

PROPOSED REGULATION PUBLICATION FORMS
Title 10

MARYLAND DEPARTMENT OF HEALTH

Subtitle 32 BOARD OF PHYSICIANS

10.32.17 Sexual Misconduct

Authority: Health Occupations Article, §1-212, Annotated Code of Maryland

Is There Emergency Text That Is Identical To The Proposed Text:

Yes No

Is There An Incorporation By Reference Document Associated With This Proposal?

Yes No

Does This Proposal Have An Impact On Environmental Hazards Affecting The Health Of Children As Defined In Health-General Article, §13-1501(c)?

Yes (explain) No

Does This Proposal Include An Increase Or Decrease In A Fee For A License?

Yes, complete (1)—(8) No, skip (1)—(8) and proceed to Notice of Proposed Action.

- (1) Explain/justify why an increase or decrease is necessary:
- (2) How much money is needed to operate effectively or to eliminate an operating fund deficit?
- (3) In what year was the most recent fee increase?
- (4) Is the fee revenue retained by the Proposing Unit or passed through to a national organization that administers a uniform licensing exam?
- (5) Describe any measures taken to mitigate the need for increased revenue:
- (6) Describe any special circumstances that have had an adverse impact on the Proposing Unit's operating expenses.
- (7) Describe any consideration given by the Proposing Unit as to the hardship a fee increase may have on the regulated profession.

- (8) Describe any efforts to solicit the opinions of licensees regarding the Proposing Unit's effectiveness and performance.

Notice of Proposed Action

The Secretary of Health proposes to amend Regulations **.01**, **.02**, and **.03** under **COMAR 10.32.17 Sexual Misconduct**.

This action was considered at a public meeting on August 22, 2018, notice of which was given by publication on the Maryland Board of Physicians' Website at <https://www.mbp.state.md.us/forms/Aug18Bagenda.pdf> from August 7, 2018 through August 22, 2018, pursuant to General Provisions Article, §3-302(c), Annotated Code of Maryland.

Statement of Purpose

The purpose of this proposal is to:

- (1) Revise the scope under COMAR 10.32.17.01;
- (2) Add or delete certain definitions under COMAR 10.32.17.02;
- (3) Move language from certain deleted definitions to COMAR 10.32.17.03; and
- (4) Update COMAR 10.32.17.03 to, among other things:
 - (a) State that sexual misconduct includes, but is not limited to, sexual harassment of a "patient, key third party, employee, student, or co-worker," regardless of whether the sexual harassment occurs inside or outside of a professional setting; and
 - (b) Include factors to consider in determining whether a sexual or romantic relationship with a key third party or former patient is prohibited.

Comparison to Federal Standards

(Check one option)

There is no corresponding federal standard to this proposed action.

or

There is a corresponding federal standard to this proposed action, but the proposed action **is not** more restrictive or stringent.

The corresponding federal standard is: _____

EXPLAIN why the proposed action **is not** more restrictive or stringent than the corresponding federal standard:

or

In compliance with Executive Order 01.01.1996.03, this proposed action **is** more restrictive or stringent than corresponding federal standards as follows:

- (1) Regulation citation and manner in which it is more restrictive than the applicable federal standard:

- (2) Benefit to the public health, safety or welfare, or the environment:
- (3) Analysis of additional burden or cost on the regulated person:
- (4) Justification for the need for more restrictive standards:

Impact Statements
Part A
(check one option)

Estimate of Economic Impact

- The proposed action has no economic impact.
Or
 The proposed action has an economic impact. (IF this is checked, complete the following form in its entirety)

I. Summary of Economic Impact. (INSERT SHORT SUMMARY)

	Revenue (R+/R-)	
Types of Economic Impact.	<u>Expenditure (E+/E-)</u>	<u>Magnitude</u>
A. On issuing agency:		
B. On other State agencies:		
C. On local governments:		
	Benefit (+)	
	<u>Cost (-)</u>	<u>Magnitude</u>
D. On regulated industries or trade groups:		
E. On other industries or trade groups:		
F. Direct and indirect effects on public:		

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

Part B
Economic Impact on Small Businesses
(check one option)

- The proposed action has minimal or no economic impact on small businesses.
or
 The proposed action has a meaningful economic impact on small businesses. An analysis of this economic impact follows.

