

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: State Medical Board of Ohio

Regulation/Package Title: Current Best Practices/ Sexual misconduct rules

Rule Number(s): 4731-26-01, 4731-26-02, and 4731-26-03.

Date: _____

Rule Type:

New

5-Year Review

Amended

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

The rules in Chapter 4731-26, Ohio Administrative Code, clarify for licensees, the public, and employers the behaviors and activities that subject the licensee to administrative discipline as sexual misconduct. Proposed revised rule 4731-26-01 defines important terms

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such as “patient,” and “sexual misconduct,” “sexual contact,” “sexual interaction.” The revisions to the rule add oriental medicine practitioners and genetic counselors in the list of licensees subject to the rules since their licensure first occurred after the rules were last reviewed. In addition, unnecessary language was deleted to support clarity of the rule.

Rule 4731-26-02, which sets out prohibitions regarding sexual misconduct by Medical Board licensees, is proposed as a no change rule.

Rule 4731-26-03, sets out the violations for engaging in sexual misconduct by Medical Board licensees by referring to specific disciplinary statutes in the Medical Board’s governing Revised Code chapters: Chapters 4730 (physician assistants), 4731 (physicians and limited practitioners), 4760 (anesthesiologist assistants), 4762 (acupuncturists and oriental medicine practitioners), 4774 (radiologist assistants), and 4778 (genetic counselors). The revisions add oriental medicine practitioners and genetic counselors.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Sections 4730.07, 4731.05, 4760.19, 4762.19, 4774.11 and 4778.12, Ohio Revised Code.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

Not applicable.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Society has recognized that healthcare professionals occupy a unique position of trust regarding their patients and medical ethics require that healthcare professionals hold their patients’ best interests paramount to their own. Accordingly, rules set clear standards to prohibit boundary violations that constitute sexual misconduct.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The success of the rules will be measured by the number of sexual misconduct cases that come before the Medical Board.

Development of the Regulation

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7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The first step in proposing to revise the current rules was to obtain recommendations from the Physician Assistant Policy Committee (“PAPC”). Pursuant to Section 4730.05, O.R.C., PAPC membership consists of three physician assistants, three physicians (including a physician member of the Medical Board) and a public member. On November 3, 2015, the PAPC recommended that the proposed revised rules be considered by the Medical Board, and the Medical Board approved the proposals for circulation to interested parties at its meeting on November 4, 2015. On November 9, 2015, the proposed rules were sent via e-mail to organizations such as, but not limited to, the Ohio Association of Physician Assistants, Ohio State Medical Association, Ohio Academy of Family Physicians, Academy of Medicine of Cleveland and Northern Ohio, and Ohio Osteopathic Association; governmental affairs representatives for numerous organizations; attorneys were appear before the Medical Board; and all others persons who have requested notice of Medical Board rule activity.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The members of PAPC offered no substantive changes to the draft rules. The comment deadline for interested parties was December 10, 2015, and no comments were received by the Medical Board.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

Scientific data was not required to develop Rules 4731-26-01 through 4731-26-03. The rules were developed in 2006 based on the American Medical Association Code of Ethics and the document “Addressing Sexual Boundaries: Guidance for State Medical Boards,” published by the Federation of State Medical Boards after study of the issue of sexual boundary violations. A member of the State Medical Board of Ohio was on the study committee.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn’t the Agency consider regulatory alternatives?

No regulatory alternatives were considered for the proposed rules. It is clear under Ohio law that a standard to which all licensees will be held must be promulgated as a rule or it is not enforceable.

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- 11. Did the Agency specifically consider a performance-based regulation? Please explain.**
Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

The rules prohibit sexual misconduct by the Medical Board's licensees. However, except for the requirement that the licensee offer a chaperone before conducting an intimate exam, the rules do not dictate action. The rules do not dictate the method for complying with the prohibitions.

- 12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The Medical Board is the sole state agency that licenses physicians, limited practitioners, physician assistants, anesthesiologist assistants, acupuncturists, oriental medicine practitioners, radiologist assistants, and genetic counselors. Accordingly, the proposed amendments and no change rule do not duplicate any other Ohio regulations.

- 13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

The rules will be posted on the Medical Board's website. E-mail blasts, including the Medical Board's e-News newsletter, will be sent to all licensees and also to interested parties who have requested notice of Medical Board rule activity. Medical Board staff members are available by telephone and e-mail to answer questions. Medical Board staff members also give presentations to groups and associations who seek an update on physician practice regulations.

