

**MEDICAL BOARD
NOTICE OF PUBLIC HEARING**

THE STATE MEDICAL BOARD OF OHIO, pursuant to Chapter 119, Ohio Revised Code, hereby gives notice that it will conduct a public hearing for the purpose of considering the rescission, amendment, and adoption of rules.

The public hearing will be conducted on **Wednesday, April 20, 2016, at 9:00 a.m. in the Administrative Hearing Room, Rhodes State Office Tower, 30 E. Broad St., 3rd Floor, Columbus, OH.** Oral or written testimony may be presented by any person affected by the proposed actions.

The following rule relating to the pronouncement of death is proposed to be changed in more than fifty percent of the content of the current rule. Therefore, the current rule is proposed to be rescinded and a new rule containing the changes is proposed for adoption:

4731-14-01 Pronouncement of death.

The following rule concerning sexual misconduct is proposed to be filed as a no change rule:

4731-26-02 Prohibitions.

The following rules concerning sexual misconduct are proposed for amendment:

4731-26-01 Definitions.

4731-26-03 Violations, miscellaneous.

All of the affected rules can be found in the following pages.

All interested persons will be given the opportunity to be heard at the public hearing. Those persons who wish to provide oral testimony at the hearing are encouraged to preregister by contacting Sallie Debolt at the address below, and may be given preference in the order of their testimony. Persons providing oral testimony are encouraged to also submit a copy of the testimony at the hearing.

All written comments received by the Board before the close of the hearing record will be considered. **Written comments may be provided at the public hearing. However, persons interested in providing written comments are encouraged to do so prior to April 20, 2016 via e-mail to Sallie.Debolt@med.ohio.gov, or via mail to:**

**Sallie Debolt, Senior Counsel
State Medical Board of Ohio
30 East Broad Street, 3rd Floor
Columbus, OH 43215-6127**

TO BE RESCINDED

4731-14-01 **Pronouncement of death.**

- (A) For purposes of this rule, a "physician" refers to an individual holding a current certificate to practice medicine and surgery or osteopathic medicine and surgery.
- (B) Only an individual holding a current certificate to practice medicine and surgery or osteopathic medicine and surgery issued under section 4731.14 of the Revised Code, a training certificate issued under section 4731.291 of the Revised Code, a visiting medical faculty certificate issued under section 4731.293 of the Revised Code or a special activities certificate issued under section 4731.294 of the Revised Code, in Ohio can pronounce a person dead.
- (C) An individual as defined in paragraph (A) of this rule may pronounce a person dead without personally examining the body of the deceased only if a competent observer has recited the facts of the deceased's present medical condition to the physician and the physician is satisfied that death has occurred.
- (D) For purposes of this rule a competent observer shall mean:
- (1) A registered nurse holding a current license issued under Chapter 4723. of the Revised Code;
 - (2) A licensed practical nurse holding a current license issued under Chapter 4723. of the Revised Code;
 - (3) An EMT-B holding a current certificate pursuant to section 4765.30 of the Revised Code;
 - (4) An EMT-I holding a current certificate pursuant to section 4765.30 of the Revised Code;
 - (5) A paramedic holding a current certificate pursuant to section 4765.30 of the Revised Code;
 - (6) A physician assistant holding a current certificate to practice issued under Chapter 4730. of the Revised Code who has met all requirements of Chapter 4730. of the Revised Code;
 - (7) A chiropractor holding a current certificate issued under Chapter 4734. of the Revised Code;

- (8) An individual authorized to pronounce a person dead under paragraph (B) of this rule or a person holding a current certificate to practice podiatric medicine and surgery in Ohio.
- (9) A coroner's investigator as referenced in section 313.05 of the Revised Code.

Effective:

Five Year Review (FYR) Dates: 03/15/2016

Certification

Date

Promulgated Under: 119.03
Statutory Authority: 4730.07, 4731.05
Rule Amplifies: 4731.22, 4731.291, 4731.293, 4731.294, 4731.34
Prior Effective Dates: 5/10/90, 5/31/02, 2/28/04, 6/30/07

4731-14-01

Pronouncement of death.

(A) Only an individual holding one of the following current certificates or licenses may pronounce a person dead:

- (1) A certificate to practice medicine and surgery or osteopathic medicine and surgery issued under sections 4731.14 or 4731.29 of the Revised Code;
- (2) A training certificate issued under section 4731.291 of the Revised Code;
- (3) A clinical research faculty certificate issued under section 4731.293 of the Revised Code;
- (4) A special activities certificate issued under section 4731.294 of the Revised Code;
- (5) A certificate of authority to practice as a certified nurse practitioner or clinical nurse specialist issued under section 4723.42 of the Revised Code, when the holder acts in compliance with section 4723.36 of the Revised Code;
- (6) A license to practice as a registered nurse issued under section 4723.09 of the Revised Code, when the holder acts in compliance with section 4723.36 of the Revised Code.
- (7) A license to practice as a physician assistant issued under section 4730.12 of the Revised Code, when the holder acts in compliance with section 4730.202 of the Revised Code;
- (8) A certificate of conceded eminence issued under section 4731.297 of the Revised Code;
- (9) A certificate to practice podiatric medicine and surgery issued under sections 4731.56, 4731.57, or 4731.571 of the Revised Code.

(B) A physician holding a current certificate to practice medicine or surgery or osteopathic medicine and surgery issued under sections 4731.14 or 4731.29 of the Revised Code may pronounce a person dead without personally examining the body of the deceased only if a competent observer has recited the facts of the deceased's present medical condition to the physician and the physician is satisfied that death has occurred.

(C) For purposes of this rule a competent observer shall mean one of the following:

- (1) A licensed practical nurse holding a current license issued under Chapter 4723. of the Revised Code;
- (2) An EMT-Basic holding a current certificate issued under section 4765.30 of the Revised Code;

- (3) An EMT-Intermediate holding a current certificate issued under section 4765.30 of the Revised Code;
- (4) A EMT - Paramedic holding a current certificate issued under section 4765.30 of the Revised Code;
- (5) A chiropractor holding a current certificate issued under Chapter 4734. of the Revised Code;
- (6) An individual authorized to pronounce a person dead under paragraph (A) of this rule;
- (7) A coroner's investigator as referenced in section 313.05 of the Revised Code.

Replaces: 4731-14-01

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Five Year Review (FYR) Dates:

Certification

Date

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Statutory Authority: 4731.05, 4731.053
Rule Amplifies: 4723.36, 4730.202, 4731.053, 4731.291, 4731.293,
4731.294, 4731.297, 4731.34, 4731.51
Prior Effective Dates: 5/10/90, 5/31/02, 2/28/04, 6/30/07

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.

Effective:

Five Year Review (FYR) Dates: 03/15/2016

Certification

Date

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Prior Effective Dates: 11/30/06, 11/30/10

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.

Five Year Review (FYR) Dates: 03/15/2016 and 03/15/2021

CERTIFIED ELECTRONICALLY

Certification

03/15/2016

Date

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Statutory Authority: 4730.07, 4731.05, 4760.19, 4762.19, 4774.11, 4778.12
Rule Amplifies: 4730.25, 4731.22, 4760.13, 4762.13, 4774.13, 4778.14
Prior Effective Dates: 11/30/06, 11/30/10

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

under ~~section~~ sections 4730.25, 4731.22, 4760.13, 4762.13, ~~or~~ 4774.13 or 4778. 14
of the Revised Code.

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