

PROPOSED RULEMAKING

STATE BOARD OF PSYCHOLOGY

[49 PA. CODE CH. 41]

Sexual Intimacies

The State Board of Psychology (Board) proposes to amend § 41.1 (relating to definitions) and to adopt §§ 41.81—41.85 (relating to sexual intimacies) to read as set forth in Annex A.

Background

Under Ethical Principle 6(b) of the Code of Ethics for psychologists practicing in this Commonwealth, § 41.61, psychologists are advised that “[s]exual intimacies with clients are unethical.” Despite this clear pronouncement, complaints are filed against psychologists every year by consumers who suffer emotional harm by psychologists who violate this Ethical Principle.

In the past, psychologists have attempted to defend against prosecutions brought under Ethical Principle 6(b) by arguing that: (1) the psychologist/client relationship had terminated prior to the commencement of any sexual relationship; (2) the psychologist had ceased billing the client/patient throughout the duration of the sexual relationship; (3) the client/patient had initiated the relationship; and (4) the psychologist did not engage in “sexual intercourse” with the client/patient during the therapeutic relationship. The latter argument assumed that “sexual intimacies” within the meaning of Ethical Principle 6(b) was limited to “sexual intercourse.”

The proposed amendments seek to better protect consumers of psychological services and to provide guidance to the profession by defining the terms “client/patient,” “professional relationship,” “psychologist” and “sexual intimacies,” and by providing specific guidance to psychologists on issues relating to: (1) sexual intimacies with current client/patients, immediate family members of current client/patients, students, supervisees or research participants; (2) sexual intimacies with former client/patients or an immediate family member of a former client/patient; and (3) former sexual partners as client/patients. The proposed amendments also seek to put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary proceeding brought under §§ 41.81—41.83, and that a psychologist who engages in conduct prohibited by the proposed amendments will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective action.

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 extended an invitation to the following associations to participate in preliminary discussions relative to the proposed amendments: Delaware County Association of School Psychologists, Laurel Mountains Psychological Association, Hospital Association of Pennsylvania, Pennsylvania Psychological Association, Pennsylvania Mental Health Consumers Association, Association of School Psychologists of Pennsylvania, National Association of School Psychologists, Academy of Psychologists Engaged in Private Prac-

tice in the Lehigh Valley, Berks Area Psychological Society, Central Pennsylvania Psychological Association, Greater Pittsburgh Psychological Association, Harrisburg Area Psychological Association, Lancaster/Lebanon Psychological Association, Lehigh Valley Psychological Association, Mideast PA School Psychological Association, Northeastern PA Psychological Association, Northwestern PA Psychological Association, Philadelphia Society of Clinical Psychologists and the Philadelphia Neuropsychology Society.

These same associations were subsequently extended an opportunity to preliminarily review and comment on the Board’s draft regulatory proposal. In addition, a copy of the Board’s draft regulatory proposal was made available for comment to at least 450 attendees of the June 1997 Pennsylvania Psychological Association’s Annual meeting in Harrisburg.

In formulating this proposal, the Board reviewed and considered all comments and suggestions received by interested parties during the regulatory development process.

Description of Proposed Amendments

§ 41.1 (relating to definitions).

Definitions are proposed to be added to § 41.1 for the terms “client/patient,” “professional relationship,” “psychologist” and “sexual intimacies.” As proposed, the term “client/patient” would be defined to mean: A person, system, organization, group or family for whom a psychologist provides psychological services. In the case of individuals with legal guardians, including minors and legally incapacitated adults, the legal guardian shall be the client/patient for issues specifically reserved to the individual, such as confidential communications in a therapeutic relationship and issues directly affecting the physical or emotional safety of the individual, such as sexual or other exploitive dual relationships.

