MEMORANDUM

To: Sandra Anderson, Liz Barnard
From: Colleen Platt
Date: February 21, 2023
Re: Washington State Definition of Sexual Misconduct

You have asked me to compare the definition of "sexual activity" in Washington State to the definition of "sexual activity" found in NAC 640C.400. This memo compares the two definitions.

Washington does not have a definition of "sexual activity" in its statutes or regulations, however, within the regulatory chapter governing the Washington Department of Health where you will find regulations governing the professional standards and licensing (Washington Administrative Code Title 246-800 to 246-945, inclusive), there is a section titled "Standards of Professional Conduct" (WAC 246-16) which applies to all health care providers, of which massage therapists are included in such definition (WAC 246-16-020). Within that section of regulations (WAC 246-16-010 to 246-16-890) there is a definition of "sexual misconduct." (WAC 246-16-100) (attached hereto). Of note is that WAC 246-16-100 applies to all health care providers, including, physicians, nurses, and pharmacists, so the language of the regulation is worded to include those types of providers and the services they provide.

In reviewing the definition of "sexual misconduct" found at WAC 246-16-100 it is clear that Nevada likely mirrored its definition of "sexual activity" after the Washington definition. In the definition, there are 21 acts which are identified that constitute "sexual misconduct." Of those 21 acts, 19 are found within the Board's definition of "sexual activity." The two acts that are not included in the Board's definition are: (1) "examination of or touching genitals without using gloves;" and (2) "soliciting a date with a patient, client, or key party."

Even with the similarities, there are also differences. While Washington's definition includes: "touching the breasts, genitals, anus or any sexualized body part except as consistent with accepted community standards of practice for examination, diagnosis and treatment and within the health care practitioner's scope of practice." The Board's corresponding act is as follows: "examining or touching the genitals, anus or any sexualized body part except as otherwise provided in subsection 4 of NRS 640C.700." Here, the Board's definition excludes the term "breast." It also excludes the additional language regarding the community standards for examination, diagnosis and treatment; likely because the provision applies to physicians and other similar providers. In addition, WAC 246-16-100 includes the terms "patient, client, and **key party**." Again, this is likely because of the wide array of providers that the provision applies to. "Key party" is defined as the "immediate family members and others who would be reasonably expected to play a significant role in the health care decisions of the patient or client and includes, but is not limited to, the spouse, domestic partner, sibling, parent, child, guardian and person authorized to make health care decisions of the patient or client."

In addition, WAC 246-16-100 has the following additional provisions:

1. "Sexual misconduct" includes "sexual contact with any person involving force, intimidation, or lack of consent; or a conviction of a sex offense . . ."
2. Prohibition on health care providers from "offering to exchange health care services for sexual favors or to use the health care information to contact the patients, client, or key party for the purposes of engaging in sexual misconduct."
3. Prohibition on the use of "health care information to meet or attempt to meet the health care providers' sexual needs."

4. Prohibiting the health care provider from engaging in the earlier mentioned 21 acts for a period of two years after the provider-client relationship ends.
5. Prohibiting the health care provider from engaging in the earlier mentioned 21 acts after the 2-year period if there is a "significant likelihood that the patient, client or key party will seek or require additional services" or if there "is an imbalance of power, influence, opportunity, and/or special knowledge of the professional relationship."
6. Setting forth factors that are reviewed when determining whether a health care provider is prohibited from engaging in the earlier mentioned 21 acts.

You have also asked whether the Board should make any changes to its regulation NAC 640C.400. The decision to make changes to the regulation is a policy decision for the Board to make, however, the following is an analysis of the possible areas of change that the Board may consider.

1. Adding the term "breast" to NAC 640C.400(2). I believe that there are some forms of massage and/or structural integration in which the breast is touched and massaged during the course of the service, which is why the term is currently not included in that section. If that is the case, I would not recommend adding the term "breast" to that section, knowing that you can still seek disciplinary action by couching the term "breast" as "any sexualized body part." If there are no reasonable times during the course of a massage or structural integration that the breast of a client is touched, then adding the term "breast" would be a term you could add to that section.

2. Adding the term "key party." While the definition of the term "key party" in the Washington regulation is drafted more in the context of medical care or like services, the Board could adjust the definition to include parents/guardians of clients. Since the Board adopted regulations which allow the parent of a child to enter the treatment room, and in cases of persons with disabilities, another individual may also be in the treatment room, it might be prudent to add the term "key party" where appropriate in NAC 640C.400 and add a definition of "key party."
3. Adding language regarding 2-year time period before engaging in a relationship with a client. There are a couple licensing boards (Marriage and Family Therapists; Board of Examiners for Alcohol, Drug and Gambling Counselors) that prohibit various types of relationships for a period of 2 years after the client/provider relationship has ended. NAC 640C.400 does not give any such caveats. This is likely due to the prevalence of prostitution within the profession—you would not be able to prosecute if the licensee indicated that they are in a relationship if the relationship occurred 2 years after the therapist/client relationship ended.

In reviewing the other language included in WAC 246-16-100 that is not currently included in NAC 640C.400, I would defer to the Board and its staff to determine whether there are incidents of licensees committing acts that would fall within those other sections. If there are instances, the Board may consider adding language that encompasses such acts. Any regulatory changes would need to be approved by the Governor's Office in light of the Executive Order concerning regulations.