

Original: 2307

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2002 DEC -3 AM 8:55
PENNSYLVANIA BOARD OF DENTISTRY
REVIEW COMMISSION



November 14, 2002

Ms. Deborah Eskin, Counsel
State Board of Dentistry
Bureau of Professional and Occupational Affairs
Pennsylvania Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649

RECEIVED
NOV 18 2002
DOS LEGAL COUNSEL

Re: Proposed Rulemaking of the State Board of Dentistry regarding Sexual Misconduct Guidelines

Dear Ms. Eskin:

Thank you for allowing the Pennsylvania Dental Association (PDA) the opportunity to comment on the State Board of Dentistry's (SBOD) proposed sexual misconduct regulations. The PDA appreciates the hard work by the Sexual Misconduct Guidelines Committee in addressing this delicate and important issue. While the PDA supports disciplinary measures for dentists who are guilty of sexual exploitation, the PDA believes that there are provisions in the draft regulations that need to be addressed or amended in order to provide optimal dental care for the public and to avoid prosecution of parties who are not at fault.

- The 2002 American Dental Association (ADA) House of Delegates recently amended its Code of Professional Conduct, which is referenced in the preamble of this proposed rulemaking, to include the following resolution: "Dentists should avoid interpersonal relationships that could impair their professional judgment or risk the possibility of exploiting the confidence placed in them by a patient." The PDA supports this ADA policy.

It is important to note that 89 percent of the delegates agreed to adopt this resolution only after the deletion of the following statement: "It is unethical for a dentist to engage in a sexual relationship with a current patient of record." This statement was deleted because some dental practitioners may define certain actions as sexual misconduct, while others may define a practitioner's actions as casual social behavior. The ADA House of Delegates believed that it would be inappropriate to consider an action unethical based on differing interpretations of morality. The PDA recommends that the SBOD consider the cautions expressed by the overwhelming majority of the House of Delegates of the ADA and include the adopted statement in the proposed regulations.

- In Section 33.211(ii), sexual behavior is defined as being "non-diagnostic and non-therapeutic." This statement may be applicable to psychiatry, but the PDA believes this definition to be unnecessary and possibly confusing if applied to dentists. It is highly unlikely that any member of organized dentistry would consider sexual behavior to be

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therapeutic or diagnostic as it relates to oral health. The PDA suggests that it be changed or deleted to avoid any confusion.

- In place of the clause that eliminates consent as a defense, the PDA would prefer a provision that would require a higher standard of proof to show that the relationship was undertaken with consent from both parties. The PDA believes that a clause eliminating consent as a consideration potentially violates a provider's and the patient's constitutional rights to free association. While it could be argued that a licensed professional may waive this right as a requirement for his or her licensure, the patient does not waive this right, and therefore should not be denied the right to a consensual relationship.
- As the draft regulations read now, there is no mention of different levels of sexual misconduct. The PDA believes that sexual misconduct can be exhibited in many forms, some more severe than others. In order to appropriately discipline a practitioner who is found by the SBOD to be guilty of sexual misconduct, there should be clear definitions of varying degrees of misconduct. Each degree of misconduct should correspond with varying implications for a violation.
- The draft regulations would drastically change the supervisory responsibilities a dentist must have over a hygienist or EFDA. These regulations would force a dentist to supervise the private relationships of his or her auxiliary to avoid having an employee undergo disciplinary action.
- In the January 2002 SBOD meeting, there were two options discussed in the instance when a practitioner wishes to pursue a romantic relationship with a patient. The options presented were referring the patient to a colleague or refusing treatment of a patient altogether. The PDA believes that these proposed solutions are certain to provide an access to care problem. While it may be relatively easy for a dentist in a heavily populated area to refer a patient to a colleague in the immediate vicinity, it may be nearly impossible for a dentist in rural Pennsylvania to refer. In such areas of the state, it is not uncommon for the nearest dentist to be located over fifty miles away.
- Pennsylvania's Medical Assistance program and other insurance programs will compound the problem of referral or termination of dental care. In a rural area of the state, it is already difficult to find a dentist who participates in a certain insurance program. It is poor patient care for a dentist to refer a patient of record to the customer service department of the patient's insurance carrier to find a provider in the same program. This is especially true for managed care Medical Assistance programs, which are contractually obligated to provide an adequate network of dentists for every area of the state, and would consider two dentists in a sparsely populated area to be economically impractical.
- The PDA believes that the draft regulations, if enacted, may leave a practitioner liable for patient abandonment. In the current regulations, Section 33.211(a)(4) defines unprofessional conduct as, "Withdrawing dental services after a dentist-patient relationship has been established so that the patient is unable to obtain necessary dental care in a timely manner." If a dentist refers a patient to another practitioner because of a consensual relationship, or if

