

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF PUBLIC HEARING ON
24.156.1601 definitions, 24.156.1604) PROPOSED AMENDMENT AND
training of student physician assistants,) REPEAL
24.156.1617 application for physician)
assistant license, 24.156.1618)
physician assistant fees, 24.156.1621)
reporting to the board, 24.156.1622)
supervision of physician assistant,)
24.156.1624 patient rights, 24.156.1625)
unprofessional conduct, 24.156.1626)
management of infectious wastes, and)
the repeal of 24.156.1620 physician)
assistant license renewal)

TO: All Concerned Persons

1. On September 22, 2020, at 11:00 a.m., a public hearing will be held via remote conferencing to consider the proposed amendment and repeal of the above-stated rules. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting, <https://mt-gov.zoom.us/j/96251780405?pwd=aHVscmVWR1FEbHpYaTJYcEhsZzgvZz09>
Meeting ID: 962 5178 0405
Password: 998035

OR

(b) Dial by telephone, +1 (406) 444-9999 or +1 (646) 558 8656
Meeting ID: 962 5178 0405
Password: 998035

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Medical Examiners no later than 5:00 p.m., on September 15, 2020, to advise us of the nature of the accommodation that you

need. Please contact Samuel Hunthausen, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2360; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; or dlibsmed@mt.gov (board's e-mail).

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The board is proposing to amend and repeal several rules to clarify and simplify language, reduce ambiguity, eliminate duplication of rule and statute, replace out-of-date processes with modern technology, and align with and facilitate standardized department procedures. Additional amendments substitute modern language for archaic phrasing, update grammar, punctuation, numbering, and language choices, and eliminate repetitive language.

The board periodically reviews its administrative rules by license type for the purposes of focusing discussion and comment and recently reviewed the physician assistant (PA) rules in subchapter 16 as part of the proposed reform of the supervision agreement application process and the board member interview requirement.

Following recommendations from department staff and board members involved in the interviews, the board determined it is reasonably necessary to reform the board member interview process that is required of physicians and physician assistants applying for supervision agreement approval. Currently an applicant for a supervision agreement who has not been in a supervision relationship must submit an application, wait for the application to be processed, then arrange an interview with a board member, and then wait for the department to process the board member's report from the interview. The board has determined that these interviews are primarily educational and informational, and their purpose can be served through an online, automated presentation and test. The board intends for the online module to be available to applicants at all hours, thus reducing processing and wait times, ensuring consistent delivery of information, and reducing board member workload. The interview workload is substantial for board members, and since one member involved in the interview process will conclude his board term on September 1, 2020, the board concluded that this is an appropriate time to transition to a new process. Therefore, the board is amending several rules in this notice to replace the board member interview with online educational modules, testing, and issuance of a certificate of completion.

Authority and implementation citations are being amended throughout to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority. Where additional specific reasons for a proposed action exist, the board will identify those reasons immediately following that rule.

4. The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

24.156.1601 DEFINITIONS As used in this subchapter the following definitions apply:

(1) "Board" means the Board of Medical Examiners.

~~(1)~~ (2) "Direct supervision" means the supervisor is ~~within technologically unassisted audible and visible reach of~~ physically present with the person being supervised.

(2) (3) "General supervision" means accepting responsibility for, and overseeing the medical services of, a physician assistant by telephone (voice or text), radio, video, or in person as frequently as necessary considering the location, nature of practice, and experience of the physician assistant.

~~(3) "Nonroutine application" means an initial physician assistant license application and/or supervision agreement where the supervising physician has never supervised a Montana licensed physician assistant and/or the physician assistant has never practiced in the state of Montana. A nonroutine application shall require a teleconference interview with a current board member.~~

(4) remains the same.

~~(5) "Routine application" means a supervision agreement where the supervising physician and the physician assistant both have had approved Montana supervision agreements or utilization plans in the past. These applications shall be processed and approved by board staff.~~

AUTH: ~~37-1-131~~, 37-20-202, MCA

IMP: ~~37-1-101~~, 37-20-101, ~~37-20-202~~, 37-20-301, 37-20-403, MCA

REASON: The board is defining "board" at (1) for consistency among board rules.

Following a rules committee discussion, the board is amending the definition of "direct supervision" in (2) to clarify the board's intent that supervisors be physically present with supervisees. The board does not intend to exclude a supervisor's use of hearing aids, glasses, etc. while supervising.

The board is striking the definitions of "nonroutine application" and "routine application" to defer to the division's definitions in ARM 24.101.402 and further facilitate the department's standardized application procedures.