Adverse Impact to Business

- 14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

a. Identify the scope of the impacted business community;

The impacted business community is comprised of Medical Board licensees, i.e., physicians, limited practitioners, physician assistants, anesthesiologist assistants, acupuncturists, oriental medicine practitioners, radiologist assistants, and genetic counselors.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

There is no adverse impact on Medical Board licensees who comply with Rules 4731-2601 through 4731-26-03. On the other hand, Medical Board licensees who violate

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Rules 4731-26-01 through 4731-26-03 are subject to license discipline, up to and including license revocation. The Medical Board may also impose a civil penalty pursuant to O.R.C. Section 4731.225, of up to twenty thousand dollars for physicians, massage therapists, or cosmetic therapists who violate the rule.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

There is no cost for Medical Board licensees to comply with Rules 4731-26-01 through 4731-26-03. Rather, noncompliance can result in the costs noted above.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

Modern societal and medical ethics recognize the potential harm to the public if healthcare professionals engage in sexual misconduct with patients or key third parties. Protection of the public outweighs any adverse impact on the Medical Board’s licensees.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The proposed rules do not provide any exemptions or alternative means of compliance for small businesses. For purposes of Rules 4731-26-01 through 4731-26-03, the public benefit of avoiding sexual misconduct by the Medical Board’s licensees is not relative to the size of the medical practice.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

Rules 4731-26-01 through 4731-26-03 prohibit Medical Board licensees from engaging in sexual misconduct with patients and key third parties. Waiving penalties for committing sexual misconduct has the potential to cause serious harm to the public interest as it would send mixed messages about the seriousness of engaging in sexual misconduct.

18. What resources are available to assist small businesses with compliance of the regulation?

The rules will be posted on the Medical Board's website. Medical Board staff members are available by telephone and e-mail to answer questions. Medical Board staff members also give presentations to groups and associations who seek an update on physician practice regulations.

4731-26-01

Definitions.

For purposes of Chapter 4731-26 of the Administrative Code:

(A) “Licensee” means any of the following:

- (1) An individual holding a certificate to practice as a physician assistant under Chapter 4730. of the Revised Code;
- (2) An individual holding a certificate to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery under Chapter 4731. of the Revised Code;
- (3) An individual holding a certificate to practice a limited branch of medicine under Chapter 4731. of the Revised Code;
- (4) An individual holding a certificate of registration as an anesthesiologist assistant under Chapter 4760. of the Revised Code;
- (5) An individual holding a certificate to practice as an acupuncturist or an oriental medicine practitioner under Chapter 4762. of the Revised Code; ~~or~~
- (6) An individual holding a certificate to practice as a radiologist assistant under Chapter 4774. of the Revised Code.; or
- (7) An individual holding a license to practice as a genetic counselor under Chapter 4778. of the Revised Code.

(B) “Health care services” means examination, consultation, health care, treatment, or other services provided by a licensee under the legal authority conferred by a license, certificate, or registration issued by the board.

(C) “Patient” means a person for whom the licensee has provided health care services, whether provided by mutual consent or implied consent, or provided without consent pursuant to a court order. Once a licensee-patient relationship is established, a person remains a patient until the relationship is terminated. Patient includes any of the following:

- (1) A person who is receiving or has received health care services from the licensee without termination of the licensee-patient relationship; or
- (2) A person who meets the criteria of a key third party, as that term is defined in paragraph (D) of this rule.

- (D) “Key third party” means an individual closely involved in the patient’s decision-making regarding health care services, including but not limited to, the patient’s spouse or partner, parents, child, sibling, or guardian. For purposes of this chapter, an individual’s status as a key third party ceases upon the termination of the licensee-patient relationship or upon termination of the individual’s relationship with the patient.
- (E) “Chaperone” means a third person who, with the patient’s consent, is present during a medical examination.
- (F) “Former patient” means one of the following:
- (1) A person for whom the licensee has not rendered health care services since the licensee-patient relationship was terminated; or
 - (2) A person who has otherwise been admitted, discharged, or referred to another licensee for care subsequent to receipt of health care services by a licensee in an emergency setting or on an episodic basis, and such action has been recorded in the person’s medical record or chart.
- (G) “Intimate examination” means an examination of the pelvic area, genitals, rectum, ~~or, if the person is a female, a breast, or, if the person is a male, the prostate.~~
- (H) “Sexual misconduct” means conduct that exploits the licensee-patient relationship in a sexual way, whether verbal or physical, and may include the expression of thoughts, feelings, or gestures that are sexual or that reasonably may be construed by a patient as sexual. Sexual misconduct includes sexual impropriety, sexual contact, or sexual interaction as follows:
- (1) “Sexual impropriety” means conduct by the licensee that is seductive, sexually suggestive, disrespectful of patient privacy, or sexually demeaning to a patient, including but not limited to, the following:
 - (a) Neglecting to employ disrobing or draping practices respecting the patient’s privacy;
 - (b) Subjecting a patient to an intimate examination in the presence of a third party, other than a chaperone, without the patient’s consent or in the event such consent has been withdrawn;
 - (c) Making comments that are not clinically relevant about or to the patient,

including but not limited to, making sexual comments about a patient's body or underclothing, making sexualized or sexually demeaning comments to a patient, criticizing the patient's sexual orientation, or making comments about potential sexual performance;

