

**FEDERATION OF CHIROPRACTIC LICENSING BOARDS  
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**BOARD REGULATION AND SEXUAL MISCONDUCT**

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Rules and Regulations often propagate in a haphazard fashion. Boards tend to react to issues as they arise resulting in a hodgepodge of rules and regulations with no coherency. Rules and regulations should make sense. They should flow from underlying principles and be well grounded in the authority delegated to the board. They should be designed to accomplish the mission of the board through rational and appropriate action.

**Board's Mission: Protect the Public health, safety and welfare through the regulation and discipline of those persons licensed under the chiropractic practice act. The board's mission also includes the granting of licensure to individuals who are qualified to practice chiropractic.**

**Board's Authority: A board acts under the authority of the police power of the state. Board action is quasi-criminal .**

A board should be mindful of it's mission in formulating it's rules and regulations. It is not the mission of a board to improve chiropractic or to shape the profession according to the professional or social values of board members. It is to be hoped that board action will lead to improvement of the profession but that result is incidental and secondary to the board's purpose.

A board must also be mindful of constitutional limits on the exercise of police power. Licensee's have a right to fair notice, due process, an impartial hearing and reasonable regulation tailored to the mission of the board. Regulations which are an expression of the values of board members are not reasonable.

Rules and regulations should adhere to the following principle:

**Employ the least restrictive means that can be reasonably expected to achieve a valid governmental interest.**

Board regulations which meet this benchmark are likely to withstand legal challenge and more importantly keep a board within the parameters of proper action.

## BOARD REGULATION AND SEXUAL MISCONDUCT

Writing rules which regulate sexual contact between a doctor and patient is both difficult and necessary. Regulatory boards in all professions have reported an increase in sexual misconduct complaints. While the reason for the increase in such complaints is of interest it is not the primary concern of a board. The board's business is handling the complaints that come before it.

The starting point in writing rules governing sexual contact between a doctor and patient is to recall the mission of the board as stated above. What is the threat posed to the public by sexual contact between a doctor and patient?

The issue is greatly simplified by dealing with sexual contact in two separate categories. The first category is sexual contact which occurs within the therapeutic environment or while the doctor is engaged in the administration of therapy (sexual abuse). The second category is sexual contact which occurs outside of the therapeutic environment (sexual misconduct).

### SEXUAL ABUSE

Defining the threat posed by the first category (sexual abuse) is easily dealt with and involves the most egregious behavior. The threat to the public is clear. Any therapy involves an element of risk. Introducing activity which is unrelated and in fact distracting to the administration of therapy poses a threat to the public and demonstrates a reckless disregard for the patient's welfare. The element of consent by the patient is also not at issue. The patient does not have the training or competency to assume the risk (consent). Even if the patient is another chiropractor or trained health care provider the role of the patient does not involve the administration of therapy or clinical decision making.

Based on the above reasoning there is a clear threat to the public by virtue of a reckless disregard for the patient's welfare by the doctor. Based on this determination strict regulation is justified. The following rule would be appropriate:

#### SEXUAL ABUSE.

Sexual abuse is the use of fraud, misrepresentation or force for the purpose of engaging in sexual conduct with a patient. Sexual conduct within the context of the delivery of health care is sexual abuse. Consent of the patient to sexual conduct within the context of the delivery of health care is no defense.

The intent is to define sexual abuse as conduct which occurs within the clinical environment while engaged in, or under the pretext of, the delivery of therapy. As stated above these cases involve the most objectionable conduct. By creating a separate category a board is able to deal most severely with such cases.

## SEXUAL MISCONDUCT

The second category (sexual misconduct) is more difficult and controversial. There is a growing school of thought which holds that it is the doctor's responsibility to control the emotional bond that often develops between a doctor and patient. Of interest to boards is the classification of sexual misconduct as negligence rather than intentional misconduct. Recent articles in the professional literature as well as some recent court decisions have followed this line of reasoning.

What is the governmental interest connected with the board's mission in the area of sexual misconduct? The sexual misconduct issue arises when a doctor and patient become involved outside the delivery of health care. The element of risk discussed above (sexual abuse) is not present therefore the threat to public safety is not as great. In fact some would argue that there is no governmental interest involved in a consensual relationship.

There is a justification for a board to conclude that misuse of the trust inherent in the doctor patient relationship or failure of the doctor to handle the emotional bond between a doctor and patient is a threat to the public. The governmental interest may be stated as a need to protect the patient from unwanted sexual contact or involvement with a health care provider.

A board acts within a range of options. At one extreme is inaction or failure to properly address a valid governmental concern and threat to the public welfare. At the other extreme is excessive regulation which attempts to control behavior outside of any reasonable governmental interest and which poses no threat to the public.