Impact on Individuals with Disabilities

(check one option)

The proposed action has no impact on individuals with disabilities.

or

The proposed action has an impact on individuals with disabilities as follows:
(Agency to complete this assessment)

Opportunity for Public Comment

Comments may be sent to Sandi Van Horn, Communication, Education and Policy Unit, Maryland Board of Physicians, 4201 Patterson Avenue, Baltimore, MD 21215, or call 410-767-4777, or email to sandi.vanhorn@maryland.gov, or fax to 410-358-1298. Comments will be accepted through September 20, 2018. A public hearing has not been scheduled.

Part C

(For legislative use only; not for publication)

- A. Fiscal Year in which regulations will become effective: FY19
- B. Does the budget for fiscal year in which regulations become effective contain funds to implement the regulations?
 Yes No N/A
- C. If “yes”, state whether general, special (exact name), or federal funds will be used:
- D. If “no”, identify the source(s) of funds necessary for implementation of these regulations:
- E. If these regulations have no economic impact under Part A, indicate reason briefly:
The proposed changes to the existing regulations only concern the conduct of licensees of the Maryland Board of Physicians.
- F. If these regulations have minimal or no economic impact on small businesses under Part B, indicate the reason.
The proposed amended regulations have no requirements to be met by small businesses.

10.32.17.01 (September 4, 2018)

.01 Scope.

This chapter prohibits sexual misconduct [against patients or key third parties] by [individuals licensed or certified under Health Occupations Article, Titles 14 and 15, Annotated Code of Maryland.] *health care practitioners.*

10.32.17.02 (September 4, 2018)

.02 Definitions.

A. (text unchanged)

B. Terms Defined.

(1) *"Health care practitioner" means an individual licensed under Health Occupations Article, Titles 14 and 15, Annotated Code of Maryland.*

[(1)] (2) Key Third Party.

(a) "Key third party" means an individual who participates in the health and welfare of the patient concurrent with the physician-patient relationship.

(b) "Key third party" includes, but is not limited to the following individuals:

(i)—(ii) (text unchanged)

(iii) [Parent] *Family member*;

(iv)—(vi) (text unchanged)

[(2) Sexual Impropriety.

(a) "Sexual impropriety" means behavior, gestures, or expressions that are seductive, sexually suggestive, or sexually demeaning to a patient or a key third party regardless of whether the sexual impropriety occurs inside or outside of a professional setting.

(b) "Sexual impropriety" includes, but is not limited to:

(i) Failure to provide privacy for disrobing;

(ii) Performing a pelvic or rectal examination without the use of gloves;

(iii) Using the health care practitioner-patient relationship to initiate or solicit a dating, romantic, or sexual relationship; and

(iv) Initiation by the health care practitioner of conversation regarding the health care practitioner's sexual problems, sexual likes or dislikes, or fantasies.

(3) "Sexual misconduct" means a health care practitioner's behavior toward a patient, former patient, or key third party, which includes:

(a) Sexual impropriety;

(b) Sexual violation; or

(c) Engaging in a dating, romantic, or sexual relationship which violates the code of ethics of the American Medical Association, American Osteopathic Association, American Psychiatric Association, or other standard recognized professional code of ethics of the health care practitioner's discipline or specialty.

(4) Sexual Violation.

(a) "Sexual violation" means health care practitioner-patient or key third party sex, whether or not initiated by the patient or key third party, and engaging in any conduct with a patient or key third party that is sexual or may be reasonably interpreted as sexual, regardless of whether the sexual violation occurs inside or outside of a professional setting.

(b) "Sexual violation" includes, but is not limited to:

(i) Sexual intercourse, genital to genital contact;

(ii) Oral to genital contact;

(iii) Oral to anal contact or genital to anal contact;

(iv) Kissing in a romantic or sexual manner;

(v) Touching the patient's breasts, genitals, or any sexualized body part;

(vi) Actively causing the patient or key third party to touch the health care practitioner's breasts, genitals, or any sexualized body part;

- (vii) Encouraging the patient to masturbate in the presence of the health care practitioner or masturbation by the health care practitioner while the patient is present;
- (viii) Offering to provide practice-related services, such as drugs, in exchange for sexual favors;
- and
- (ix) Intentionally exposing the health care practitioner's breasts, genitals, or any sexualized body part.]

