

Regulatory Analysis Form

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INDEPENDENT REGULATORY REVIEW COMMISSION

(1) Agency

Department of State, Bureau of Professional and Occupational Affairs, State Board of Medicine

(2) I.D. Number (Governor's Office Use)

16A-497

IRRC Number: 2230

(3) Short Title

Sexual Misconduct

(4) PA Code Cite

49 Pa. Code §16.110

(5) Agency Contacts & Telephone Numbers

Primary Contact: Amy L. Nelson (717) 783-7200
 Counsel-State Board of Medicine
 Secondary Contact: Joyce McKeever (717) 783-7200
 Deputy Chief Counsel
 Department of State

(6) Type of Rulemaking (check one)

- Proposed Rulemaking
- Final Order Adopting Regulation
- Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No
- Yes: By the Attorney General
- Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation will better protect consumers of medical services and provide guidance to the profession on issues relating to sexual misconduct between licensees and current or former patients or immediate family members of patients.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

Sections 8 and 41(8) of the Medical Practice Act, the Act of December 20, 1985, P.L. 457, No. 112 as amended, 63 P.S. §§422.8 and 422.41(8).

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

No.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

It is axiomatic that sexual contact between health care practitioners and patients is unethical. Nevertheless, every year complaints are filed by patients who are harmed by practitioners who violate this principle.

The regulation will better protect consumers and provide guidance to the profession on issues relating to sexual misconduct between practitioners and current patients, former patients or immediate family members of patients.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

Specific regulations will help educate consumers and professionals about the boundaries of the professional relationship.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Consumers as well as the profession as a whole will benefit from the guidance to be provided by the regulations.

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(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There are no perceived people or groups of people who would be adversely affected by this regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All licensees of the Board will be required to comply with the regulation. Currently, there are over 50,000 licensees of the Board.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

A notice of the proposed rulemaking was published at 31 Pa.B. 6453 (November 24, 2001) and was submitted to the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee as well as IRRC. The Board also received comments from members of the public. In preparing the final rulemaking, the Board considered the comments received from IRRC and the public. The Committees did not comment on the proposed regulation.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

There should be no cost to the regulated community associated with compliance with this regulation. Savings to the regulated community are not specifically quantifiable.

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(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

N/A

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

N/A

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A
Regulated						
Local Government						
State Government						
Total Savings						
COSTS:	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A
Regulated						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A
Regulated						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

N/A

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

N/A

Program	FY -3 1999 - 2000	FY -2 2000 - 2001	FY -1 2001 - 2002	Current FY 2002 - 2003
State Board of Medicine	2,562,885.01	2,595,662.41	2,884,504.70	6,747,000.00

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

There should be no adverse effects and costs associated with compliance with the regulation. The benefits of the regulation are described in paragraphs 11 and 13 above.

(22) Describe the non-regulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Non-regulatory alternatives were not considered by the Board for two reasons: (1) A policy statement on the issue of sexual intimacies would not have the force or the effect of law; (2) Waiting for court decisions to address the issues addressed by the regulation would benefit neither consumers nor the profession.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No other regulatory schemes were considered.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

There are no applicable federal standards, however, the regulation is fairly consistent with the ethics code of the American Medical Association to which many State Board of Medicine licensees adhere.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The regulation is consistent with the ethics code of the American Medical Association and with the laws of other states. Compared to other states, such as Maryland, New Jersey and New York, the regulation contains similar prohibited acts of sexual misconduct by a physician. Maryland has a specific law that prohibits sexual misconduct by licensees under the Health Occupation Board and provides examples of such circumstances and disciplinary actions. 1 Md. Code Ann. § 1-212(a), (b) and (e) (2000). In New Jersey, the sexual misconduct regulation begins by defining relevant terms to interpreting the section. 13 N.J.A.C. § 35-6.3. It also lists a wide variety of conduct that is prohibited. Id. New York does not have a specific section dedicated to sexual misconduct, but instead uses three broad sections within its professional misconduct statute to prosecute this area of law. 8 NY Educ. § 6530(20), (31) and (44). Therefore, the Pennsylvania regulation will not place Pennsylvania at a competitive disadvantage compared to other states because the regulation is typical among other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

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(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

In light of the extensive public outreach already conducted in promulgation of this regulation, the Board has scheduled no public hearings or informational meetings regarding this regulation. However, the Board meets in public session on the fourth Tuesday of every month. Comments from the public are always welcome.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Board is not aware of any group with special needs which should be excepted from this regulation.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon publication as an Order of Final Rulemaking in the Pennsylvania Bulletin. Compliance will be required as of that date.

(31) Provide the schedule for continual review of the regulation.

The Board continuously reviews its regulations, periodically communicates with licensees through newsletters and obtains information and feed-back from its licensees on a frequent basis.

PROPOSED RULEMAKING

STATE BOARD OF MEDICINE

[49 PA. CODE CH. 16]

Sexual Misconduct

The State Board of Medicine (Board) proposes to adopt § 16.110 (relating to sexual misconduct) to read as set forth in Annex A.

