

BEFORE THE BOARD OF BEHAVIORAL HEALTH, BOARD OF MEDICAL EXAMINERS, BOARD OF NURSING, AND BOARD OF PSYCHOLOGISTS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the adoption of New ) NOTICE OF ADOPTION AND  
Rules I and II and the amendment of ) AMENDMENT  
ARM 24.219.2301 pertaining to )  
requirements for sexual offender )  
evaluation endorsement )

TO: All Concerned Persons

1. On November 5, 2021, the Board of Behavioral Health, Board of Medical Examiners, Board of Nursing, and Board of Psychologists (Boards) published MAR Notice No. 24-101-311 regarding the public hearing on the proposed adoption and amendment of the above-stated rules, at page 1468 of the 2021 Montana Administrative Register, Issue No. 21.

2. On December 2, 2021, a public hearing was held on the proposed adoption and amendment of the above-stated rules via the videoconference and telephonic platform. Comments were received by the December 3, 2021, deadline.

3. The Boards have considered the comments received. A summary of the comments and the Boards' responses are as follows:

COMMENT 1: Multiple commenters appreciated the coordinated efforts of the Senate Bill 39 Rule Subcommittee and Boards of Behavioral Health, Medical Examiners, Nursing, and Psychologists (Boards) to establish rules implementing the bill.

RESPONSE 1: The Boards appreciate all comments received during the rulemaking process.

COMMENT 2: Multiple commenters noted Senate Bill 39 expanded those licensed professionals able to perform psychosexual evaluations to include licensed clinical professional counselors (LCPCs), licensed clinical social workers (LCSWs), and licensed marriage and family therapists (LMFTs).

RESPONSE 2: LCSWs, LCPCs, LMFTs, psychiatrists, psychologists, and advanced practice registered nurses with a psychiatric mental health nurse practitioner certification are all currently allowed to perform sexual offender evaluations within their existing scopes of practice. Senate Bill 39, codified at 37-1-139, MCA, did not alter any existing scopes of practice. Under the new statute, anyone holding any one of these licenses must now obtain a sexual offender evaluator endorsement to conduct sexual offender evaluations.

COMMENT 3: Multiple commenters noted Senate Bill 39 requires the Boards set experience requirements for the endorsement. The commenters asserted the proposed rules are unclear on the education needed for each base license type to hold an endorsement and recommended the Boards jointly develop clearer rules.

RESPONSE 3: The requirements to obtain an endorsement are described in 37-1-139, MCA, and NEW RULE II. The statute does not give the Boards authority to set any additional educational requirements. Expanding the educational requirements beyond those in statute can only be accomplished through the legislative process. Since it would be difficult to set additional education standards applicable to the four different professions, the Boards believe the supervision requirement and the requirement for membership in the Association for the Treatment of Sexual Abusers (ATSA) or other board-approved national professional organization are sufficient.

COMMENT 4: Commenters recommended the Boards jointly develop rules and set additional education requirements for all the individual base license types to ensure competency and consistency in sexual offender evaluations across the professions.

RESPONSE 4: Existing education requirements for LCSWs, LCPCs, LMFTs, psychiatrists, psychologists, and advanced practice registered nurses with a psychiatric mental health nurse practitioner certification are already authorized and determined by each governing board's respective education statutes and rules. See RESPONSE 3.

COMMENT 5: Multiple commenters requested the Boards define "sexual offender evaluator" in NEW RULE I as it is currently undefined.

RESPONSE 5: Section 2 of Senate Bill 39 amended 46-23-509, MCA, under the authority of the Department of Corrections to require that any individuals performing sexual offender evaluations be issued endorsements under 37-1-139, MCA, which is the statute being implemented by these rules under the authority of the Boards. Sexual offender evaluator is currently defined in 46-23-502(8), MCA, and does not require definition through rulemaking.

COMMENT 6: Multiple commenters suggested the Boards further collaborate to refine the definition of "face-to-face" in NEW RULE I(1). The commenters stated that "two-way" is redundant and unnecessary since (v) requires both audio and visual interaction and that "real time" and "simultaneous" are similar and need further definition. Further, the commenters asked the Boards to reconsider and modify the two-way transmission requirement to allow for times when a supervisor, evaluator, and patient are in three separate locations.

RESPONSE 6: This definition is based on a standard "face-to-face" definition as utilized by several boards including the Board of Behavioral Health regarding teletherapy and supervision of individuals engaged in teletherapy. The Boards may consider the commenters' suggestions regarding "real time" and "simultaneous" in future rulemaking. The Boards note that "two-way" refers to the supervision

requirements for the transmission between the supervisor and the individual being supervised. Teletherapy standards for licensees providing services will govern transmission requirements for licensees providing evaluation to patients.

