Boundary Training – Sexual
“It Can’t Happen To Me.”

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This course contains practical guidance for you. It also has examples of good practice, and incorporates excerpts of the law(s) that impact your workplace. Included are ideas you may find useful when dealing with your staff. Hopefully, you will make these be your standard as a professional.

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Times have changed, what might have been normal in the 1950’s is not what is normal now. We are a litigious society. Creating and practicing useable boundaries is essential now, for both you and your employees.

Today’s social, moral, political and legal standards are also different. Look, all societies have moral rules regulating sexual behavior. These behaviors may vary in application and in punishment. But, whether written in law or just in the eyes of the public, we know what these standards are. A public standard is “common understanding of what behavior is right or wrong. Most standards are not enforceable by law but in society they are definite enough to be used in judging conduct and firm enough to make it awkward to flout them” ¹ Ethics refers to one’s personal moral conduct. Often one’s beliefs can be stricter than the letter of the law. Depending on the person and his/her beliefs, their own or another’s conduct will be deemed “right” or “wrong.” This can be a very sticky situation because it is difficult to have good judgment if you are the judge. The Council on Chiropractic Education regulates all U.S. chiropractic colleges. The ACA’s “Code of Ethics” is the International Standard for Chiropractors.²

Public morality refers to an ethical standard enforced by society via a legal system. Public morality regulates many behaviors, prostitution, homosexuality, nudity, pornography, cohabitation before marriage. An ethical “standard” is an established norm or requirement. Ethical Standards “Laws” are usually contained in a formal document that establishes uniform criteria to ensure levels of, among other things, personal performance.³

Morality changes over time and so do the laws. The law is a constantly changing, man-made set of written down rules that govern our society. These rules also control our personal conduct. The law consists of rules that are created by our elected government officials at federal, state and local levels.

Most of us obey the law because we fear receiving punishment for “breaking the law”. When a law is broken we can suffer dire consequences. These include, but are not limited to: civil or criminal prosecution, fines, sanctions, suspensions, revocation of licenses, and/or imprisonment.

Laws, rules, regulations and qualifications vary state to state for Chiropractors. At a minimum you should go to your state’s government web site and print out a copy of the laws that govern your business and look at your Chiropractic Board website monthly to find out about new regulations. It is your responsibility to know about ALL the laws, rules and regulations that impact your business.

The old saying applies: “Ignorance of the law is not an excuse.”

¹ http://turnabout.ath.cx:8000/node/6#2
² Refer to web site of CCE for complete Code.
³ Definition found on the internet [paraphrased]
Review of Key Terms:

Times Have Changed:

- **Standard** – Established Norm
- **Public Standard** – Common understanding of what is right and wrong
- **Public Morality** – Ethical Standard that is enforced by Law
- **Laws** – Written Rules
- **Ethics** – Personal Moral Conduct
Critical Thinking Exercise

A client, who has been a long-time patient with insurance, changes jobs and has to meet a $1,000.00 deductible before his new insurance will pay for chiropractic care again.

The patient states he can’t afford any out-of-pocket expense and asks you to meet the deductible for him.

Do you consider this a boundary crossing?

Is it legal to do this?

Why would the patient ask you and not another Doctor?

How would you or how would you tell your staff to handle this situation?

In your office how do you determine “financial hardship?”

Can you do this in a way that is legal?

If you do bill their insurance and do not collect (the payment) from the patient are there any ramifications, other than the legal issues?
Critical Thinking Answer

This is a boundary crossing. The patient is testing the waters. It is illegal for the patient to not pay their deductible. One of the great things about being a DC is that we get to know our patients because of the frequency of their visits. This has its ups and downs. Patients often feel that you are more than a Doctor and will tell them you are a “friend”. Therefore, they believe you will extend them courtesies that they know other Doctors wouldn’t. This is a form of boundary crossing by the patient. In this exercise you can take their request as a great sign of patient satisfaction, never the less, what they are asking you to do is still illegal.

The patient enters into a legally binding agreement with their insurance company that states they will be responsible for paying x-amount $ of deductible before the insurance company pays their part.

A patient can have a discount applied for “pre-payment”, if the same discount is offered to the insurance company in writing. A “pay-at-the-time-of-service” discount can be taken if the patient pays for their entire service at the time of the visit. The insurance company then can be billed by the patient who waits for reimbursement. A “financial hardship” discount can be applied with documentation and specific guidelines established. (Many offices use state guidelines for Medicaid.)

The best way to handle this request is to train your staff to inform the patient that what they are asking you to do is commit insurance fraud which is a felony in most states.

You could offer them the ability to make payments on their balance for an extended period of time.

Remember, once you have done something illegal for a person, they OWN You. It is much harder for you to say “No,” to the next illegal thing they ask you to do.
Critical Thinking Exercise

In many states C.A.s are required to undergo training. The state Board regulates the safety of the public in chiropractic offices.

Why do you believe the Boards think training is necessary for C.A.s?

What benefits are derived by you and your office from on-going training?

After reading the law, did you allow your C.A. to perform tasks before they completed training that you were not allowed to by law?

Why does the Board require every Doctor to register, CAs and advise the board of any change at each location where they work?
Critical Thinking Answer

Chiropractic Assistant training is necessary to protect the public, regulate standards for the profession, improve workplace knowledge and inter-personal dynamics.

Learning about new technology, techniques, modalities, equipment and laws allows you to make better or different choices for treating patients.

On-going training teaches C.A.s to perform their duties correctly, understand the requirements of the laws that govern them, and do their work in a safe manner.

On-going training is effective in improving patient care.

