Civil Implications for Medical Practitioner of Sexual Contact with Patient

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It is beyond dispute that sexual contact with patients is in conflict with the very essence of the practice of medicine." Moreover, "[i]t is well established that sexual activity between physicians and patients is almost always harmful to the patient and is prohibited." New Jersey Board of Medical Examiners Policy Statement Regarding Sexual Activity Between Physicians and Patients and in the Practice of Medicine, N.J.A.C. 13:35-6.3.

Nonetheless, sexual activity between physicians, therapists and other medical professionals persists, and many of us have defended or prosecuted these claims either in civil litigation or before the Board of Medical Examiners. So what happens when that line is crossed and a medical professional sexually abuses or assaults a patient who had put their trust in them?

There are various implications to the medical practitioner, including a potential medical malpractice lawsuit, possible criminal charges, potential suspension or revocation of their professional license, and the potential for monetary penalties. If you are a medical professional, you may want to stop and read this brief overview as it could save you from a potential career-ending mistake. If you are a defense attorney, you need to understand the civil implications for your client. A plaintiff's attorney needs to be familiar with the battle to collect on a jury award as there is no basis for the physician's professional liability carrier to indemnify such claims.

Notable Civil Actions

In *L.S. v. Jonathan Fellus, M.D.,* ESX-L-7684-10, a case that received widespread media attention, Dr. Fellus, a neuro-rehabilitation specialist, was sued for medical malpractice and intentional infliction of emotional distress after he engaged in a five-month affair with one of his patients, L.S., who had suffered a traumatic brain injury to the frontal lobe of her brain after a car accident. Due to the injury, the plaintiff suffered from cognitive deficits, emotional issues, panic attacks and seizures. From the beginning of the plaintiff's professional relationship with Dr. Fellus, she claimed that he had engaged in inappropriate flirtation with her, especially in light of the fact that she suffered from a traumatic brain injury and he was tasked with her rehabilitation. The plaintiff testified that she felt threatened by the doctor, that if she did not accept his flirtatious advances, he would not treat her. During this five-month affair, the plaintiff became pregnant, underwent an abortion at the defendant's urging and then threatened suicide. It was not until two years later that the plaintiff sought treatment with a new neurologist and disclosed the affair.

Dr. Fellus not only had a medical malpractice case filed against him that sought punitive damages, but he also lost his medical license for three years due to a violation of the New Jersey Administrative Code that forbids physicians from having sex with their patients. Punitive damages in medical malpractice cases are exceedingly rare and are hardly ever awarded since the alleged malpractice almost never rises to the threshold showing of malicious conduct. However, here, after an 11-day jury trial where Dr. Fellus testified that he knew it was wrong to have an affair with a brain-damaged patient and to continually deceive others about it for two years, an Essex County jury found for the plaintiff in the amount of $1.5 million in compensatory damages and $1.7 million in punitive damages. There was no insurance coverage for the damages awarded. Dr. Fellus has appealed the jury verdict.

In situations where a medical practitioner is alleged to have had inappropriate sexual contact with a patient, the medical practitioner is often going it alone—without their medical malpractice insurance and absent a claim of medical negligence—in which case the matter is defended under a reservation of rights. In the landmark case of Princeton Ins. Co. v. Chunmuang , 151 N.J. 80 (1997), the Supreme Court of New Jersey held that the medical malpractice insurance company was not liable for the criminal acts of its insured. The issue relating to *Princeton Ins. Co.,* arose out of the underlying case of *Davis v. Chunmuang*, where in 1994, Ms. Davis sued Dr. Chunmuang seeking compensatory and punitive damages for medical malpractice, negligent and intentional infliction of emotional distress, sexual assault, and assault and battery due to alleged inappropriate sexual conduct that occurred during Ms. Davis' office visit with Dr. Chunmuang. The Law Division entered a default judgment against Dr. Chunmuang. A proof hearing was held before the trial court, and Ms. Davis was awarded $50,000 in compensatory damages and $50,000 in punitive damages.