Effective Date

The proposed regulation will be effective upon final-form publication as in the *Pennsylvania Bulletin*.

Statutory Authority

Under sections 8 and 41(8) of the Medical Practice Act of 1985 (63 P. S. §§ 422.8 and 422.41(8)), the Board has authority to establish standards of professional conduct for Board regulated practitioners under its jurisdiction. These individuals include physicians, physician assistants, nurse midwives, certified registered nurse practitioners (jointly regulated with the State Board of Nursing), respiratory care practitioners, drugless therapists and acupuncturists. The proposed regulation identifies when sexual contact by Board regulated practitioners with patients, and under certain circumstances, immediate family members of patients, will be deemed unprofessional conduct.

Background and Purpose

It should be axiomatic that it is unprofessional conduct for a health care practitioner to engage in sexual contact with patients. Past decisions of the Board upheld by the Commonwealth Court, the Code of Medical Ethics, as published by the American Medical Association and responsible professional publications addressing the issue denounce sexual contact between practitioner and patient. Nevertheless, complaints are filed each year by consumers who have been harmed by Board regulated practitioners who engage in this conduct.

Description of Proposed Regulation

The proposed regulation seeks to better protect patients by providing guidance to the profession and the public as to prohibited conduct relating to sexual contact between practitioners and patients. The proposed regulation would prohibit any sexual contact between a Board regulated practitioner and a current patient. The proposed regulation would further prohibit any sexual contact between a Board regulated practitioner and a former patient prior to the 2-year anniversary of the termination of the professional relationship when the Board regulated practitioner has been involved with the management or treatment of a patient for a mental health disorder. This 2-year period was developed from professional literature which indicates that an imbalance of power between health care practitioners and patients continues after the professional relationship ends.

The proposed regulation would also prohibit sexual exploitation by a Board regulated practitioner of a current or former patient or immediate family member of a patient. "Sexual exploitation" is defined by the proposed regulation as sexual behavior that uses the trust, knowledge, emotions or influence derived from the professional relationship. The Board believes that it is appropriate to

protect immediate family members from sexual exploitation by Board regulated practitioners because immediate family members are often as vulnerable as the patients.

The proposed regulation would also provide that Board regulated practitioners who engage in prohibited sexual contact with patients or former patients will not be eligible for placement in the Board's impaired professional program in lieu of disciplinary or corrective actions. The impaired professional program is unable to effectively monitor Board regulated practitioners who have engaged in sexual misconduct.

The proposed regulation would also provide that patient consent will not be considered a defense to disciplinary action in these cases. The imbalance of power inherent in the health care practitioner-patient relationships not only serves as the basis for the prohibition but also undermines the patient's ability to consent to the sexual contact as an equal. Indeed, the Board's experience in adjudicating these cases has repeatedly demonstrated the reality of the inherent imbalance of the relationship and the patient's inability to give meaningful consent to sexual contact.

Fiscal Impact and Paperwork Requirements

The proposed regulation should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the proposed regulation should not necessitate any legal, accounting, reporting or other paperwork requirements.

Sunset Date

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation.

In compliance with Executive Order 1996-1, the Board extended an invitation to comment on early drafts of the proposed regulation to numerous parties who have indicated an interest in the Board's regulatory activities. The list of these persons is available upon request from the contact person. Only the Pennsylvania Medical Society (PMS) commented on the early version. PMS agreed that sexual exploitation of patients is improper and should subject the Board regulated practitioner to disciplinary action. PMS was concerned that innocent behavior may be prohibited by the proposed regulation and only the issue of exploitation should be addressed. PMS suggested that the Board retain § 16.110(a), (e) and (f) and delete § 16.110(b), (c) and (d). The Board disagrees, believing that § 16.110(b), (c) and (d) are necessary to address the inherent imbalance of power between Board regulated practitioners and patients, vulnerable former patients and immediate family members of patients.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 7, 2001, the Board submitted a copy of the proposed regulation to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee. In addition to submitting the proposed regulation, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Board in compliance with Execu-

tive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRRC has objections to any portion of the proposed regulation, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed regulation to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to publication of the final-form rulemaking, by the Board, the General Assembly and the Governor of objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulation to Amy L. Nelson, Counsel, State Board of Medicine, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking.

CHARLES D. HUMMER, Jr., M.D.,
Chairperson

Fiscal Note: 16A-497. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 16. STATE BOARD OF MEDICINE—GENERAL PROVISIONS

Subchapter H. SEXUAL MISCONDUCT

§ 16.110. Sexual misconduct.

(a) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Immediate family member—A parent or guardian, child, sibling, spouse or other family member with whom a patient resides.

Sexual behavior—Any sexual conduct which is non-diagnostic and nontherapeutic; it may be verbal or physical and may include expressions of thoughts and feelings or gestures that are sexual in nature or that reasonably may be construed by a patient as sexual in nature.

Sexual exploitation—Any sexual behavior that uses trust, knowledge, emotions or influence derived from the professional relationship.

