

BEFORE THE BOARD OF DENTISTRY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW)	NOTICE OF ADOPTION,
RULES I and II, the amendment of)	AMENDMENT, AND REPEAL
ARM 24.138.301, 24.138.402,)	
24.138.406, 24.138.407, 24.138.419,)	
24.138.502, 24.138.503, 24.138.511,)	
24.138.514, 24.138.530, 24.138.906,)	
24.138.2301, 24.138.2703,)	
24.138.2707, 24.138.2710,)	
24.138.2712, 24.138.3003,)	
24.138.3101, 24.138.3221,)	
24.138.3223, 24.138.3225,)	
24.138.3227, and 24.138.3231, and)	
the repeal of ARM 24.138.206,)	
24.138.208, 24.138.306, 24.138.403,)	
24.138.414, 24.138.415, 24.318.416,)	
24.138.417, 24.138.418, 24.138.430,)	
24.138.504, 24.138.505, 24.138.506,)	
24.138.508, 24.138.512, 24.138.513,)	
24.138.525, 24.138.540, 24.138.601,)	
24.138.603, 24.138.2101,)	
24.138.2102, 24.138.2103,)	
24.138.2104, 24.138.2105,)	
24.138.2106, 24.138.2302,)	
24.138.2303, 24.138.2701,)	
24.138.2705, 24.138.2714,)	
24.138.2716, 24.138.2719,)	
24.138.3001, 24.138.3002,)	
24.138.3102, 24.138.3211,)	
24.138.3213, 24.138.3215,)	
24.138.3217, 24.138.3219, and)	
24.138.3229 pertaining to the Board of)	
Dentistry)	

TO: All Concerned Persons

1. On April 26, 2024, the Board of Dentistry (agency) published MAR Notice No. 24-138-83 regarding the public hearing on the proposed changes to the above-stated rules, at page 837 of the 2024 Montana Administrative Register, Issue No. 8.

2. On May 21, 2024, a public hearing was held on the proposed changes to the above-stated rules via the videoconference and telephonic platform. Comments were received by the deadline.

3. The agency has thoroughly considered the comments received. A summary of the comments and the agency responses are as follows:

Comment 1: One commenter was in general support of the proposed changes except for particular suggested changes provided by the commenter.

Response 1: The board appreciates all comments received during the rulemaking process.

Comment 2: Numerous commenters opposed the proposed changes.

Response 2: The board appreciates all comments received during the rulemaking process.

Comment 3: One commenter supported retaining the continuing education requirements, the jurisprudence exam, the screening panel rules, and the anesthesia committee.

Response 3: The board appreciates all comments received during the rulemaking process. There are no changes proposed to those requirements in this notice as they exist in current rule although the location and rule numbers have changes as part of the consolidation. Prior to finalizing the language in the proposal notice that was filed, the board had discussed potential changes to those rules; however, ultimately it decided not propose changes to those requirements.

Comment 4: One commenter suggested certified dental assistants be required to complete continuing education.

Response 4: As the board has no authority to license dental assistants, it cannot require continuing education. Dentists or private certification bodies may require continuing education of their employees or continued certification.

Comment 5: Several commenters suggested that the board change "annual" in NEW RULE II(7) to "cyclical" as CE is earned over a three-year period, not annually.

Response 5: The board agrees with the commenter and changes the word accordingly.

Comment 6: Several commenters suggested the board draft a rule regarding the establishment of the adjudication panel.

Response 6: The board cannot add a rule at this stage of the statutory rulemaking process but may consider the suggestion in a future rule package.

Comment 7: One commenter suggested the board keep the requirement to display the license so the public could still verify in the event of a website failure.

Response 7: The board agrees with the commenter and will retain the longstanding requirement of display.

Comment 8: One commenter requested the board adopt the proposed LAP rules as noticed, indicating the board would continue to have state representation in the event of legal challenges.

Response 8: This comment is outside the scope of this proposed rulemaking. LAP practice has been addressed by the board in MAR Notice No. 24-138-84.

Comment 9: Several commenters requested the board insert "supervising" into the "general supervision" definition in ARM 24.138.301(5), to clarify that the supervising licensee is not required to be on the premises and maintains intent and knowledge over the hygienist or auxiliary personnel.

Response 9: The board concurs with the commenter and amends the rule accordingly.

Comment 10: One commenter suggested the board define "licensee" and "supervising licensee" to indicate who may supervise.

Response 10: "Licensee" refers generally to someone who is issued a license to practice in Montana by a board or the department. "Supervising licensee" refers to the dentist who is supervising either a hygienist or an auxiliary or the dentist supervising an intern and can be understood contextually based on the section of rules.

