LET'S GO TO THE VIDEO TAPE

Board of Medical Examiners Eviscerates Chaperone Rule Protections, Responding to Patients Personal Crises May be Punishable Boundary Violation

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In a shocking decision, the New Jersey Board of Medical Examiners at its May meeting eliminated any protection its Chaperone Rule afforded physicians wrongly accused of misconduct. That rule requires a physician to have a chaperone available when a patient of the opposite sex is disrobed.

Upholding a decision of an Administrative Law Judge (ALJ) that two eyewitness female medical assistants should not be believed because they were the physician's co-workers, the Board found a physician to have engaged in sexual misconduct with a patient and suspended his license. Both medical assistants corroborated the physician's testimony that no impropriety occurred. Given this finding, short of installing video cameras in every examining room, physicians are left with no protection, whatsoever, when examining a patient. The extraordinary facts of this case follow:

A twenty-four year old go-go dancer at the topless bar known by viewers of "The Sopranos" as the "Bada Bing" was seen on two occasions by a salaried physician at a fourteen physician medical office, following an auto accident in January, 2003. At the end of March, 2003 she returned to the medical office bruised from head to toe. She spoke to two medical assistants, telling them that she had been badly beaten by her boyfriend, but did not want to go to the police or to the emergency room because she loved him and didn't want to get him in trouble. However, she wanted documentation, in case something happened to her in the future.

Without checking with the doctor, the assistants told her to return two days later, when the doctor who initially examined her would be back in the office. According to the testimony of the medical assistants, they told her to dress wearing a sports bra and shorts so they could take Polaroid pictures to document her bruises.

The woman returned two days later, without a bra, and wearing only thong underwear under a warm-up suit. The medical assistants gave her a gown to put on and she was then seen by the physician, who examined her in the presence of one of the assistants. He then left, and the second assistant took the photographs which she gave to the patient, at her insistence. According to the medical assistants, the physician, and the dictated medical record, this visit occurred on April 2, 2003.

On April 5, 2003, the accuser went to the police and reported that she had been to the physician on March 14, 2003, at which time he had her remove her bra and then placed her hand on his crotch, over his pants, and then kissed her on the mouth. She also told the police that the physician had left a message on her cell phone the previous afternoon telling her he wanted to see her at her house, and that shortly thereafter, she saw the physician outside her home driving a dark blue or black "regular" car in front of her as she was about to leave her parking place. According to a statement provided by a girlfriend, the accuser told her that she sighted the car after she had pulled out of her complex and saw him pulling in, and that the sighting occurred on April 5th, not April 4th.

Two days later she reported to the attorney handling her personal injury case that the

examination at issue occurred on March 26, 2003 and that she saw this dark blue or black car parked outside her house. She then told another attorney that she saw the car "in the area" as she was leaving her house.
On May 7th after visiting a malpractice attorney to file suit against the physician, she filed a formal complaint with the county prosecutor, this time alleging that the incident occurred either on March 23 or March 24, 2003, and that she saw the physician driving in front of her home.

Her case was subsequently presented to a Grand Jury, but the Grand Jury refused to indict. Though summoned to appear at the Grand Jury, the accuser failed to appear.

Despite the fact that the Grand Jury refused to indict, despite the fact that only three days after the alleged incident she told the police that the examination – which she claimed she would remember for the rest of her life – occurred two and a half weeks earlier, and despite the fact that the physician denied any impropriety, and demonstrated that he neither owns nor has access to a dark blue or black car, and otherwise confirmed the medical assistants version of events, the deputy attorneys general assigned to the Board of Medical Examiners decided to pursue the physician. They did so even after the Board rejected the deputies' application for temporary suspension of the physician's license and after confirmation that the physician neither owned nor had access to a dark blue or black car, but that he drives a red SUV.

A hearing was finally commenced in October, 2005. At that time she testified that she came to the office wearing a bra and underwear, that the medical assistant took the pictures of her wearing a bra and underwear, and that after the pictures were taken, the medical assistant left, the physician entered the room, alone, had her remove her bra and then engaged in the alleged misconduct.

