

Significant Legislative Rule Analysis
WAC 246-840-740
Sexual Misconduct Prohibited
6/9/2014

Proposing amendments to sexual misconduct standards for practitioners
licensed by the Nursing Care Quality Assurance
Commission.

Describe the proposed rule, including a brief history of the issue, and explain why the proposed rule is needed.

This proposed rule amends the existing sexual misconduct rule for nurses and nursing technicians. The Nursing Care Quality Assurance Commission (commission) determined a need to increase patient protection by updating the existing rule. The existing rule was written in 1999 in the “question and answer” format that was in use at that time but has since been discontinued. The rule is being rewritten in the current format and more clearly defines acts that constitute a sexual misconduct violation.

As a guideline for updating the existing rule, the commission reviewed the Department of Health’s (department) general sexual misconduct rule (WAC 246-16-100) and the Medical Quality Assurance Commission’s sexual misconduct rule (WAC 246-919-630), both adopted in 2006. The proposed rule is largely consistent with both of these existing rules’ format and intent. The commission worked with the public by hosting rules writing workshops in four different locations across Washington to gather input prior to drafting the rule. Draft rule language was sent to an interested parties list generated from the workshops and to the nursing listserv, which includes approximately 17,000 subscribers.

The commission proposes this amendment to increase public protection and create a better understanding of sexual misconduct violations. The draft rule lists specific actions that are prohibited and boundaries for conduct toward other individuals. It will provide clarity in determining if there has been a violation and aid in disciplining violators. More specifically identifying violations will assist in future investigations of alleged sexual misconduct.

The amendments achieve the authorizing statute’s goals and objectives because they provide specific sexual misconduct prohibitions for nurses and nursing technicians. The amendments also create a clearer basis for investigating and taking disciplinary action in sexual misconduct cases. These amendments will help prevent sexual misconduct by nurses and nursing technicians and improve protection for the public.

The commission determined there are no alternatives to rulemaking, because the existing rule does not sufficiently define prohibited acts. If this rule is not adopted, nurses and nurse

technicians will not have a clear threshold for sexual misconduct. The current rule is not specific enough to allow for disciplinary action related to many sexual misconduct allegations.

Is a Significant Analysis required for this rule?

Yes

Clearly state in detail the general goals and specific objectives of the statute that the rule implements.

RCW 18.130.050 and 18.130.180 are intended to provide a safe environment for clients of healthcare providers. These statutes allow the commission to enact rules for the healthcare providers it regulates.

The rule implements the following objectives of the statute:

1. Prohibiting sexual misconduct by nurses and nursing technicians regulated by the commission.
2. Protecting the public from sexual misconduct by defining specific violations of RCW 18.130.180(24) in rule.

Explain how the department determined that the rule is needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rule.

There is an existing rule on this subject, which both the commission and prosecutors have determined to be insufficient. The alternative to rulemaking is to leave the current rule in place. If the current rule is not amended, parameters for behavior will be less clear, and it will be more difficult to determine if someone engaged in acts that constitute sexual misconduct and appropriately discipline violators.

Explain how the department determined that the probable benefits of the rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

The proposed rule amendments include one rule, WAC 246-840-740. This rule clearly defines the actions that constitute sexual misconduct for nurses and nursing technicians. The amendment provides the commission or department, as applicable, with a greater ability to discipline sexual misconduct violators.

Non-Significant Rule Identification

This entire package is significant.

