

## TEN TIPS FOR HANDLING SEXUAL ASSAULT BY A HEALTH CARE PROVIDER CASES

By Glenn C. McGovern, Attorney  
Metairie, La.

A female client comes into the office and claims a male nurse P.A raped her. She claims instead of being given a nerve block injection as usual, she was given another medication that made her unconscious. She then woke up gagging for breath in the middle of a forced sexual act with the treating nurse P.A. The nurse P.A threatens her with harm to her children if she tells anyone of the rape.

A female client has a long mental history of mental illness that the doctor is fully aware of. During treatments in his office behind closed door of the physician's examination room she is sexually assaulted and battered in the examining room by the physician resulting in humiliation of the patient and sexual gratification of the physician.

A 14-year-old female client sustains injuries on a four-wheeler and goes to a local hospital where she is sent to a male x-ray technician for x-rays. She is ordered into a hospital gown. She is given anesthesia for simple x-rays. During the x-ray exam she is held down and sexually assaulted, battered and objects inserted into her cavities by the male technician. The male technician was previously discharged from another hospital for allegations of sexual assault of a patient.

These are all real cases this office has handled. The perpetrators are not the expected sex offenders or repeat rapists. They are licensed professionals who are in fact criminals and have violated their professional code of ethics.

Claims of sexual assault by a health care provider are nothing new. Even Hippocrates advised physicians to "enter only for the good of the patients, keeping yourself far from all...seduction and especially from the pleasures of love with women or with men..."<sup>1</sup> An article in the Journal of the American Medical Association reports that "physician sexual misconduct is not a new behavior", "it exists in the past and will probably exist in the future".<sup>2</sup>

These cases are challenging but winnable. Here are ten tips to successfully handling these cases:

1. Convince the client to report the crime to the police. Usually when the clients call the victims are embarrassed and confused and may have not reported the incidents to the hospital nor police much less the medical board. They frequently feel guilty, as they were in some way responsible for the assault. You must determine if the sexual battery was reported and if so to whom, when and why it was reported. If it was not reported you must have the client/victim report it to the police and

---

<sup>1</sup> Irwin Dreiblatt, *Health Care Providers and Sexual Misconduct*, 79 Fedn. Bull. 8 Jan. 1992) quoting the Hippocratic Oath);

<sup>2</sup> Michael T. McGuire, *Physician Sexual Misconduct*; discussing *Physician Sexual Misconduct*, 283 JAMA, 809 (2000), Joseph D. Bloom, Am. Psychiatric Press (1999)

other authorities. Sexual assault victims rarely report the incidents but you must insist that they do so.<sup>3</sup>

2. If improper administration of drugs were involved in the sexual assault file a written report with the Drug Enforcement Administration (D.E.A).
3. Report the incident to the licensing board that is applicable. Report to any licensing board such as the La. State Medical Licensing Board, La. State Nursing Board or any other applicable governing body for the health care administration, provider or organization involved.
4. Preserve all evidence of personal articles of the victim for sperm and DNA testing. I have had two cases where a relative of the victim and the police had the presence of mind to preserve the clothing of the victim. The clothes were then sent off for testing for sperm at a nominal cost of about \$500. Then, once sperm is confirmed as in fact being present on the victim's clothing a DNA test can be done at a cost of about \$1500. A cheek swab will usually be required of the defendant by the law enforcement authority and such a cheek swab is not covered by the 5<sup>th</sup> Amendment and the defendant cannot invoke any 5<sup>th</sup> Amendment privilege against self-incrimination. A motion for production of a cheek swab can also be filed but usually the police require this if they preserved all evidence. Such evidence is compelling proof of a sexual assault. The defense may move for a stay of proceedings to block this however the cheek swab had been held to be non-evasive and not subject to the 5<sup>th</sup> Amendment privilege against self-incrimination.<sup>4</sup>
5. An extensive background check should be made of the defendant's background. It is not unusual to find they have been discharged from other health care providers after allegations of sexual assault were filed. Surprisingly, they defendants seem to find other employment in most cases, despite the previous allegations in their past. Most victims are embarrassed and feel guilt so they may not fully report the incidents. The victims do not think to report it to a medical society or police so the defendants can continue to sexually assault patients.
6. If you cannot find any victims, write a notice and run an ad asking for others to come forward with information. Before running the ad sent it to the La. Bar Association and pay the \$175 for an opinion the notice is permissible. Be sure to put why you are running it and state you represent a victim and what happened. Put your name, address and phone number in the ad. I have obtained bar association approval for such notices. After you get approval, run the notice in the local paper in the community.

---

<sup>3</sup> Michael R. Rand, *National Crime Victimization Survey: Criminal Victimization, 2008*, Bureau of Justice Statistics Bull. 1,6 (Sept. 2009)

<sup>4</sup> *Hargrave v. Brown and Maintaining Total Control, Inc.*, 783 So. 2d 499 (La. App. 5<sup>th</sup> Cir. 2001) (Cheek swab of defendant ordered in sex harassment and abuse suit.)

7. Consider all causes of action depending on the facts. Consider negligent hiring, negligent supervision, negligent security, negligent retention, medical malpractice, assault, battery, sexual assault, intentional infliction of mental distress and negligent infliction of mental distress. Unfortunately Louisiana does not have a criminal prohibition on physician-patient sexual relations although the AMA Ethical Rules Rule E-8.14 and Rule E-10.01 and La. Medical Association ethic rules clearly prohibit such conduct.
8. Take the depositions of the defendant and facility (if applicable) as early as possible. If there are pending criminal charges, take the deposition of the defendant immediately after filing suit. The defendant will usually invoke the Fifth Amendment.
9. File a medical malpractice complaint out of an abundance of caution as well as a civil suit. A suit for sexual gratification is not generally covered under the La. Medical Malpractice Act LSA R. S. 40:1299.41 *et seq.* However it is recommended that due to the specific facts of each case that a medical malpractice complaint for medical malpractice as well as a civil suit for state causes of action is filed to avoid any prescription problems. Some but not all allegations of sexual misconduct were held do not constitute medical malpractice under the Act in *Jury v. Raviotta*, 612 So. 2d 225) La. App. 4<sup>th</sup> Cir. 1992) because they do not qualify as unintentional torts. However see how the facts can be important in dicta that there could be a medical malpractice claim by a physician who initiated a sexual relationship, as part of the patient's treatment or therapy might be held accountable for a violation of the duty owed to the patient under the Medical Malpractice Act. *Wadsworth v. ABC Insurance Co.*, 731, So. 2d 56, at 58-59 (La. App. 4<sup>th</sup> Cir. 1998). In that case, one allegation of many was held to be covered under the Medical Malpractice Act. File your medical malpractice administrative claim and get a denial of all claims under the La. Medical Malpractice Act to be sure before your state lawsuit is filed. Some claims may be covered under the La. Medical Malpractice Act. Others may not.
10. Use the "Rules of the Road" technique of the book by authors Rick Friedman and Patrick Malone in asking questions in the video deposition of the defendant physician, nurse, P.A. or health care provider.

It is worth mentioning the defense tactics are always to trash the victim, place all blame on the patient/victim and portray the physician or health care provider as being seduced or falsely accused. As set out above in the health care providers own ethics, any sexual activity is clearly prohibited even with the consent of the patient. The client has to be prepared for the harassment and dilatory tactics the defense will use.

