



What did I do wrong?

Legal and ethical analysis of state licensure board complaints

This article is based on a presentation given by Mark R. Brengelman at the 2013 FSBPT Annual Meeting.

The practice of physical therapy is defined by state statute and administrative regulations of the board. Ethical violations are covered in different ways in various jurisdiction statutes.

The American Physical Therapy Association (APTA) developed a Code of Ethics for the physical therapist. APTA says, “The code of ethics for the physical therapist delineates the ethical obligations of all physical therapists as determined by the House of Delegates of the American Physical Therapy Association.”

The APTA Code of Ethics may be incorporated into state law by regulation or statute. In Kentucky, the APTA Code of Ethics is not adopted into law, although other states may have done so. In those states, the code of ethics is binding and enforceable under law.

Like other physical therapy boards, the Kentucky Physical Therapy Board regulates the profession and enforces minimum standards to be a licensed physical therapist and certified physical therapist assistant. The license or certificate to practice is a property right under law and the government cannot deprive a person of his/her “life, liberty or property” without “due process of law.”

Sanctions to protect the public

The Kentucky board, after due notice and an opportunity for an administrative hearing, may take any one or a combination of the following actions:

- Refuse to license or certify any applicant.
- Refuse to renew the license or certificate of any person.
- Suspend or revoke or place on probation the license or certificate of any person.
- Impose restrictions on the scope of practice of any person.
- Issue an administrative reprimand to any person.
- Issue a private admonishment to any person. (This is “a good one-time rule to have in the tool box for violators who have done no real harm to the patient or public.”)
- Impose fines not to exceed \$2,500 (hearing officers interpret the fine as being per violation).

Vignette No. 1

The violation: Failure to adhere to an administrative regulation to document reassessments of the patient's condition every 30 days.

The case: For about a year, from October 25, 2010 to about November 1, 2011, a patient received physical therapy services from the respondent, including an initial evaluation on October 25, 2010.

Reassessments were performed and documented on January 12, 2011, February 27, 2011, April 17, 2011, August 7, 2011 September 17, 2011 and November 1, 2011. A physical therapist assistant provided weekly physical therapy services.

The patient was not being reassessed every 30 days. There were at least two other similar cases.

Respondents should be given the opportunity to clear their name before charges are filed. For instance, the information might have been documented without the use of the word "reassessment."

The issues: The respondent had established a pattern.

- Were reassessments documented every 30 days?
- Were they actually performed every 30 days, but simply not documented?
- What was the violation?
 - Not performing the reassessments could be substandard care.
 - Actually performing the reassessments, but simply not documenting them, could be a mere documentation violation only.
- How could you prove they were actually performed? (The physical therapist? The patient?)
- Were the assessments billed? Not performing the reassessments, but billing for them is billing misconduct and stealing.
- How would one prove the reassessments were not performed when there is documentation? It could be proven by obtaining admission by the physical therapist, the patient or staff. The calendar could conflict with the patient record or there could be a sameness of each assessment entry.

The state violations: It was found that the PT was not reassessing every 30 days following the initial evaluation or subsequent reassessment but billing for the reassessment every 30 days. This is a violation of Kentucky law, as is delivering substandard care and engaging in fraud or material deception by billing for the reassessment which was not performed and documented.

The APTA Code of Ethics violations:

- Principle No. 7 – Physical therapists shall promote organizational behaviors and business practices that benefit patients/clients and society.
- Principle No. 7E – Physical therapists shall be aware of charges and shall ensure that documentation and coding for physical therapy services accurately reflect the nature and extent of the services provided.

- Principle No. 3- Physical therapists shall be accountable for making sound professional judgments.
- Principle No. 3B – Physical therapists shall demonstrate professional judgment informed by professional standards, evidence (including current literature and established best practice) practitioner experience and patient/client values.
- Principle No. 5- Physical therapists shall fulfill their legal and professional obligations.
- Principle No. 3A – Physical therapists shall comply with applicable local, state and federal laws and regulations.

The effect upon licensure - Probation and monitoring with costs

The disciplinary action – Probation for one year, fine of \$1,800 and costs of \$500 in lieu of an additional fine, passing the board’s open book jurisprudence examination (now required of all physical therapists for continued competency requirements) and monitoring the entire practice by a board-designated PT every 90 days for one year with payment of up to \$500 per monitoring visit.

Vignette No. 2

The violation: Billing fraud to the employer.

The case: JMF recorded for billing and payment purposes as having been physically present and performing physical therapy on patients at ABC Nursing and Rehab from noon to 4:45 p.m. by using a time-clock stamp.

He also signed in by hand on an entry/exit log as having been physically present and performing physical therapy on patients at XYZ Nursing Home, a facility 20 miles away, from 8 a.m. to 2 p.m. the same day.

In another example, he recorded for billing and payment purposes that he worked at one facility from 8 a.m. to 4:30 p.m. and another facility from 11 a.m. to 1:40 p.m.

In a third instance, he recorded for billing and payment purposes that he worked at one facility from 6:30 a.m. to 3:05 p.m. and another facility from 3 p.m. to 7 p.m. (He later changed the times on the second facility to 3:35 to 5:15 p.m.)