To align with the replacement of the interview process with an online process, the board is moving relevant provisions to ARM 24.156.1617 and 24.156.1622.

24.156.1604 TRAINING OF STUDENT PHYSICIAN ASSISTANTS (1) and (2) remain the same.

(3) A physician assistant student training in Montana must:

(a) be currently enrolled in a physician assistant training program accredited by the Accreditation Review Commission on Education for the Physician Assistant or, if accreditation was granted before 2001, accredited by the American Medical Association's Committee on Allied Health Education and Accreditation or the Commission on Accreditation of Allied Health Education Programs; and

(b) remains the same.

AUTH: 37-20-202, MCA

IMP: ~~37-20-202~~, 37-20-303, 37-20-402, MCA

24.156.1617 APPLICATION FOR PHYSICIAN ASSISTANT LICENSE

(1) An applicant for a physician assistant license shall submit an application on a form prescribed by the department. ~~The application must be complete and accompanied by the appropriate fees, and the following information and/or documentation:~~

(a) remains the same.

(b) verification of education as required by 37-20-402, MCA; ~~and~~

(c) verification of passage of an exam as required by 37-20-402, MCA; ~~and~~

(d) certificate of completion of the board-approved online training for physician assistants and supervising physicians.

(2) The board or its designee will obtain a query from the National Practitioner Data Bank for each applicant.

(2) remains the same but is renumbered (3).

~~(3) Applicants whose applications are received, processed, and determined to be incomplete will be sent a letter from the board office specifying the deficiencies, which may include but not be limited to appropriate fees, verifications, character references, and any other supplemental information the board or its designee deems appropriate. The incomplete application will be held for a period of one year at which time the application will be treated as an expired application and all fees will be forfeited. The applicant may correct any deficiencies, submit missing or additional information, and complete any requirements necessary to complete the application within one year from the date the initial application is received in the board office.~~

~~(4) The applicant may voluntarily withdraw the application prior to the one-year deadline set forth in (3) by submitting a request to withdrawal in writing to the board, if the application has not appeared on a board agenda, by submitting a written request to the board office. All application fees submitted will be forfeited.~~

~~(5) After withdrawal of an application, the applicant will be required to submit a new application, including supporting documentation and appropriate fees to begin the licensing and verification process again.~~

~~(6) Completed applications shall be reviewed by the board or its designee, which may request such additional information or clarification of information provided in the application as deemed reasonably necessary.~~

AUTH: 37-1-131, 37-20-202, MCA

IMP: 37-1-131, 37-20-203, 37-20-302, 37-20-402, MCA

REASON: To align with the new online education module and test, the board is adding (1)(d) to require proof of completion of that education. The board is adding (2) to clarify the requirement and process for the NPDB query. When the process shifted from an applicant request to the department obtaining the query, the board amended the rules for other board license types but had not yet done so for PAs.

The board is removing application processes from this rule as they are uniformly applied across all licensing boards and set forth in standardized department procedures.

24.156.1618 PHYSICIAN ASSISTANT FEES (1) remains the same.

(2) Licensees desiring to activate an inactive physician assistant license must contact the board department and pay an activation fee of \$150 ~~and affirm that they have a current NCCPA certification.~~

(3) remains the same.

AUTH: 37-1-134, 37-20-202, MCA

IMP: 37-1-134, 37-1-141, 37-20-302, MCA

REASON: The board previously eliminated the requirement for NCCPA certification for PA licensure in both statute and rule. This reference was inadvertently missed in prior rulemaking projects and the board is striking it for consistency.

24.156.1621 OBLIGATION TO REPORT REPORTING TO THE BOARD

(1) A physician assistant shall report to the board within ~~three months from~~ 30 days of the date of a the final judgment, order, or agency action, ~~all information related to~~ any malpractice, professional misconduct, criminal, or disciplinary action in which the physician assistant or the physician assistant's supervisor, based on the physician assistant's conduct, is a named party, or any loss of privileges.

(2) A physician assistant shall, within ten days of receipt of a complaint from the board, provide the board department with the name of the supervising physician who is responsible under the supervision agreement to which the complaint is related.

(3) A physician assistant with ~~suspected or~~ known impairment shall self-report to the board. In lieu of reporting to the board, the physician assistant may self-report to the board-endorsed professional assistance program.

(4) A physician assistant may report suspected or known impairment of other health care providers to the appropriate licensing board, or agency; ~~or,~~ in lieu of the board or agency, may report to the board-endorsed professional assistance program.

