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RULE ADOPTION LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS
PRESENCE OF CHAPERONES

Adopted New Rule: N.J.A.C. 13:35-6.23

Adopted Amendment: N.J.A.C. 13:35-6.3 Appendix

Proposed: July 21, 2003 at 35 N.J.R. 3262(a).

Adopted: December 10, 2003 by the State Board of Medical Examiners, David M. Wallace, M.D., President.

Filed: March 10, 2004 as R.2004 d.135, with a technical change not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 45:9-2 and 45:1-15.1.

Effective Date: April 5, 2004.
Expiration Date: September 20, 2004.

Summary of Public Comments and Agency Responses:

The official comment period ended September 19, 2003. The Board received comments from the following individuals and public agencies:

1. William L. Diehl, M.D., FACS, Allied Surgical Group, P.A.

2. Susan H. Gartland, Executive Director, New Jersey State Board of Physical Therapy Examiners

3. Kay K. McCormack, Executive Director, State Board of Social Work Examiners

4. Mark T. Olesnicky, M.D., President, Medical Society of New Jersey

5. Robert L. Sweeney, D.O., FAAP, FACEP, Medical Staff President, Jersey Shore University Medical Center

COMMENT: Ms. Gartland, Ms. McCormack and Dr. Olesnicky expressed support for the proposed rule on behalf of the New Jersey State Board of Physical Therapy Examiners, the State Board of Social Work Examiners and the Medical Society of New Jersey, respectively. Ms. Gartland and Dr. Olesnicky noted their members' appreciation for the balanced approach encompassed in this proposed rule which is designed to protect both patients and physicians.

RESPONSE: The Board appreciates the support given by these entities and agrees that the purpose of the rule is to provide a balanced approach to protect the public.

COMMENT: Ms. Gartland noted a concern of the New Jersey State Board of Physical Therapy regarding a minor's ability to be protected under this proposed rule since it is the New Jersey State Board of Physical Therapy's understanding that minors cannot legally insist on having a chaperone or request a change in chaperones. Specifically, she raises the question, "How does the language 'the patient or person to be examined' address those under the age of 18?"

RESPONSE: This new rule does not alter the parental and guardian's rights to authorize medical care for minors nor a physician's obligations to provide medical care to minors. Pursuant to current law, a parent or legal guardian of a

minor has the legal authority to authorize the minor's medical treatment. Therefore, generally, this rule would require the physician to notify the parent or legal guardian of the right to a chaperone when the minor undergoes one of the listed examinations. However, in several instances, such as when treating a minor's venereal disease, when the physician suspects sexual assault to a minor, when the minor believes that he or she is suffering from the use of drugs or when the minor is drug-dependent (N.J.S.A. 9:17A-4), the consent of the minor is as binding as if the minor had reached the age of majority. In such cases, the physician would notify the minor of the right to have a chaperone if one of the listed examinations is to be performed.

COMMENT: Dr. Olesnicky comments that there may be some difficulties if a patient speaks a foreign language and the physician had not prepared the office for that eventuality.

RESPONSE: The Board does not believe that this rule will impose any greater difficulties upon a physician in cases where a patient speaks a foreign language. Presently, a physician and patient must come to some accommodation so that proper communication between them can occur for diagnosis and treatment purposes. Under this rule, the physician would have to communicate in the same way regarding the offer of a chaperone.

COMMENT: Two commenters expressed concern that this rule would increase the cost of providing care by physicians or would be too onerous. Specifically, Dr. Diehl comments that he is a breast surgeon and believes that the proposed rule is unnecessary since he and his associates provide care in a professional manner without the use of chaperones and without incident or complaint. Dr. Diehl believes that an educational campaign aimed to increase the awareness and importance of this issue among physicians would go further toward reducing complaints than the requirement imposed by this proposed rule. Dr. Diehl also notes that the use of chaperones would likely increase the cost of providing care to patients. In addition, Dr. Sweeney, commenting on behalf of the Medical Executive Committee of the Jersey Shore University Medical Center, believes that while the proposal is well intentioned, it would be too onerous for all physicians to adopt in their practices and in all stages of life, from pediatrics to old age. Dr. Sweeney states that most doctors can use common sense as to when a chaperone is appropriate because most doctors know their patients. In addition, although Dr. Sweeney states that some doctors who do not have chaperones available face some risk, a mandatory requirement for physicians to offer chaperones would be onerous and may lead to financial hardship for some physicians.

