

Regulatory Analysis Form

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REGULATORY REVIEW COMMISSION

(1) Agency

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

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

16A-448

IRRC Number: 2381

(3) Short Title

Sexual Misconduct

(4) PA Code Cite

49 Pa. Code § 29.21a

(5) Agency Contacts & Telephone Numbers

Primary Contact: Roberta L. Silver (717) 783-7200
Counsel-State Board of Podiatry

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 patients of podiatrists and provide guidance to the profession on issues relating to sexual misconduct between licensees and current patients.

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

Sections 15 and 16(3) of the Podiatry Practice Act (Act), (63 P.S. §§ 42.15 and 42.16(3)).

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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 exploitation of a patient by a Board regulated practitioner is unethical. Nevertheless, 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.

(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 approximately 1330 licensed podiatrists in the Commonwealth.

(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 a draft of this proposal to parties who have indicated an interest in the Board's regulatory activities. The Board did not receive any comments.

(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.

There may be a cost associated with prosecuting individuals under these regulations. However, there may also be a savings if licensees are better informed of what behavior is permitted, and tailor their actions accordingly, leading to fewer complaints of unprofessional conduct.

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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.

Any costs or savings associated with this regulation would be minimal. (See question 19).

Regulatory Analysis Form

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

Program	FY -3	FY -2	FY -1	Current FY
State Board of	99-00	00-01	01-02	02-03
Podiatry	\$158,405.80	\$109,592.17	As of 7/02/02	Budget
			\$124,450.71	\$262,000.00

(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 covered 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.

No.

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

New Jersey - no specific sexual misconduct regulations. Unprofessional conduct is listed under Board of Medical Examiners regulations.

Ohio - Professional misconduct regulations provide for minimum and maximum penalties for sexual misconduct.

New York - no specific sexual misconduct regulations; however, harassing or abusive behavior, or actions that demonstrate moral unfitness to practice the profession, or actions which violate federal or state laws, are grounds for a charge of misconduct.

Delaware - no specific sexual misconduct regulations. General professional misconduct violations enumerated under Podiatry regulations.

Maryland -- has specific sexual misconduct regulations similar to those being proposed by this Board.

The sexual misconduct regulations will not put Pennsylvania at a competitive disadvantage with 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 by the Department in promulgation of sexual misconduct regulations for health care practitioners, the Board has scheduled no public hearings or informational meetings regarding this regulation. However, the Board meets bi-monthly. Comments from the public are always welcome. A schedule of Board meetings is available on the Department of State's website at www.dos.state.pa.us/bpoa.

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(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 that 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 of final-form 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 feedback from its licensees on a frequent basis.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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LEGISLATIVE REFERENCE BUREAU
REVIEW COMMISSION

+2381

DO NOT WRITE IN THIS SPACE

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

Amy M. Elliott

BY: Amy M. Elliott
(DEPUTY ATTORNEY GENERAL)

DEC 31 2003

DATE OF APPROVAL

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

STATE BOARD OF PODIATRY
(AGENCY)

DOCUMENT/FISCAL NOTE NO. 16A-448

DATE OF ADOPTION: _____

BY: *Jeffrey B. Gerland*
Jeffrey B. Gerland, D.P.M.

TITLE: Chairman
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

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

John V. Turner

9/30/03
DATE OF APPROVAL

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

[] 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 PODIATRY
49 Pa. Code, Chapter 29

Sexual Misconduct

The State Board of Podiatry (Board) proposes to amend § 29.1 (relating to definitions) and to adopt § 29.21a. (relating to sexual misconduct) to read as set forth in Annex A.

Effective Date

The proposed rulemaking will be effective upon publication of final-form rulemaking in the Pennsylvania Bulletin.

Statutory Authority

Under Sections 15 and 16 (3) of the Podiatry Practice Act (Act) (63 P.S. §§ 42.15 and 42.16(3)), the Board has authority to establish standards of professional conduct for licensed podiatrists.

Background and Purpose

It should be axiomatic that it is unprofessional conduct for a podiatrist to engage in sexual contact with patients. Past decisions of the Board and the American Podiatric Medical Association guidelines denounce sexual contact between podiatrist and patient. However, complaints have been filed by consumers who have been harmed by podiatrists who engage in such conduct.

Description of Proposed Amendments

The proposed rulemaking would amend § 29.1 to define the terms, “sexual behavior” and “sexual exploitation,” and add § 29.21a to make it clear that sexual misconduct is unprofessional conduct.