AUTH: 37-1-131, 37-3-203, MCA

IMP: 37-1-131, 37-3-401, MCA

REASON: The board is changing the reporting deadline from three months to thirty days to align with standardized department procedures that apply to all boards.

The board is amending (1) to add a PA's loss of privileges as actions reportable to the board. Department counsel suggested the board amend this rule and ARM 24.156.1625 (PA unprofessional conduct) to enable and assist the prosecution of such non-reporting.

The board determined it is reasonably necessary to amend (3) to not require reporting of one's own "suspected" impairment. During the rule review, board counsel noted individuals generally either acknowledge or deny such impairment and the provision made no sense. Further, non-reporting of personally suspected impairment would be extremely difficult if not impossible to enforce.

24.156.1622 SUPERVISION OF PHYSICIAN ASSISTANT (1) remains the same.

~~(2) The supervising physician shall consider the location, nature, and setting of the practice and the experience of the physician assistant when entering into a new supervision agreement and a duties and delegation agreement to assure the safety and quality of physician assistant services.~~

(2) A physician who has never previously acted as a supervising physician in Montana, as defined by 37-20-401, MCA, must complete the board-approved online training for physician assistant supervision and a certificate of completion must be submitted to the board office with the signed supervision agreement prior to the supervision agreement taking effect.

~~(3) The supervising physician shall meet face-to-face~~ communicate with each supervised physician assistant ~~supervised~~ a minimum of once a month for the purposes of discussion, education, and training, to include but not be limited to practice issues and patient care.

(4) A supervising physician may supervise more than one physician assistant if the supervising physician:

(a) and (b) remain the same.

(c) determines the appropriate level of supervision identified in (1) ~~(direct, on-site, or general)~~, based on the physician assistant's education, training, and experience; and

(d) remains the same.

~~(5) The supervision agreement and duties and delegation agreement for nonroutine applicants~~ must assure the safety and quality of physician assistant services, considering the location, nature, and setting of the practice and the experience of the physician assistant, and shall provide for:

(a) and (b) remain the same.

(c) appropriate frequency and duration of ~~face-to-face~~ meetings.

~~(6) The supervision agreement and duties and delegation agreement for nonroutine applicants~~ may provide for periodic changes in the type of supervision, scope of delegation, practice limitations, frequency, and duration of face-to-face meetings, and percentage of charts reviewed, based upon the duration and nature of experience gained by the physician assistant, the supervising physician's written assessment and evaluation of the physician assistant's experience and judgment, and other factors relevant to the nature and degree of supervision appropriate to assure the safety and quality of physician assistant services.

(7) The duties and delegation agreement must be available at the practice site at all times and must be submitted, if requested, to the board or its designee upon request during the interview required pursuant to ARM 24.156.1601(3).

AUTH: 37-1-131, 37-20-202, MCA

IMP: 37-1-131, 37-20-101, 37-20-301, 37-20-403, MCA

REASON: See GENERAL STATEMENT OF REASONABLE NECESSITY.

The board is striking "face-to-face" from (3) and (5)(c) as it is an undefined term and department staff receives many questions from licensees as to whether videoconferencing satisfies the requirement, particularly as COVID-19 protocols discourage face-to-face meetings. The board concluded that meetings may be

conducted by other means, including by phone or e-mail, when necessary and appropriate.

The board is amending (6) to align with the removal of the "nonroutine application" definition from ARM 24.156.1601(3). Additionally, the board concluded that the provisions of (6) should apply to all PA applicants and not just to nonroutine applicants.

24.156.1624 PATIENT RIGHTS (1) For the purposes of implementing this chapter, if the patient is being medically cared for or treated by a physician assistant:

- (a) The patient may request to be treated or seen by the supervising physician in lieu of the physician assistant, if the supervising physician is available;
- (b) If the supervising physician is not available, the patient must be given an explanation for the unavailability of the supervising physician and the patient's request and explanation must be documented in the patient's chart at the time of the request. The patient must also be given the opportunity to be treated by the supervising physician when the supervising physician is available; and
- (c) remains the same.