Comment 11: One commenter suggested the board retain the language in ARM 24.138.301 requiring a supervisor to reside in the state of Montana to avoid out-of-state supervision.

Response 11: The board concurs with the commenter and amends the rule accordingly.

Comment 12: Many commenters urged the board not to strike the definition of "prophylaxis," citing the need to define it for members of the public or lay persons.

Response 12: The board agrees with the commenters and is retaining the definition of "prophylaxis."

Comment 13: Many commenters stated that removing the definition of "prophylaxis" would cause confusion and a public safety issue.

Response 13: The board is retaining the definition of "prophylaxis" based on comments received.

Comment 14: Many commenters noted that "Current Dental Technology," the standard code set for dental diagnoses and treatments, is not marketed at or available to the general public.

Response 14: The board had previously discussing using the CDT codes for prophylaxis to define the term. The board notes that CDT codes are available online or for purchase, but the board is retaining the definition of prophylaxis based on comments received.

Comment 15: Several commenters noted that less than half of Montanans have dental insurance, so relying on an insurance code as the source of a definition is not within the purview of the board.

Response 15: The board is retaining the definition of "prophylaxis."

Comment 16: One commenter, citing the board's reason for proposing repeal of the definition of "prophylaxis," stated that the board and legislature should set the definitions and scope of practice and that insurance companies should use that to base billing codes.

Response 16: The board is retaining the definition of "prophylaxis," though it recognizes insurance codes are a standard of practice.

Comment 17: In reference to repealing the definition of "prophylaxis," several commenters noted the board defines other procedures in rule where those terms have specialized meanings.

Response 17: The board agrees and is retaining the definition of "prophylaxis."

Comment 18: Several commenters noted that 37-4-401, MCA, authorizes the board to define "prophylaxis" through rule.

Response 18: The board agrees and is retaining the definition of "prophylaxis."

Comment 19: One commenter pointed out that "prophylaxis" as defined in the dictionary, is a very broad term and could mean anything from brushing and flossing to extraction, and noted that is the reason it is important the board define "prophylaxis."

Response 19: The board agrees and is retaining the definition of "prophylaxis."

Comment 20: Many commenters observed that board staff indicated questions about prophylaxis are frequent and that the board should retain the definition for that reason.

Response 20: The board is retaining the definition of "prophylaxis."

Comment 21: Numerous commenters urged the board to keep the definition of "prophylaxis" as a clear and concise definition.

Response 21: The board agrees and is retaining the definition of "prophylaxis."

Comment 22: Several commenters noted that not having the definition in rule will require the public and licensees to consult an attorney for legal advice, which harms those who cannot afford an attorney.

Response 22: The board is retaining the definition of "prophylaxis."

Comment 23: One commenter suggested removal of the prophylaxis definition was not red tape reduction, but rather an ulterior motive.

Response 23: The board is retaining the definition of "prophylaxis."

Comment 24: Numerous commenters indicated their belief that the board did not act in good faith in going against the advice of board staff in moving to propose to repeal the definition.

Response 24: The board accepted public comment on the rule discussion during the meeting and is not required to follow the advice of staff. Further, the board has followed the statutory rulemaking requirements of accepting public comment on the proposed rules. As a result of the comments received, the board is retaining the definition of "prophylaxis."

Comment 25: One commenter suggested either defining "competent" in ARM 24.138.301(11) or removing the term.

Response 25: The term is defined in the proposed rule as "displaying special skill or knowledge derived from training and experience."

Comment 26: One commenter suggested that instead of "trained healthcare professional," the board use the term "anesthesia monitor" to better reflect the intent of the definition.

Response 26: The board believes the term "trained healthcare professional" as defined is sufficient as it is and is adopting as proposed.

Comment 27: One commenter was opposed to allowing unlicensed assistants to perform sodium bicarbonate air polishing, citing potential damage to enamel and root surface.

Response 27: The board appreciates the commenter's opinion but will include sodium bicarbonate air polishing in the final rule as proposed. Dentists can already delegate rubber cup polishing, which is a different modality to achieve the same purpose as sodium bicarbonate air polishing. Dentists remain responsible for the

conduct of their assistants and confirming that a dental auxiliary is competent to perform the delegated tasks.

Comment 28: One commenter opposed removal of prophylaxis as restricted to dental hygienists, noting that it now appears unlicensed assistants can scale teeth.

Response 28: Section 37-4-408, MCA restricts dentists from delegating prophylaxis to unlicensed assistants, and restating the requirement in rule violates 2-4-305, MCA. Additionally, the board is retaining the definition of "prophylaxis."

