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### The Nexus Necessity: Disciplining Physicians for Non-Clinical Misconduct

It is a common phrase that even heroes, like a wagon wheel, will eventually wear down. Hippocrates recognized there was more to practicing medicine than just serving the patient. In the *Hippocratic Oath*, Hippocrates admonishes physicians to preserve and promote the health of humanity. He also cautions against the use of drugs to bring the individual patient to harm, and to hold one's tongue. The admonition to hold one's tongue may refer to the physician's duty to keep patient secrets, but it may also refer to the physician's duty to keep his or her own secrets.

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in various forms, such as wrong patient/wrong site surgery, but not always made more difficult when the unprofessional conduct does not affect on patient care, such as being drunk, smoking inside the practice, or commiserating or investigating claims of unprofessional conduct. This article focuses on legalities of applying the Medical Practice Act to conduct that does not affect patient care.

#### The Nexus Necessity

When looking to our own jurisdiction, state legislatures and state medical boards should tread carefully. As mentioned above, there is no doubt some medical boards can discipline physicians for non-clinical unprofessional conduct, but there are limitations. One is a state must affirm its intention state medical boards responsible for enforcing the medical practice act to punish unprofessional conduct is the consistent practice of the law. Another limitation is a "public safety" clause and the "public protection clause" in the full approval of the state's constitution and statute laws may limit the scope of the physician's knowledge and ability to practice. The law, however, may be more lenient in some jurisdictions, but it is not a state's duty to protect the public health, safety, and welfare of its citizens. The "public safety" clause is "prevented from practicing a profession except for valid reasons". Indeed, the "public safety" clause is a "public safety" clause.

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for reasons related to his or her fitness or competence to practice that profession."<sup>11</sup> One court held that "there must be a logical connection of licensees' conduct to their fitness or competence to practice the profession or to the qualifications, functions, or duties of the profession in question."<sup>12</sup> Thus the state can impose discipline on a professional license only if the conduct upon which the discipline is based relates to the practice of the particular profession and thereby demonstrates an unfitness to practice such profession.

### Identifying the Nexus

It is the state medical board's responsibility to identify the nexus between conduct and the profession. The *Matanky* court held that "with regard to actions that do not directly affect patient care, the state medical board must demonstrate a nexus between the proscribed conduct and the practice of medicine. For a nexus to exist between the unprofessional conduct and the fitness or competence to practice medicine, it is not necessary for the misconduct forming the basis for discipline to have occurred in the actual practice of medicine. "[The medical board] is authorized to discipline physicians who have been convicted of criminal offenses not related to the quality of health care."<sup>13</sup> This decision makes it clear that the state medical board can identify the nexus in situations where there is no patient care.

The first place to look for the necessary nexus is the Medical Practice Act and associated rules. The legislature and subsequently the state medical board can establish a nexus through statutory process and rule making. One court concluded that by defining "more than one misdemeanor conviction involving alcohol consumption as unprofessional conduct ... the Legislature has determined that a nexus exists between those convictions and a physician's fitness or competence to practice medicine. The issue is whether such convictions have a "logical connection" to a physician's fitness or competence to practice medicine."<sup>14</sup> Likewise, the *Griffiths* court found that by defining convictions for use, consumption, or self-administration of

alcoholic beverages as unprofessional conduct, the statute satisfies the constitutional requirement that a nexus exist between the disciplined conduct and the physician's fitness and competence to practice medicine without any additional showing that the convictions or the alcohol consumption impaired Griffiths' practice of medicine.<sup>15</sup>

A California statute provides an example of a statutorily created nexus. In 16 § 1360, the California legislature provides that:

For the purposes of denial, suspension or revocation of a license, certificate or permit pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall be considered to be *substantially related* to the qualifications, functions or duties of a person holding a license, certificate or permit under the Medical Practice Act if to a *substantial degree* it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Medical Practice Act.

Most statutes are not as explicit as California's, but they can still create the nexus. A good example is Kentucky's statute KRS 311.597(4), in which the legislature provides that "it is unprofessional for a physician to take any action calculated to or has the effect of bringing the medical profession in disrepute including, but not limited to, violations of AMA/AOA ethics."<sup>16</sup>

The courts are willing to allow the legislature to connect the disconnected. "The Legislature which presumptively legislated in a constitutional fashion . . . has determined that conviction of a doctor for a violation of the laws regulating narcotics and dangerous drugs or a doctor's personal non-

prescribed use of such substances evidences a sufficient danger to the public that sanctions should be imposed regardless of the availability of evidence that such conduct in fact impaired the doctor's professional skill."<sup>17</sup> This similarly reflects the Federation of State Medical Boards' policy stating it is unprofessional to engage in conduct calculated

to or having the effect of bringing the medical profession into disrepute, including but not limited to, violation of any provision of a national code of ethics acknowledged by the board.<sup>18</sup>

### **The Unconnected Connection**

Sometimes statutes or rules do not establish the nexus between the prohibited act and the practice of medicine. In these instances, the courts have read into law a nexus where one does not explicitly exist. So, "where a licensing statute does not require a showing of a nexus between the licensee's conduct and the licensee's fitness or competence to practice, the statute must be read to include this "nexus" requirement to ensure its constitutionality.<sup>19</sup> Further, "[a] presumption exists that in enacting a statute, the Legislature did not intend it to violate the Constitution, but instead intended to enact a valid statute within the scope of its constitutional powers. Therefore, we frequently have observed that a statute must be interpreted in a manner, consistent with the statute's language and purpose, which eliminates doubts as to the statute's constitutionality."<sup>20</sup> The act of dishonesty need not arise out of the practice of medicine to establish the required nexus. "For a nexus to exist between the misconduct and the fitness or competence to practice medicine, it is not necessary for the misconduct forming the basis for discipline to have occurred in the actual practice of medicine.