The term “professional relationship” would be defined to mean: A therapeutic relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a psychologist and a client/patient and continuing thereafter until the last date of a professional service. If a psychologist sees a client/patient on an intermittent basis, the professional relationship shall be deemed to start anew on each date that the psychologist provides a professional service to the client/patient. Reference to “professional relationship” is found in proposed § 41.83 (relating to sexual intimacies with former client/patients or an immediate family member of a former client/patient). The definition is intended to provide guidance to psychologists on the issue of when a client/patient relationship terminates, if ever. As proposed, if a psychologist sees a client/patient on an intermittent basis, the professional relationship would be deemed to start anew on each date that the psychologist provides a professional service to the client/patient.

The proposal would define “psychologist” to mean a person who holds a license issued under the act to engage in the practice of psychology. Although the Professional Psychologists Practice Act (act) (63 P. S. §§ 1201.1—1218) empowers the Board to license and regulate psychologists, the term “psychologist” is not defined by the act.

Finally, the term “sexual intimacies” would be defined to include any romantic, sexually suggestive, sexually

demeaning or erotic behavior. Examples of this behavior includes but is not limited to, sexual intercourse, nontherapeutic verbal communications, inappropriate nonverbal communications, sexual invitations, soliciting a date from a client/patient, masturbating in the presence of a client/patient (or encouraging a client/patient to masturbate in the presence of the psychologist), exposure, kissing, inappropriate hugging or touching or any other inappropriate physical contact or inappropriate self-disclosure. The definition is intended to emphasize that "sexual intimacies" within the context of Ethical Principle 6(b) includes not only sexual intercourse but, also, any other type of inappropriate sexualized behavior or nontherapeutic touch.

§ 41.81 (relating to prohibited conduct).

Proposed § 41.81(a) addresses the issue of sexual intimacies between a psychologist and a current client/patient or an immediate family member of a current client/patient, such as, parent/guardian, child or spouse. Subsection (b) addresses sexual intimacies between psychologists and persons over whom they have current supervisory, evaluative or other authority.

As proposed, subsection (a) would outright prohibit an intimate relationship between a psychologist and a current client/patient or an immediate family member of a current client/patient. The sole goal of the therapeutic alliance is to help the patient. During the therapeutic relationship, trust, openness and empathy are promoted, dependency often develops and confidences are fostered. For sexual intimacies to intrude upon this relationship, distorts therapy, creates unrealistic expectations and shame in the patient, and exploits the patient's trust and dependency. Proposed subsection (a) seeks to reinforce the prohibition against sexual intimacies with clients announced in Ethical Principle 6(b), and to extend the prohibition to immediate family members of a current client/patient.

Ethical Principle 6(b) of the Code of Ethics, also directs psychologists to avoid relationships which might impair their professional judgment or increase the risk of exploitation. Consistent with this directive, proposed subsection (b) would prohibit sexual intimacies between psychologists and persons over whom they have current supervisory, evaluative or other authority. These persons would include students, supervisees or research participants.

§ 41.82 (relating to former sexual partners as client/patients).

Proposed § 41.82 addresses the issue of former sexual partners as client/patients. For reasons similar to those which support the outright ban of sexual intimacies with current client/patients, the proposal would prohibit psychologists from accepting as client/patients persons with whom they have engaged in sexual intimacies. This prohibition is consistent with a new provision added to the 1992 Ethics Code of the American Psychological Association.

§ 41.83 (relating to sexual intimacies with former client/patients or an immediate family member of a former client/patient).

Proposed § 41.83 addresses the issue of sexual intimacies with a former client/patient or an immediate family member of a former client/patient.

As proposed, subsection (a) would establish an absolute prohibition against this conduct for a period of at least 2 years following the termination of the professional relationship. The phrase "termination of the professional

relationship" is key. If a psychologist sees a patient on only a periodic basis, the 2 year period would not begin to run until the last date of professional service. Any professional contact or service thereafter, for example, telephone contacts, brief consults or providing psychological reports about the client/patient, would restart the 2-year period.

