

It's Just Not OK-Sexual Relations Between Physicians and Their Patients

New York Law Journal March 7, 2013 Thursday

New York Law Journal

SECTION: OUTSIDE COUNSEL; Pg. p.4, col.1 Vol. 249 No. 44

LENGTH: 1460 words

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BYLINE: Daniel N. Arshack And David J. Knight

BODY:

Much has been written in recent weeks about the Court of Appeals' decision in *Dupree v. Giugliano*, 2012 N.Y. LEXIS 3556, 4 (Nov. 30, 2012), which established that it is medical malpractice for a physician of any specialty to have sex with a patient to whom he has provided mental health treatment. (Previously, liability for malpractice in cases of physician-patient sexual relationships was limited to where the physician was a psychiatrist, or where the patient had been led to believe that the sexual contact was part of her treatment; otherwise, the courts left the task of punishing offending physicians to the New York Office of Professional Medical Conduct (OPMC).)

n1 The OPMC has repeatedly stated that the fact that psychiatrists and other therapy providers are affirmatively precluded, by rule, from having sex with their patients, does not establish an open season for other kinds of physicians. See *Matter of D'Angelo v. State Bd. for Professional Med. Conduct*, 66 AD3d 1154, 887 NYS2d 290 (2009); *Matter of Barad v. State Bd. for Professional Med. Conduct*, 282 AD2d 893, 724 NYS2d 87 (2001) (upholding revocation of non-psychiatric physician's license for sexual misconduct.)

It should be noted, however, that (1) psychiatrists are by no means the only physicians who engage in such behavior, and (2) alternatives to a claim for malpractice, such as breach of fiduciary duty, sexual battery and infliction of emotional distress, are available in these types of cases, regardless of the physician's practice area or whether the physician provided mental health treatment to the plaintiff. This article provides an overview of physician-patient sexual encounters and explores these alternative causes of action through the lens of the medical profession's own ethics rules, which universally condemn physician-patient sexual relationships under any circumstances.

Patterns and Prohibitions

As a threshold matter, the reader should be aware that *Dupree's* underlying facts-namely, that a male family practitioner coerced his younger, female patient into an adulterous affair-are not unique. According to recent research published by the National Institute of Health, in anonymous surveys, 7 percent of physicians report a history of sexual relationships with their patients.n2 But, alarmingly, more than 90 percent of all physician-patient sexual encounters go unreported.n3 Offenders are overwhelmingly male and tend to practice in the fields of family medicine, psychiatry, and obstetrics/gynecology.n4 One third of them report having had sex with multiple patients.n5

These statistics are troubling given that sexual relationships between physicians and their patients have been strictly prohibited for more than 2,500 years. Under the Hippocratic Oath, which has been the foundation for medical ethics since the fifth century BCE, physicians must always act "for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations" with the patient or other members of her household.n6 More contemporarily, the American Medical Association Code of Medical Ethics proscribes "sexual or romantic interactions between physicians and patients."n7 Likewise, the International Code of Medical Ethics prohibits a physician from "enter[ing] into a sexual relationship with his/her current patient."n8

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Physician-patient sexual relationships are universally prohibited because they are directly contrary to the goals of the physician-patient relationship.⁹ The physician-patient relationship "is a fiduciary one, based on trust and confidence and obligating the physician to exercise good faith."¹⁰ As a fiduciary, the physician "acts as the medical trustee of the patient and the patient's life and health."¹¹ He therefore has a duty to place the patient's welfare above his own self-interest.¹² The physician breaches that duty when he sets aside his professional objectivity and instead pursues his own sexual gratification with little or no regard for the inevitable harmful effects of his actions on the patient's well-being.¹³

Alternative Theories

The offending physician arguably also opens himself up to a claim for negligent or intentional infliction of emotional distress, in that he knew, or should have known, that his actions were unethical and unreasonably endangered the health of his patient. This theory may be particularly effective in cases where the offending physician has a history of being investigated or disciplined for sexual misconduct. Under those circumstances, his employer may also be liable if they knew or should have known of the errant physician's sexual proclivities with regard to his patients.