(b) *Sexual exploitation.* Sexual exploitation by a Board regulated practitioner of a current or former patient, or of an immediate family member of a patient, constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action.

(c) *Current patients.* Sexual behavior that occurs with a current patient constitutes unprofessional conduct, is prohibited and subjects the practitioner to disciplinary action.

(d) *Mental health patients.* When the practitioner is involved with the management or treatment of a patient for a mental health disorder, sexual behavior with that former patient which occurs prior to the 2-year anniversary of the termination of the professional relationship

constitutes unprofessional conduct, is prohibited and subjects the practitioner to disciplinary action.

(e) *Impaired professional program.* A practitioner who engages in conduct prohibited by this section will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

(f) *Consent.* Consent is not a defense to conduct prohibited by this section.

[Pa.B. Doc. No. 01-2104. Filed for public inspection November 21, 2001, 9:00 a.m.]

STATE CIVIL SERVICE COMMISSION

[4 PA. CODE CH. 95]

Promotion Procedure

The State Civil Service Commission (Commission) proposes to amend Chapter 95 (relating to promotion procedures). The Commission is publishing this amendment as a notice of proposed rulemaking under the authority of section 208 of the Civil Service Act (act) (71 P. S. § 741.208).

A. Effective Date

The proposed amendment, if approved on final-form rulemaking, will go into effect upon publication of an order adopting the amendment in the *Pennsylvania Bulletin*.

B. Contact Person

For further information on the proposed amendment, contact Randall C. Breon, whose contact information appears in the "Public Comments" section of this Preamble.

This proposal is available electronically through the Commission's website (<http://www.spsc.state.pa.us>).

C. Statutory Authority

The statutory authority for the proposal is section 203(1) of the act (71 P. S. § 741.203(1)).

D. Purpose and Background

A change in the procedures for promotions was requested by the State agency "clients" of the Commission. Currently the State's personnel system has civil service and noncivil service employees. Many are initially hired into noncivil service positions. These employees often work for the State for years, and sometimes are promoted from one noncivil service position to another. In many instances, however, they reach a point when their logical and natural career progression would call for a promotion to a particular position, but that position is covered by the act. Currently our rules require that the noncivil service employees compete with and be treated in the same fashion as non-Commonwealth employees being newly hired into the civil service system. The result is that some career State employees who started their employment as noncivil service reach a "career ceiling" prematurely. If not for the barrier presented by our current rules, their skills, knowledge and abilities would allow for further promotion.

The proposed amendment gives the employing agency of State government an option to consider both civil

JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
ARTHUR COCCODRILLI
ROBERT J. HARBISON, III
JOHN F. MIZNER, ESQ.
ROBERT E. NYCE, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 24, 2002

Charles D. Hummer, Jr., M.D., Chairman
State Board of Medicine
116 Pine Street
Harrisburg, PA 17105

RECEIVED
JAN 29 2002
DOS LEGAL COUNSEL

Re: Regulation #16A-497 (IRRC #2230)
State Board of Medicine
Sexual Misconduct

Dear Chairman Hummer:

Enclosed are our Comments. They will soon be available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director
wbg
Enclosure

cc: Honorable Mario J. Civera, Jr., Majority Chairman, House Professional Licensure Committee
Honorable William W. Rieger, Democratic Chairman, House Professional Licensure Committee
Honorable Clarence D. Bell, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Kim Pizzingrilli, Secretary, Department of State

Comments of the Independent Regulatory Review Commission

on

State Board of Medicine Regulation No. 16A-497

Sexual Misconduct

January 24, 2002

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The State Board of Medicine (the Board) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by December 24, 2003, the regulation will be deemed withdrawn.

1. Section 16.110. Sexual Misconduct. - Clarity.

General

As proposed, Section 16.110 contains both definitions and substantive regulatory provisions. In order to be consistent with regulatory framework existing in Chapter 16, the Board should create two separate sections. The definitions should remain in Section 16.110. The substantive provisions should be placed in a separate section following the definitions.

Subsection (a)

This subsection defines "immediate family member." It is unclear if the phrase "other family member" contained in the definition includes a relationship by blood and by marriage or law. In addition, the inclusion of the phrase, "with whom a patient resides" in the definition limits the scope of this regulation. Finally, the definition does not address a patient's relationships with non-family members such as "significant others."

Subsection (b)

This subsection refers to "Board regulated practitioner." The Board should define "Board regulated practitioner" by adding the term to the definitions section and referencing Section 422.2 of the Medical Practice Act (63 P.S. § 422.2).

Subsections (b), (c), and (d)

These subsections include the phrase "and subjects the practitioner to disciplinary action." Where can the disciplinary action be found? A cross-reference to the appropriate citation for disciplinary action should be provided in the subsections.

Subsection (d)

The Board uses the phrase “mental health disorder” in this subsection. The meaning of this phrase is vague. The regulation should either define or reference the categories of mental health disorders. For instance, the Board could refer to patients who are diagnosed under the Diagnostic and Statistical Manual of Mental Disorders – IV (DSM-IV) or subsequent publications.