In writing regulations in the area of sexual misconduct (or any other area) a board should have the following considerations clearly in mind:

1. A definitive understanding of where the board stands philosophically (within the permissible range of board action),
2. The governmental interest being addressed and
3. The relationship to the mission of the board.

A board that is philosophically oriented toward the non-regulatory extreme will write minimal rules. Such a board runs the risk of judicial intervention, i.e. a court interprets the minimal rules in an expansive way. Depending on the political environment of the state there is also the risk of legislative condemnation through oversight. In other words a legislative committee proclaims that the board is not doing its job and gets a lot of headlines.

A board that is philosophically oriented toward the opposite extreme, inappropriate regulation, will write rules and regulations that go beyond any valid governmental interest and attempt to force behavior to conform to the board's values. A board that errs in this direction runs the risk of having its rules thrown out by a court leaving the area unregulated and jeopardizing all pending cases. There is also the risk that a legislative committee will proclaim that the board is out of control and get a lot of headlines.

An advisable approach is to find the middle ground first and then vary the regulation according to the board's philosophical bent. Accepting the governmental interests as defined above:

“To protect the patient from unwanted sexual contact or involvement with a health care provider,”

and keeping in mind the principal of:

“Employing the least restrictive means that will achieve a valid governmental interest,”

Consider the following regulation:

#### SEXUAL MISCONDUCT

Misuse of the authority or trust placed in a doctor for the purpose of engaging in sexual activity with a patient is sexual misconduct. Sexual activity between a doctor and patient creates a presumption of sexual misconduct which may be rebutted by showing that the sexual activity was consensual and not a product of manipulation of the doctor-patient relationship by the doctor. The board may consider sexual misconduct as negligence by the doctor in dealing with the responsibilities of the doctor-patient relationship.

This rule places a heavy burden on the doctor. On proof that sexual contact occurred the burden shifts to the doctor to overcome a presumption of misconduct which the defendant doctor must overcome. The rule allows for rebuttal of the presumption on showing that the conduct was consensual. As we shall see below the rebuttal provision is important in cases where the complainant is a third party. The rule also allows the board to classify the violation as negligence rather than intentional misconduct, an important consideration in determining appropriate discipline.

Some boards have enacted rules which state that any sexual contact between a doctor and patient is sexual misconduct. There are several problems with that stance. The governmental interest in regulating sexual activity between consenting adults is questionable. The board has no discretion under such a rule. There is a likelihood that third parties (jilted lovers, competitors, etc.) will use the board for retaliatory or vindictive purposes.

A board philosophically oriented toward minimal regulation may choose to amend the proposed rule as follows:

#### SEXUAL MISCONDUCT

Misuse of the authority or trust placed in a doctor for the purpose of engaging in sexual activity with a patient is sexual misconduct. ~~Sexual activity between a doctor and patient creates a presumption of sexual misconduct which may be rebutted by showing that the sexual activity was consensual and not a product of manipulation of the doctor-patient relationship by the doctor.~~ The board may consider sexual misconduct as negligence by the doctor in dealing with the responsibilities of the doctor-patient relationship.

By removing the presumption the issue is whether or not the doctor misused the trust inherent to the doctor patient relationship and the full burden of proof is on the prosecutor.

A board philosophically oriented toward maximum regulation may amend the rule as follows:

#### SEXUAL MISCONDUCT

Misuse of the authority or trust placed in a doctor for the purpose of engaging in sexual activity with a patient is sexual misconduct. Sexual activity between a doctor and patient creates a presumption of sexual misconduct which may be rebutted by showing that the sexual activity was consensual and not a product of manipulation of the doctor-patient relationship by the doctor. ~~The board may consider sexual misconduct as negligence by the doctor in dealing with the responsibilities of the doctor-patient relationship.~~

Removing the board's discretion to consider the conduct negligent (rather than intentional) allows the board to deal harshly with violations theoretically enhancing the deterrent value of the rule.

### ANALYSIS OF A SEXUAL MISCONDUCT COMPLAINT

The enclosed complaint "What Would Your Board Do??" is an actual complaint received by a state board and forwarded to the FCLB. Of course the ultimate answer to the question depends on what your board's rules and regulations are. For our purposes we will assume the regulation discussed above governs (version 1).

The threshold question in evaluating a complaint is whether or not the complaint states allegations which, if proven true, would constitute a violation of statute, rule or regulation. At this stage we are not interested in the credibility of the allegations or any assessment of the truth or accuracy thereof.

In this case the complainant states in paragraph 4 that the patient and doctor became sexually involved. Paragraph 5 states that sexual contact occurred in clinic offices. Both of these allegations would constitute a violation. Paragraph 4 involves sexual misconduct, Paragraph 5 may involve sexual abuse depending on the circumstances of the sexual contact, i.e. was it within the context of the delivery of therapy. At this point these are the only aspects of the complaint relevant to our evaluation.

