WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Medicine

TITLE-SERIES: 11-16

RULE TYPE: Legislative

Amendment to Existing Rule: No

Repeal of existing rule: No

RULE NAME: Prohibiting Sexual Misconduct by Health Care Practitioners

CITE STATUTORY AUTHORITY: W. Va. Code §§ 30-1-7(a), 30-3-14(u).

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/25/2022 12:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Mark A. Spangler, Executive Director

ADDRESS: 101 Dee Drive, Suite 103

Charleston, WV 25311

EMAIL: mark.a.spangler@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule establishes the definition of sexual misconduct and identifies sexual misconduct, for which an application may be denied and/or a license or other authorization to practice may be subject to disciplinary action by the West Virginia Board of Medicine. It establishes relevant definitions, identifies prohibited sexual misconduct with respect to patients, patent surrogates, and former patients. It identifies other prohibited sexual misconduct in the health care work environment, exceptions and the applicable disciplinary process.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

During the 2022 legislative session, the West Virginia legislature passed SB 606, which modified W. Va. Code § 30-3-14(c) to clarify the prohibition on practitioner sexual misconduct. The bill also directed the Board of Medicine to propose rules for legislative approval which define sexual misconduct and identify prohibited sexual misconduct.

Section 2 provides definitions relevant to the rule.

Section 3 establishes a prohibition on practitioner sexual misconduct with a patient. This section also establishes that sexual misconduct with a patient involving either sexual contact or sexual interaction constitutes gross misconduct. It further provides that patient consent, participation in, or initiation of sexual contact, sexual interaction or sexual impropriety with a practitioner may not be used by the practitioner as defense to charges of practitioner sexual misconduct or as mitigation of professional misconduct.

Section 4 addresses sexual misconduct with a patient surrogate, a key third party closely involved in a patients medical decision making and care, including but not limited to the patients spouse or partner, family member, legal representative, proxy, or guardian. It also identifies the conditions precedent which would permit a practitioner to engage in a romantic relationship with a surrogate without engaging in sexual misconduct.

Section 5 establishes the parameters within which it is, and is not, not sexual misconduct for a practitioner to engage in a romantic or sexual relationship with a former patient.

Section 6 identifies other sexual misconduct, including sexual harassment, which constitutes professional misconduct in the practice environment.

Section 7 identifies an exception for certain draping, personal protective equipment, and chaperone requirements in emergency situations.

Section 8 provides that practitioners who engage in sexual misconduct or other violations of the professional conduct standards set forth in this rule shall be subject to license or other credential denial proceedings or disciplinary action pursuant to the processes, standards and penalties set forth in the West Virginia Medical Practice Act, the West Virginia Physician Assistants Practice Act, and W. Va. Code R. § 11-1A-12.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

None.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

None.

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

None.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

N/A.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Mark A Spangler -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 11
LEGISLATIVE RULE
WEST VIRGINIA BOARD OF MEDICINE

SERIES 16

PROHIBITING SEXUAL MISCONDUCT BY HEALTH CARE PRACTITIONERS

§11-16-1. General.

1.1. Scope. -- This rule establishes the definition of sexual misconduct and identifies sexual misconduct, for which an application may be denied and/or a license or other authorization to practice may be subject to disciplinary action.

1.2. Authority. -- W. Va. Code § 30-3-14(u).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision -- This rule shall terminate and have no further force or effect upon August 1, 2028.

§11-16-2. Definitions.

2.1. "Chaperone" means a third person who, with the patient's consent, is present during a medical examination.

2.2. "Health care practitioner" or "practitioner" means:

2.2.1. A physician, podiatric physician or physician assistant who holds any practice credential issued by the Board; or

2.2.2. An applicant for any practice credential issued by the Board.

2.3 "Health care services" means any examination, treatment, evaluation, or other medical care rendered by a ~~provider~~ practitioner pursuant to a practice credential.

2.4. "Patient" means a person for whom a practitioner is providing, has provided, or is scheduled to provide health care services. The fact that a person is not actively receiving treatment or professional services from a practitioner is not determinative of a person's status as a patient. Once a practitioner-patient relationship is established, a person is presumed to remain a patient until the practitioner-patient relationship is terminated.

