

02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

373 BOARD OF LICENSURE IN MEDICINE

a joint rule with

383 BOARD OF OSTEOPATHIC LICENSURE

Chapter 10: SEXUAL MISCONDUCT

SUMMARY: This chapter defines sexual misconduct by physicians and physician assistants, sets forth the range of sanctions applicable to violations of this rule, and identifies the factors the Board should consider in imposing sanctions.

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SECTION 1. DEFINITIONS

1. **“Board”** means the Board of Licensure in Medicine or the Board of Osteopathic Licensure.
2. **“Intimate examination”** means examination of the breasts, genitalia, or rectum and any anatomy immediately adjacent to these areas.
3. **“Key third party”** means immediate family members and others who would be reasonably expected to play a significant role in the health care decisions of a patient of the physician or physician assistant and includes, but is not limited to, the spouse, domestic partner, parent, child, guardian, or surrogate.
4. **“Legitimate health care purpose”** means activities for examination, diagnosis, treatment, and personal care of patients, including palliative care, as consistent with community standards in medicine. The activity must also be within the scope of practice of medicine.
5. **“Patient”** means an individual who currently receives health care from a physician or physician assistant, or who previously received health care from a physician or physician assistant within the preceding twelve (12) months. For physicians and physician assistants engaged in the practice of psychiatry, “patient” means an individual who currently receives or previously received health care from that physician or physician assistant.
6. **“Physician”** means an individual who is qualified and licensed according to the provisions of 32 M.R.S. §3270 *et seq.* and 32 M.R.S. §2571 *et seq.*
7. **“Physician Assistant”** means an individual who is qualified and licensed or certified according to the provisions of 32 M.R.S. §3270-E and 32 M.R.S. §2594-E.

8. **"Physician/physician assistant sexual misconduct"** means behavior that exploits the physician/physician assistant and patient/key third party relationship in a sexual way. This behavior is nondiagnostic and/or nontherapeutic, may be verbal or physical, and may include expressions or gestures that have a sexual connotation or that a reasonable person would construe as such. Sexual misconduct is considered incompetence and unprofessional conduct as defined by 32 M.R.S. §3282-A(2)(E) & (F) and 32 M.R.S. §2591-A(2)(E) & (F).

There are two levels of sexual misconduct: sexual violation and sexual impropriety. Behavior listed in both levels may be the basis for disciplinary action.

- A. **"Sexual violation"** means any conduct by a physician/physician assistant with a patient and/or key third party that is sexual or may be reasonably interpreted as sexual, even when initiated by or consented to by a patient and/or key third party, including but not limited to:

1. sexual intercourse, genital to genital contact;
2. oral to genital contact;
3. oral to anal contact or genital to anal contact;
4. kissing in a sexual manner (e.g. - french kissing);
5. any touching of breasts, genitals, or any sexualized body part for any purpose other than appropriate examination, treatment, or comfort, or where the patient has refused or has withdrawn consent;
6. encouraging the patient to masturbate in the presence of the physician/physician assistant or masturbation by the physician/physician assistant while the patient is present;
7. offering to provide practice-related services, such as drugs, in exchange for sexual favors;
8. touching, fondling or caressing of a romantic or sexual nature;
9. rubbing against a patient or key third party for sexual gratification;
10. photographing, filming or digitally recording the body or any body part or pose of a patient or key third party, other than for legitimate health care purposes;
11. showing a patient or key third party sexually explicit photographs or digital images, other than for legitimate health care purposes;
12. requesting a patient or key third party to provide or display or email or text sexually explicit material to the physician or physician assistant;
13. performing an intimate exam or consultation without the presence of a chaperone, if one was requested by the patient; and

14. a criminal conviction for any of the following involving a patient and/or key third party:
 - a. Gross Sexual Assault in violation of 17-A M.R.S. §253;
 - b. Unlawful Sexual Contact in violation of 17-A M.R.S. §255-A;
 - c. Sexual Abuse of a Minor in Violation of 17-A M.R.S. §254;
 - d. Visual Sexual Aggression Against a Child in violation of 17-A M.R.S. §256;
 - e. Sexual Misconduct with a Child Under 14 Years of Age in violation of 17-A M.R.S. §258;
 - f. Solicitation of a Child to Commit a Prohibited Act in violation of 17-A M.R.S. §259-A;
 - g. Unlawful Sexual Touching in violation of 17-A M.R.S. §260;
 - h. Sexual Exploitation of a Minor in violation of 17-A M.R.S. §282.