2. Behavioral examples. - Clarity.

A commentator noted that the proposed regulation is too vague and provided several scenarios in which innocent behavior would be in violation of the regulation. Given this possibility, has the Board considered providing examples of the type of behavior it considers inappropriate?



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APR 16 2002

DOS LEGAL COUNSEL

April 12, 2002

HOWARD A. RICHTER, MD
President

EDWARD H. DENCH JR., MD
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Vice President

MICHAEL J. PRENDERGAST, MD
Chair

GEORGE F. BUERGER, JR., MD
Secretary

ROGER F. MECUM
Executive Vice President

Amy L. Nelson³⁸
Counsel
State Board of Medicine
P.O. Box 2649
Harrisburg, PA 17105-2649

Dear Ms. Nelson:

The Pennsylvania Medical Society reviewed the proposed rulemaking by the State Board of Osteopathic Medicine concerning sexual misconduct [49 PA Code CH. 25] [32 Pa.B 1734]. In the proposal, the Board cites the intention to adopt 25.215 relating to sexual misconduct.

You may recall that we wrote to you expressing a number of concerns when the State Board of Medicine published a similar proposal several months ago. In order to refresh your memory, we've attached a copy of that letter.

We noted with dismay that the same problems we cited with the Board of Medicine's proposed regulations in our letter in November of 2001 exist in this proposal by the State Board of Osteopathic Medicine. It was our conclusion then that these regulations serve no purpose since they do not provide guidance. They actually create more questions. In addition, we fail to see why they are necessary for prosecution since physicians who exploit patients are already subject to disciplinary action.

Sincerely,

Howard A. Richter, MD
President

777 East Park Drive

P.O. Box 8820

Harrisburg, PA 17105-8820

Tel: 717-558-7750

Fax: 717-558-7840

E-Mail: stat@pamedsoc.org

www.pamedsoc.org

Attachment

CC: Daniel D. Dowd, Jr., DO
Charles D. Hummer, Jr., MD
John R. McGinley, Jr., Esq

November 29, 2001

Amy L. Nelson
Counsel, State Board of Medicine
116 Pine Street
P.O. Box 2649
Harrisburg, PA 17105-2649

Dear Ms. Nelson:

We reviewed the Medical Board's recently published draft regulations (Chapter 16, Subchapter H, 16.110 Sexual Misconduct) and have the following comments.

First, please understand that the Pennsylvania Medical Society does not in any way condone sexual advances by any physician toward a patient. We abhor such behavior and strongly condemn any physician who disgraces the profession in this way. However, the Medical Society does have concerns about the language of these regulations.

The Society objected to earlier versions of these regulations because they were too vague. We are now convinced that it is impossible to write regulations for sexual misconduct that clearly define prohibited behavior without also creating the possibility of prosecution for innocent behavior. The Society is aware that the Medical Board attempted to address the concerns we've expressed previously but we still see problems. This leads one to conclude that these regulations are more problematic than helpful. The Medical Board does currently prosecute physicians for sexual misconduct so one wonders what purpose these regulations serve if they create ambiguities rather than resolving them. Therefore, we believe that the Medical Board should abandon the attempt to pass these regulations.

The Medical Society perceives several scenarios that illustrate our concerns about the regulations. At (b), the regulations prohibit sexual exploitation of a patient or immediate family member. This may appear reasonable until one reads the definition of "sexual exploitation" and note that it includes the use of any knowledge derived from the professional relationship. Imagine the scenario where a patient believes that the physician would get along well with the patient's sibling who resides with the patient and gives the physician the telephone number. The physician derived that information from the professional relationship so if he or she develops a romantic relationship with the patient's sibling, he or she violates the law.

Section (d) deals with creating a two-year period during which the physician cannot establish a sexual relationship with a former patient if he or she provided mental health services. How are mental health services defined? Mental health services could be counseling provided by a psychiatrist but they could also be less clear. Would the family practice physician who treats a patient for a painful condition be included if he or she wrote a prescription for an antidepressant to help the patient deal with the pain? This section provides little guidance to physicians in this situation.

We are told that the Board hopes the regulations will provide guidance to practitioners about exactly what behavior is forbidden. However, we fear they create questions instead of providing guidance. If they don't serve to provide guidance and are not needed to prosecute physicians who exploit patients, they serve no purpose and the Medical Board should abandon the attempt to promulgate the regulations.

Sincerely,

A handwritten signature in cursive script that reads "Howard A. Richter MD". The signature is written in dark ink and is positioned above the typed name.

