

PROPOSED RULEMAKING

STATE BOARD OF NURSING

[49 PA. CODE CH. 21]

Sexual Misconduct

The State Board of Nursing (Board) proposes to adopt amendments regarding sexual misconduct committed by registered and licensed practical nurses by amending §§ 21.1 and 21.141 (relating to definitions) and §§ 21.18 and 21.148 (relating to standards of nursing conduct) and adopting §§ 21.4a and 21.146a (relating to procedural matters), §§ 21.18a and 21.148a (relating to post-adjudication reporting) and §§ 21.18b and 21.148b (relating to impaired professional program) to read as set forth in Annex A.

Effective Date

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

Statutory Authority

The Board is authorized to adopt regulations necessary for the administration of its enabling statutes under section 2.1(k) of the Professional Nursing Law (63 P. S. § 212.1(k)) and section 17.6 of the Practical Nurse Law (63 P. S. § 667.6).

Background and Purpose

This proposed rulemaking was developed against a background of increasing complaints of sexual misconduct against health care professionals who are licensed by the Bureau of Professional and Occupational Affairs. A presentation by Dr. Kenneth Pope, a National authority on sexual misconduct committed by health care practitioners, to a joint session of various health boards on April 25 and 26, 1996, made clear that the sexual exploitation of patients by health care practitioners presents a threat to public health and safety.

The proposed amendments seek to better protect consumers of nursing services and to provide guidance to the profession by defining terms such as "behavioral/mental health nurse therapist," "patient," "professional relationship," "sexual impropriety" and "sexual violation." The proposed amendments guide nurses by informing them that conduct defined as a sexual violation or impropriety with a patient during the course of a professional relationship violates standards of nursing conduct. The proposed amendments guide behavioral/mental health nurse therapists by informing them that their professional relationship with a patient extends for 2 years after services are discontinued. The proposed amendments notify nurses that the consent of a patient to a sexual impropriety or violation cannot be a defense in a disciplinary proceeding before the Board and that a nurse who engages in conduct prohibited by the proposed amendments will not be eligible for placement into an impaired professional program under either the Professional Nursing Law or the Practical Nurse Law.

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

In compliance with Executive Order 1996-1, prior to drafting these proposed amendments, the Board invited interested associations to comment on a preliminary draft. The Board reviewed and considered all comments and suggestions received by interested parties during the regulatory development process. The interested associations included the American Association of Neuroscience Nurses, American Nephrology Nurses' Association, Association of Operating Room Nurses, Inc., Council on Health Professions Education, Emergency Nurses Association, Forum for Nurse Executives, GPC-Oncology Nursing Society, Hospital Association of Pennsylvania, Intravenous Nurses Society, Licensed Practical Nurses Association of Pennsylvania, Northeastern Pennsylvania League of Licensed Practical Nurses, Pennsylvania Association of Home Health Agencies, Pennsylvania Association of Non-Profit Homes for the Aging, Pennsylvania Association of Nurse Anesthetists, Pennsylvania Association of Occupational Health Nurses, Pennsylvania Association of Practical Nursing Program Coordinators, Pennsylvania Coalition of Nurse Practitioners, Pennsylvania College of Associate Degree Nursing, Pennsylvania Higher Education Nursing Schools Association, Pennsylvania League for Nursing, Inc., Pennsylvania Nurses Association, Pennsylvania Organization of Nurse Leaders, Pennsylvania Society of Gastroenterology Nurses and Associates and School Nurse Section of Pennsylvania State Education Association.

Description of Proposed Amendments

§§ 21.1 and 21.141 (relating to definitions)

The amendments proposed for both registered and practical nurses contain identical definitions of "sexual impropriety" and "sexual violation."

The term "patient" includes resident and client and is defined to mean a person other than a spouse or immediate family member, who receives professional services from a registered nurse or a licensed practical nurse, regardless of whether the nurse receives remuneration for the services.

The term "sexual impropriety" is defined as making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments; unnecessarily exposing a patient's body or watching a patient dress or undress, unless for therapeutic purposes or the patient specifically requests assistance; examining or touching genitals without the use of gloves when performing an otherwise appropriate examination; discussing or commenting on a patient's sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive health care; soliciting a date from a patient; and volunteering information to a patient about one's sexual problems, preferences or fantasies.