In a fourth instance, he said he worked at one facility from 6:45 a.m. to 2 p.m. and worked at the other facility for eight hours.

The issues: There were multiple violations provable in multiple ways.

The state violation: Engaging in fraud or material deception. Respondent billed for performing physical therapy services on patients at two different locations on the same day at the same time.

The APTA Code of Ethics violations:

- Principle No. 7 – Physical therapists shall promote organizational behaviors and business

- practices that benefit patients/clients and society.
- Principle No. 7E – Physical therapists shall be aware of charges and shall ensure that documentation and coding for physical therapy services accurately reflect the nature and extent of the services provided. (In this instance, the fraudulent charges were to the employer.)

The effect upon licensure: Active suspension

The disciplinary action: Probation with practice restriction, costs/fine and monitoring with costs. He received an active suspension for 60 consecutive days to allow conclusion of treatment/transfer patients and physical therapy records documentation. He was not permitted to practice “physical therapy” as defined or provide any healthcare service to the public during the suspension.

He was placed on probation for three years, paid a total fine of \$10,500 and was assigned to monitored practice.

After two years of probation and eight successful monitoring visits with the written approval of the board monitor, the respondent could request to be relieved of further monitoring or to reduce the frequency of monitoring.

He also had to file a copy of the document with current and future employers during the period of probation and had to give the board notice of employment within five days.

He was assigned various courses to complete and was told to cooperate with any current or former employer which may be involved in obtaining restitution.

Vignette No. 3

The violation: Sexual misconduct.

The case: A physical therapist developed a personal relationship by discussing his personal life, including the fact that he was divorcing his spouse, that the spouse was unfaithful during the marriage, that he had cancer with a likelihood of not surviving, that he would treat the patient better than her husband and that the patient should get divorced. He made sexually provocative comments. He gave the impression he would divorce his spouse and marry the patient. They traveled together to Miami, Florida and Cincinnati, Ohio. He purchased a car for her, gave her several thousand dollars and other gifts, and sent her to a dentist for a treatment plan costing \$10,000 which he said he would pay for.

The patient divorced her husband, and the respondent and patient had a sexual relationship. The respondent treated the patient at the clinic with a discharge summary in the physical therapy record. The respondent continued physical therapy treatment of the patient at the clinic for about two months without charge. The respondent treated the patient at her home without charge.

The respondent removed an ultrasound unit owned by the clinic for use in the patient’s home

for the physical therapy treatment. The respondent removed prescription hydrocortisone cream owned by the clinic for the patient's physical therapy treatment. The hydrocortisone cream was not prescribed.

He did not maintain documentation or perform reassessments.

When confronted by a management member of the clinic regarding his sexual relationship with the patient, the respondent resigned from the clinic under threat of termination from employment.

The issues:

- Was the individual being treated a patient?
- Did she think she was a patient?
- If she was a patient but being treated for free, does the physical therapist have to comply with the documentation and reassessment laws?

The state violations: Don't engage in lewd or immoral conduct with a patient; failing to respect the rights and dignities of all individuals, discussing the respondent's personal life with the patient and the exploitation of the patient for the personal benefit of the respondent, failing to create and maintain the physical therapy record; failing to document reassessments.

The APTA Code of Ethics violations:

- Principle No. 2 – Physical therapists shall be trustworthy and compassionate in addressing the rights and needs of patients/clients.
- Principle No. 2A – Physical therapists shall adhere to the core values of the profession and shall act in the best interests of patients/clients over the interests of the physical therapist.
- Principle No. 4 – Physical therapists shall demonstrate integrity in their relationships with patients/clients.
- Principle 4B – Physical therapists shall not exploit persons over whom they have supervisory, evaluative or other authority.
- Principle 4E – Physical therapists shall not engage in any sexual relationship with any of their patients/clients.

The effect upon licensure: Two-year active suspension

The disciplinary actions: The physical therapist agreed to a two-year active suspension and not to engage in the practice of physical therapy. He could not be employed by a health facility as a licensed physical therapist. He was told to refer his current patients and to complete all documentation very quickly.

There were numerous reinstatement provisions, including renewing his license. He was put on five years of probation, told to participate in impaired physical therapy practitioners' services and not to practice in a home health setting. It was a de-facto revocation because of the burden put upon him.



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Mark became interested in the law when he graduated with both Bachelor's and Master's degrees in Philosophy from Emory University in Atlanta. He then earned a Juris Doctorate from the University of Kentucky College of Law. In 1995, Mark became an Assistant Attorney General and focused in the area of administrative and professional law. He represented multiple boards as General Counsel and Prosecuting Attorney, including the Kentucky Board of Physical Therapy, until he retired from state government in the summer of 2012.

Also in 2012, he became certified as a hearing officer. Mark is a frequent participant in continuing education and has been a presenter for over a dozen national and state organizations including the Federation of State Boards of Physical Therapy, the Kentucky Office of the Attorney General, and the National Attorneys General Training and Research Institute. Currently, Mark opened his own law practice to focus on government services and consulting, continuing education, and the representation of health care practitioners before licensure boards and in other professional regulatory matters. He is also contract counsel to the Kentucky Board of Physical Therapy.