Howard A. Richter, MD
President

KERRY A. BENNINGHOFF
MEMBER 171ST DISTRICT
HOUSE OF REPRESENTATIVES
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CENTRE COUNTY DISTRICT OFFICE
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BELLEFONTE, PA 16823
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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

January 8, 2002

COMMITTEES

FINANCE
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JAN 25 2002

DOS LEGAL COUNSEL

Amy L. Nelson, Counsel
State Board of Medicine
116 Pine Street
PO Box 2649
Harrisburg PA 17105-2649

Dear Ms. Nelson:

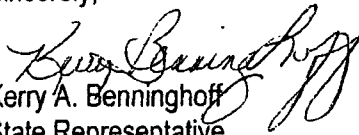
I have reviewed the proposed regulatory changes as they pertain to sexual exploitation and I am in agreement with them.

I feel compelled to comment, and request your serious consideration to whether or not these regulatory changes may be incomplete without specifics, including clearly stating language specific to voyeurism. History will show that there have been cases where patients, in good faith and trust of their privacy, have been spied upon in changing areas and rooms of examination. These victims, predominantly women have, in my opinion, been sexually exploited as well as those involving physical contact.

Therefore, I am formally requesting the State Board of Medicine conduct a serious review of my request so that we can legally prosecute those who would abuse a position of trust and good faith through the act of voyeurism.

I can be reached in Harrisburg at 717-783-1918 or in Bellefonte at 814-355-1300 should you have any questions or wish to further discuss this matter. I look forward to a favorable response to this request.

Sincerely,


Kerry A. Benninghoff
State Representative
171st Legislative District

cc: Honorable Mario J Civera Jr, Chairman, House Professional Licensure Committee
Ray Gricar, Centre County District Attorney
Steve Snook, Mifflin County District Attorney
State College Women's Resource Center
Pennsylvania Coalition Against Rape
Dawn McKee

KALOGREDIS, SANSWEET, DEARDEN AND BURKE, LTD.

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Laurie Lawton-Smith, Paralegal
Susan M Harmon¹, Of Counsel

¹ Also Member NJ Bar
² Also Member MA Bar
³ LL.M. in Taxation

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DEC 26 2001

DOS LEGAL COUNSEL

December 14, 2001

Ms. Cindy Warner
Health Licensing Division
Bureau of Professional and Occupational Affairs
P.O. Box 2649
Harrisburg, PA 17105

Re: Sexual Misconduct

Dear Ms. Warner:

I reviewed the State Board of Medicine's proposed addition to Title 49 in the November 24, 2001 Pennsylvania Bulletin, Volume 31 No. 47.

Our office has been involved in health care for many years and we represent many physicians and other professionals in the Commonwealth of Pennsylvania. Therefore, we deem ourselves to be interested persons and we write to provide our suggestions concerning the proposed regulations.

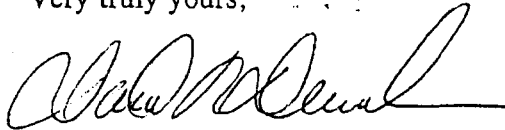
Section 16.110(e) - We believe that this proposed regulatory provision is ill advised. The explanatory comment indicate that the impaired professional program is unable to effectively monitor board regulated petitioners who have engaged in sexual misconduct.

I do not believe that that is the view of the physician health program in Pennsylvania. In fact, we believe that the impaired professional program would otherwise agree to monitor physicians depending upon the circumstances concerning the offense. Numerous psychologists and psychiatrists who are involved in treating professionals who are involved with sexual misconduct have arranged monitoring programs that allow the physician to continue to practice with appropriate monitoring guidelines in place. Physicians can be prohibited from seeing

certain types of patients, physicians can be required to have a neutral observer present when examining patients, physicians can ask their colleagues, partners, supervisors and so forth to submit monthly reports concerning their conduct. There are many creative way of allowing physicians to rehabilitate themselves from isolated instances of sexual misconduct. This regulation is too restrictive and should not be part of the law in Pennsylvania.

Thank you for considering our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "David R. Dearden", written in a cursive style.

David R. Dearden

DRD:jm

RECEIVED

DEC 26 2001

DOS LEGAL COUNSEL

Barbara A. Francis
40 Birch Tree Lane
Altoona, Pa. 16601
(814) 944-8484

Dear Ms Nelson,

I read the article in the local newspaper regarding Sexual Misconduct by Doctors and other licensed professionals.


This article means a lot to me because I live with my own pain everyday because I was sexually assaulted by a doctor that I was sent to for an IME. But for this state it comes down to who is the liar and who sleeps with the politicians. The state does not care about the people who are hard working tax payers. They are concerned about pushing all the dirt under the rug so their stats look good. We all know the game they are playing. There has been so many more incidents of doctors assaulting patients since my complaint.

Since my complaint was made known, 2 other people have had similar complaints,(same professional?) I was not the first, but they allow him to practice. Oh, He made all kind of lies and accusations saying the motive was financial gain----never. It was pay back----never. His actions were so unbecoming as a professional, no one would believe or could believe his actions towards a 4 year old child in a public place.

