

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 22, 1981

George E. Sullivan, M.D.
Secretary
Board of Registration in Medicine
100 College Ave.
Waterville, Maine 04901

Dear Dr. Sullivan:

This letter responds to your request of November 6, 1981 for an opinion on the question of whether a physician's sexual activity with a patient may constitute grounds for disciplinary action by the Board of Registration of Medicine.

As you know, 32 M.R.S.A. § 3282(5)(G) authorizes the Administrative Court to revoke or suspend a license of a doctor and the same section authorizes the Board to take other disciplinary action against a medical doctor for "unprofessional conduct" including "dishonorable or immoral conduct that tends to discredit the medical profession."

Two threshold questions are often raised by statutes of this kind. The first is whether the statute is unconstitutionally vague. While this question cannot be lightly treated and although there are no Maine cases addressing the issue, several other state courts have upheld similar statutes against similar attacks. See, e.g., Martinez v. Texas State Board of Medical Examiners, 476 S.W.2d 400 (Tex. Civ. App. 1972); Cardamon v. State Board of Optometric Examiners, 411 P.2d 25 (Colo. 1968). Also see, Krohn v. Michigan Board of Medicine, 296 N.W. 2d 57 (Mich. 1980); Shea v. Board of Medical Examiners, 81 Cal. App. 3d 564, 146 Cal. Reprtr. 656; Buhr v. Arkansas State Board of Chiropractic Examiners, 547 S.W.2d 762 (Ark. 1977); Richardson v. Florida State Board of Dentistry, 326 So.2d 231 (Fla. App., 1976); and Hoke v. Board of Medical Examiners, 395 F.Supp. 357 (W.D.N.C., 1975).

Another threshold issue is whether the Board must issue regulations defining "unprofessional conduct" before it can bring a disciplinary action on such grounds. A recent case has ruled that regulations are necessary to define this standard, Megdal v. Oregon State Bd. of Dental Examiners, Or., 605 P.2d 273 (1979) and we would certainly advise that your Board do so. However, at this juncture this office is not prepared to say that the Maine courts would reach the same result.

Coming to the question you raise, we conclude that the term "unprofessional conduct" including "dishonorable or immoral conduct that tends to discredit the medical profession" can fairly be interpreted to include sexual activity between a doctor and a patient at least under circumstances where the doctor initiates the conduct and the doctor is or is purporting to act in his professional capacity. The case for such a finding of unprofessional conduct would be particularly strong where there is a pattern of such conduct with several patients or when the conduct is with minor women. The rationale for this conclusion is stated in Texas State Board of Medical Examiners v. Koepsel, 322 S.W.2d 609, 612 (Tex. 1959);

It is well recognized that in the professions dealing with human ills and their treatment, it is the policy of the people, expressed in legislative enactments, to require those who practice such a profession to conform to the highest moral standards. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners but protection against those who would prey upon those particularly susceptible to their position.

322 S.W.2d at 612.

Also see, Bernstein v. Board of Medical Examiners, 22 Cal. Rptr. 419 (D.Ct. App. 1962). Cf., Jacobi v. Texas State Board of Medical Examiners, 308 S.W.2d 261 (Tex. Civ. App. 1955); Clark v. Michigan State Board of Registration in Medicine, 116 N.W.2d 797 (Mich. 1962).

Based on the foregoing conclusion we will continue investigating Dr. Hornstein's conduct. We would stress, however, the sensitive nature of this kind of investigation and therefore would welcome the opportunity to confer with you again before the Board decides to take any formal action based on this investigation.

Very truly yours,


RUFUS E. BROWN
Deputy Attorney General

REB:jg
cc: Michael Richards