

Regulatory Analysis Form

This space for use by IRRC

(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.

Regulatory Analysis Form

(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.

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

(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	FY +2	FY +3	FY +4	FY +5
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 Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A
Regulated Community						
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	FY -2	FY -1	Current FY
N/A				

(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.

(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.

Regulatory Analysis Form

(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.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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:

Copy below is approved as to form and legality. Executive or Independent Agencies.

Christina L. Cooper
(DEPUTY ATTORNEY GENERAL)

State Board of Medicine
(AGENCY)

John V. Z...

16A-497

SEP 18 2001

DOCUMENT/FISCAL NOTE NO.

DATE OF ADOPTION:

8/23/01

DATE OF APPROVAL

DATE OF APPROVAL

BY:

Charles D. Rummel
Charles D. Rummel, D.O., M.D.

(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.

Proposed 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) proposes to adopt §16.110 (relating to sexual misconduct) to read as set forth in Annex A.

Effective Date

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

Statutory Authority

Under Sections 8 and 41(8) of the Medical Practice Act of 1985, Act of December 20, 1985, P.L. 457, No. 112, as amended, 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. 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.

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 which have been 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. Never the less, complaints are filed each year by consumers who have been harmed by Board regulated practitioners who engage in such conduct.

Description of Proposed Amendments

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 regulation would prohibit any sexual contact between a Board regulated practitioner and a current patient. The regulation would further prohibit any sexual contact between a Board regulated practitioner and a former patient prior to the two 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 two 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 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 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.

Fiscal Impact and Paperwork Requirements

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

Sunset Date

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

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

In compliance with Executive Order 1996-1 the Board extended an invitation to comment on early drafts of this proposal 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 listed below. 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 proposal and only the issue of exploitation should be addressed. Thus 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 §§(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

Pursuant to Section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), the Board submitted a copy of this proposed regulation on November 7, 2001 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 amendments, the Board has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Board in compliance with Executive 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 IRRC has objections to any portion of the proposed amendments, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for the Board, the Governor and the General Assembly to review these objections before final publication of the proposed amendments.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments 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.

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

§ 16.110. Sexual Misconduct.

(a) Definitions

(1) Sexual exploitation - any sexual behavior that uses trust, knowledge, emotions, or influence derived from the professional relationship.

(2) 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.

(3) Immediate family member - a parent or guardian, child, sibling, spouse, or other family member with whom a patient resides.

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

(d) 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 two year anniversary of the termination of the professional relationship constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action.

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

(f) Consent shall not be 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

November 7, 2001

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

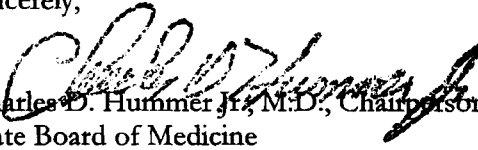
Re: Proposed Regulation
State Board of Medicine
Sexual Misconduct: 16A-497

Dear Chairman McGinley:

Enclosed is a copy of a proposed 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,


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

CDH/ALN:lm

Enclosure

c: John T. Henderson, Jr., Chief Counsel
Department of State
Albert H. Masland, Commissioner
Bureau of Professional and Occupational Affairs
Joyce McKeever, Deputy Chief Counsel
Department of State
Philip Zarone, Regulatory Counsel
Bureau of Professional and Occupational Affairs
Gerald S. Smith, Senior Counsel in Charge
Bureau of Professional and Occupational Affairs
Amy L. Nelson, Counsel
State Board of Medicine

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

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

TYPE OF REGULATION

- X Proposed Regulation
- 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

RECEIVED
 2001 SEP -7 AM 11:07
 DEPARTMENT OF STATE

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
11-7-01	<i>Louisa Clark</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
11-07-01	<i>Tami Tarasi</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
11-07-01	<i>Elena Pagan</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
11/16/01	<i>Mayra Garcia</i>	LEGISLATIVE REFERENCE BUREAU

September 18, 2001