The term "sexual violation" is defined as offenses including, but not limited to, sexual intercourse, genital to genital contact, and oral to genital contact between a nurse and a patient during the period of the professional relationship; touching breasts, genitals, or any other body part for any purpose other than appropriate examination or treatment; using prolonged or improper examination

techniques, or examining a patient after the patient has refused or withdrawn consent; encouraging a patient to masturbate in the presence of the nurse or masturbating while a patient is present; providing or offering to provide drugs or treatment in exchange for sexual favors; and using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in any conduct that would constitute a sexual impropriety or violation.

The term "behavioral/mental health nurse therapist" is defined as a registered nurse engaged in a specialized practice involving the assessment, diagnosis, counseling or treatment, including psychotherapy, of any mental or emotional problem, impairment, dysfunction or illness.

The term "professional relationship" for a registered nurse who is not a behavioral/mental health nurse therapist means the period of time beginning with the first professional contact or consultation with the patient and ending with the patient's discharge from or discontinuance of services by the nurse or the nurse's employer. For the behavioral/mental health nurse therapist, the professional relationship extends to 2 years after discharge or discontinuance of services. If the patient is a minor, the professional relationship extends 2 years or until 1 year after the age of majority, whichever is longer, after discharge from or discontinuance of services. For a practical nurse the professional relationship begins with the first professional contact between the nurse and a patient and ends with the final professional contact. An exception to the existence of a professional relationship is made for a nurse who administers emergency medical treatment or transitory trauma care.

§§ 21.4a and 21.146a (relating to procedural matters)

These proposed amendments pertaining to registered and practical nurses address procedural issues in disciplinary matters before the Board. Subsection (a) would put all licensees on notice that the consent of a patient to a sexual impropriety or violation may not be a defense in a sexual misconduct proceeding. A patient cannot consent to unprofessional forms of treatment. Subsection (b) would put all licensees on notice that neither evidence of specific instances, nor opinion evidence, nor reputation evidence of a patient's past sexual conduct is admissible in proceedings alleging a sexual impropriety or violation. Subsection (c) puts all licensees on notice that if a licensee accused of a sexual impropriety or violation raises the defense that his conduct was appropriate to the treatment, the licensee will have to demonstrate that he is competent in practice which relates directly to the treatment of sexual function or dysfunction.

§§ 21.18 and 21.148 (relating to standards of nursing conduct)

The provisions of the regulations pertaining to registered and practical nurses are proposed to be amended to specifically prohibit a nurse from engaging in conduct defined as a sexual violation or impropriety. These proposed amendments further inform licensees that the failure to comply with an obligation or prohibition under this section is subject to disciplinary and corrective measures, including the imposition of civil penalties, under the Professional Nursing Law and the Practical Nurse Law.

§§ 21.18a and 21.148a (relating to post-adjudication reporting)

The provisions of the regulations pertaining to registered and practical nurses are proposed to be amended to allow the Board to require a licensee whose license had

been suspended or revoked for committing a sexual impropriety or violation to be reinstated subject to the condition that the licensee obtains the written consent of patients before providing nursing services. The consent would inform patients of the date and duration of the disciplinary action; the text of the law that was violated; and the address and telephone number of the Board. The consent form would have to be maintained in the licensee's primary practice location and would be subject to the Board's inspection.

§§ 21.18b and 21.148b (relating to impaired professional program)

These provisions of the regulations pertaining to registered and practical nurses are proposed to be added to inform licensees that a licensee subject to disciplinary action for a sexual impropriety or violation will not be eligible for an impaired professional program under either the Professional Nursing Law or the Practical Nurse Act.

Fiscal Impact and Paperwork Requirements

The proposed amendments should have no fiscal impact and will not impose additional paperwork on the private sector, the general public and the Commonwealth and its political subdivisions.

Sunset Date

The Board continuously monitors its regulations. Therefore, no sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 28, 1998, the Board submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Professional Licensure and the Senate Consumer Protection and Professional Licensure Committee. In addition to submitting the proposed amendments, the Board has provided the Committees and IRRC 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 that have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the amendments, 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 amendments to Edward Vavro, Counsel, State Board of Nursing, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days following publication of the proposed amendments in the *Pennsylvania Bulletin*. Please reference (16A-5110) Sexual Misconduct, when submitting comments.

M. CHRISTINE ALICHNIE, Ph.D., R.N.,
Chairperson

Fiscal Note: 16A-5110. 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 21. STATE BOARD OF NURSING

Subchapter A. REGISTERED NURSES

GENERAL PROVISIONS

§ 21.1. Definitions.