Comment 29: Several commenters noted that allowing unlicensed assistants to perform prophylaxis is a risk to public health and safety.

Response 29: The board agrees, and notes that 37-4-408(1), MCA, prevents dentists from delegating prophylaxis to unlicensed assistants. Additionally, the board is retaining the definition of "prophylaxis."

Comment 30: One commenter noted the investment the commenter was putting into becoming a hygienist, suggesting that the proposed change to repeal the definition of "prophylaxis" would negate the investment.

Response 30: See the response to Comment 29.

Comment 31: One commenter noted that preventive healthcare should be provided by educated professionals.

Response 31: See the response to Comment 29.

Comment 32: One commenter noted the schooling hygienists receive to become licensed versus an unlicensed assistant.

Response 32: See the response to Comment 29.

Comment 33: One commenter noted the assessments hygienists perform while providing prophylaxis.

Response 33: See the response to Comment 29.

Comment 34: One commenter noted the commenter will only seek services from a registered hygienist.

Response 34: The board appreciates all comments received during the rulemaking process.

Comment 35: One commenter noted the commenter pays a lot of money for dental services and would not feel comfortable with an unlicensed individual cleaning the commenter's teeth.

Response 35: See the response to Comment 29.

Comment 36: One commenter accused the board of caring more about making money than protecting the public.

Response 36: The board remains committed to its regulatory mission of protecting the public.

Comment 37: One commenter suggested that dentists want to pay someone less money to clean teeth so dentists can make more money off patients.

Response 37: The board notes that statute does not allow dentists to delegate prophylaxis to unlicensed assistants, and so either a dentist or hygienist must perform the prophylaxis. Additionally, the board is retaining the definition of "prophylaxis."

Comment 38: One commenter expressed concern that this proposal to repeal the definition of "prophylaxis" would lead to unlicensed people being able to perform a variety of medical procedures.

Response 38: Except for the addition of sodium bicarbonate air polishing, the board is not otherwise amending the duties unlicensed assistants may perform. Additionally, the board is retaining the definition of "prophylaxis."

Comment 39: One commenter noted assistants are not properly trained to clean teeth.

Response 39: See the responses to Comments 29, 37, and 38.

Comment 40: Several commenters stated that prophylaxis should only be performed by a dentist or a registered dental hygienist.

Response 40: See the response to Comment 29.

Comment 41: One commenter noted that polishing over calculus is not standard of care.

Response 41: The board does not have enough context to address the standard of care comment. The board does note coronal polishing by itself, without an appropriately licensed dentist or licensed dental hygienist inspecting for and removing any supragingival and subgingival calculus and gingival irritants is unprofessional conduct. The board appreciates all comments made during the rulemaking process.

Comment 42: One commenter highlighted the serious health issues that could occur without coordination of care between medical professionals.

Response 42: The board concurs with the commenter.

Comment 43: One commenter stated patients would be at risk for misinformation in thinking they have received complete dental care from untrained persons.

Response 43: A dentist remains responsible for the care provided to the dentist's patients and is responsible for ensuring the services provided comply with the rules and regulations of the board.

Comment 44: One commenter indicated that a cleaning from the commenter's dentist was substandard from the hygienist's service.

Response 44: The board appreciates all comments received during the rulemaking process.

Comment 45: Several commenters have observed multiple assistants attempt prophylaxis and leave calculus on the teeth.

Response 45: The board appreciates all comments made during the rulemaking process.

Comment 46: One commenter suggested the board raise standards, not lower them.

Response 46: The board appreciates all comments received during the rulemaking process.

Comment 47: One commenter believes the scope of hygienists is constantly questioned, noting there was a legislative bill brought in 2023 to allow dental assistants to scale teeth.

Response 47: This comment is outside the scope of the proposed rulemaking.

Comment 48: One commenter requested the board either maintain the requirement that a supervising dentist verify credentials of auxiliaries and hygienists or add the failure to do so to the unprofessional conduct rule.

Response 48: The supervising dentist remains responsible for the conduct of the personnel working under their supervision per ARM 24.138.406(7) and 24.138.2301(1)(f).

Comment 49: Several commenters were opposed to the board repealing ARM 24.138.406(13), requiring proof of current certification of a dental assistant.

Response 49: The board is not repealing the requirement but has moved it to (8) of the same rule.

Comment 50: One commenter suggested the board maintain the requirement that certified dental assistants pass a written radiology exam before being allowed to administer radiographs.

Response 50: The board agrees. The requirements to expose radiographs have not been repealed but have been moved into (2)(a) of the rule.