The Medical Board is authorized to discipline physicians who have been convicted of criminal offenses not related to the quality of health care."<sup>21</sup>

Not all courts agree that deriving a nexus is necessary. Two courts have held it is unnecessary to establish a nexus. The *Weissbuch* court held "there is no basis, constitutional or otherwise, for the courts to override that legislative determination by imposing a special requirement of 'nexus' between the proscribed conduct and professional conduct."<sup>22</sup> Likewise, the *Wilson* court concluded that no basis appears for creating a special requirement of 'nexus' where conviction of a crime is considered as a ground for discipline.<sup>23</sup>

### **The Board's Broad Authority**

Some courts require boards to identify the nexus when one is not obvious. The *Kvitka* court noted that "the concerns with protecting the integrity of the profession and protecting the public are not unrelated. As an interest of the state, however, preserving professionalism is not an end in itself. Rather, it is an instrumental end pursued in order to serve the state's legitimate interest in promoting and protecting the public welfare. To perform their professional duties effectively, physicians must enjoy the trust and confidence of their patients. "Conduct that lowers the public's esteem for physicians erodes that trust and confidence, and so undermines a necessary condition for the profession's execution of its vital role in preserving public health through medical treatment and advice."<sup>24</sup> The board has broad authority to regulate the conduct of the medical profession,<sup>25</sup> including the ability to sanction physicians for conduct which undermines public confidence in the integrity of the medical profession.<sup>26</sup> Likewise, in *Kindschi*, a board had suspended a physician's license to practice medicine after he was convicted of tax fraud. The court upheld the board's action, and in doing so it took a broad view of the required relationship between the improper conduct and the practice of the profession. The court pointed out that a medical disciplinary proceeding is taken for two purposes: "to protect the

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public, and to protect the standing of the medical profession in the eyes of the public."<sup>27</sup>

Not only may state medical boards draw the connection when necessary, they may draw the connection before there is an actual connection. "The protection of the public, the primary purpose of licensing statutes, does not require harm to a client before licensing discipline can take place. "[R]epeated criminal conduct, and the circumstances surrounding it, are indications of alcohol abuse that is adversely affecting petitioner's private life. We cannot and should not sit back and wait until petitioner's alcohol abuse problem begins to affect her practice of law."<sup>28</sup>

### **Good Doctor/Bad Person Dilemma**

Once the legislature, the state medical board or the court draws the nexus between the non-clinical conduct and the practice of medicine, the state medical board will encounter a "good doctor/bad person dilemma." When searching to make a connection, boards may encounter a physician who is an excellent clinician or surgeon but has a lack of moral character. To discipline such a physician could result in the loss of a highly skilled, badly needed physician, but failure to discipline could bring the profession into disrepute. "A personal relationship of trust and confidence must exist between a physician and his patient if the patient is to have confidence in the physician's professional judgment."<sup>29</sup> "The public has the right to expect the highest degree of integrity from members of the medical profession."<sup>30</sup> "Mere intellectual power and scientific achievement without uprightness of character may be more harmful than ignorance. Highly trained intelligence combined with disregard of the fundamental virtues is a menace."<sup>31</sup> *Matanky* bluntly made the same point: "A physician can be subject to disciplinary action notwithstanding his technical competence or skill under circumstances where his moral character is in dispute. Intentional dishonesty, especially involving moral turpitude, demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine."<sup>32</sup>

The *Griffiths* court held that "driving while under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society. Knowledge of such repeated conduct by a physician, and particularly of its propensity to endanger members of the public, tends to undermine public confidence in and respect for the medical profession."<sup>33</sup>

Likewise, the *Burg* court held that "convictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance."<sup>34</sup>

While the repeated excessive off duty use of alcohol demonstrates a clearer nexus, the courts and the state medical boards can identify a nexus in more nebulous situations. For example, the *Windham* court rejected the argument that personal income tax evasion did not reflect upon a doctor's professional qualifications.<sup>35</sup> The *Matanky* court held that an intentional misdeed relating to third-party payors reflects adversely on a physician's fitness to practice medicine. It is irrelevant that it is a third party, and not a patient, who is being defrauded.<sup>36</sup>

### **Conclusion**

Broadly put, intentional dishonesty, especially involving moral turpitude, demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine.<sup>37</sup> The public has a right to expect the highest degree of trustworthiness of the members of the medical profession. We believe there is a rational connection between income tax fraud and one's fitness of character or trustworthiness to practice medicine, so that the legislature can properly make fraudulent conduct in such

instances a ground for revoking or suspending the license of a doctor.<sup>38</sup>

The U.S. Supreme Court and subsequent court decisions makes it clear there must be a nexus between the physician's conduct and the practice of medicine if the state medical board wants to take disciplinary action. When deciding whether to discipline a physician for non-clinical unprofessional conduct, state medical boards should look to the statutes and rules to see if there is an explicit or implicit nexus. Medical boards should be prepared to demonstrate a nexus between the physician's unprofessional conduct and the practice of medicine. ■

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