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Physicians and Sexual Misconduct

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Just as there has been an increased emphasis on the prevention of sexual abuse and sexual harassment generally in the employment sector in the United States, there has also been a commensurate increase in interest on the part of the California legislature and hospital staffs in preventing and punishing sexual misconduct by physicians.

It is important that physicians be aware of the rules with respect to sexual relations with patients, employees, and others, as well as the consequences of engaging in sexual relations.

Under California Business and Professions Code Section 726, any "act of sexual abuse, misconduct, or relations with a patient" constitutes unprofessional conduct and grounds for disciplinary action by the Medical Board of California (MBC).

In a 1992 case, *Gromis vs. Medical Board,* the California Court of Appeal reviewed an MBC case in which a physician had been disciplined by the MBC for dating and engaging in consensual sexual activity with a patient. The alleged victim had been a patient of the physician for some years and she considered him her primary care physician. After confiding that she was emotionally distressed from marital problems, the physician and patient mutually agreed to see one another socially and this led to a sexual relationship.

Subsequently, the patient ended the relationship and about a year later sought psychological counseling.

The Court of Appeal set aside the decision of the MBC and remanded the case for further findings to determine whether the physician took advantage of his status as the patient's physician to induce her into the relationship and whether his failure to refer the patient for counseling was related to a sexual relationship with her.

The reason for reversing the disciplinary decision was the court's determination that Section 726 of the Business and Professions Code, as it then existed, provided that an act of sexual misconduct or relations with a patient only constituted unprofessional conduct and grounds for disciplinary action when it is "substantially related to the qualifications, functions, or duties of the occupation for which a license was issued."

The court held that the statute did not bar all sexual relations with a patient, only activity that was substantially related to the qualifications, functions, or duties of the occupation. Moreover, the court made the important holding that "constitutional considerations require that a statute bar a person from practicing a lawful profession only for reasons related to his fitness or confidence to practice that profession." Hence,

although Business and Professions Code Section 726 was amended in 1993 to eliminate the language requiring that the conduct in question be substantially related to the qualifications, functions, or duties of the physician, the constitutional requirement would appear to have continued pertinence to current cases.

In the *Gromis* case, the Court of Appeal held that whether or not the physician's conduct was morally reprehensible was beside the question. The issue was whether or not his conduct was substantially related to his qualifications or fitness to practice medicine. That depended upon whether or not the physician abused his status as the patient's physician to induce her consent to sexual activity or whether the sexual relations "arose from the mutual friendship and affection that formed outside the office."

The prohibitions of Section 726 do not apply to sexual contact between a physician and his or her spouse or any other person "in an equivalent domestic relationship" when the physician provides medical treatment "other than psychotherapeutic treatment."

Although the *Gromis* case exemplifies that it is not cut and dry that a physician who engages in sexual relations with a patient is subject to discipline, physicians would be well advised not to take any chances and to follow a strict policy of avoiding relations with patients or employees.

If not, any errant physician could be the target of a suit for sexual harassment pursuant to California Civil Code Section 51.9. Under this Section, a physician is liable for damages if the following conditions are met:

- there is a physician-patient relationship
- the defendant has made unwelcome and "persistent or severe" sexual advances, solicitations, sexual requests or demand for sexual compliance continuing after a request for the plaintiff to stop
- there is an inability by the plaintiff to terminate the relationship without substantial hardship
- the plaintiff has suffered economic loss or personal injury.

A physician or psychotherapist is also at risk if he or she has a relationship with a former patient and engages in sexual contact with that former patient when the relationship was terminated primarily for the purpose of engaging in those sexual acts, according to Business and Professions Code Section *729.*

The only exception to that rule exists when the physician or psychotherapist has referred the patient to an independent and objective physician, surgeon, or psychotherapist, recommended by a third-party physician, surgeon, or psychotherapist for treatment.

For violating Business and Professions Code Section 729, a physician can be criminally prosecuted and is also subject to disciplinary action by the MBC.

Sexual Harassment in the Medical Staff Context

Largely in reaction to an increase in sexual harassment cases against employers, some California hospitals have over-reacted by suggesting that sexual harassment claims against medical staff members should be handled differently and more stringently than other disciplinary problems. Thus, in some instances, sexual harassment policies have been proposed containing vague definitions of sexual harassment and circumventing the medical staff disciplinary processes that are normally involved. There is no need to handle sexual harassment cases any differently than any other disciplinary cases within the medical staff arena.

Virtually all medical staff bylaws call for corrective action in cases not directly related to patient care involving actions by a practitioner that are disruptive to hospital operations. All forms of abuse, including sexual harassment, can be a basis for discipline under such general provisions. Moreover, medical staff bylaws can contain specific prohibitions of sexual harassment without reducing any of the procedural safeguards that physicians are entitled to before they may be disciplined.

Thus, the Model Medical Staff Bylaws provisions for sexual harassment adopted by the California Medical Association provide that "all allegations of sexual harassment shall be immediately investigated by the medical staff and, if confirmed, will result in appropriate corrective action, from reprimands up to and including termination of medical staff privileges or membership, if warranted by the facts."

Such a provision permits a measured response to any allegations of sexual harassment and entitles the charged physician with a full panoply of rights under the medical staff bylaws.

Also of legitimate concern is that the description of sexual harassment in any proposed medical staff bylaw be sufficiently specific as not to prohibit protected free speech and other legitimate conduct.

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