Comment 51: One commenter suggested the board require dental assistants to be certified and work under the direct supervision of a licensed dentist.

Response 51: The board does not believe that certification and direct supervision are required for every assistant. Dentists should have the flexibility to determine the duties they can delegate within the statutory requirements. The board does not license or certify dental auxiliaries and cannot require certification for every auxiliary. Under 37-4-408, MCA, the board may allow dental auxiliaries who have voluntarily received certification to work under the general supervision of a dentist. The supervising dentist remains responsible for ensuring dental auxiliaries are working within the scope and training of the auxiliary.

Comment 53: Several commenters requested the board remove the word "successful" from ARM 24.138.502, 24.138.503, and 24.138.511 as redundant. Candidates either pass the examination or fail it.

Response 53: The board agrees and amends the rules accordingly.

Comment 54: Several commenters suggested the board insert the date "March 12, 2020" into (2) to mirror the language used in ARM 24.138.502 as the date when simulated patient exams became allowable in Montana.

Response 54: The board agrees and amends the rule accordingly.

Comment 55: One commenter took issue with the board's proposal to require a dentist internship of at least one but not more than two years and recommends removing the "and not more than two years."

Response 55: The board is moving the proposed language from a rule proposed for repeal, and the language already exists in rule. A change to that current requirement is outside the scope of this proposal, but the board may consider the proposal in future rulemaking.

Comment 56: One commenter stated the proposed rules surrounding volunteer licensing and scopes of practice needed to be better clarified.

Response 56: Section 37-4-430, MCA limits the provision of volunteer services to indigent or uninsured patients in underserved or critical need areas. Section 37-4-341, MCA limits the practice of temporary restricted volunteer licenses to university

clinics for the purpose of providing dental care to registered students; correctional facilities for the purpose of providing dental care to inmates; and federally funded community health centers, migrant health care centers, or programs for health services for the homeless established pursuant to the Public Health Service Act, 42 U.S.C. 254b.

Comment 57: One commenter noted there is not a shortage of hygienists, but rather that hygienists are not willing to work for uncompetitive wages that are not keeping pace with inflation and cost of living increases.

Response 57: The board appreciates all comments received during the rulemaking process.

Comment 58: One commenter suggested the board follow Oregon's process of having hygienists and dentists work together.

Response 58: The board appreciates all comments received during the rulemaking process.

Comment 59: Several commenters took issue with the board not seeking further public engagement in considering the repeal of the definition of "prophylaxis."

Response 59: The board has followed the statutory rulemaking requirements of accepting public comment on the proposed rules. As a result of the comments received, the board is retaining the definition of "prophylaxis."

Comment 60: One commenter proposed the board set the wages for dental auxiliaries equivalent to hygienists.

Response 60: The board does not set wages for licensees.

Comment 61: Several commenters opposed the board allowing dentists who had not completed a post-doctoral program to advertise as specialists.

Response 61: The board is requiring general dentists to disclose they are general dentists in advertising.

Comment 62: Several commenters opposed the board's proposed changes in ARM 24.138.3003 as requiring a specialist to indicate the specialty services were being performed by a general dentist and indicated patients would be confused.

Response 62: The board agrees with the commenters and inserts the following language: "(3) A Montana licensed dentist, who does not meet the criteria in ARM 24.138.3101 for advertising as a specialist who is listing or advertising the dentist's services under any specialty practice dental category in ARM 24.138.3101 must clearly disclose within the licensee's individual advertisement that the services are provided by a general dentist."

Comment 63: Several commenters noted the omission of the word "and" in ARM 24.138.3101(1)(e).

Response 63: The board agrees with the commenter and inserts "and" as follows: "orthodontic and dentofacial orthopedics."

4. The agency has adopted NEW RULE I (24.138.550) as proposed.

5. The agency has amended ARM 24.138.402, 24.138.406, 24.138.407, 24.138.419, 24.138.514, 24.138.530, 24.138.906, 24.138.2301, 24.138.2703, 24.138.2707, 24.138.2710, 24.138.2712, 24.138.3221, 24.138.3223, 24.138.3225, 24.138.3227, and 24.138.3231 as proposed.