The purpose of the proposed rulemaking is to better protect patients by providing guidance to the profession and the public as to prohibited sexual conduct between podiatrists and patients. The regulation would prohibit any sexual contact between a podiatrist and a current patient.

Prohibited “sexual behavior,” defined in § 29.1, is any sexual conduct that has no diagnostic or therapeutic purpose, including words, actions, or any combination thereof which are, or are intended to be, sexual in nature, or which may be construed by a reasonable person as sexual in nature.

The regulation would further prohibit sexual exploitation by a podiatrist of a current patient. “Sexual exploitation” is defined in § 29.1 as sexual behavior with a current patient that uses trust, knowledge, emotions or influence derived from the professional relationship.

The proposed rulemaking provides that licensed podiatrists who engage in prohibited sexual conduct with 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 licensed podiatrists who have engaged in sexual misconduct.

The proposed rulemaking would also provide that patient consent would 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 sexual behavior as an equal when trust, knowledge, emotions or influence derived from the professional relationship are used.

Fiscal Impact and Paperwork Requirements

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

Sunset Date

The Board continuously monitors the 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 this proposed rulemaking to 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 in this Preamble. The Board did not receive any comments.

Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), the Board submitted a copy of this proposed regulation on January 20, 2004 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. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, if IRRC has comments, recommendations or objections to any portion of the proposed rulemakings, it will notify the Board **within 30 days** of the close of the public comment period. The notification will specify the regulatory review criteria that have not been met. The Regulatory Review Act specifies detailed procedures for the Board, the Governor and the General Assembly to review these comments, recommendations and objections before final publication of the proposed rulemakings.

Public Comment

Interested persons are invited to submit written comments, recommendations or objections regarding the proposed amendments to Roberta L. Silver, Counsel, State Board of Podiatry, 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 29. STATE BOARD OF PODIATRY

GENERAL PROVISIONS

§ 29.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Sexual behavior – any sexual conduct with a current patient during the course of a professional relationship, evaluation, treatment, procedure, or other service to the patient, regardless of the setting in which the professional service is provided, including words, actions, or any combination thereof, which are non-diagnostic or non-therapeutic, and are intended to be sexual in nature, or which may be construed by a reasonable person as sexual in nature.

Sexual exploitation - any sexual behavior, with a current patient, that uses trust, knowledge, emotions, or influence derived from the professional relationship.

STANDARDS OF ETHICAL PRACTICE

§ 29.21a. Sexual misconduct.

Under Section 16(a)(3) of the Act, (63 P.S. § 42.16(a)(3)), the Board may refuse to grant and may suspend or revoke or cancel a license or a registration for gross immorality or misconduct in carrying on the profession of podiatry. Gross immorality or misconduct includes sexual misconduct by a podiatrist as follows:

- (1) Sexual behavior by a podiatrist with a current patient constitutes unprofessional conduct, is prohibited, and subjects the podiatrist to disciplinary action under § 16(a)(3) of the Act, (63 P.S. § 42.16(a)(3)).
- (2) Sexual exploitation by a podiatrist of a current patient constitutes unprofessional conduct, is prohibited, and subjects the podiatrist to disciplinary action under § 16(a)(3) of the Act, (63 P.S. § 42.16(a)(3)).
- (3) A podiatrist 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 action.
- (4) 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 PODIATRY
2601 N. Third Street, Post Office Box 2649
Harrisburg, Pennsylvania 17110-2649
(717) 783-4858

January 20, 2004

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

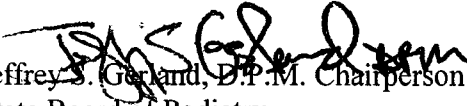
Re: Proposed Regulation
State Board of Podiatry
16A-448: Sexual Misconduct

Dear Chairman McGinley:

Enclosed is a copy of a proposed rulemaking package of the State Board of Podiatry 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,


Jeffrey S. Garland, D.P.M. Chairperson
State Board of Podiatry

JSG/RLS:law

Enclosure

cc: Basil L. Merenda, Acting Commissioner
Bureau of Professional and Occupational Affairs
Andrew Sislo, Chief Counsel
Department of State
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
Roberta L. Silver, Counsel
State Board of Podiatry
State Board of Podiatry

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

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REGULATORY REVIEW COMMISSION

I.D. NUMBER: 16A-448
 SUBJECT: 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

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
1/20/04	<i>Sandra J. Hayer</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
1/20/04	<i>Mary Walmer</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
1/20/04	<i>Dr. Belmont</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
1/20/04	<i>[Signature]</i>	LEGISLATIVE REFERENCE BUREAU (for Proposed only)

January 6, 2004