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State Medical Board Attempts to Censure Physician Communication Styles

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“You should purchase a gun and end your suffering, rather than live with extensive brain injuries,” he said to one patient [1]. “You need to lose weight. ...If your husband were to die tomorrow who would want you?” he said to another [1]. These statements were made by Terry Bennett, a New Hampshire physician, to patients who were under his care. Hurt by their doctor’s insensitive comments, the patients reported his behavior to the New Hampshire State Medical Board. Determining that Dr. Bennett was in violation of their code of professional ethics, the board informed him that they would hold an adjudicatory hearing to evaluate whether his comments were so unprofessional as to warrant the suspension of his license to practice medicine.

Was this a commendably swift action by a medical board to deter unprofessional action, or was the board overstepping its relatively limited scope of authority? This article will discuss the authority and role of state medical boards and will attempt to discern how boards may best serve the medical community and the general public. Its scope will be behaviors that, while they violate standards of ethics and professionalism demanded of physicians, fall short of criminal acts.

In response to the action taken by the New Hampshire State Medical Board, Dr. Bennett filed a claim against the board, contending that his comments were a form of speech or activity that could not be policed by the board. Dr. Bennett argued to the Superior Court of New Hampshire that simply being a member of a licensed profession did not strip him of his First Amendment right to free speech, and he successfully petitioned for an injunction against the board. Specifically, the injunction forbade the board from further pursuing an investigation that could result in the suspension of his medical license. The court sided with Dr. Bennett, ruling that, although a physician subjects himself to the regulations and responsibilities set by that particular licensing board, the acceptance of this license does not abridge his right to speak freely [1].

Like many other states, New Hampshire has adopted the American Medical Association’s Principles of Medical Ethics. The 160-year-old principles are a comprehensive guide to the ethical situations and dilemmas that medical professionals may encounter from the start of medical school to their final days of practice. The most basic role of the physician is summed up in Principle I, “A physician shall be dedicated to providing competent medical care, with compassion

and respect for human rights” [2]. This edict comports with what we have come to expect from a physician, but is it enforceable? And, if so, by whom?

Dr. Bennett certainly did not demonstrate the compassion that is essential in quality medical care. The medical board’s intervention was stopped by the Superior Court of New Hampshire, however, because the principle under which the board wished to punish the physician was unconstitutionally vague. In our system of jurisprudence, a rule that seeks to limit an area of protected speech—that is, speech that is free to be spoken by all—must be narrowly tailored to fit a reasonable state objective. The court stated that the principle provided no details as to what speech actually violates the dignity and human rights of the patients. Furthermore, the court was uneasy with the subjective evaluation it had to make regarding the sensitivity of listeners when assessing whether their dignity had been offended (the court generally prefers an objective “reasonable person” standard) [1]. Even though the court felt the AMA’s medical ethics principle was not narrow enough, it did concede that it would be unreasonable to expect the AMA or any other group to exhaustively define every utterance that was a violation of human dignity. Nevertheless, the court overruled the medical licensing board’s claim of authority to police its members, and granted Dr. Bennett’s injunction.

It appears that the only forum a patient has for redress of an excessively insensitive (and unethical) physician is state court. If the court system decides to make the ethical guidelines written or adopted by its state boards toothless, they implicitly invite all requested reparations for wrongs at the hands of their doctors to be heard at the bench. As demonstrated in the Bennett case, the superior court used a constitutional right to strike down the impending action of the state medical board, thus substantially decreasing the board’s authority to police physicians who behave in a rude, poor, or otherwise unprofessional manner toward their patients.

Another constitutional concept, however, may lessen the load of the court’s already burdened docket and return some authority to the state medical boards. The Seventh Amendment to the Constitution provides that in suits involving more than \$20, the defendant is guaranteed a trial by a jury of his peers. This provision forces us to ask, who *are* the physician’s peers—the state medical boards, a state or federal judge, or 12 randomly selected laymen? The most obvious answer is the state medical boards. Who better than the board of physicians in charge of licensing guidelines to determine whether a physician has breached one of the ethical regulations of which they are custodians? The board’s serving as the judiciary when a physician was accused of violating an ethical principle would ensure that the rule was interpreted as the board had intended and would provide the physician with a jury of true peers—fellow physicians familiar with the standards of practice and codes of ethics.

But who can patients turn to if their doctor commits an ethical breach? The answer may be more complex than simply deciding on a forum to hear the allegation. It is the state legislature that adopts a format for ethical regulations for the professions, usually codified as state medical practice acts. The state may choose to create its own

standards or to adopt in part or in whole the ethical guides written by large bodies such as the AMA. Using the example of Dr. Bennett again, state law clearly sets forth that rudeness and poor bedside manner may not be addressed by the board unless accompanied by another, more dire complaint [3]. States that have adopted a structure like New Hampshire's for hearing grievances essentially don't allow the board to handle complaints against rude physicians who tarnish the professional image.

What is one to conclude? There are at least two somewhat conflicting views. The first would have us believe that the system is fine as-is and needs no change. The proponent of this view would state that rude, unprofessional behavior is a self-limiting characteristic. The laws of the market demonstrate that, if someone is bad at what he does, his business will suffer for it. Not unlike the millions of dollars corporate America spends on advertising, the compassionate care physicians provide to their patients is the currency that buys them the word-of-mouth recommendations that result in patient referrals and a successful practice. If word gets around that a doctor is rude, condescending, and insensitive, an action by the state medical board will be unnecessary because that physician's practice will eventually dwindle.

The alternate view recognizes the shortage of medical care and the growing number of Americans who need it. As the population grays and more regular medical attention becomes necessary, patients may not have as much choice in selecting their physicians. They may be forced to remain with humiliating, rude physicians who get away with ignoring their patients' dignity solely because of the demand on a stressed field. This view demands changes in the current level of authority vested in state medical boards. Acting on this interpretation would require state legislatures to revisit their application of ethical standards and grant greater latitude to state medical boards to police their members. The boards must be given an authority that wields genuine power, or else their decisions will not be respected, and their role in enforcing ethics will remain weak.

Granting state medical boards the authority to police not only severe violations of ethical standards but also minor violations, will provide patients an adequate forum for redress of their grievances, while at the same time lessening the burden on an already full state court docket. Allowing the board latitude to exercise its role as the ethical custodian for the medical profession will maintain the luster associated with the respected role of compassionate healer, kind physician, and trusted doctor.

References

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3. New Hampshire State Board of Medicine. Frequently asked questions. <http://www.nh.gov/medicine/cifaq.html#whattype>. Accessed June 5, 2007.

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