Since the allegations would constitute a violation of any version of the rule we would proceed to an informal investigation. Dr. Smith would be informed of the allegations and asked to respond and Jane Doe and Chris Brown would be interviewed.

If it was proven that sexual contact occurred in the context of the delivery of therapy Dr. Smith would be guilty of sexual abuse regardless of Jane's consent. The complaint states that there was a doctor patient relationship as well as a student teacher relationship, Paragraph 3. This is an important point since the board has authority within the context of the doctor patient relationship but no authority relative to any abuse of the teacher student relationship. For the sake of discussion we will assume that there was a doctor patient relationship and that there was no sexual contact within the context of the delivery of therapy, that is no sexual abuse as defined.

We will assume that Dr. Smith and Jane Doe were involved in a sexual relationship. The question now is whether or not Dr. Smith can overcome the presumption of misconduct by showing that the relationship was consensual and not a product of manipulation of the doctor patient relationship. Under version 2 of the rule Dr. Smith's burden would be less onerous. He would not have to overcome a presumption which means that the prosecutor would have to prove that Dr. Smith misused his position.

It should be noted that in those states which hold that consent is no defense the case is over when there is proof of sexual involvement. The danger of such a rule should be evident. If we change the scenario to one in which Jane Doe and Dr. Smith became involved in a consensual relationship Dr. Smith would still be subject to sanctions. Even if they had married the board, under the consent is no defense rule, would have no discretion. The potential for abuse by third parties such as Chris Brown or the chiropractor down the street is extensive.

From this point the case involves questions of fact to be tried in formal hearing. A few comments in closing. Note that most of the information in Chris Brown's complaint is irrelevant as far as the board is concerned. Jane's beliefs about fidelity and commitment, the current status of Chris and Jane's relationship, Chris' rather inflammatory comment about venereal disease, and so on, have no bearing on what the board should do.

There are no easy answers in dealing with sex related complaints. They are highly charged and the consequences serious. Clearly defined rules and orderly procedures are indispensable tools in fair and effective regulation.

## GENERAL GUIDELINES FOR COMPLAINT REVIEW

Often boards lose perspective in reviewing and proceeding with a complaint. The disciplinary process should proceed step by step within clearly defined parameters. It is advisable to have clear standards for advancing through each step of the process.

1. Does the complaint make allegations which, if proven true, would be a violation? If the complaint is unclear the board may seek clarification from the complainant. If the complaint fails to state such allegations, even if the doctor did something reprehensible, the case does not fall under the board's jurisdiction. If such allegations are stated proceed to 2.
2. Is there a likelihood that a violation occurred? The board now takes a first look at the quality of the allegations. The defendant is contacted for a response to the charges. The complainant and witnesses are informally questioned and then the defendant is asked to come in for an informal session. The decision makers should consider the following in reaching a conclusion:
  - a. Is the evidence, including the witnesses, credible ?
  - b. Does the defendant have a defense which is likely to prevail ?
  - c. Are the witnesses solid ? Are they likely to lose interest or decide not to cooperate as the case progresses ?

If there is a likelihood that a violation occurred and the witnesses and evidence are such that a viable case can be prosecuted the board should go to formal action (or settle if appropriate) as discussed in 3..

If the informal process fails to raise the likelihood that a violation has occurred, or if the witnesses and evidence are such that a viable case could not be maintained the matter should be dismissed.

(Likelihood is more than an allegation and less than a probability. It is a substantial belief based on allegations, circumstances, untested facts, the demeanor of the parties and other similar factors. It is a judgment made in good faith on the basis of available information that there is sufficient cause to pursue formal action.)

3. Is there a probability that a violation has occurred ? As the case progresses through the formal process it should be pursued so long as timely investigation indicates a probability that violation has occurred. If substantial investigation fails to produce evidence which meets this standard the matter should be dismissed.

These guidelines should help you to proceed through cases like the one presented here in an orderly manner. Standards uniformly applied to all complaints will allow you to aggressively prosecute cases with less vulnerability to charges of arbitrary or malicious prosecution. In adopting and applying any legal procedures seek the advice of and work closely with your board attorney.



# WHAT WOULD YOUR BOARD DO??

January 01, 1995

FCLB  
901 54th Avenue, Suite 101  
Greeley, CO 80634

*This letter is a copy of a complaint that I have recently filed with the State Board of Examiners concerning a case of sexual misconduct. I would like you to retain a copy for your files:*

Dear Licensing Board,

**1** I am writing to inform you of a case of gross professional misconduct by Dr. John Smith, a Chiropractor registered to practice in the State.