Since the photographs and the voicemail message would have either proven the accuser or the assistants and physician a liar, demand was made for the production of the picture and voicemail. Shockingly, the accuser testified that she purposely destroyed the photographs a couple of months earlier, many months after the prosecuting deputy attorney general asked her for them, claiming she could no longer bear to look at them, and also claiming that she intentionally erased the voicemail message.

Moreover, at the demand of defense counsel the prosecuting deputy attorney general was forced to admit on the record that the accuser had lied because she had told the deputy attorney general that it was not the physician, but one the of medical assistants, who asked her to remove her bra.

The accuser also testified that the incident occurred not on March 14, as she told the police, not on March 23 or 24, as she told the prosecutor, and not on April 2 as the medical records revealed and the physician and the medical assistants maintained, but on March 26, 2003. She claimed she refreshed her recollection of the date by looking at the back of the photographs that she had since intentionally destroyed, claiming that the medical assistant had handwritten the date on the back of the photos. She also testified, contrary to all of her previous versions, that the physician's car was not parked, but passed her at an unknown speed as she was leaving her parking space, going in the opposite direction.

During her testimony it was also revealed that during the period in which she was claiming to be totally disabled and unable to work, she was engaged in "strenuous" dancing around a pole at the "Bada Bing" and that she failed to report her income from her "dancing" on her tax returns. Following this admission she filed an amended tax return which also failed to disclosure her tip

income from her dancing.

There were only two other witnesses produced by the prosecution, two lawyers to whom the accuser related her story. One candidly admitted that when she told him her story he had no idea if she was telling the truth or lying. The other admitted that she never told him that her boyfriend had beaten her up, that she had already been to the police, or that she continued to obtain treatment, including physical therapy and an MRI, at the medical offices, after the date of the alleged incident. Nor could he explain a note, written on April 7, 2003, which was clearly overwritten, indicating that she told him the date of the exam was March 26, 2003, especially since the accuser claimed that it was not until a great deal later that her memory of the date was refreshed by looking at the back of the pictures. Both lawyers also provided different versions of where the accuser claimed to have seen the physician's car.

Though the accuser claimed that there were five other witnesses to support her story, none came forward to testify on her behalf. The five other witnesses included her boyfriend, her mother, her husband, a girlfriend to whom she claims to have shown the pictures, and another dancer at the "Bada Bing" whom she said she contacted immediately after sighting the physician's car. Over objection, the statement of the "Bada Bing" dancer was admitted, and that statement again contradicted the accuser, claiming the car sighting occurred on April 5, not April 4, and that the accuser saw the car as she was exiting her complex and he was coming into the complex.

In deciding against the physician, the ALJ, astonishingly, found that she could not believe the medical assistants because they were co-workers of the physician and therefore, that their conditions of employment could be altered if he lost his license, and because they and their families continued to used him as their personal physician. By contrast, since the two lawyers had no interest in the case, the ALJ reasoned, their testimony was credible, even though they knew nothing other than what they were told by the accuser. The recommended penalty – permanent revocation of the physician's license to practice.

The finding is even more inexplicable given the fact that one of the medical assistants left the practice a year before giving her testimony and that the physician was neither an owner nor officer of the practice. Also, the notion that two medical assistants would cover up an act of sexual misconduct by a physician so that they and their children could continue to see this physician for care can only be described as absurd.

Unfortunately, the Board refused to overturn the decision, finding only that there was "insufficient basis" to overturn the Administrative Law Judge's decision. The Board did reduce the penalty to a six month suspension of license, but, after allowing the physician to continue to practice without incident for four years since the complaint was first brought, refused to stay the suspension pending review by the Courts. In refusing to stay its action, the Board found that many of the physician's patients who came forward to testify on his behalf spoke of his availability to them during personal crises. The Board viewed this not as a favorable attribute but rather concluded that this testimony "bespeaks of familiarity that is not conducive to an appropriate physician-patient relationship. . . ." According to the Board, "While compassion is certainly a laudatory attribute, a physician must maintain a boundary."

Given this finding, physicians should be on notice that making themselves available to patients in times of personal crisis may constitute a punishable boundary violation.

The case is now in the Appellate Division.

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