he or she refuses to treat the patient altogether, it is not unreasonable to expect a vindictive patient to hold a dentist liable for unprofessional conduct under Section 33.211(a)(4). The PDA believes that these provisions, both of which would be enumerated under unprofessional conduct, are contradictory.

- The draft regulations define sexual behavior to include, “actions that may be construed by a reasonable person as sexual in nature.” When speaking in terms of sexual behavior, the word ‘reasonable’ can be defined in many different ways. Would it be considered unprofessional conduct for a dentist to take a patient out for a simple lunch or dinner, or to compliment patients on their physical appearance? How would a prosecutor define sexual behavior? It would be unfortunate for a practitioner to be disciplined for an action that is carried out with platonic intentions.

If you have any questions or concerns with these comments, please call the PDA Government Relations Department at (717) 234-5941. The PDA looks forward to working with the SBOD in drafting fair and appropriate regulations regarding sexual misconduct by dental professionals.

Sincerely,



ANDREW J. KWASNY DMD, MSD
Chair, Council on Government Relations

Cc: The Honorable Representative Mario Civera, Majority Chair, House Professional
Licensure Committee
The Honorable Representative William Rieger, Minority Chair, House Professional
Licensure Committee
The Honorable Senator Charles Dent, Majority Chair, Senate Professional Licensure
Committee
The Honorable Senator Lisa Boscola, Minority Chair, Senate Professional Licensure
Committee
John R. McGinley, Chair, Independent Regulatory Review Commission
David Williams, Commissioner, Bureau of Professional and Occupational Affairs
Dr. Michael Cerveris, President
PDA Board of Trustees
PDA Council on Government Relations
Kim Contino, Esq., Wojdak and Associates
Camille Kostelac-Cherry, Esq., Chief Executive Officer
Thomas J. Weber, Esq., Goldberg, Katzman and Shipman, PC

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2004 SEP -7 AM 9:36

August 31, 2004

John R. McGinley, Jr., Esquire, Chairman
Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Re: 49 Pa. Code § 33.211a. (Proposed sexual misconduct language)

Dear Chairman McGinley:

Thank you for allowing the Pennsylvania Dental Association (PDA) the opportunity to comment on the State Board of Dentistry's (SBOD) proposed sexual misconduct regulations. This letter is in response to proposed regulations that were approved by the State Board of Dentistry at the June meeting. The PDA continues to have concerns with certain language within the proposed regulations.

An area of great concern to the PDA is the proposed section that eliminates consent as a defense to prohibited conduct. A more reasonable approach that still protects the Constitutional rights of both the doctor and the patient would allow *mutual* consent to serve as a defense to conduct prohibited by the section. Mutual consent would permit a more case-by-case review of situations arising under the proposed section during a properly defended hearing. For example, if the doctor and patient have engaged in the past or are presently in a personal relationship (not as a cohabitating couple) prior to the start of a professional relationship, mutual consent would obviate the need for any disciplinary action under Sections 4.1(a)(8) and 10.1 of the Dental Law (63 P.S. §§ 123.1(a)(g) and 129.1).

Freedom of association is protected under the Constitution and should not be eliminated within the practice of Dentistry in order to further define conduct that is already prohibited by the Code and the Act and reiterated by section (b) of the proposed regulations. Furthermore such conduct or rather misconduct is already prohibited under the Pennsylvania Crimes Code.