Our state must look into the possibility that there are unstable professionals taking care of innocent people; These patients are @ the mercy of these professionals, if you will, who has entrusted their lives to them. And these patients should be treated with the utmost dignity and respect the profession can give and has to offer. Professionalism is the key word here. Integrity is also another virtue that must be bestowed upon our medical students. Also it is time the medical schools do a better screening of those who are granted priviledges to study @ their institutions and work @ their facilities. You see I'm a nurse and I know the difference between palpating and indecent touching and guilty behavior such as cracking the door (out of guilt) to see if any one person saw him doing an unprofessional act. I'll never forget him peeking out the door and looking through the slit of the door. Just as guilty as can be.

Feel free to contact me @ any time. I only want to make certain this never happens to another person. No person should ever be demoralized ever again. Not in the state of Pennsylvania or any other state in our country. Our country is hurting enough. God Bless You and God Bless America.

Sincerely,


Barbara A. Francis

*P.S. Another (so called) Dr. gave me a
Blood clot in my Leg & caused the
STATE more money with Diagnostic (w/*

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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2003 OCT -8 AM 10:34

HOUSE OF REPRESENTATIVES
REVIEW COMMISSION

#2230

DO NOT WRITE IN THIS SPACE

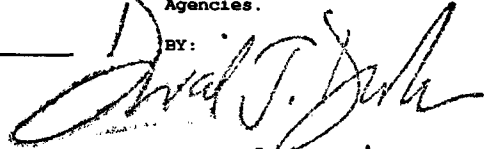
Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

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BY: _____
(DEPUTY ATTORNEY GENERAL)

State Board of Medicine
(AGENCY)

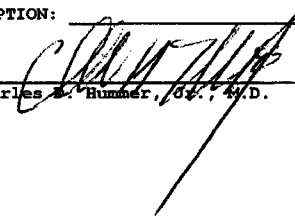
BY: 

DOCUMENT/FISCAL NOTE NO. 16A-497

DATE OF ADOPTION: _____

9/30/03
DATE OF APPROVAL

DATE OF APPROVAL

BY: 
Charles A. Hummer, Esq., J.D.

~~8/19/03~~

(Deputy General Counsel
(Chief Counsel,
Independent Agency
Strike inapplicable
title)

TITLE: Chairman
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

- Check if applicable
Copy not approved.
Objections attached.
- Check if applicable. No Attorney
General approval or
objection within 30 day
after submission.

NOTICE OF FINAL RULEMAKING
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF MEDICINE
49 PA. CODE, CHAPTER 16
SEXUAL MISCONDUCT

The State Board of Medicine (Board) amends its regulations by amending § 16.1 (relating to definitions) and by adding §16.110 (relating to sexual misconduct) to read as set forth in Annex A.

A. Effective Date

The regulation will be effective upon publication as an Order of Final Rulemaking in the Pennsylvania Bulletin.

B. Statutory Authority

Under Sections 8 and 41(8) of the Medical Practice Act of 1985 (63 P.S. §§422.8 and 422.41(8)), the Board has authority to establish standards of professional conduct for Board regulated practitioners under its jurisdiction. These individuals include physicians, physician assistants, nurse midwives, respiratory care practitioners, drugless therapists, acupuncturists and athletic trainers. These regulations identify when sexual contact by Board regulated practitioners with patients, and under certain circumstances, immediate family members of patients, will be deemed unprofessional conduct.

C. Background and Purpose

The regulation seeks to better protect patients by providing guidance to the profession and the public as to prohibited conduct relating to sexual contact between practitioners and patients. The regulation prohibits any sexual contact between a Board regulated practitioner and a current patient. The regulation further prohibits any sexual contact between a Board regulated practitioner and a former patient prior to the 2-year anniversary of the termination of the professional relationship when the Board regulated practitioner has been involved with the management or treatment of a patient for a mental health disorder. This 2-year period was developed from professional literature which indicates that an imbalance of power between health care practitioners and patients continues after the professional relationship ends. The regulation specifically exempts spouses of Board-regulated practitioners from the provisions prohibiting sexual contact with patients.

The regulation also prohibits sexual exploitation by a Board regulated practitioner of a current or former patient or immediate family member of a patient. "Sexual exploitation" is defined by the regulation as sexual behavior that uses the trust, knowledge, emotions or influence derived from the professional relationship. The Board believes that it is appropriate to protect immediate family members from sexual exploitation by Board regulated practitioners because immediate family members are often as vulnerable as the patients.

The regulation also provides that Board regulated practitioners who engage in prohibited sexual contact with patients or former patients will not be eligible for placement in the Board's impaired professional program in lieu of disciplinary or corrective actions. The impaired

professional program is unable to effectively monitor Board regulated practitioners who have engaged in sexual misconduct.

The regulation also provides that patient consent will not be considered a defense to disciplinary action in these cases. The imbalance of power inherent in the health care practitioner – patient relationship not only serves as the basis for the prohibition but also undermines the patient’s ability to consent to the sexual contact as an equal. Indeed, the Board’s experience in adjudicating these cases has repeatedly demonstrated the reality of the inherent imbalance of the relationship and the patient’s inability to give meaningful consent to sexual contact.

