

Sexual Misconduct

Protecting patients, employees,
providers and the organization

Dr. Alan Joffe & Ruth Wood, MBA, CPHRM



Sexual misconduct: Behavior that exploits the physician-patient relationship in a sexual way

- Sexual behavior between a physician and patient is ***never*** diagnostic or therapeutic
- Interaction can be virtual, inside or outside the medical encounter
- There may be a discrepancy between the physician's perception between inappropriate behavior and the legal definition

Intent does not matter if the impact results in unwanted or offensive behavior

Sexual harassment

- Behavior characterized by the making of unwelcome and inappropriate sexual remarks or physical advances in a workplace or other professional or social situation.
- The victim is a co-worker or employee rather than a patient

Unwelcome remarks without physical conduct is still considered harassment

Why is this important? Recent escalating events at a national level

2016

First of several lawsuits filed against **Dr. Larry Nassar**, physician to the US Women's Gymnastics Team and Associate Professor in the Michigan State University College of Osteopathic Medicine.

2017

Federation of State Medical Boards (FSMB) created a Workgroup on Physician Sexual Misconduct to review data, identify barriers to reporting, and to update the Federation's policy; Addressing Sexual Boundaries: Guidelines for State Medical Boards.

2018

Dr. Nassar sentenced to 40-175 years for sexual abuse charges, subsequent to a 60-year sentence for child pornography. Reportedly, the abuse had been going on since 1994.

2019

Class-action suit against **UCLA Professor of Gynecology, Dr. James Heaps** with allegations of inappropriate comments during examinations, groping women and simulating intercourse with an ultrasound probe at the UCLA student health center, Ronald Reagan UCLA Medical Center or his on-campus office from 1983-2018.

July 2021

\$73 million settlement on behalf of > 6,000 women patients of Dr. Heaps. UCLA accused of failing to take action against Heaps despite complaints and of a "policy of indifference" to reports of sexual misconduct.

Feb 2022

\$243.6 million settlement on behalf of 203 women patients of Dr. Heaps.

Potential impact



Prevention Strategies

Harassment prevention strategies... Create a safe and respectful workplace



- Develop and communicate clear policies and procedures
- Provide training to employees
- Foster a culture of respect
- Encourage reporting
- Establish a zero-tolerance policy
- Provide resources and support
- Conduct regular reviews and evaluations

Utilization of Chaperones...

Promote safety, respect, and dignity



- During intimate exams
- During exams of minors
- When the patient requests a chaperone
- When there are concerns about the patient's behavior
- Per policy or requirement of the organization

Standardization of chaperone use...

Recommended by medical societies

- **American College of Obstetricians and Gynecologists (ACOG):** recommends the use of chaperones during pelvic and other intimate exams.
- **American Medical Association (AMA):** recommends that healthcare providers offer a chaperone for any patient undergoing an intimate exam or procedure, and that patients be given the option to refuse the chaperone if they so choose. The AMA also recommends that healthcare providers receive training in how to use chaperones effectively.
- **American Nurses Association (ANA):** recommends that healthcare providers use chaperones during intimate exams, and that the chaperone be trained in patient-centered communication and informed consent.
- **American Academy of Pediatrics (AAP):** recommends the use of chaperones during exams of minors, and that the chaperone should be a trained healthcare provider who is able to provide emotional support and physical assistance if needed.

What is a chaperone?

- A chaperone is an employee who serves as an impartial observer and is present during an intimate examination of a patient/resident or anytime a patient/resident requests a chaperone be present.
- A chaperone will be a health professional who is familiar with the procedures involved in the examination.
- The chaperone will usually be the same sex as the patient/resident.
- The chaperone will have line of sight to the exam being performed.
- The chaperone name is documented in the medical record.