COMMENT 7: Multiple commenters asked whether or not all supervisors per NEW RULE I(2) need to be licensed since only LCSW, LCPC, and LMFT include the word "licensed" in the titles. Commenters supported all supervisors being licensed.

RESPONSE 7: All supervisors are required to hold a license in good standing as referenced in NEW RULE I(2)(a). To further clarify, the term "licensed" is used for LCSW, LCPC, and LMFT to match the statutory definitions of the professional license titles. "Nurse," "psychologist, and "physician" are all title protected terms under statute and only individuals who are licensed can use those titles.

COMMENT 8: Multiple commenters asked if all supervisors under NEW RULE I(2) must hold Montana licenses or if they could be licensed in other jurisdictions.

RESPONSE 8: Anyone who is a sexual offender evaluator supervisor in Montana under the statutory authority of 37-1-139, MCA, and these rules must hold Montana licenses per NEW RULE I. An individual who is gaining experience in another jurisdiction under that jurisdiction's laws would be held to its requirements. Supervised hours obtained in another jurisdiction under that jurisdiction's laws that meet Montana's requirements for supervised experience would be considered as part of an application for endorsement in Montana.

COMMENT 9: Multiple commenters asked if NEW RULE I(2) requires that supervisors obtain and hold an endorsement to supervise as the rule merely states that they must be "qualified" to conduct sexual offender evaluations.

RESPONSE 9: Once Senate Bill 39 takes effect and sexual offender evaluator endorsements are required to conduct sexual offender evaluations, supervisors must only hold endorsements to be "qualified" to conduct sexual offender evaluations. Prior to the law taking effect, there is no requirement that qualified LCSWs, LCPCs, LMFTs, psychiatrists, psychologists, and advanced practice registered nurses with a psychiatric mental health nurse practitioner certification obtain an additional endorsement and sexual offender evaluations are covered under scopes of practice of qualified licensees.

COMMENT 10: Multiple commenters asked the Boards to add provisions addressing the issue of licensees currently conducting evaluations and supervising to clarify the endorsement pathway and not disrupt short-term services.

RESPONSE 10: Department staff will continue to work to ensure that department procedures and communications to existing licensees appropriately reflect the implementation of the new endorsement statute and rules without interrupting necessary services provided by licensees currently performing evaluations under

existing scopes of practice. It is not necessary to amend the new rules as this is appropriately addressed in department processes and procedures.

COMMENT 11: Multiple commenters suggested the Boards consider amending NEW RULE II to differentiate between applicants holding current Montana licenses and those needing to apply concurrently for both a license and the endorsement.

RESPONSE 11: Standardized department application procedures, instructions, and forms apply to all applicants, whether Montana licensees or those applying from out of state. Department staff will provide endorsement application instructions and materials to the public and applicants in the same manner as for all other board and program applications. No additional clarification in rule is necessary.

COMMENT 12: Multiple commenters questioned why NEW RULE II requires endorsement applicants be members of the Association for the Treatment of Sexual Abusers (ATSA), but does not name the Montana Sexual Offender Treatment Association (MSOTA) as a qualifying professional organization. Commenters stated MSOTA historically established qualification criteria and training guidelines for conducting sexual offender evaluations in Montana, including a competency survey covering the latest research and best practices for treatment and evaluation. Commenters noted the ATSA does not specifically survey clinical knowledge of membership applicants, but acknowledged it does require 2000 hours supervised experience and has the same ethical codes used by MSOTA.

RESPONSE 12: During this rulemaking, the Senate Bill 39 rules subcommittee and the Boards reviewed various professional organizations to determine those meeting the criteria in 37-1-139(3)(d), MCA, of being a "...relevant national professional organization that has ethics of practice for sexual offender assessment and treatment." Since the statutory language limits membership to national organizations, state-level organizations such as MSOTA do not qualify. Further, for state-level organizations to qualify, the statutory language would need to be changed through the legislative process.

COMMENT 13: Multiple commenters asked for confirmation that there are no additional requirements for renewing an endorsement outside of renewing the license itself.

RESPONSE 13: There are no additional requirements for renewing an endorsement, and individuals renewing their licenses only need to meet current renewal requirements for their base license type of LCSW, LCPC, LMFT, psychiatrist, psychologist, and advanced practice registered nurse with a psychiatric mental health nurse practitioner certification. Licensees are still held to professional conduct and ethical requirements under the base license.

4. The Boards have adopted New Rules I (24.250.301) and II (24.250.501) exactly as proposed.

5. The Board of Behavioral Health has amended ARM 24.219.2301 exactly as proposed.

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Certified to the Secretary of State December 14, 2021.