In addition, of the other professions listed in the Code, the proposed sexual misconduct language to the Dental regulations, in some respects, are the most restrictive and constitutionally challengeable. For example, in the field of psychology the prohibited conduct includes "sexual intimacies between a psychologist and a current/patient" with said conduct being prohibited for a two-year period only.¹ The same is true for the medical profession, which prohibits sexual contact between a doctor and a *current* patient

¹ See 49 Pa. Code § 41.83.

or for a two-year period when the practitioner is engaged in the treatment of a patient for a mental health disorder.² Dentistry simply does not pose the rationale behind the establishment of a waiting period that naturally flows from mental health issues because the inherent psychological dependency does not exist.

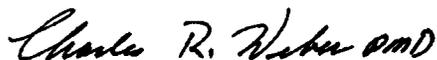
The proposed dental regulations define a "current patient" as one who is presently under care or one who has been under care within three months. Moreover, the proposed regulations insert the caveat that the doctor client relationship continues until the patient is accepted as a patient of record at a new dental office, a condition subsequent that may never come to realization particularly in rural areas currently or potentially experiencing access to care issues.

The proposed regulations clearly create an indefinite time period regarding the termination of the doctor patient relationship. It is axiomatic that free association is a right protected under the Constitution. However, in light of the Constitutional rights afforded to both doctors and to patients, such a prohibition of consensual relationships should be limited to the actual time during the existence of the doctor patient relationship and should extend only to a time certain upon the termination of the doctor patient relationship, if at all.

PDA would suggest a change of the language found in proposed § 33.211 so that sexual misconduct would be defined as any "unwanted" sexual contact. The addition of the term "unwanted" would essentially eliminate the need to define a current patient as well as do away with the necessity of proposed section (d) referring to consent.

We would welcome the opportunity to provide further input via a public hearing. If you have any questions or concerns with these comments, please feel free to contact the PDA Government Relations Department at (717) 234-5941.

Sincerely,



Charles R. Weber, DMD
President, PDA

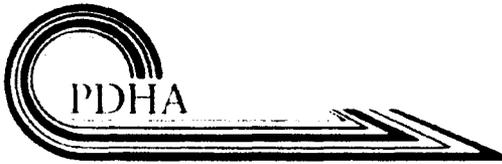


Steven B. Grater, DMD, Chair
Council on Government Relations

Cc: PDA Board of Trustees
PDA Council on Government Relations
Gail Reinard, S.R. Wojdak and Associates

² See 63 P.S. § 16.110(c).

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RECEIVED
2002 DEC -6 AM 9:32
PENNSYLVANIA DENTAL HYGIENISTS' ASSOCIATION
REVIEW COMMISSION

Pennsylvania Dental Hygienists' Association
Central Office, P.O. Box 606
Mechanicsburg, Pennsylvania 17050

TO: IRRC Executive Director Robert Nyce
IRRC Chairman John R. McGinley, Jr.
FROM: Sherri L. Meyers, RDH, MS, PDHA President
DATE: December 5, 2002
RE: Sexual Misconduct, Regulation #16A-4613(#2307)

The intention of this memo is to bring to your attention concerns regarding Sexual Misconduct, specifically Regulation #16A-4613(#2307). The Pennsylvania Dental Hygienists' Association (PDHA) is concerned with the regulation given the fact that Pennsylvania has a large rural patient delivery area. Often the number of licensees available to meet the care needs of these patients is small. This increases the likelihood or potentiality of licensees having personal relationships with their patients. In fact, PDHA has members who have married their patients. PDHA has concerns that a disgruntled or jilter lover could bring accusations against the licensee. The way that the regulation is written does not leave much room to protect the licensee. Please consider PDHA's focus of concern in your deliberations. Thank you for your time and attention to this matter.

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Date: 5 Dec 2002, 13:49
Size: 43008 bytes.
Type: Unknown

IRRC

From: Sherri L. Meyers [sxm@mail.northampton.edu]
Sent: Thursday, December 05, 2002 2:05 PM
To: IRRC
Cc: dentistr@pados.dos.state.pa.us
Subject: Sexual Misconduct (Regulation #16A-4613(#2307))



Attachment
information.



Pennsylvania
Dental Hygienists...

To whom it may concern:

Attached please find comment regarding Sexual Misconduct
(Regulation #16A-4613(#2307) on behalf of the Pennsylvania
Dental Hygienists' Association. Thank you.

Sherri L. Meyers, RDH, MS
PDHA President

cc: SBOD

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