Types of boundaries



Boundary checklist

- ✓ You cannot shift the power dynamic
- ✓ Chaperones protect everyone
- ✓ Terminating a treating physician relationship to initiate a romantic one is unethical
- ✓ Sexual relationships with employees or patients are unethical
- ✓ Practice good self care; watch for burnout
- ✓ Dual relationships (patient and family member/patient and employee) are high risk
- ✓ Politely turn down requests from patients to connect on social networking sites
- ✓ Engage in social media in personal and professional settings with respect
- ✓ Consider all online content as accessible and discoverable



All communication authored by a physician to a patient (including texts) should include content you would be comfortable putting in a written chart.

The Organizational Response

Responding to allegations of harassment...

Prompt and appropriate action



- Follow organizational policies
- Take the allegation seriously
- Provide support to the complainant
- Conduct an investigation
- Report to appropriate agencies
- Report to your insurance carrier
- Take necessary action
- Communicate the outcome
- Monitor the situation

Maintaining confidentiality...

Essential to protect privacy and rights

- Limit the number of people involved in the investigation
- Use secure communication methods
- Keep records protected
- Inform participants of the need for confidentiality
- Avoid discussing the matter with others
- Redact identifying information (when applicable)
- Conduct the investigation as quickly as possible



Case Reviews

CASE #1

- A 19-year-old female athlete presents with a complaint of ankle pain s/p inversion injury while hiking.
- The physician requests that the patient undress completely for the exam.
- His usual practice is to have every patient in a gown and underwear regardless of the chief complaint.
 - The rationale for undressing is explained as the usual practice for this physician.
- Chaperones are not consistently used.

DEFENSE WEAKNESSES/ PLAINTIFF STRENGTHS

The patient presents with ankle pain, and there is no explanation specific to her complaint that justifies undressing down to a gown and underwear.

The patient is examined without a chaperone.



CASE OUTCOME

The patient does not pursue litigation further. Claim is closed.

CASE #1:

What We Can Learn

- You are likely increasing your risk if you are having patient remove clothing that doesn't need to be removed.

CASE #2

46-year-old female alleges intentional and negligent infliction of emotional distress and battery based on two office visits

March office visit:

- Alleges physician asked if she had children and described vagina as “righty tight” during Pap smear.
- Alleges that he was smirking during the examination.
- Alleges that he remarked that it didn’t appear as though she had delivered any children.

December office visit:

- Alleges physician squeezed her right breast while he listening to her heart with a stethoscope.
- Alleges he squeezed her abdomen and said that she had gained some weight.
- Alleges he called her fat several times during the exam and repeatedly called her fat in the hallway in front of employees.

CASE #2

This same patient calls the PD and a press conference is held. PD ask to see the operations of the clinic.

Allegations:

- Intentional infliction of emotional distress through touching and verbal insults.
- Negligent infliction of emotional distress by inappropriate conduct, such as inappropriate touching and lodging complaints. It was reasonably foreseeable that his actions would cause her emotional distress.
- Battery because the physician touched her in an offensive manner by and through his squeezing her breast and inserting a finger into her vagina.

CASE DEFENSE

All physician contact with the plaintiff was part of the physical examination and medically necessary and appropriate.

Chaperones used.

CASE #2

ISSUE ONE: BATTERY

Did the Defendant commit a battery upon the Plaintiff?

ANSWER: No.

ISSUE TWO: INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

Did the Defendant intentionally or recklessly cause severe emotional distress to the Plaintiff?

ANSWER: No.

CASE #2:

What We Can Learn

- Chaperone gave a completely different history that was consistent with the doctor's history and not the patient's.
 - Chaperones provide an objective account of what actually happened.
 - All care was medically appropriate and necessary. No inappropriate behavior witnessed.

CASE #3

- 17 year-old female patient presents to ED with right breast pain. After taking a history, the physician asks the patient to show him where she is hurting, she points to an area under her breast.
- He hurriedly lifted the breast to look for any area for possible abscess without a chaperone.
- He then performed a standard breast exam, palpated under the arm, ordered labs, and a chest X-ray.
- Mother present for the entire exam.
- After the patient was discharged, they went to the sheriff's department and made a report of sexual assault.
- SD interviewed physician.

DEFENSE WEAKNESSES/ PLAINTIFF STRENGTHS

The patient is examined without a chaperone.

