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Oregon Medical Board 847

Agency and Division Administrative Rules Chapter Number
Nicole Krishnaswami (971) 673-2667

Rules Coordinator Telephone
1500 SW 1st Ave., Suite 620, Portland, OR 97201

Address

To become effective Upon filing. Rulemaking Notice was published in the November 2015 Oregon Bulletin.

RULE CAPTION

Updates to the definitions of sexual misconduct and licensee impairment

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:

847-010-0073

REPEAL:

RENUMBER:

AMEND AND RENUMBER:

Statutory Authority:

ORS 676.150, 677.205, 677.265

Other Authority:

Statutes Implemented:

ORS 676.150, 677.092, 677.190, 677.205, 677.265, 677.415

RULE SUMMARY

The rule amendment revises the definition of "sexual misconduct" to include electronic forms of communication such as text message and e-mail under the "sexual impropriety heading" and clarifies that sexual misconduct results from inappropriate behavior with a patient or a patient's immediate family. The amendment also clarifies that the use of alcohol or other substances, including the legal use of recreational marijuana, should not be used while a licensee is working in any capacity or used while off duty if it may cause impairment while on duty. The rule amendment also removes section (8), which allows a civil penalty to be issued through an administrative process to licensees who fail to report as required by statute and this rule.

Nicole Krishnaswami
Rules Coordinator Name

nicole.krishnaswami@state.or.us
Email Address

OREGON ADMINISTRATIVE RULES

CHAPTER 847, DIVISION 010 – OREGON MEDICAL BOARD

FINAL REVIEW – JANUARY 2016

The rule amendment revises the definition of “sexual misconduct” to include electronic forms of communication such as text message and e-mail under the “sexual impropriety heading” and clarifies that sexual misconduct results from inappropriate behavior with a patient or a patient’s immediate family. The amendment also clarifies that the use of alcohol or other substances, including the legal use of recreational marijuana, should not be used while a licensee is working in any capacity or used while off duty if it may cause impairment while on duty. The rule amendment also removes section (8), which allows a civil penalty to be issued through an administrative process to licensees who fail to report as required by statute and this rule.

847-010-0073

Reporting Requirements

(1) Board licensees and health care facilities must report to the Board as required by ORS 676.150, 677.092, 677.190, and 677.415. These reports include, but are not limited to, the following:

(a) A licensee must self-report to the Board:

(A) Any conviction of a misdemeanor or felony or any arrest for a felony crime to the Board within 10 days after the conviction or arrest;

(B) Any adverse action taken by another licensing jurisdiction or any peer review body, health care institution, professional or medical society or association, governmental agency, law enforcement agency or court for acts or conduct similar to acts or conduct that would constitute grounds for disciplinary action as described in ORS chapter 677;

(C) Any official action taken against the licensee within 10 business days of the official action; or

(D) A voluntary withdrawal from practice, voluntary resignation from the staff of a health care facility or voluntary limitation of the licensee’s staff privileges at a health care facility if the licensee’s voluntary action occurs while the licensee is under investigation by the health care facility or its committee for any reason related to possible medical incompetence, unprofessional conduct or physical incapacity or impairment.

(b) A licensee who has reasonable cause to believe that another state licensed health care professional has engaged in prohibited or unprofessional conduct must report the conduct within 10 working days to the board responsible for the other professional unless disclosure is prohibited by state or federal laws relating to confidentiality or protection of health information.

(c) A licensee must report within 10 business days to the Board any information that appears to show that a licensee is or may be medically incompetent or is or may be guilty of unprofessional or dishonorable conduct or is or may be a licensee with a physical incapacity.

(d) A health care facility must report to the Board:

(A) Any official action taken against a licensee within 10 business days of the date of the official action; or

(B) A licensee's voluntary withdrawal from practice, voluntary resignation from the staff of a health care facility or voluntary limitation of the licensee's staff privileges at a health care facility if the licensee's voluntary action occurs while the licensee is under investigation by the health care facility or its committee for any reason related to possible medical incompetence, unprofessional conduct or physical incapacity or impairment.

(2) For purposes of the statutes, reporting to the Board means making a report to the Board's Investigation Unit or the Board's Executive Director or the Board's Medical Director. Making a report to the Board's Health Professionals' Services Program (HPSP) or HPSP's Medical Director does not satisfy the duty to report to the Board.

(3) For the purposes of the statutes, the terms medical incompetence, unprofessional conduct, and impaired licensee have the following meanings:

(a) **Medical Incompetence:** A licensee who is medically incompetent is one who is unable to practice medicine with reasonable skill or safety due to lack of knowledge, ability, or impairment. Evidence of medical incompetence shall include:

(A) Gross or repeated acts of negligence involving patient care.

(B) Failure to achieve a passing score or satisfactory rating on a competency examination or program of evaluation when the examination or evaluation is ordered or directed by a health care facility.

(C) Failure to complete a course or program of remedial education when ordered or directed to do so by a health care facility.

(b) **Unprofessional conduct:** Unprofessional conduct includes the behavior described in ORS 677.188 (4) and is conduct which is unbecoming to a person licensed by the Board [~~of Medical Examiners~~] or detrimental to the best interest of the public and includes:

(A) Any conduct or practice contrary to recognized standards of ethics of the medical, podiatric or acupuncture professions or any conduct which does or might constitute a danger to the public, to include a violation of patient boundaries.

