

Report From Agency

**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