AUTH: 37-20-202, MCA

IMP: 37-20-101, 37-20-301, MCA

24.156.1625 UNPROFESSIONAL CONDUCT (1) In addition to those forms of unprofessional conduct defined in 37-1-316, MCA, the following is are considered unprofessional conduct for a physician assistant licensee or license applicant under Title 37, chapter 20, MCA:

- ~~(a) conviction, including conviction following a plea of nolo contendere of an offense involving moral turpitude, whether misdemeanor or felony, and whether or not an appeal is pending;~~
- ~~(b) (a) conduct likely to deceive, defraud, or harm the public, including, but not limited to, practicing while subject to a physical or mental condition which renders the licensee unable to safely engage in the practice of medicine;~~
- ~~(c) making a false or misleading statement regarding the licensee's skill or the effectiveness or value of the medicine, treatment, or remedy prescribed by the licensee or at the licensee's direction in the treatment of a disease or other condition of the body or mind;~~
- ~~(d) resorting to fraud, misrepresentation, or deception in the examination or treatment of a person; or in billing, giving, or receiving a fee related to professional services; or reporting to a person, company, institution, or organization, including fraud, misrepresentation, or deception with regard to a claim for benefits under Title 39, chapter 71 or 72, MCA;~~
- ~~(e) (b) violation of any section in Title 37, chapter 20, MCA, and/or any statute or rule adopted by the board to implement Title 37, chapters 1 or 20, MCA, under the board's jurisdiction any order of the board regarding enforcement of discipline of a licensee, or any term, condition, or limitation imposed on the licensee in a utilization plan;~~
- ~~(f) habitual intemperance or excessive use of an addictive drug, alcohol, or any other substance to the extent that the use impairs the user physically or~~

mentally; this provision does not apply to a licensee who is maintaining an approved therapeutic regimen as described in 37-3-203, MCA;

~~(g) (c) failing to furnish to the board or its investigators or representatives information legally requested by the board cooperate with an investigation or request for information by the board or its designee;~~

~~(h) failing to cooperate with a lawful investigation conducted by the board;~~

~~(i) (d) failing to report to the board office within 30 days of the date of a final any adverse judgment, order, or agency action, any malpractice, professional misconduct, criminal or disciplinary action in which the physician assistant or the physician assistant's employer, on account of the physician assistant's conduct, is a named party, or any loss of privileges settlement, or award arising from a medical liability claim or other unprofessional conduct;~~

~~(j) obtaining a fee or other compensation, either directly or indirectly, by the misrepresentation that a manifestly incurable disease, injury, or condition of a person can be cured;~~

~~(k) (e) commission of an act of sexual abuse, misconduct, or exploitation by the licensee, whether or not related to occurring in the licensee's practice of medicine;~~

~~(l) administering, dispensing, prescribing, or ordering a controlled substance, as defined by the federal Food and Drug Administration or successors, other than in the course of legitimate or reputable professional practice;~~

~~(m) conviction or violation of a federal or state law regulating the possession, distribution, or use of a controlled substance, as defined by the federal Food and Drug Administration or successors, whether or not an appeal is pending;~~

~~(n) remains the same but is renumbered (f).~~

~~(o) conspiring to misrepresent or willfully misrepresenting medical conditions improperly to increase or decrease a settlement, award, verdict, or judgment;~~

~~(p) through (r) remain the same but are renumbered (g) through (i).~~

~~(s) (j) willfully harassing, abusing, or intimidating a patient, either physically or verbally;~~

~~(t) and (u) remain the same but are renumbered (k) and (l).~~

~~(v) (m) acting in such a manner as to present conduct that presents a danger to public health or safety, or to any patient including, but not limited to, incompetence, negligence, or malpractice;~~

~~(w) (n) having voluntarily relinquished or surrendered a professional or occupational license, certificate, or registration in this state, or in another state or jurisdiction while under investigation or during a pending complaint;~~

~~(x) remains the same but is renumbered (o).~~

~~(y) failing to furnish to the board or its designee information requested by the board;~~

~~(z) (p) filing a complaint with, or providing information to, the board, which the licensee knows, or ought to should know, is false or misleading. This provision does not apply to any filing of a complaint or providing information to the board when done in good faith under 37-1-308, MCA;~~

~~(aa) (q) falsifying and altering patient records, intentionally documenting patient records inaccurately, or failing to appropriately and timely document patient records;~~

~~(ab) (r) diversion of a medication for any purpose or a violation of state or federal laws governing the administration of medications;~~

~~(s) violating state or federal laws relative to drugs;~~

~~(ae) (t) failing to comply with any agreement with the board, required by the board, or with the endorsed professional assistance program contracted by the board, the licensee has entered into with a program established by the board under 37-3-203, MCA;~~

~~(ad) (u) failing to submit to the board a completed supervision agreement prior to commencing physician assistant practice in Montana; and~~

~~(ae) failing to maintain and/or provide copies on request, pursuant 37-1-301, MCA, of the physician assistant's current duties and delegation agreement; and~~

~~(af) any other act, whether specifically enumerated or not, that in fact constitutes unprofessional conduct.~~

(v) violating state or federal laws while performing or attempting to perform the practice of medicine.