(B) Willful performance of any surgical or medical treatment which is contrary to acceptable medical standards.

(C) Willful and repeated ordering or performance of unnecessary laboratory tests or radiologic studies, administration of unnecessary treatment, employment of outmoded, unproved, or unscientific treatments, except as allowed in ORS 677.190 (1)(b), failing to obtain consultations when failing to do so is not consistent with the standard of care, or otherwise utilizing medical service for diagnosis or treatment which is or may be considered unnecessary or inappropriate.

(D) Committing fraud in the performance of, or the billing for, medical procedures.

(E) Engaging in repeated instances of disruptive behavior in the health care setting that could adversely affect the delivery of health care to patients.

(F) Any conduct related to the practice of medicine that poses a danger to the public health or safety.

(G) Sexual misconduct: Licensee sexual misconduct is behavior that exploits the licensee-patient relationship in a sexual way. The behavior is non-diagnostic and non-therapeutic, may be verbal, [~~or~~] physical **or other behavior**, and may include expressions of thoughts and feelings or gestures that are sexual or that reasonably may be construed by a patient as sexual. Sexual misconduct includes but is not limited to:

(i) *Sexual violation:* Licensee-patient sex, whether or not initiated by the patient, and engaging in any conduct with a patient **or the patient's immediate family** that is sexual or may be reasonably interpreted as sexual, including but not limited to:

(I) Sexual intercourse;

(II) Genital to genital contact;

(III) Oral to genital contact;

(IV) Oral to anal contact;

(V) Genital to anal contact;

(VI) Kissing in a romantic or sexual manner;

(VII) Touching breasts, genitals, or any sexualized body part for any purpose other than appropriate examination or treatment, or where the patient has refused or has withdrawn consent;

(VIII) Encouraging the patient to masturbate in the presence of the licensee or masturbation by the licensee while the patient is present; or

(IX) Offering to provide practice-related services, such as medications, in exchange for sexual favors.

(ii) *Sexual impropriety*: Behavior, gestures, or expressions that are seductive, sexually suggestive, or sexually demeaning to a patient or ~~their~~ **the patient's immediate** family ~~or associates~~, to include:

(I) Sexually exploitative behavior, to include taking, transmitting, viewing, or in any way using photos or any other image of a patient, their family or associates for the prurient interest of others.

(II) Intentional viewing in the health care setting of any sexually explicit conduct for prurient interests.

(III) Having any involvement with child pornography, which is defined as any visual depiction of a minor (a child younger than 18) engaged in sexually explicit conduct.

(IV) Sexually explicit communication in person, by mail, by telephone, or by other electronic means, including but not limited to text message, e-mail, video or social media.

(c) **Licensee Impairment**: A licensee who is impaired is a licensee who is unable to practice medicine with reasonable skill or safety due to factors which include, but are not limited to:

(A) The use ~~or abuse~~ of alcohol, drugs, **prescribed medication**, or other substances **while on or off duty** which ~~impair ability~~ **causes impairment when on duty, including taking call or supervising other healthcare professionals, regardless of practice setting**.

(B) Mental or emotional illness.

(C) Physical deterioration or long term illness or injury which adversely affects cognition, motor, or perceptive skills.

(4) For the purposes of the reporting requirements of this rule and ORS 677.415, licensees shall be considered to be impaired if they refuse to undergo an evaluation for mental or physical competence or chemical impairment, or if they resign their privileges to avoid such an evaluation, when the evaluation is ordered or directed by a health care facility or by this Board.

(5) A report made by a board licensee or the Oregon Medical Association or other health professional association, to include the Osteopathic Physicians and Surgeons of Oregon, Inc, or the Oregon Podiatric Medical Association to the Board [~~of Medical Examiners~~] under ORS 677.415 shall include the following information:

(a) The name, title, address and telephone number of the person making the report;

(b) The information that appears to show that a licensee is or may be medically incompetent, is or may be guilty of unprofessional or dishonorable conduct or is or may be a licensee with an impairment.

(6) A report made by a health care facility to the Board under ORS 677.415 (5) and (6) shall include:

(a) The name, title, address and telephone number of the health care facility making the report;

(b) The date of an official action taken against the licensee or the licensee's voluntary action withdrawing from practice, voluntary resignation or voluntary limitation of licensee staff privileges; and

(c) A description of the official action or the licensee's voluntary action, as appropriate to the report, including:

(A) The specific restriction, limitation, suspension, loss or denial of the licensee's medical staff privileges and the effective date or term of the restriction, limitation, suspension, loss or denial; or

(B) The fact that the licensee has voluntarily withdrawn from the practice of medicine or podiatry, voluntarily resigned from the staff of a health care facility or voluntarily limited the licensee's privileges at a health care facility and the effective date of the withdrawal, resignation or limitation.

(7) A report made under ORS 677.415 Section 2 may not include any information that is privileged peer review data, *see* ORS 41.675.

(8) All required reports shall be made in writing.

(9) Any person who reports or provides information in good faith as required by the statutes is immune from civil liability for making the report.

~~[(10) A licensee's failure to report information or conduct as required by this rule is a violation of ORS 676.150, 677.092, 677.190, 677.205, or 677.415 and is grounds for a \$500 fine. The licensee may be subject to further disciplinary action by the Board.]~~

Stat. Auth.: ORS 676.150, 677.205, 677.265

Stats. Implemented: ORS 676.150, 677.092, 677.190, 677.205, 677.265, 677.415