Hurried.

Inadequate explanation of the rationale for examination?

Inadequate informed consent prior to clinical examination?



CASE OUTCOME

Given her complaint of chest pain, there is clinical justification to examine symptomatic area.

No payment, and claim is closed.

CASE #3:

What We Can Learn

- Chaperones strongly encouraged even if the patient is the same gender.
- Chaperone strongly encouraged even if there is a family member.
- Explain and document informed consent for examination.
- Explain what you are doing during the exam.
- Do not be hurried in the exam.

CASE #4

- 15-year-old female with symptoms of a UTI but negative urinalysis.
- She developed a cystic mass around the urethra that the mother wanted evaluated by the physician.
- The mother alleges sexual assault when the female physician placed a speculum “forcefully within the vagina without an explanation of the procedure.”
- Mother files complaint to the medical board.
- She requested that her medical license be withdrawn or a formal apology be made in her permanent file.



CASE OUTCOME

No action taken by the state board.

CASE #4:

What We Can Learn

- Chaperones strongly encouraged even if the patient is the same gender.
- Explain and document informed consent.
- Explain while performing the exam.
- Do not be hurried in the exam.

CASE #5

- 16-year-old Hispanic female with abdominal pain.
- Family friend used as the interpreter.
- Physician attempts to perform a rectal exam on uncooperative and upset patient.
- He missed the rectum and entered the vagina causing injury to hymen.
- Family alleges sexual assault.
- Family present for exam, but no chaperone.
- The family friend that is interpreting has no formal medical interpretation training.

CASE #5: Defense Weaknesses/Plaintiff Strengths

- There is no chaperone to objectively determine the appropriateness of the examination.
- There is a language barrier because the interpreter is not medically trained.
 - Difficulty with explaining the rationale for the exam.
 - Difficulty with obtaining an informed consent for the exam.



CASE OUTCOME

The family does not pursue litigation further.

Claim is closed.

CASE #5: What We Can Learn

- Do not perform an exam in an uncooperative and upset adolescent female. Delay if necessary.
- Chaperones, not family or family friends, strongly encouraged.
- Language barrier comes up repeatedly.
- Cultural differences are extremely important to consider.
- Explain and document consent.
- Explain as you are performing the examination.
- Do not be hurried in the exam.

CASE #6

- A pharmaceutical rep presents to orthopedic surgeon's office in the hope of encouraging the sale of her products.
- Rep asks physician about a new shoulder surgery.
- Rep alleges the physician touches her breast during the process of explaining the shoulder surgery.
 - No one else present
- He does admit touching the shoulder and back but only in the process of explaining the injection procedure.
 - He later admits to touching close to the chest

Criminal charges of battery filed.

Interviewed by SD.

He retained a defense attorney.

Insurance routinely covers only patient care and not criminal.



CASE OUTCOME

Physician covered his own civil defense legal fees.

He settled for \$28,000 out of his own pocket.

CASE #6: What We Can Learn

- Insurance did not cover defense or indemnity.
 - This is not a patient.
 - He was the only physician in the practice.

CASE #7

- Plaintiff alleges that defendant, under the guise of listening to her heart and while holding his stethoscope, cupped, rubbed, and fondled plaintiff's breast.

Multiple plaintiffs come forward after the allegations are published in the paper.



CASE OUTCOME

Outcome: Settlements made to multiple plaintiffs.

Physician to lose medical license.

CASE #8

- Telemedicine visit in which physician repeatedly asked patients to disrobe and touch themselves during multiple encounters.



CASE OUTCOME

Medical Board: medical license revoked.

Example of exploiting the virtual physician-patient relationship in a sexual way.

CASE #9

- 45-year-old female evaluated by a male internist for disability evaluation.
- Alleges physician went around behind her, unhooked her bra.
- Lifted her bra and began a breast exam.
- There are several other plaintiffs with similar experiences around the time of this incident.



CASE OUTCOME

Repeated breast examinations on patients without medical justification.

Multiple settlements to plaintiffs between \$5,000-7,500.

Questions