aggravated battery
940.22 (2) or (3)	Sexual exploitation by therapist; duty to report
940.225 (1), (2) or (3)	First, second, or third degree sexual assault
940.285 (2)	Abuse of individuals at risk
940.29	Abuse of residents of penal facilities
940.295	Abuse and neglect of patients and residents
948.02 (1) or (2)	First and second degree sexual assault of a child
948.03 (2) (a), (b) or (c)	Physical abuse of a child, intentional causation of bodily harm
948.05	Sexual exploitation of a child
948.051	Trafficking of a child
948.055	Causing a child to view or listen to sexual activity
948.06	Incest with a child
948.07	Child enticement
948.08	Soliciting a child for prostitution
948.085	Sexual assault of a child placed in substitute care

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.

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(END OF TEXT OF RULE)

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Dated _____

Agency _____

Chairperson
Medical Examining Board