CHAMBLEE RYAN

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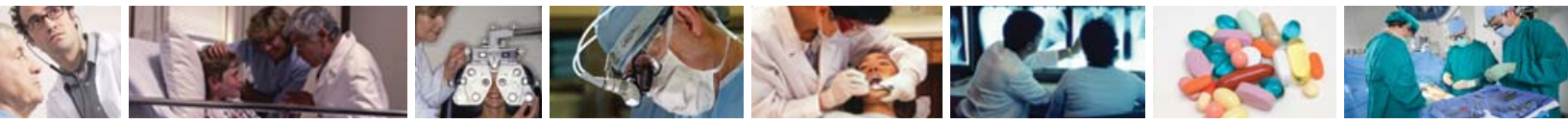

Physician/Patient Boundary Issues

Many questions we answer daily fall into a broad category known as physician/patient boundary issues. Such issues do not directly relate necessarily to patient care, but the ancillary issues that can arise between a physician and his or her patients. The Texas Medical Board's newsletter which publicizes a list of recent infractions by Texas physicians is a constant reminder that physicians need to remain at all times cognizant of the special relationship they enjoy with their patients. We have set forth below some of the more common questions asked of us pertaining to physician/patient boundary issues.

The Texas Medical Board ("the Board") has promulgated specific rules governing the professional conduct of physicians licensed to practice medicine in the State of Texas. The rules promulgated by the Board are legally binding upon licensed physicians as enumerated in Title 22, Part 9 of the Texas Administrative Code. *For a link to these rules, please see the Board's website (www.tmb.state.tx.us/rules/rules.php).* In addition to these rules, the Board has adopted certain policies which tend to operate as guidelines for proper adherence to the rules.

The rules as a whole are fairly general and can require a subjective interpretation. For example, the rules prohibit "unprofessional and dishonorable conduct that is likely to deceive, defraud, or injure the public." 22 Tex. Admin. Code §190.8(2). The rules then go on to state specific conduct that is prohibited, but indicate that this list is not exclusive. On the other hand, a policy is a commentary on the rules that is officially adopted by the Board. The Board can adopt its own policies or even adopt the text of articles written on various subjects relevant to the rules as official Board policies.

As previously mentioned, the rules as drafted are fairly general and open to subjective interpretation. Board policies function as suggestions by the Board for proper adherence to the rules. Although a violation of a Board policy would not subject a physician to repercussions in and of itself, it almost certainly would be significant evidence of violation of the rule that the policy was meant to clarify. Presumably, if the Board cared enough about clarifying the rule by adopting a policy directly related to it, they would consider a violation of that policy a violation of the related rule.

For examples of specific policies adopted by the Board, see the Texas Medical Board's website (www.tmb.state.tx.us). Please note that at the August 2006 Board meeting, the Board voted to rescind all policies, guidelines, and published position statements made effective prior to August 31, 2005. The Board directed staff to develop corresponding rules for these former policies, guidelines, and published position statements. According to a representative of the Board's legal department, this action is indicative of a move toward clearing up the confusion associated with sometimes out-dated policy statements and Board rules. The Board is moving towards codifying all its previous policy statements into rules to reduce this confusion.

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Inside This Edition

Q: ***What is the best advice for physicians about being aware of boundary issues?***

A: Based on the inherent power of a physician over a patient, the vagueness of the rules promulgated by the Board, and the general subjective nature of interpreting these rules, the best advice is quoted in the Board's former policy for Physician/Patient Intimacy: "when in doubt, don't."

Physicians should always remember the fact that they hold a position of power over a patient, and the law recognizes this. The Board's rules regarding boundary issues are promulgated to protect the patient. Therefore, physicians should always proceed with an abundance of caution in any sort of relationship with a patient or former patient, whether the relationship is financial or intimate. No matter how "appropriate" a relationship may seem to a physician, he or she should always remember the particular relationships which raise boundary issues and proceed with an abundance of caution. No physician wants to find himself or herself in the position of having to rely on someone else's subjective opinion as to whether a particular relationship was appropriate.

Q: ***Can a physician be prosecuted by the Texas Medical Board in a "boundary crossing" relationship not based on a sexual relationship with a patient?***

A: A physician absolutely can be subject to disciplinary action by the Board for certain other "boundary crossing" relationships other than those based on a sexual relationship with a patient. Remember, the Board prohibits the very broad category of "unprofessional and dishonorable conduct that is likely to deceive, defraud, or injure the public." 22 Tex. Admin. Code §190.8(2). Among the specific actions that the Board prohibits is "becoming financially or personally involved with a patient in an inappropriate manner." 22 Tex. Admin. Code §190.8(2)(G). The rule is very subjective. Out of an abundance of caution, a physician may want to try and avoid any financial relationship with a patient or a former patient. Of course, this would most likely be overdoing it, and it would be practically impossible in some small communities. An "appropriate" financial relationship with a patient does not violate the rule, but without more interpretive case law on the issue, it is very difficult to define what is appropriate and what is not.