**2** For the past three and a half years, I have been living with my girlfriend, Jane Doe, in a deeply committed relationship. In September 1993, was admitted as a student to a College of Chiropractic. A few months later, because she had severe neck pains, she started visiting the student clinic for adjustments. These turned out to be insufficient, and so she made an appointment with Dr. John Smith. Jane had heard of Dr. Smith because he was running a workshop.

**3** Jane first visited Dr. Smith around April 1994 and he started her on a course of upper cervical treatment. Being a chiropractic student, she was obviously interested in the equipment and techniques used. Dr. Smith said that rather than simply attending his workshop, Jane should come to him for private tuition in some of these techniques (he also asked her to keep this arrangement confidential from the other students). Each week Jane was to visit him once for treatment, and once more for tuition (the tuition sessions were sometimes to include one other female college student).

**4** From the outset, Dr. Smith was fully aware of my relationship with Jane, and of the fact that we had been living together for over three years. However, a few weeks into the treatment/tuition, he announced that he had "strong feelings" for her, and in June 1994 they started a sexual affair, which lasted for over a month before Jane told me about it.

**5** For the entire duration of their affair, John Smith was Jane's doctor. He was simultaneously providing her with "tuition". He knew very well that she was living with me in a long term relationship, and that I was entirely unaware of their affair. Their sexual meetings usually started with a legitimate treatment or tuition session. On at least one occasion, sexual contact actually occurred in the clinic offices.

**6** I firmly believe that when your wife, girlfriend or daughter visits a doctor, you should have absolutely no concern that it will lead to any form of sexual overtures. I have many friends in conventional medicine, and they have all expressed shock at this incident. More over, Dr. Smith was simultaneously acting in an extended professional role to Jane, and his willingness to tutor her seemed at the time to be an innocent and natural extension of this. His dual positions of trust and authority gave both Jane and myself a sense of assurance about his moral stature. The trust that we placed in him was shamelessly betrayed, and that is quite simply wrong.

7 Obviously Jane's behavior is not above reproach. However, she had always previously had very strong beliefs about fidelity and commitment, and her self esteem has been shattered by this incident to such an extent that I was briefly concerned about her becoming suicidal. At the time of the affair, I was working very long hours, and she says that this caused her to feel lonely and unhappy with our relationship. Dr. Smith became aware of this situation directly because of his role as a health professional. As Jane's doctor and teacher he was in a position in which she greatly respected and trusted him. John Smith capitalized on his professional position for the lowest of reasons, and as a result has caused both Jane and myself an enormous amount of pain. We have been struggling to overcome this incident ever since it occurred, and as of now we are still together. If Dr. Smith had behaved with professional integrity, I believe that we would have been married and raised a family. I am honestly not sure whether this will still happen, but I do know that we will both suffer from these emotional wounds for a long time. It is presumably only a matter luck that we did not also become infected by any venereal diseases that Dr. Smith might have been carrying.

8 You may wonder why I waited many months before bringing this to your attention. As soon as Jane told me about the affair, I telephoned Dr. Smith to ask him whether he had anything to say. His response was that all along he had felt guilty about the affair because of John's relationship with me, but that he had decided to pursue it nonetheless. I then contacted the doctor who heads the clinic, who expressed considerable shock, and agreed with me that this sort of behavior from a doctor was completely unacceptable. Perhaps not surprisingly, neither Dr. Smith nor the head doctor indicated that there was any further action that I could take, and it was only recently that I became aware of the existence of the State Board of Examiners. Neither Jane nor I had any wish to be motivated by feelings of revenge or bitterness, and we have been concentrating on saving our relationship rather than pointing fingers. However, I still strongly feel that it is my duty and responsibility to do everything I can to prevent this from happening to anyone else.

9 If there is any Chiropractic analog to the Hippocratic Oath, then surely it must have been violated by this sort of doctor-patient seduction. As Jane herself put it, Dr. Smith was making the pain in her neck go away, was teaching her new palpation techniques, and was making her very confused. After the affair ended, she was terrified that she would have to leave the college and her chosen career, and have her neck treatment left incomplete. It is entirely unconscionable that any patient should feel that their health care is connected to their doctor's sexual satisfaction, or that any student should feel that their career is influenced by their professors' flirtations.

10 I sincerely hope that you share my outrage at John Smith's behavior and that you will take the necessary action to prevent it from occurring again. If it is required, both Jane and myself may be contacted at the above address. I would like to request, however, that Jane's involvement in any legal proceedings be kept to a minimum, since she is extremely embarrassed and unhappy about the entire affair. Naturally, I assume that this complaint will be treated in confidence and will have no effect on her future career.

I look forward to receiving your written response.

Sincerely/  
N/A  
Chris/Brown, Ph.D.

*(This is a copy of an actual complaint filed with a board. The names have been changed to protect the parties involved.)*