AUTH: 37-1-319, 37-20-202, MCA

IMP: 37-1-316, 37-1-319, 37-3-202, 37-20-403, MCA

REASON: Following an in-depth review, the board determined it is reasonably necessary to update this rule to remove duplication with statute, streamline the rule for ease of use, and more clearly set forth the actions considered by the board as unprofessional conduct. The board further determined that this rule requires several revisions to make it more effective for prosecuting alleged unprofessional conduct. The board is removing duplicative language and combining several provisions throughout for simplicity, better organization, and improved readability. The board is also adding clarifying language to several provisions to address licensee questions and assist in the prosecution of certain unprofessional conduct.

Legal counsel recommended striking (1)(a) through (d), (f), (j), (m), and (o) to avoid unnecessary duplication with the unprofessional conduct statute 37-1-316, MCA.

In response to department counsel's request and to align with amendments to ARM 24.156.1621, the board is amending (d) to add the failure to report loss of privileges as unprofessional conduct and facilitate the prosecution of such non-reporting.

The board is striking (h) and (y) as the conduct is adequately addressed in new (c). The board is eliminating (l) and incorporating its purpose into (s).

The board is amending (n) upon request of department counsel and for consistency with changes made to the ECP rules in 2019.

The board is striking (ae) because it is already stated in statute at 37-20-301(3), MCA.

Department counsel requested the board remove (af) because the provision is too vague to be utilized as a basis for licensure discipline or sanction.

Following a suggestion from department counsel, the board is adding (v) to allow prosecution of complaints arising from the violation of state or federal laws that may not be specifically enumerated within this rule.

24.156.1626 MANAGEMENT OF INFECTIOUS WASTES (1) Each physician assistant ~~certified~~ licensed by the board shall store, transport off the premises, and dispose of infectious wastes, as defined in 75-10-1003, MCA, in accordance with the requirements set forth in 75-10-1005, MCA.

(2) remains the same.

AUTH: 37-1-131, ~~37-20-202~~, 75-10-1006, MCA

IMP: 37-1-131, 75-10-1006, MCA

REASON: In 2006, the board amended the PA rules to implement House Bill 737 (2005) which eliminated the use of "certified" for physician assistants. The board inadvertently missed this reference and is amending for consistency now.

5. The rule proposed to be repealed is as follows:

24.156.1620 PHYSICIAN ASSISTANT LICENSE RENEWAL

AUTH: 37-1-131, 37-20-202, MCA

IMP: 37-1-141, 37-20-203, 37-20-302, 37-20-402, MCA

REASON: The board determined it is reasonably necessary to repeal this rule as unnecessarily redundant, since the renewal process is adequately addressed by ARM 24.101.408 and standardized department procedures.

6. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or e-mail to dlibsmed@mt.gov, and must be received no later than 5:00 p.m., September 25, 2020.

7. An electronic copy of this notice of public hearing is available at <http://boards.bsd.dli.mt.gov/med> (department and board's web site). Although the department strives to keep its web sites accessible at all times, concerned persons should be aware that web sites may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing a web site do not excuse late submission of comments.

8. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-

mailed to dlibsmed@mt.gov; or made by completing a request form at any rules hearing held by the agency.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. Regarding the requirements of 2-4-111, MCA, the board has determined that the amendment of ARM 24.156.1601, 24.156.1604, 24.156.1617, 24.156.1618, 24.156.1621, 24.156.1622, 24.156.1624, 24.156.1625, and 24.156.1626 will not significantly and directly impact small businesses.

Regarding the requirements of 2-4-111, MCA, the board has determined that the repeal of ARM 24.156.1620 will not significantly and directly impact small businesses.

Documentation of the board's above-stated determinations is available upon request to the Board of Medical Examiners, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2360; facsimile (406) 841-2305; or to dlibsmed@mt.gov.

11. Samuel Hunthausen, Executive Officer, has been designated to preside over and conduct this hearing.

BOARD OF MEDICAL EXAMINERS
ANA DIAZ, Ph.D.
PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ BRENDA NORDLUND
Brenda Nordlund, Acting Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State August 18, 2020.