Q: ***Can the Board investigate if a doctor and a patient have a consensual affair?***

A: The Board most definitely will investigate a consensual affair between a doctor and a patient, even without a "jilted lover" figure. The Board explicitly prohibits "engaging in sexual contact with a patient." 22 Tex. Admin. Code §190.8(2)(E). Once again, this is a vague rule in that the Board does not define "sexual contact" or "patient." However, it is clear that the Board would consider any sort of "sexual contact" with a current patient as a violation of disciplinary rules for physicians. As such, a physician could be subject to disciplinary action by the Board even by engaging in a consensual relationship with a current patient.

In addition to prohibiting sexual contact between a doctor and a patient, the Board also prohibits "engaging in sexually inappropriate behavior or comments directed towards a patient." 22 Tex. Admin. Code §190.8(F). Clearly, the Board will not tolerate any sexual activity between a doctor and a patient, even if it only includes inappropriate behavior. This is another very broad and vague term which raises all sorts of potential disciplinary problems for doctors. The best advice is to simply stay away from any sort of sexual relationships with patients.

The rules are less clear as to former patients, but the dangers are just as real. Although some arguments have been made that sexual relationships between a physician and a former patient are not prohibited by the rules, the best legal advice is to avoid such situations. The Board's former policy regarding Physician/Patient Intimacy advised against such relationships even with former patients, based in part on the inherent power that a physician has over a patient. As stated above, former Board policies have been rescinded and staff has been ordered to draft corresponding rules. Therefore, the policy is still an indication of the position of the Board. Because of this considerable power that a physician has over a patient, there is always the danger that it could be exploited.

Q: ***What are the Board's rules regarding prescription of medications for family members?***

A: The Board generally prohibits "practice inconsistent with public health and welfare." See 22 Tex. Admin. Code §190.8(1). This includes "inappropriate prescription of dangerous drugs or controlled substances to oneself, family members, or others in which there is a close personal relationship that would include the following:

> (i) prescribing or administering dangerous drugs or controlled substances without taking an adequate history, performing a proper physical examination, and creating and maintaining adequate records; and
> (ii) prescribing controlled substances in the absence of immediate need. 'Immediate need' shall be considered no more than 72 hours."
> 22 Tex. Admin. Code §190.8(1)(M).

At the very least, physicians should be cautious when prescribing medications for family members. Even though it may seem unnecessary and impractical, it is advisable to treat family members as regular patients. Prior to prescribing, the physician should have an adequate history and physical from the family member. Ideally, the physician would also keep and maintain medical records on all family members that they are treating as patients. The Board rule seems to give some latitude for physicians to prescribe controlled substances without maintaining such records if there is an "immediate need." However, it is advisable to keep proper medical records on family members unless there is an emergent medical need to do otherwise. We have never seen this issue come up as part of a Texas Medical Board Investigation unless connected to another investigation.

Texas Medical Board Update

At some point in virtually every physician's career, he or she will face a complaint filed most likely by a former patient with the Texas Medical Board. We routinely guide physicians through the process of a Board complaint and investigation. In terms of assessing how a physician should respond to an investigation by the Texas Medical Board, our advice is always "as though your livelihood depends upon it, because it does." However petty or ridiculous a complaint may seem on its face, the best advice is to take all such complaints seriously and gather all supporting documentation (whatever it may be) on the front end. We have seen too many instances where physicians were given false assurances by Board investigators only to find themselves facing a hearing in Austin with approximately thirty (30) to sixty (60) days notice. Once the Board has opened an investigation, the Board has one hundred eighty (180) days to dismiss the complaint, invite the physician to Austin for an Informal Settlement Conference/Show Compliance Proceeding, or seek additional time. As such, a large part of this is simply "hurrying up and waiting." Our goal in all such matters is to avoid ever going to Austin for the hearing. The Board's own statistics reflect that approximately eighty percent of such investigations get dismissed without the need for a hearing. This is why it is important to provide the Board supportive information in your own defense early on. This can avoid having to go to Austin to explain things that could have been explained early on. The Texas Medical Board investigates every complaint which is filed against a physician or health care provider.