Princeton Insurance Company filed a declaratory action to determine its liability of the judgment awarded to Ms. Davis under its medical malpractice policy. In the policy furnished to Dr. Chunmuang, it explicitly stated, in pertinent part, under Coverage, that:

> We will pay all amounts up to the limit of liability which you become legally obligated to pay as a result of injury to which this insurance applies. The injury must be caused by a "medical incident" arising out of your supplying or failure to supply professional services.
>
> "Medical incident" is defined as 'any act or failure to act … in the furnishing of professional medical … services by you ….'

Further, under Exclusions, it expressly stated in pertinent part, "This insurance does not apply for: (a) Injury resulting from your performance of a criminal act." *Id.* at 85. The trial court held that the punitive damages award given to Ms. Davis was based "solely on Chunmuang's criminal conduct" and found that Princeton Insurance Company was not liable for that portion of the damages. However, the trial court found that the compensatory damages were based on Dr. Chunmuang's medical malpractice and criminal conduct

and held Princeton Insurance liable for that portion of the award. Princeton Insurance appealed the trial court's decision, and the Appellate Division affirmed. However, Princeton appealed to the New Jersey Supreme Court, which agreed with Princeton's argument and held that "[c]laims based on injuries caused by a physician's criminal conduct are properly excluded from coverage under the policy at issue. Princeton is not responsible to Davis for the damages she suffered as a result of Chunmuang's sexual assault." *Id*. at 100.

A doctor's duty to refrain from sexual misconduct does *not* give rise to a claim for medical negligence. A duty to not engage in sexual relations is not subsumed within professional medical services. *Zuidema v. Pedicano , 373 N.J. Super. 135 (App. Div. 2004).*

Select NJ Administrative Code Directives

The New Jersey Board of Medical Examiners specifically prohibits sexual misconduct if there is a patient-physician relationship. This relationship must be terminated on written notice to the patient with a minimum of a 30-day period from the last professional service, or if the last professional service was more than one year prior. N.J.A.C. 13:35-6.3. Patient solicitation or consent to the contact is not a defense, nor is a claim of being in love with the patient. Violation of this prohibition shall be deemed to constitute gross negligence or repeated malpractice pursuant to N.J.S.A. 45:1-21(c), or professional misconduct pursuant to N.J.S.A. 45:1-21(e).

The New Jersey Board of Psychological Examiners prohibits sexual contact with a current client, a former client within the last 24 months, a current student, a direct supervisor or supervisee, or a research subject. N.J.A.C. 13:42-10.9.Again, solicitation, consent or love are not defenses.

The New Jersey Board of Marriage & Family Therapists extends the prohibition to not only the client, but also the client's immediate family, a former client and immediate family, a former student or a current student. Former students and clients must have had no direct involvement with the therapist for at least 24 months before entering into any relationship. N.J.A.C. 13:34-28.

Recent NJ Board of Medical Examiners' Decision

The Appellate Division recently heard the matter of *In the Suspension or Revocation of the License of Leonard Joachim, M.D.,* A-5184-14T2. The court upheld the revocation of Dr. Joachim's license by the NJBME following his third disciplinary hearing and second conviction for criminal sexual assault. He previously had his license suspended, had been placed on probation, and had monetary civil penalties of $60,000 and costs of $74,000 imposed. He violated the requirement of a chaperone to be present for all female patients and had sex with a patient in the exam room (after hours) in 2011. He was charged under N.J.S.A 2C:14-2c(1), with second degree sexual assault. Although the order by the board revokes the license, it does not state whether Dr. Joachim is barred from applying for reinstatement in the future.

The professional and personal costs to a medical professional who violates the prohibition on sexual contact with a patient are very high. Such behavior is universally condemned and should never be pursued. Attorneys defending or prosecuting these cases should keep the following information in mind.

- One cannot defend by claiming "consent" or "love."
- Malpractice insurance does not indemnify for intentional torts.
- A potential settlement or jury verdict will almost always require the medical practitioner to pay out of pocket—screen your case carefully.
- N.J.S.A. 2A:14-2 applies to personal injuries from sexual assault claims.•

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