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

* * * * *

Behavioral/mental health nurse therapist—A registered nurse engaged in a specialized practice involving assessment, diagnosis, counseling or treatment, including psychotherapy, of any mental or emotional problem, impairment, dysfunction or illness.

* * * * *

Patient (includes residents and clients)—A person, other than a spouse or immediate family member, who receives professional services from a registered nurse, regardless of whether or not the nurse receives remuneration for the services.

* * * * *

Professional relationship—

(i) Except for a behavioral/mental health nurse therapist, the relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a registered nurse and a patient and ending with the patient's discharge from or discontinuance of services by the nurse or by the nurse's employer, except that a professional nurse may administer necessary emergency medical treatment or transitory trauma care.

(ii) For a behavioral/mental health nurse therapist, the therapeutic relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between the behavioral/mental health nurse therapist and patient and ending 2 years after discharge from or discontinuance of services, except for a minor, when the term means 2 years or until 1 year after the age of majority, whichever is longer, after discharge from or discontinuance of services.

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Sexual impropriety—The term includes the following offenses:

(i) Making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments.

(ii) Unnecessarily exposing a patient's body or watching a patient dress or undress, unless for therapeutic purposes or when a patient specifically requests assistance.

(iii) Examining or touching genitals without the use of gloves when performing an otherwise appropriate examination.

(iv) Discussing or commenting on a patient's potential sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive health care. Discussion of a patient's sexual practices and preferences shall be fully documented in the patient's chart.

(v) Soliciting a date from a patient.

(vi) Volunteering information to a patient about one's sexual problems, preferences or fantasies.

Sexual violation—The term includes the following offenses:

(i) Sexual intercourse between a registered nurse and a patient during the period of the professional relationship.

(ii) Genital to genital contact between a nurse and a patient during the professional relationship.

(iii) Oral to genital contact between a nurse and a patient during the period of the professional relationship.

(iv) Touching breasts, genitals or another body part for purpose other than appropriate examination or treatment, or using prolonged or improper examination techniques, or after the patient has refused or withdrawn consent.

(v) Encouraging a patient to masturbate in the presence of the nurse or masturbating while a patient is present.

(vi) Providing or offering to provide drugs or treatment in exchange for sexual favors.

(vii) Using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in conduct that would constitute a sexual impropriety or sexual violation.

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§ 21.4a. Procedural matters.

(a) The consent of the patient to a sexual impropriety or violation is not a defense to a disciplinary charge for violation of the act or this subchapter.

(b) Evidence of specific instances, opinion evidence or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under § 21.18(b)(9) (relating to standards of nursing conduct). The Board may consider sexual relationships between the nurse and the patient occurring prior to the professional relationship.

(c) A nurse who attempts to raise as a defense an argument that conduct prohibited as a sexual violation or sexual impropriety was necessary or appropriate to the treatment of a patient shall be required to demonstrate competency in practice which relates directly to the treatment of sexual function or dysfunction. This competence may be demonstrated through educational training and supervised clinical experience. Appropriate discussions of sexual matters between a nurse and a patient shall be fully documented in patient records.

RESPONSIBILITIES OF THE REGISTERED NURSE

§ 21.18. Standards of nursing conduct.

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(b) A registered nurse may not:
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(9) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.

(c) A registered nurse who fails to comply with an obligation or prohibition under this section is subject to disciplinary [action under section 14(a)(3) of the act (63 P. S. § 224(a)(3))] and corrective measures under section 14 of the act (63 P. S. § 224).

(d) The Board may, in addition to another disciplinary or corrective measure set forth in this section, levy appropriate civil penalties as authorized by law upon a nurse found to have engaged in conduct constituting a sexual impropriety or sexual violation.

§ 21.18a. Post-adjudication reporting.

(a) As a condition to reinstatement of a license from a disciplinary measure arising out of a violation of § 21.18(b)(9) (relating to standards of nursing conduct), the Board may require the nurse to obtain the prior, written, informed consent of patients treated by the nurse on a form approved by the Board. The form shall set forth the following:

- (1) The effective date and duration of the suspension, revocation or other sanction.
- (2) A citation to the statutory provisions under which the sanction was issued, and a copy of the specific text of the act cited.
- (3) The address and telephone number of the Board.
- (b) The form shall be maintained on file in the nurse's primary practice location and shall be subject to inspection, with or without notice, by representatives of the Board.

§ 21.18b. Impaired professional program.