Proposed subsection (b) addresses behavior after 2 years. As proposed, following the passage of the 2-year period, psychologists who engage in sexual intimacies with former client/patients or immediate family members of former client/patients will have the burden of demonstrating that there has been no exploitation of the client/patient in light of all relevant factors including: (1) the amount of time that has passed since the professional relationship terminated; (2) the nature and duration of the therapy; (3) the circumstances of termination; (4) the client/patient's personal history, such as, unique vulnerabilities; (5) the client/patient's current mental status; (6) any statements or actions made by the psychologist during the course of therapy suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client/patient; and (7) the likelihood of adverse impact on the client/patient and others.

The intent of subsection (b) is not to suggest that sexual intimacies between a psychologist and a former client/patient or immediate family member of a former client/patient are always acceptable after 2 years. On the contrary, the proposal is a very restrictive rule which contemplates that sexual involvement after 2 years would occur only under very limited circumstances. After 2 years, the onus would be on the psychologist who engages in the activity to demonstrate that there has been no exploitation of the client/patient in light of all relevant factors, including the seven enumerated factors in subsection (b).

The proposal outlined in § 41.83 is consistent with the Ethics Code of the American Psychological Association.

§ 41.84 (relating to disciplinary proceedings).

Proposed § 41.84 would address procedural issues in disciplinary proceedings before the Board.

As proposed, the section would be divided into three subsections, (a)—(c). Proposed subsection (a) would put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in a disciplinary action brought under §§ 41.81—41.83. Courts have traditionally rejected these arguments on two grounds: (1) that consent in these instances cannot be voluntary or informed because it is affected by the powerful transference created by therapy; and (2) that as a matter of public policy, a patient cannot consent to unprofessional forms of treatment. Stromberg, Clifford D. and his colleagues of the law firm of Hogan & Hartson, "Physical Contact and Sexual Relations with Patients," *The Psychologist's Legal Handbook*, Chapter 8, § 8.07 (1988).

Proposed subsection (b) would similarly put psychologists on notice that, with the exception of information contained in a professional record, neither opinion evidence, reputation evidence nor specific instances of the past sexual conduct of an individual may be admissible in any disciplinary action brought under §§ 41.81—41.83. With one exception, this provision, as proposed, is consistent with the Pennsylvania's Rape Shield Law, 18 Pa.C.S.

§ 3104 (relating to evidence of victim's sexual conduct). The Rape Shield Law allows evidence of an alleged victim's past sexual conduct with the defendant when the consent of the victim is at issue. Proposed § 41.82 would prohibit a psychologist from accepting as a client/patient a person with whom he has engaged in sexual intimacies. Proposed § 41.84 would bar consent as a defense in any proceeding before the Board. Thus, the Rape Shield Law exception would not be germane to Board disciplinary proceedings.

Proposed subsection (c) would put psychologists on notice that in a disciplinary proceeding brought under §§ 41.81—41.83, the psychologist has the burden of proving that there has been no exploitation of the client/patient in light of all of the relevant factors enumerated under § 41.83(b)(1)—(7).

§ 41.85 (relating to impaired professional program).

Under section 18(b) of the act (63 P. S. § 1218(b)), the Board is empowered to defer and ultimately dismiss any types of corrective action that the Board may otherwise impose against a psychologist who violates the act or regulations of the Board, for an impaired professional. Proposed § 41.85 would put psychologists on notice that they would be ineligible for placement into an impaired professional program in lieu of disciplinary or corrective action for engaging in conduct prohibited by proposed §§ 41.81—41.83.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 10, 1998, the Board submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Professional Licensure and the Senate Committee on Consumer Protection and Professional Licensure. 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 Committee's 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.

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.

Statutory Authority

The amendments are proposed under the authority of section 3.2(2) of the act (63 P. S. § 1203.2(2)).

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to Jackie Wiest Lutz, Counsel, State Board

of Psychology, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking.

YVONNE E. KEAIRNS, Ph.D.,
Chairperson

Fiscal Note: 16A-633. 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 41. STATE BOARD OF PSYCHOLOGY
GENERAL**

§ 41.1. Definitions.