- (d) Soliciting a date or romantic relationship with a patient;
 - (e) Participation by the licensee in conversation regarding the sexual problems, sexual preferences, or sexual fantasies of the licensee;
 - (f) Requesting details of the patient's sexual history, sexual problems, sexual preferences, or sexual fantasies when not clinically indicated for the type of health care services; and
 - (g) Failing 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.
- (2) "Sexual contact" includes, but is not limited to, the following:
- (a) Touching a breast or any body part that has sexual connotation for the licensee or patient, for any purpose other than appropriate health care services, or where the patient has refused or has withdrawn consent; and
 - (b) Examining or touching of the patient's genitals without the use of gloves.
- (3) "Sexual interaction" means conduct between a licensee and patient, whether or not initiated by, consented to, or participated in by a patient, that is sexual or may be reasonably interpreted as sexual, including but not limited to, the following:
- (a) Sexual intercourse, genital to genital contact;
 - (b) Oral to genital contact;
 - (c) Oral to anal contact, genital to anal contact;
 - (d) Kissing in a romantic or sexual manner;

- (e) Encouraging the patient to masturbate in the presence of the licensee or masturbation by the licensee while the patient is present;
 - (f) Offering to provide health care services, such as drugs, in exchange for sexual favors; and
 - (g) Performing an intimate examination without clinical justification.
 - (h) Conduct that is sexually demeaning to a patient or which demonstrates a lack of respect for the patient's privacy.
- (4) Conduct described in paragraphs (H)(1)(a), (H)(1)(b), (H)(1)(g), and (H)(2)(b) of this rule does not constitute sexual misconduct when all of the following criteria are met:
- (a) The conduct occurred during the rendering of health care services in an emergency setting;
 - (b) The health care services rendered were clinically necessary;
 - (c) The patient was unconscious or otherwise unable to consent to health care services; and
 - (d) The patient's clinical condition required immediate action and the licensee's violation of the provisions of paragraph (H)(1)(a), (H)(1)(b), (H)(1)(g), or (H)(2)(b) of this rule, as applicable, was due to circumstances not within the licensee's control.

(I) "Emergency setting" means an emergency department.

(J) "Board" means the state medical board of Ohio.

(K) "Conduct" includes, but is not limited to the following:

- (1) Behaviors, gestures, or expressions, whether verbal or physical; or
- (2) The creation, receipt, exchange, saving, or sending of images or communications, whether verbal or written, via a telecommunications device.

4731-26-02

Prohibitions.

Sexual misconduct, as that term is defined in paragraph (H) of rule 4731-26-01 of the Administrative Code, between a licensee and a patient is never diagnostic or therapeutic.

(A) A licensee shall not engage in sexual misconduct with a patient or key third party, as that term is defined in paragraph (C) of rule 4731-26-01 of the Administrative Code.

(B) Conduct included within the definition of sexual misconduct occurring between a licensee and a former patient constitutes sexual misconduct and is prohibited if it meets any of the following criteria:

(1) The conduct occurred within ninety days after the licensee-patient relationship was terminated;

(2) The conduct occurred between a psychiatrist and a person to whom the psychiatrist formerly provided psychiatric or mental health services, and the conduct is in violation of the code of ethics of the “American Psychiatric Association”; or

(3) The board determines that the conduct constitutes sexual misconduct upon consideration of the following factors:

(a) The duration of the licensee-patient relationship;

(b) The nature of the health care services provided;

(c) The lapse of time since the licensee-patient relationship ended;

(d) The extent to which the former patient confided personal or private information to the licensee;

(e) The degree of emotional dependence that the former patient has or had on the licensee; and

(f) The extent to which the licensee used or exploited the trust, knowledge, emotions, or influence derived from the previous licensee-patient relationship.

4731-26-03

Violations, miscellaneous.

(A) Except as provided in paragraph (C) of this rule, a violation of rule 4731-26-02 of the Administrative Code, as determined by the board, shall constitute the following:

- (1) For a physician, massage therapist, or cosmetic therapist, “a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,” as that clause is used in division (B)(6) of section 4731.22 of the Revised Code.
- (2) For a physician assistant, “a departure from, or failure to conform to, minimal standards of care of similar physician assistants under the same or similar circumstances, regardless of whether actual injury to a patient is established, as that clause is used in division (B)(19) of section 4730.25 of the Revised Code.
- (3) For an anesthesiologist assistant, “a departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established,” as that clause is used in division (B)(4) of section 4760.13 of the Revised Code.
- (4) For an acupuncturist or oriental medicine practitioner, a “departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established,” as that clause is used in division (B)(4) of section 4762.13 of the Revised Code.
- (5) For a radiologist assistant, a “departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established,” as that clause is used in division (B)(4) of section 4774.13 of the Revised Code.
- (6) For a genetic counselor, a "departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established," as that clause is used in division (B)(4) of section 4778.14 of the Revised Code.

(B) Where the alleged conduct does not in itself constitute sexual misconduct, as defined in paragraph (H) of rule 4731-26-01 of the Administrative Code, the board may consider expert testimony or other evidence in making its determination as to whether the conduct of the licensee constitutes sexual misconduct.

(C) Nothing in this rule shall limit the board’s authority to investigate and take action

*** DRAFT - NOT YET FILED ***

4731-26-03

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under ~~section~~ sections 4730.25, 4731.22, 4760.13, 4762.13, ~~or~~ 4774.13 or 4778.14
of the Revised Code.