When the Board is empowered to take disciplinary or corrective action against a nurse for conduct defined as a sexual violation or sexual impropriety, the nurse will not be eligible for placement into an impaired professional program under section 15 of the act (63 P. S. § 224.1).

**Subchapter B. PRACTICAL NURSES
GENERAL PROVISIONS**

§ 21.141. Definitions.

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

* * * * *

Patient (includes residents and clients)—A person, other than a spouse or immediate family member, who receives professional services from a licensed practical nurse, regardless of whether or not the nurse receives remuneration for the services.

* * * * *

Professional relationship—The relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a licensed practical nurse and a patient and ending with the final professional contact between them, except that a licensed

practical nurse may administer necessary emergency medical treatment or transitory trauma care.

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Sexual impropriety—The term includes the following offenses:

- (i) Making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments.
- (ii) Unnecessarily exposing a patient's body or watching a patient dress or undress, unless for therapeutic purposes or when a patient specifically requests assistance.
- (iii) Examining or touching genitals without the use of gloves when performing an otherwise appropriate examination.
- (iv) Discussing or commenting on a patient's potential sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive health care. Discussion of a patient's sexual practices and preferences shall be fully documented in the patient's chart.
- (v) Soliciting a date from a patient.
- (vi) Volunteering information to a patient about one's sexual problems, preferences or fantasies.

Sexual violation—The term includes the following offenses:

- (i) Sexual intercourse between a licensed practical nurse and a patient during the period of the professional relationship.
- (ii) Genital to genital contact between a nurse and a patient during the period of the professional relationship.
- (iii) Oral to genital contact between a nurse and a patient during the period of the professional relationship.
- (iv) Touching breasts, genitals or another body part for a purpose other than appropriate examination or treatment, or using prolonged or improper examination techniques, or after the patient has refused or withdrawn consent.
- (v) Encouraging a patient to masturbate in the presence of the nurse or masturbating while the patient is present.
- (vi) Providing or offering to provide drugs or treatment in exchange for sexual favors.
- (vii) Using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in any conduct that would constitute a sexual impropriety or sexual violation.

§ 21.146a. Procedural matters.

- (a) The consent of the patient to a sexual impropriety or violation is not a defense to a disciplinary charge for violation of the act or this subchapter.
- (b) Evidence of specific instances, opinion evidence or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under § 21.148(b)(9) (relating to standards of nursing conduct). The Board may consider

sexual relationships between the nurse and the patient occurring prior to the professional relationship.

(c) A nurse who attempts to raise as a defense an argument that conduct prohibited as a sexual violation or sexual impropriety was necessary or appropriate to the treatment of a patient shall be required to demonstrate competency in practice which relates directly to the treatment of sexual function or dysfunction. This competence may be demonstrated through educational training and supervised clinical experience. Appropriate discussions of sexual matters between a nurse and a patient shall be fully documented in patient records.

§ 21.148. Standards of nursing conduct.

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(b) A licensed practical nurse may not:

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(9) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.

(c) Failure to comply with an obligation or prohibition imposed by this section is subject to disciplinary [action under section 16(a)(3) of the act (63 P. S. § 666(a)(3))] and corrective measures under section 16 of the act (63 P. S. § 666).

(d) The Board may, in addition to another disciplinary or corrective measure set forth in this section, levy appropriate civil penalties as authorized by law upon a nurse found to have engaged in

conduct constituting a sexual impropriety or sexual violation.

§ 21.148a. Post-adjudication reporting.

(a) As a condition to reinstatement of a license from a disciplinary measure arising out of a violation of § 21.148(b)(9) (relating to standards of nursing conduct), the Board may require a practical nurse to obtain the prior, written, informed consent of patients treated by the nurse on a form approved by the Board. The form shall set forth the following:

(1) The effective date and duration of the suspension, revocation or other sanction.

(2) A citation to the statutory provisions under which the sanction was issued, and a copy of the specific text of the act cited.

(3) The address and telephone number of the Board.

(b) The form shall be maintained on file in the nurse's primary practice location and shall be subject to inspection, with or without notice, by representatives of the Board.

§ 21.148b. Impaired professional program.

When the Board is empowered to take disciplinary or corrective action against a practical nurse for conduct defined as a sexual violation or sexual impropriety, the nurse will not be eligible for placement into an impaired professional program under section 16.2 of the act (63 P. S. § 666.2).

[Pa.B. Doc. No. 98-924. Filed for public inspection June 12, 1998, 9:00 a.m.]