Has the risk gone up?

The Texas Medical Board publishes statistics for the number of investigations opened, number of informal hearings held, and number of disciplinary rulings made. Over the past several years, the numbers have increased in each field. The Board's statistics reflect the number of investigations opened as follows:

Year – Investigations opened

2001 – 1,365
2002 – 1,725
2003 – 1,775
2004 – 1,900
2005 – 2,231
2006 – 2,032

Year – # of informal hearings held – % of investigations which required hearings

2001 – 187 – 13.7%
2002 – 172 – 10.0%
2003 – 477 – 26.9%
2004 – 420 – 22.1%
2005 – 469 – 21.0%
2006 – 427 – 21.0%

Year – # of physicians sanctioned

2001 – 105
2002 – 187
2003 – 277
2004 – 256
2005 – 304
2006 – 335

Therefore, by the Board's own statistics, approximately 80% of complaints are dismissed without the need of an informal settlement conference. Correspondingly, approximately 20% of complaints require the physician to travel to Austin to attend an informal settlement hearing. As you can see, the number of physicians sanctioned by the Board has steadily increased over the past five years.

Providing our clients the best possible result

Read This Before Retiring

Patient access to their medical records is an issue of great importance to the Texas Medical Board. The Board is concerned with situations in which a physician has retired or ceased to practice medicine and has not made reasonable arrangements to communicate this information to his or her patients to ensure that their medical records are available to the patient or their subsequent treating physicians. In an effort to achieve this legitimate goal, the Board has promulgated rules which put significant burdens on retiring physicians. Physicians may not be familiar with these requirements, but any retiring physician in Texas should know that there are specific actions he or she must take in order to protect their patients' medical records before they leave their current practice.

When a physician makes the decision to discontinue his or her practice, he or she is responsible for ensuring that patients receive reasonable notification and are given the opportunity to obtain copies of their records or have their records transferred to another physician. The physician must also notify the Texas Medical Board, specifying who has custodianship of the medical records and how they may be obtained.

The notification notice to the patients must be specific. It must detail when the physician intends to terminate the practice and will no longer be available to patients, and it must advise the patients of their right to obtain a copy of the medical records and indicate how to do so. A copy of the notice must be submitted to the Board within 30 days from the date of termination of the practice.

The physician must present this notice in three specific ways: The first required method is publishing notice in the newspaper with the greatest circulation in each county in which the physician practices or practiced and in a local newspaper that serves the immediate practice area. The Board does not specify how often such notice should be published, but it should be conspicuous and not hidden away in small print. The second action that a physician must take when retiring is to send letters to all his or her patients that he or she has seen in the last two years to their last known mailing addresses. Finally, a retiring physician must place written notice in the physician's office of his or her intent to retire or terminate their practice. This notice should be in a conspicuous location.

Please see Tex. Admin. Code §165.5.

Requirements for Non-Compete Clauses Involving Physicians

A common element of many contracts between physicians and other health care providers are covenants not to compete, or non-compete clauses. In order for a non-compete clause to be enforceable in court, it must meet several requirements. In general, non-compete clauses must contain limitations as to time, geographical area, and scope of activity to be restrained. These limitations must be reasonable and must not impose a greater restraint than necessary to protect the goodwill or other legitimate business interest of the party receiving the benefit of the non-compete clause. For example, non-compete clause which prohibited a physician from ever practicing medicine in the Dallas are would not be enforceable because it does not have a time limitation. These requirements are required for any non-compete to be considered enforceable by a court of law.

In addition to the above requirements, non-compete clauses against physicians licensed by the Texas State Board of Medical Examiners have specific requirements which must be met for them to be considered enforceable in court. First, the covenant must: (1) not deny the physician access to a list of his or her patients who he or she had seen or treated within one year of termination of the contract or employment; (2) provide access to medical records of the physician's patients upon authorization by the patient; and (3) provide that any access to a list of patients or to patients' medical records after the termination of the contract or employment shall not require such list or records to be provided in a different format than by which such records are regularly maintained.

Second, the non-compete clause must provide for a buy-out option by the physician at a reasonable price or, at the option of either party, as determined by an arbitrator.

Third, the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.

All of the above elements must be included in a contract containing a non-compete clause for a physician for that contract to be considered enforceable by a court of law.

Please see Texas Business & Commerce Code, Section 15.50.

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For more information regarding **Chamblee & Ryan's** Health Law practice,
please contact Brian Hunt or Peter Anderson at 214-905-2003.