D. Summary of Comments and Responses to Proposed Rulemaking

Notice of the proposed rulemaking was published at 31 Pa.B. 6453 (November 24, 2001). The Board received comments from the Independent Regulatory Review Commission (IRRC), the Pennsylvania Medical Society (PMS), Representative Kerry Benninghoff and several individuals.

IRRC commented that the regulation should be broken into two sections – one for definitions and one for substantive regulatory provisions. The Board incorporated this recommendation into its final regulation by moving the definitions to § 16.1 (relating to definitions). IRRC also recommended that the Board add the definition of “Board regulated practitioner” to its definition section. Although this definition is included in the Medical Practice Act, the Board accepted IRRC’s suggestion and added it to the general definition section of the regulations as well. The Board also accepted IRRC’s recommendation that the definition of “immediate family member” clarify that the term included those related by blood or marriage. The Board chose not to adopt IRRC’s recommendation to extend the regulation’s protection to “significant others,” as they felt that “significant others” are not a legally recognized, defined group of people and that inclusion would create undue vagueness to the regulation. The Board did incorporate IRRC’s suggestion that the regulation provide a cross-reference to the statutory citation for disciplinary actions. IRRC recommended that the Board delete the phrase “mental health disorder” and substitute diagnoses under the Diagnostic and Statistical Manual of Mental Disorders – IV (DSM- IV). The Board chose not to make this change. There are certain “mental health disorders” that are not included in the DSM-IV, but which may nonetheless make an individual partially vulnerable, such as an individual suffering from anxiety, fearfulness and sadness, who is not clinically depressed.

Finally, IRRC expressed concern that the regulation appeared to be somewhat vague, and suggested that the Board consider providing examples of prohibited conduct. It has been the Board’s experience that when examples are used, situations not depicted are often deemed acceptable. The Board does not wish to inadvertently approve sexual misconduct by omission, and therefore, declines IRRC’s invitation to provide examples of prohibited conduct.

The Pennsylvania Medical Society opined that it is impossible to write regulations for sexual

misconduct that clearly define prohibited behavior without also creating the possibility of prosecution for innocent behavior. While the Board agrees that these are difficult regulations to write, it believes that sexual contact with patients and certain vulnerable family members so severely threatens public safety that an effort must be made to put physicians on further notice that the conduct is prohibited. While some practitioners are currently being prosecuted for sexual exploitation of patients, the Board feels strongly that it must be as clear as possible that a healthcare practitioner – patient relationship must never contain elements of sexual behavior. Moreover, prosecutors are routinely responsible for exercising professional judgment in regard to matters more complex than these.

Representative Benninghoff wrote in support of the regulations, but suggested that the regulations be amended to specifically prohibit voyeurism. While the Board was mindful of the Representative's concerns, the Board finds that the current definition of sexual exploitation would permit prosecution for voyeurism.

An attorney who frequently represents physicians in disciplinary matters before the Board wrote to object to the Board's determination that a physician engaging in conduct prohibited by this section would not be eligible for the impaired professional program in lieu of discipline. The Board based its determination on information from peer reviewed literature and experts in the field of sexual behaviors that practitioners who engage in sexual misconduct are not impaired and are not good candidates for a monitoring program such as the Professional Health Monitoring Program (PHMP).

The Governor's Policy Office recommended that the regulation specifically exempt spouses of Board-regulated practitioners from the provisions prohibiting sexual contact with patients. The Board amended its regulation to comply with this request.

E. Fiscal Impact and Paperwork Requirements

The regulation should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the regulation should not necessitate any legal, accounting, reporting or other paperwork requirements.

F. Sunset Date

The Board continuously monitors the cost effectiveness of its regulation. Therefore, no sunset date has been assigned.

G. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the Board submitted

copies of the notice of proposed rulemaking, published at 31 Pa.B. 6453, on November 24, 2001, to IRRC, the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the House Professional Licensure Committee (HPLC) for review and comment.

In compliance with section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), the Board also provided IRRC, SCP/PLC, and HPLC with copies of comments received as well as other documents. In preparing the final-form regulation, the Board has considered the comments received from IRRC, SCP/PLC, HPLC, and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), this final-form regulation was (deemed) approved by the HPLC on _____, ___200___, and (deemed) approved by SCP/PLC on _____, ___200___. Under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)), IRRC met on _____, ___200___, and (deemed) the final-form regulation approved.

H. Contact Person

Further information may be obtained by contacting Amy L. Nelson, Board Counsel, State Board of Medicine, P.O. Box 2649, Harrisburg, PA 17105-2649.

I. Findings

The State Board of Medicine finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the Commonwealth Documents Law (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) This amendment does not enlarge the purpose of proposed rulemaking published at 31 Pa.B. 6453.

(4) This amendment is necessary and appropriate for administering and enforcing the authorizing acts identified in Part B of this Preamble.

J. Order

The State Board of Medicine, acting under its authorizing statutes, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 16, are amended by amending §16.1 and by adding §16.110 to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect on publication in the *Pennsylvania Bulletin*.