- B. "**Sexual impropriety**" means behavior, gestures, or expressions by the physician/physician assistant towards the patient and/or key third party that are seductive, sexually suggestive, disrespectful of privacy, or sexually demeaning, including but not limited to:
 1. kissing;
 2. neglecting to employ disrobing or draping practices respecting the patient's privacy; touching of the patient's clothing that reflect a lack of respect for the patient's privacy; deliberately watching a patient dress or undress instead of providing privacy for disrobing;
 3. subjecting a patient to an intimate examination in the presence of another when the physician/physician assistant has not obtained the verbal or written informed consent of the patient or when the informed consent has been withdrawn;
 4. examination or touching of genitals without the use of gloves;
 5. inappropriate comments about or to the patient, including but not limited to making sexual comments or jokes about a patient's body or underclothing; making sexualized or sexually demeaning comments or jokes to a patient; criticizing the patient's sexual orientation (homosexual, heterosexual, or bisexual); making comments or jokes about potential sexual performance during an examination or consultation (except when the examination or consultation is pertinent to the issue of sexual function or dysfunction); requesting details of sexual history or sexual likes or dislikes when not clinically indicated;
 6. using the physician/physician assistant-patient relationship to solicit or initiate a date or sexual or romantic relationship;

7. initiation by the physician/physician assistant of conversation regarding the sexual problems, preferences, or fantasies of the physician/physician assistant;
8. performing an intimate examination or consultation without clinical justification;
9. performing an intimate examination or consultation without explaining to the patient the need for such examination or consultation even when the examination or consultation is pertinent to the issue of sexual function or dysfunction; and/or
10. requesting the details of sexual history or sexual likes or dislikes when not clinically indicated for the type of examination or consultation.

SECTION 2. SANCTIONS

If the Board finds that a licensee has engaged in sexual misconduct as defined in section 1 of these rules the licensee shall be disciplined in accordance with these rules.

1. All disciplinary sanctions under 32 M.R.S. §2591-A, 32 M.R.S. §3282-A and 10 M.R.S. §8003 are applicable.
2. Sexual Violations. Findings of sexual violations are egregious enough to warrant revocation of a physician/physician assistant's license. The Board may, at times, find that mitigating circumstances do exist and may impose a lesser sanction.
3. Sexual Impropriety. Findings of sexual impropriety will result in harsh sanction, which may include revocation.
4. Factors affecting sanctions. Special consideration should be given to at least the following factors when determining an appropriate sanction:
 - a. patient and/or key third party harm;
 - b. opportunity (type of practice) for past/future misconduct;
 - c. severity of impropriety or inappropriate behavior;
 - d. context within which the impropriety or inappropriate behavior occurred;
 - e. culpability of licensee;
 - f. psychotherapeutic relationship;
 - g. existence of a physician/physician assistant–patient and/or key third party relationship;
 - h. scope and depth of the physician/physician assistant relationship with the patient and/or key third party;
 - i. inappropriate termination of physician/physician assistant-patient relationship;
 - j. age and competence of the patient and/or key third party;

- k. physical/mental capacity of the patient and/or key third party;
 - l. vulnerability of the patient and/or key third party;
 - m. number of times behavior occurred;
 - n. number of patients and/or key third parties involved;
 - o. period of time relationship existed;
 - p. evaluation/assessment results;
 - q. prior professional disciplinary history; and
 - r. recommendation(s) of assessing/treating professional(s).
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STATUTORY AUTHORITY: 32 M.R.S. §§ 3269 (3),(7)
32 M.R.S. §2562

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