Sexual battery is an equally viable claim in most cases. Sexual battery, broadly defined, is the intentional touching of another person's sexual organs without that person's consent. While consent of the victim is ordinarily a valid defense, there is a statutory presumption in New York that patients are never capable of giving full and informed consent to sexual contact by their physicians.¹⁴ Studies have proven that the physician's tremendous power over the patient, coupled with the patient's emotional and/or psychological vulnerability, deprives the patient of the ability to give true or valid consent to a sexual relationship with her physician.¹⁵ In fact, as one American Medical Association report observes, "the lack of reliable or true consent on the part of the patient...has led researchers to compare physician-patient sexual contact with other sexually exploitative situations such as sexual assault and incest."¹⁶

These alternative theories may allow the plaintiff to recover where the facts do not meet the Dupree "mental health treatment" standard for malpractice. But in any event, it is unfortunate that New York law continues to fall short of the medical profession's own ethics codes, such that attorneys must craft alternative theories for what is clearly a departure from the standard of care. Ultimately, it is not in the public interest for the court to treat sexual misconduct differently depending on whether the physician was involved in the patient's mental health treatment.

[note 1] See New York State Education Law §6530(20) (defining professional misconduct to include sexual contact between patient and physician practicing in "field of psychiatry").

[note 2] Randy Sansone, M.D. and Lori Sansone, M.D., "Crossing the Line: Sexual Boundary Violations by Physicians," *Psychiatry* (Edgmont), 6(6): 45-48 (2009).

[note 3] See Am. Med. Ass'n, *Sexual Misconduct in the Practice of Medicine* (1991) at 8 (citing survey in which only 8 percent of physicians who were aware of their colleagues' physician-patient sexual relationships reported their colleagues to a professional organization or legal authority).

[note 4] See Randy Sansone, M.D. and Lori Sansone, M.D., "Crossing the Line," *supra*.

[note 5] Am. Med. Ass'n, *Sexual Misconduct in the Practice of Medicine*, *supra*, at 3.

[note 6] Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* (1943) (emphasis added).

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[note 7] See Am. Med. Ass'n, Council on Ethical and Judicial Affairs, Opinion 8:14 (1992).

[note 8] World Med. Ass'n, Int'l Code of Med. Ethics (2006).

[note 9] See Am. Med. Ass'n, Council on Ethical and Judicial Affairs, Opinion 8:14 (1992).

[note 10] 83A N.Y. Jur. Physicians, Surgeons, and Other Healers §194 (2012), citing 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §142 (2012).

[note 11] Norman S. Blackman and Charles S. Bailey, *Liability in Medical Practice: A Reference for Physicians* 52 (1990); see also Joseph D. Bloom, M.D., et al., *Physician Sexual Conduct* 28 (1999) ("As fiduciary, the doctor is party to a relationship of special trust, like a trustee").

[note 12] Am. Med. Ass'n, Code of Medical Ethics 10.015.

[note 13] AMA Report, *supra*, at 3 (noting that 85-90 percent of patients are psychologically harmed by sexual contact with their physicians).

[note 14] See N.Y. Penal Code §130.05(3) (2012) (with regard to sex offenses, a "person is deemed incapable of consent when he or she is...a client or patient and the actor is a health care provider"); Fla. Stat. Ann. 458.331(1)(j) (2012) ("A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician").

[note 15] Am. Med. Ass'n, "Sexual Misconduct in the Practice of Medicine," 266 JAMA 2741, 2742 (1991). See generally 50 Wash. & Lee L. Rev. 1733 (discussing psychological, social and cultural factors that prevent patient from withholding consent).

[note 16] *Id.*

DANIEL N. ARSHACK is the managing partner at Arshack, Hajek & Lehrman. DAVID J. KNIGHT is of counsel in the firm's litigation department.

LOAD-DATE: March 7, 2013