Charles D. Hummer, Jr., M.D.
Chairperson
State Board of Medicine

ANNEX A
TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS
PART I. DEPARTMENT OF STATE
SUBPART A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS
CHAPTER 16. STATE BOARD OF MEDICINE – GENERAL PROVISIONS
Subchapter A. BASIC DEFINITIONS AND INFORMATION

§ 16.1. Definitions.

The following words and terms, when used in this chapter and Chapters 17 and 18 (relating to State Board of Medicine – medical doctors; and State Board of Medicine – practitioners other than medical doctors), have the following meanings, unless the context clearly indicates otherwise.

* * *

BOARD REGULATED PRACTITIONER – A MEDICAL DOCTOR, MIDWIFE, PHYSICIAN ASSISTANT, DRUGLESS THERAPIST, ATHLETIC TRAINER, ACUPUNCTURIST OR AN APPLICANT FOR A LICENSE OR CERTIFICATE THAT THE BOARD MAY ISSUE.

* * *

IMMEDIATE FAMILY MEMBER - A PARENT OR GUARDIAN, CHILD, SIBLING, SPOUSE, OR OTHER FAMILY MEMBER, WHETHER RELATED BY BLOOD OR MARRIAGE, WITH WHOM A PATIENT RESIDES.

* * *

SEXUAL BEHAVIOR – ANY SEXUAL CONDUCT WHICH IS NON-DIAGNOSTIC AND NON-THERAPEUTIC; IT MAY BE VERBAL OR PHYSICAL AND MAY INCLUDE EXPRESSIONS OF THOUGHTS AND FEELINGS OR GESTURES THAT ARE SEXUAL IN NATURE OR THAT

REASONABLY MAY BE CONSTRUED BY A PATIENT AS SEXUAL IN NATURE.

SEXUAL EXPLOITATION - ANY SEXUAL BEHAVIOR THAT USES TRUST, KNOWLEDGE, EMOTIONS, OR INFLUENCE DERIVED FROM THE PROFESSIONAL RELATIONSHIP.

* * *

Subchapter H. SEXUAL MISCONDUCT

§ 16.110. Sexual Misconduct.

(a) ~~Definitions. The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.~~

~~Immediate family member—A parent or guardian, child, sibling, spouse or other family member with whom a patient resides.~~

~~Sexual behavior—Any sexual conduct which is non-diagnostic and nontherapeutic; it may be verbal or physical gestures that are sexual in nature or that reasonably may be construed by a patient as sexual in nature.~~

~~Sexual exploitation—Any sexual behavior that uses trust, knowledge, emotions or influence derived from the professional relationship.~~

~~(b) Sexual exploitation.~~ Sexual exploitation by a Board regulated practitioner of a current or former patient, or of an immediate family member of a patient, constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action UNDER 63 P.S. §422.41(8).

(e B) ~~Current patients.~~ Sexual behavior that occurs with a current patient OTHER THAN THE BOARD-REGULATED PRACTITIONER'S SPOUSE constitutes unprofessional conduct, is prohibited and subjects the practitioner to disciplinary action UNDER 63 P.S. §422.41(8).

(d C) ~~Mental health patients.~~ When the A BOARD-REGULATED practitioner is involved with the management or treatment of a patient OTHER THAN THE PRACTITIONER'S SPOUSE for a mental health disorder, sexual behavior with that former patient which occurs prior to the 2-year anniversary of the termination of the professional relationship constitutes unprofessional conduct, is prohibited and subjects the practitioner to disciplinary action UNDER 63 P.S. §422.41(8).

(e D) ~~Impaired professional program.~~ A practitioner who engages in conduct prohibited by this section will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

(f E) ~~Consent.~~ Consent is not a defense to conduct prohibited by this section.



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF MEDICINE
Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649
(717) 783-1400

October 8, 2003

The Honorable John R. McGinley, Jr., Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14th Floor, Harristown 2, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Final Regulation
State Board of Medicine
16A-497: Sexual Misconduct

Dear Chairman McGinley:

Enclosed is a copy of a final rulemaking package of the State Board of Medicine pertaining to sexual misconduct.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles D. Hummer, Jr." with a stylized flourish at the end.

Charles D. Hummer, Jr., MD, Chairperson
State Board of Medicine

CDH/ALN:kp

Enclosure

c: Andrew Sislo, Chief Counsel
Department of State
Scott J. Messing, Deputy Commissioner
Bureau of Professional and Occupational Affairs
Joyce McKeever, Deputy Chief Counsel
Department of State
Cynthia Montgomery, Regulatory Counsel
Department of State
Gerald S. Smith, Senior Counsel in Charge
Department of State
Amy L. Nelson, Counsel
State Board of Medicine
State Board of Medicine

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 16A-497
 SUBJECT: Sexual Misconduct (State Board of Medicine)
 AGENCY: DEPARTMENT OF STATE

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

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 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
10/2/03	<i>Sandra J. Hayden</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
10/1/03	<i>Mary Walmer</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
10/8/03	<i>Elena Page</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)