RESPONSE: The Board has carefully reviewed this issue and has found that the number of complaints and the need to protect the public warrants the adoption of this rule. The Board expects that the vast majority of physicians provide care in a professional manner and without incident; however, the Board believes that the patient should be notified of the option to have a chaperone present when the patient believes that it is necessary during certain examinations. The Board does not believe that the requirements of this rule will be too onerous for all physicians. Specifically, a physician will only be required to have a chaperone available during breast and pelvic examinations of females and genitalia and rectal examinations of both males and females. Not all physicians perform these examinations, or such examinations may be a small part of their practice. In addition, during these specific examinations, physicians are only required to have chaperones present when the patient has requested one. It is likely that some patients may not request to have a chaperone present. Furthermore, the chaperone need not be a member of the physician's staff for all examinations; some patients may provide their own chaperones for their examinations.

Summary of Agency-Initiated Change:

On adoption, the Board's policy statement in the Appendix to the sexual misconduct rule, N.J.A.C. 13:45-6.3, has been amended to make a cross-reference to this new rule to ensure that the published policy statement is consistent with the new rule.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rule is governed by State statute and is not subject to Federal requirements or standards.

Full text of the adoption follows :

<< NJ ADC 13:35-6.3 >>

13:35-6.3 Sexual misconduct

(a)-(l) (No change.)

APPENDIX

POLICY STATEMENT REGARDING SEXUAL ACTIVITY BETWEEN PHYSICIANS AND PATIENTS AND IN THE PRACTICE OF MEDICINE

It is beyond dispute that sexual contact with patients is in conflict with the very essence of the practice of medicine. Despite that fact, the Board of Medical Examiners continues to receive complaints of sexual activity involving physicians and other licensees with patients. While the Board is promulgating a regulation to specifically notify licensees of conduct which it deems to be violative of law and will subject them to disciplinary action, this statement is meant as an advisory to licensees to guide professional behavior and further expand upon the Board's reasoning in promulgating such a regulation.

A. (No change.)

B. Recommendations and Guidelines for Conduct.

(i)-(iv) (No change.)

(v) Chaperon--<<-Consistent->> <<+Pursuant to N.J.A.C. 13:35-6.23, a licensee shall provide notice to a patient, or any other person who is to be examined, of the right to have a chaperon present during breast and pelvic examinations of females and during genitalia and rectal examinations of both males and females. In all other instances, consistent+>> with promoting patient privacy, licensees should inform patients of the option of having a chaperon present during examination and should provide a chaperon when requested by a patient.

(vi) (No change.)

1-2 (No change.)

<< NJ ADC 13:35-6.23 >>

13:35-6.23 Presence of chaperones

(a) In all office settings, a licensee shall provide notice to a patient, or any other person who is to be examined, of the right to have a chaperone present:

1. During breast and pelvic examinations of females; and

2. During genitalia and rectal examinations of both males and females.

(b) The notice required by (a) above shall either be provided in written form to the patient or by conspicuously posting a notice in a manner in which patients or any other person who is to be examined are made aware of the right to request a chaperone and to decline care if a chaperone acceptable to the patient is not available. In circumstances where the posting or the provision to the patient of the written notice would not convey the right to have a chaperone present, the licensee shall use another means to ensure that the patient or person to be examined understands his or her right to have a chaperone present.

(c) A licensee shall not be obligated to provide further care for the immediate medical problem presented if the licensee is unable to provide a requested chaperone acceptable to the patient.

(d) A licensee shall not be obligated to provide further care for the immediate medical problem presented if the patient

refuses to have a chaperone present and it is the licensee's desire to have a chaperone present during the examination.

(e) If care is not to be provided to a patient under the circumstances described in (c) or (d) above, the licensee shall, consistent with the principles of informed consent, discuss with the patient the risks of not receiving further care.