2.5. "Practice credential" means a license, permit, registration, or other authorization to practice a health profession.

2.6. "Sexual contact" includes, but is not limited to:

2.6.1. Performing an examination of the patient's pelvic area, genitals, breasts, rectum, or prostate without clinical justification;

2.6.2. Touching any body part that has sexual connotation for the practitioner or patient, for any purpose other than appropriate and legitimate health care services, or where the patient has refused or has withdrawn consent; and

2.6.3. Examining or touching a patient's genitals without the use of gloves.

2.7. "Sexual impropriety" means practitioner conduct that is seductive, sexually suggestive, disrespectful of patient privacy, or sexually harassing or demeaning including but not limited to:

2.7.1. Soliciting or accepting a date or romantic relationship with a patient or surrogate;

2.7.2. Making comments that are not clinically relevant about or to the patient, including but not limited to, making sexual comments about a patient's body or underclothing, making sexualized or sexually demeaning comments to a patient, or making comments about potential sexual performance;

2.7.3 Requesting details of the patient's sexual history, sexual problems, sexual preferences, or sexual fantasies when not clinically indicated for the type of health care services;

2.7.4. Participation by the practitioner in conversation regarding the sexual problems, sexual preferences, or sexual fantasies of the practitioner;

2.7.5. Any verbal, written or electronic communication between the practitioner and patient or surrogate which are of a sexual nature, including sexually suggestive or explicit images, messages, or videos;

2.7.6. Sexual harassment, including but not limited to the following practitioner conduct towards patients, surrogates, or other persons the practitioner encounters during the course of the practitioner's professional practice:

2.7.6.a. Unwelcome sexual advances;

2.7.6.b. Requests for sexual favors; and

2.7.6.c. Other verbal or physical conduct of a sexual nature.

2.7.7. Failing to employ disrobing or draping practices which respect the patient's privacy;

2.7.8. Failing to offer the patient the opportunity to have chaperone in the examining room during an examination of the pelvic area, genitals, breasts, rectum, or prostate;

2.7.9. If a patient requests a chaperone, failing to provide a chaperone in the examining room during an examination of the pelvic area, genitals, breasts, rectum, or prostate; and

2.7.10. Subjecting a patient to an intimate examination in the presence of a third party, other than a chaperone, without the patient's consent.

2.7.11. Conduct that is sexually demeaning to a patient or which demonstrates a lack of respect for the patient's privacy.

2.8. "Sexual interaction" means conduct between a practitioner and patient or surrogate, whether or not initiated by, consented to, or participated in by the patient or surrogate, that is sexual or may be reasonably interpreted as sexual, including but not limited to, the following:

2.8.1. Any physical contact intended to provide sexual gratification or sexual stimulation to the practitioner or the patient or surrogate;

2.8.2. Kissing in a romantic or sexual manner; and

2.8.3. Offering to provide any health care services, including but not limited to prescribing medication, in exchange for sexual favors.

2.9. "Sexual misconduct" means:

2.9.1. Conduct that exploits the practitioner-patient relationship in a sexual way, whether verbal or physical, and may include the expression of thoughts, feelings or gestures that are sexual or romantic, or that reasonably may be construed as sexual or romantic;

2.9.2. Sexual contact with a patient;

2.9.3. Sexual interaction with a patient or surrogate; and

2.9.4. Sexual impropriety with a patient, surrogate, or another person the practitioner encounters during the course of the practitioner's professional practice.

2.10. "Surrogate" means a key third party closely involved in a patient's medical decision making and care, including but not limited to the patient's spouse or partner, family member, legal representative, proxy, or guardian.

§11-16-3. Sexual Misconduct With A Patient.

3.1. Practitioners are prohibited from engaging in sexual misconduct with a patient.

3.2. Sexual misconduct with a patient constitutes dishonorable, unethical, and unprofessional conduct.

3.3. Sexual misconduct with a patient involving sexual contact or sexual interaction constitutes gross misconduct.

3.4. Patient consent, participation in, or initiation of sexual contact, sexual interaction or sexual impropriety with a practitioner may not be used by the practitioner as defense to charges of practitioner sexual misconduct or as mitigation of professional misconduct.