6. The agency has repealed ARM 24.138.206, 24.138.208, 24.138.306, 24.138.403, 24.138.415, 24.138.416, 24.138.417, 24.138.418, 24.138.430, 24.138.504, 24.138.505, 24.138.506, 24.138.508, 24.138.512, 24.138.513, 24.138.525, 24.138.540, 24.138.601, 24.138.603, 24.138.2101, 24.138.2102, 24.138.2103, 24.138.2104, 24.138.2105, 24.138.2106, 24.138.2302, 24.138.2303, 24.138.2701, 24.138.2705, 24.138.2714, 24.138.2716, 24.138.2719, 24.138.3001, 24.138.3002, 24.138.3102, 24.138.3211, 24.138.3213, 24.138.3215, 24.138.3217, 24.138.3219, and 24.138.3229 as proposed.

7. The agency has decided not to repeal 24.138.414.

8. The agency has adopted NEW RULE II (24.138.2110) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE II (24.138.2110) CONTINUING EDUCATION (1) through (6) remain as proposed.

(7) Any CE hours required by disciplinary order do not apply toward hours required ~~annually~~ cyclically.

(8) through (10) remain as proposed.

AUTH: 37-1-131, 37-1-319, MCA

IMP: 37-1-131, 37-1-306, MCA

9. The agency has amended ARM 24.138.301, 24.138.502, 24.138.503, 24.138.511, 24.138.3003, and 24.138.3101 with the following changes, stricken matter interlined, new matter underlined:

24.138.301 DEFINITIONS For the purposes of this chapter, the following definitions apply:

(1) through (4) remain as proposed.

(5) "General supervision" means the provision of allowable functions by dental hygienists or auxiliaries provided to a current patient of record, with the intent and knowledge of the licensee licensed and residing in the state of Montana. The

supervising licensee need not be on the premises.

(6) through (9) remain as proposed.

(10) "Prophylaxis" is a preventative and therapeutic dental health treatment process by which gingival irritants, including any existing combination of calculus deposits, plaque, material alba, accretions, and stains are removed supragingivally and/or subgingivally from the natural and restored surfaces of teeth by a method or methods, which may include scaling, root planing, and subgingival curettage, that are most suitable for the patient, by an appropriately licensed dentist or licensed dental hygienist.

(10) and (11) remain as proposed but are renumbered (11) and (12).

AUTH: 37-1-131, 37-4-205, 37-4-340, 37-4-511, 37-29-201, MCA

IMP: 37-1-131, 37-4-101, 37-4-205, 37-4-340, 37-4-408, 37-29-201, MCA

24.138.502 LICENSURE OF DENTISTS (1) and (1)(a) remain as proposed.

(b) ~~successfully~~ passed a board-approved regional clinical practical examination. Examinations shall be valid for the purpose of initial licensure for a period of five years from the date of ~~successful~~ passage of the examination; and (c) and (2) remain as proposed.

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-1-131, 37-4-301, 37-4-401, 37-4-402, MCA

24.138.503 LICENSURE OF DENTAL HYGIENISTS (1) and (1)(a) remain as proposed.

(b) ~~successfully~~ passed a board-approved regional clinical practical examination. Examinations shall be valid for the purpose of initial licensure for a period of five years from the date of ~~successful~~ passage of the examination; and (c) remains as proposed.

(2) The patient-based or, beginning March 12, 2020, a simulated patient-based clinical practical exam must include the following:

(a) through (5) remain as proposed.

AUTH: 37-1-131, 37-4-205, 37-4-402, MCA

IMP: 37-1-131, 37-4-401, 37-4-402, MCA

24.138.511 LICENSURE OF DENTURISTS (1) Denturist license applicants must have:

(a) ~~successfully~~ passed:

(i) through (2) remain as proposed.

AUTH: 37-1-131, 37-29-201, MCA

IMP: 37-1-131, 37-29-201, 37-29-302, 37-29-303, 37-29-306, MCA

24.138.3003 ADVERTISING RESPONSIBILITY (1) and (2) remain as proposed.

(3) A Montana licensed dentist who does not meet the criteria in ARM

24.138.3101 for advertising as a specialist who is listing or advertising the dentist's services under any specialty practice dental category in ARM 24.138.3101 must clearly disclose within the licensee's individual advertisement that the services are provided by a general dentist.

(4) remains as proposed.

AUTH: 37-4-205, MCA

IMP: 37-4-205, MCA

24.138.3101 GENERAL STANDARDS FOR SPECIALTIES (1) through (1)(d) remain as proposed.

(e) orthodontic and dentofacial orthopedics;

(f) through (4) remain as proposed.

AUTH: 37-4-205, MCA

IMP: 37-4-205, 37-4-301, MCA

BOARD OF DENTISTRY
ALLEN CASTEEL, LD, CHAIR

/s/ JENNIFER STALLKAMP
Jennifer Stallkamp
Rule Reviewer

/s/ SARAH SWANSON
Sarah Swanson, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 10, 2024.