(3) Sexual Contact.

(a) "Sexual contact" means the knowing touching directly or through clothing, where the circumstances surrounding the touching would be construed by a reasonable person to be motivated by the health care practitioner's own prurient interest or for sexual arousal or gratification.

(b) "Sexual contact" includes, but is not limited to:

(i) Sexual intercourse, genital to genital contact;

(ii) Oral to genital contact;

(iii) Oral to anal contact or genital to anal contact;

(iv) Kissing in a romantic or sexual manner; or

(v) Nonclinical touching of breasts, genitals, or any other sexualized body part.

(4) "Sexual harassment" means an unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct of a sexual nature.

10.32.17.03 (September 4, 2018)

.03 Sexual Misconduct.

A. [Individuals licensed or certified under Health Occupations Article, Titles 14 and 15, Annotated Code of Maryland,] *Health care practitioners* may not engage in sexual misconduct.

B. Health Occupations Article, §§14-404(a)(3), 14-5A-17(a)(3), 14-5B-14(a)(3), 14-5C-17(a)(3), 14-5D-14(a)(3), 14-5E-16(a)(3), 14-5F-18(a)(19), and [15-314(3),] 15-314(a)(3), Annotated Code of Maryland, includes, but is not limited to, sexual misconduct.

C. Sexual misconduct includes, but is not limited to:

(1) Engaging in sexual harassment of a patient, key third party, employee, student, or co-worker regardless of whether the sexual harassment occurs inside or outside of a professional setting;

(2) Failing to provide privacy for disrobing;

(3) Performing a pelvic or rectal examination without the use of gloves;

(4) Discussing the health care practitioner's sexual problems, sexual likes or dislikes, or fantasies;

(5) Using the health care practitioner-patient relationship to initiate or solicit a dating, romantic, or sexual relationship;

(6) Engaging in a dating, romantic, or sexual relationship which violates §D of this regulation or the code of ethics of the American Medical Association, American Osteopathic Association, American Psychiatric Association, or other professional code of ethics;

(7) Participating in any form of sexual contact with a patient or key third party;

(8) Having non-consensual sexual contact with a co-worker or employee;

(9) Causing a patient or key third party to touch the health care practitioner's breasts, genitals, or any sexualized body part;

(10) Encouraging a patient or key third party to masturbate in the presence of the health care practitioner or masturbation by the health care practitioner while a patient or key third party is present;

(11) Offering to provide practice-related services in exchange for sexual favors; and

(12) Exposing the health care practitioner's breasts, genitals, or any sexualized body part.

D. Sexual or Romantic Relationships. A health care practitioner may not engage in sexual behavior with:

(1) A current patient;

(2) A key third party if the key third party's decisions directly affect the health and welfare of the patient or if the relationship could otherwise compromise the patient's care based on the following considerations, which include, but are not limited to:

(a) The nature of the patient's medical problem and the likely effect on patient care;

(b) The length of the professional relationship;

(c) The degree of emotional dependence on the health care practitioner;

(d) The importance of the clinical encounter to the key third party and the patient; and

(e) Whether the health care practitioner-patient relationship can be terminated in keeping with ethics guidance and what implications doing so would have for the patient; and

(3) A former patient upon consideration of the following factors:

(a) Duration of the health care practitioner-patient relationship;

(b) Nature of the health care services provided;

(c) Lapse of time since the health care practitioner-patient relationship ended;

(d) Extent to which the former patient confided personal or private information to the health care practitioner;

(e) Degree of emotional dependence that the former patient has or had on the health care practitioner;

(f) Extent to which the health care practitioner used or exploited the trust, knowledge, emotions, or influence derived from the previous health care practitioner-patient relationship; and

(g) Whether the health care practitioner-patient relationship was terminated in order to enter into a romantic or sexual relationship.

ROBERT R. NEALL

Secretary of Health

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