§11-16-4. Sexual Misconduct With A Surrogate.

4.1. Practitioners are prohibited from engaging in sexual misconduct with a surrogate.

4.2. It is not sexual misconduct for a practitioner to participate in a romantic or sexual relationship with a surrogate if:

4.2.1. The practitioner-patient relationship has terminated;

4.2.2. The surrogate no longer serves as a surrogate for the patient; or

4.2.3. Objective evidence exists for a reasonable practitioner to conclude that a romantic or sexual relationship between the practitioner and surrogate:

4.2.3.a. Would not exploit trust, knowledge, influence, or emotions derived from a practitioner's professional relationship with the surrogate;

4.2.3.b. Would not compromise or have an adverse effect on the patient's care; and

4.2.3.c. The surrogate's decisions and participation in the patient's health care do not directly affect the health and welfare of the patient.

4.3. Sexual misconduct with a surrogate constitutes dishonorable, unethical, and unprofessional conduct.

4.4. Surrogate consent, participation or initiation may not be used by a practitioner as defense to charges of practitioner sexual misconduct or as mitigation of professional misconduct.

§11-16-5. Sexual Misconduct With A Former Patient.

5.1. A romantic or sexual relationship between a practitioner and a former patient after termination of the practitioner-patient relationship constitutes sexual misconduct if:

5.1.1. The relationship is, at least in part, a result of the exploitation of trust, knowledge, emotions or influence derived from the previous professional relationship or if the relationship would otherwise foreseeably harm the former patient;

5.1.2. The relationship occurs within 90 days of the termination of the practitioner-patient relationship; or

5.1.3. The practitioner provided psychiatric or mental health services to the patient and the conduct is in violation of the code of ethics of the American Psychiatric Association as set forth in *American Psychiatric Association's Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry.*

5.2. It is sexual misconduct for a practitioner to engage in sexual contact, sexual interactions, or sexual impropriety with a former patient within 90 days of the termination of the practitioner-patient relationship.

5.3. Sexual misconduct with a former patient as set forth in this section constitutes dishonorable, unethical, and unprofessional conduct.

5.4. Consent, participation, or initiation by a former patient may not be used by a practitioner as defense to charges of practitioner sexual misconduct or as mitigation of professional misconduct.

§11-16-6. Other Practitioner Sexual Misconduct.

6.1. Sexual relationships between practitioners who supervise health care practitioners in training and trainees are unethical and constitute practitioner sexual misconduct. Trainee consent is not a defense to charges of professional misconduct.

6.2. Engaging in sexual impropriety, including sexual harassment, in the practice of a health profession or in a practitioner's work environment is unethical, may disrupt patient care, and constitutes sexual misconduct.

6.3. Sexual misconduct with respect to trainees and other individuals a practitioner encounters during the course of the practitioner's professional practice as set forth in this section constitutes dishonorable, unethical, and unprofessional conduct.

§11-16-7. Exceptions.

7.1. A practitioner's failure to provide for appropriate draping, include chaperones for certain examinations, exclude third parties from examinations absent patient consent, or to wear required personal protective equipment while conducting intimate examinations shall not constitute sexual misconduct if:

7.1.1. The conduct occurred while the practitioner rendered clinically necessary health care services to the patient in an emergency;

7.1.2. The patient's clinical condition required immediate action; and

7.1.3. The patient was unconscious or otherwise unable to provide consent for the healthcare services and the practitioner's conduct confirmed to the standard of care for the patient presentation in an emergency setting.

§11-16-8. Disciplinary Action.

8.1. Practitioners who engage in sexual misconduct or other violations of the professional conduct standards set forth in this rule shall be subject to license or other credential denial proceedings or disciplinary action pursuant to the processes, standards and penalties set forth in the West Virginia Medical Practice Act, W. Va. Code § 30-3-1 *et seq*., the West Virginia Physician Assistants Practice Act, W. Va. Code § 30-3E-1 *et seq*., and W. Va. Code R. § 11-1A-12.