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

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[Client] Client/patient—A person, system, organization, group or family for whom a psychologist provides psychological services. **In the case of individuals with legal guardians, including minors and legally incapacitated adults, the legal guardian shall be the client/patient for decision making purposes. The minor, legally incapacitated adult or other person actually receiving the service shall be the client/patient for issues specifically reserved to the individual, such as confidential communications in a therapeutic relationship and issues directly affecting the physical or emotional safety of the individual, such as sexual or other exploitive dual relationships.**

* * * * *

Professional relationship—A therapeutic relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a psychologist and a client/patient and continuing thereafter until the last date of a professional service. **If a psychologist sees a client/patient on an intermittent basis, the professional relationship shall be deemed to start anew on each date that the psychologist provides a professional service to the client/patient.**

* * * * *

Psychologist—A person who holds a license issued under the act to engage in the practice of psychology.

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Sexual intimacies—Any romantic, sexually suggestive, sexually demeaning or erotic behavior. **Examples of this behavior include, but are not limited to, sexual intercourse, nontherapeutic verbal communications, inappropriate nonverbal communications, sexual invitations, soliciting a date from a client/patient, masturbating in the presence of a client/patient (or encouraging a client/patient to masturbate in the presence of the psychologist), exposure, kissing, inappropriate hugging or touching or any other inappropriate physical contact or inappropriate self disclosure.**

SEXUAL INTIMACIES

§ 41.81. Prohibited conduct.

(a) Sexual intimacies between a psychologist and a current client/patient or an immediate family member of a current client/patient (for example, parent/guardian, child and spouse) are prohibited.

(b) Sexual intimacies with persons over whom psychologists have current supervisory, evaluative or other authority are prohibited. These persons include students, supervisees or research participants.

§ 41.82. Former sexual partners as client/patients.

Psychologists may not accept as client/patients persons with whom they have engaged in sexual intimacies.

§ 41.83. Sexual intimacies with former client/patients or an immediate family member of a former client/patient.

(a) Sexual intimacies between a psychologist and a former client/patient or an immediate family member of a former client/patient are prohibited for at least 2 years following the termination of the professional relationship, and then only under very limited circumstances.

(b) Following the passage of the 2-year period, psychologists who engage in sexual intimacies with former client/patients or immediate family members of former client/patients shall have the burden of demonstrating that there has been no exploitation of the client/patient in light of all relevant factors, including:

- (1) The amount of time that has passed since the professional relationship terminated.
- (2) The nature and duration of the therapy.
- (3) The circumstances of termination.
- (4) The client/patient's personal history (for example, unique vulnerabilities).
- (5) The client/patient's current mental status.

(6) Statements or actions made by the psychologist during the course of therapy suggesting or inviting the possibility of a posttermination sexual or romantic relationship with the client/patient.

(7) The likelihood of adverse impact on the client/patient and others.

§ 41.84. Disciplinary proceedings.

(a) The consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary action brought under §§ 41.81—41.83 (relating to prohibited conduct; former sexual partners as client/patients; and sexual intimacies with former client/patients or an immediate family member of a former client/patient).

(b) With the exception of information contained in a professional record, neither opinion evidence, reputation evidence nor specific instances of the past sexual conduct of an individual may be admissible in any disciplinary action brought under §§ 41.81—41.83.

(c) In a disciplinary proceeding brought under §§ 41.81—41.83, the psychologist shall have the burden of proving that there has been no exploitation of the client/patient in light of all of the relevant factors enumerated under § 41.83(b)(1)—(7).

§ 41.85. Impaired professional program.

When the Board takes disciplinary or corrective action against a psychologist under section 8(a) of the act (63 P. S. § 1208(a)) for conduct prohibited by §§ 41.81—41.83 (relating to prohibited conduct; former sexual partners as client/patients; and sexual intimacies with former client/patients or an immediate family member of a former client/patient), the psychologist will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

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