Significant Rule Analysis

The amendments clearly outline what behavior or actions constitute sexual misconduct, not only for the benefit of those licensed as nurses or nursing technicians, but also for healthcare consumers. They also provide the commission or department, as applicable, with a greater ability to prosecute violations of the sexual misconduct rule. Specific sexual misconduct actions include:

- Sexual intercourse;
- Touching the breasts, genitals, anus or any sexualized body part except as consistent with accepted community standards of practice for examination, diagnosis and treatment;
- Rubbing against a patient or client or key party for sexual gratification;
- Kissing;
- Hugging, touching, fondling or caressing of a romantic or sexual nature;
- Examination of or touching genitals without using gloves;
- Not allowing a patient or client privacy to dress or undress except as may be necessary in emergencies or custodial situations;
- Not providing the patient or client a gown or draping without consent, emergent medical necessity or being in a custodial setting;
- Dressing or undressing in the presence of the patient, client or key party;
- Removing patient or client's clothing or gown or draping without consent, emergent medical necessity or being in a custodial setting;
- Encouraging masturbation or other sex act in the presence of the health care provider;
- Masturbation or other sex act by the health care provider in the presence of the patient, client or key party;
- Suggesting or discussing the possibility of a dating, sexual or romantic relationship after the professional relationship ends;
- Terminating a professional relationship for the purpose of dating or pursuing a romantic or sexual relationship;
- Soliciting a date with a patient, client or key party;
- Discussing the sexual history, preferences or fantasies of the health care provider;
- Any behavior, gestures, or expressions that may reasonably be interpreted as seductive or sexual;
- Making statements regarding the patient, client or key party's body, appearance, sexual history, or sexual orientation other than for legitimate health care purposes;
- Sexually demeaning behavior including any verbal or physical contact which may reasonably be interpreted as demeaning, humiliating, embarrassing, threatening or harming a patient, client or key party;
- Photographing or filming the body or any body part or pose of a patient, client, or key party, other than for legitimate health care purposes; or
- Showing a patient, client or key party sexually explicit photographs, other than for legitimate health care purposes.

Nurses and nursing technicians may not:

- Offer to provide health care services in exchange for sexual favors;
- Use health care information to contact a patient, client or key party for the purpose of engaging in sexual misconduct; or
- Use health care information or access to health care information to meet or attempt to meet his or her sexual needs.

The amendments include a definition of “key party” and specify a time period of two years after a patient leaves a provider’s care during which the actions listed above are considered violations.

Rule Cost/Benefit Analysis

This is a preventative rule only; there is no cost to nurses or nursing technicians to comply. Clearer limits for nurses and nurse technicians about these prohibitions increases awareness, removes potential interpretation of violations and thereby decreases the chances of sexual misconduct occurring. At the same time, there could be an increase in investigations and disciplinary actions as healthcare consumers become more aware of the limits. If there is a violation, the commission or department, as appropriate, has a greater ability to determine if a nurse or nurse technician has engaged in an act that constitute sexual misconduct and discipline accordingly. This better protects patients in Washington State.

Benefit:

- Increased protection for patients of nurses and nurse technicians.
- Increased understanding of conduct that is considered a violation.
- Increased awareness for nurses and nurse technicians on how to avoid disciplinary actions.
- Increased ability of the commission or department, as appropriate, to charge nurses and nursing technicians with violations.

Cost:

- None.

Rule Package Cost-Benefit Conclusion

The amendments provide more specific definitions of sexual misconduct violations for nurses and nursing technicians. Increased specificity helps nurses and nursing technicians avoid disciplinary actions and reduces the need for investigations. A better definition of violations enables appropriate discipline when sexual misconduct has occurred. There are no compliance costs to practitioners associated with the amendment. After consideration of the proposed rule, the commission has determined the probable benefits outweigh the probable costs.

Identify alternative versions of the rule that were considered, and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives state previously.

Descriptions of alternatives considered

The commission considered making no change to the current rule. This alternative was rejected because the current rule is not as clearly defined as the secretary or medical commission rules and inadequately protects the public.

Least burdensome determination

The commission determined the proposed rule amendments are the least burdensome option and provide the public with the most protection.

Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

The rule does not require those to whom it applies to take an action that violates requirements of federal or state law.

Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The commission determined that the rule does not impose more stringent performance requirements on private entities than on public entities.

Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary.

The rule does not differ from any applicable federal regulation or statute.

Demonstrate that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

There are no other applicable laws.