Hopefully, you only had your C.A. performing clerical duties. Or, while in training, under the supervision of a qualified Doctor learning to do therapeutic modalities and exercises.

You and your C.A.s are required to Register with the Board at each location for your protection in case there arises legal proceedings.

Plus, they just want to know where to find you.
Risk management & professional boundaries for doctors and staff.

According to Gutheil and Gabbard the authors of *The Concepts of Boundaries in Clinical Practice: Theoretical and Risk Management Dimensions*. Risk Management, Self Disclosure and Boundary violations should be self evident...let’s look at a few quotes from their paper in the American Journal of Psychiatry and then, let’s take a look at boundaries in context of the chiropractic office.

According to Gutheil and Gabbard (1993)\(^4\)

**Risk Management**

"Is a preventative measure that one takes to prevent wrong doing or even avoid the appearance of wrong doing."

—Gutheil and Gabbord

**Risk Management is Self Evident**

"Recent court decisions suggest a trend toward findings of liability for boundary violations even in the absence of sexual contact. On this basis, the risk-management value of avoiding even the appearance of boundary violations should be self evident.” (p 189)

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In other words don’t do it, and make your practice and policies be so strict, that no one would ever be able to assert that it could happen in your practice. When it comes to litigation lawyers can twist all kinds of things. Here is an example of self disclosure. A Doctor tells a patient that they painted their baby room purple with yellow butterflies this weekend. The patient states that they have been to the Doctor’s home. It doesn’t matter if it is true. If the patient could tell the lawyer and court intimate details of your person or home, it would be easy for a lawyer to make a connection that makes it look true. They could infer that the patient had to have been to your house to know that much detail and therefore, they must have been intimate with the doctor.

“On the subject of self-disclosure of matters which include information concerning the therapist’s family, they advise that such behavior: may be used by the legal system to advance or support a claim of sexual misconduct. The reasoning is that the patient knows so much about the therapist’s personal life that they must have been intimate.” (p. 194)

Providing special services, appointments, even extra long conversations can be construed as sexual misconduct. Treat all the patients the same.

**Sexual Misconduct**

“In the fog of uncertainty surrounding sexual misconduct…some attorneys seem to presume that because the patient had the last appointment of the day, sexual misconduct occurred!” (p. 191)
Recent court decisions suggest a trend toward findings of liability for boundary violations even in the absence of sexual contact. On this basis, the risk-management value of avoiding even the appearance of boundary violations should be self-evident. (p. 189)

Because we are business owners, managers and doctors we have many different boundaries we need to maintain.

**Boundaries**

- Between Doctor and Patients
- Between Staff and Patients
- Between Doctors and Staff
- Between Supervisor and Staff
- Between Coworkers

Before we discuss specific boundaries let us understand professionalism and how we can become better professionals with training.

**What is Professionalism?**

I believe “professionalism” is a choice to behave in a way that inspires people around you to do what is right. When we choose to be a person with integrity, that is honest and truthful, people know they can count on us to be responsible and accountable in what we do.
Doctors of Chiropractic (D.C.s) are held to strict limits with regard to the procedures and modalities they can use. These come under the heading: “Professional Conduct,” and every State Board makes its own rules.

How do We Project Professionalism?

- **Dress For Success**
- **Attitude**
- **Be A Team Player**
- **Conduct Regular Trainings**

1. **DRESS FOR SUCCESS**

   The way you dress is a reflection of the attitude you have for your job. The way we look often determines the way we act and the way people treat us. Two young women in Arizona dressed in shorts, T-shirt, and flip flop sandals goes into a high end car dealership. When the sales staff ignores them, one woman asks her friend “why isn’t anyone coming to talk to me.” The friend replies “You don’t look like you can afford one of these cars.” People, and patients, will judge you and your staff on first sight.

   Uniforms and business clothing identify who is an employee of the clinic

   How we dress affects how we act subconsciously. (Conservative in a suit, sexy in heels or a tight fitted shirt, and behaving like a professional healthcare worker in scrubs)

   You should have employees wear clothing that is appropriate for the activities they perform.

   A few good rules of thumb are to cover your shoulders, do not show too much cleavage or chest hair, do not wear open toed shoes, and make sure your clothes are clean, ironed and without stains or rips.
2. **ATTITUDE**

Adopt an attitude of serving and/or assisting people. A positive attitude, patience and empathy should come across in everything you do in the office. Smile while you work. Dedicate yourself to providing competent, complete health care.

3. **BE A TEAM PLAYER**

“Practice building” starts with a strong team. No one person can do everything by themselves in the office. You need to be determined to help others succeed, for together you are only as strong as your weakest link.

4. **CONDUCT REGULAR TRAINING**

Run different scenarios to handle problem situations; develop procedures and scripts to increase effective communication. Discuss performance and formulate procedures for handling various common situations.

Your staff is a direct reflection of you. Every action they take, every procedure performed, is a reflection of you and is your responsibility. Make sure you are constantly improving their skills and yours by doing team training and mock situations.

It is a good Doctor that demands that each staff member pursues excellence. It is difficult to give and get criticism. We should check our egos and understand that when criticism is given by a patient or a team member it is to improve and create better team work and/or to help you improve your skills. Critiques are done by people who care about YOU. Do not be defensive or try to justify your actions. It is not about how you did something, wrong or right. It is about how you, and the whole office team, can best serve your patients.

Often situations in a healthcare office are dealt with, and learned, as they come up or, on a patient by patient basis. The healthcare field is constantly evolving due to new science, improved technologies, State Boards and Insurance Companies changing their rules.

5. **CONTINUE TO LEARN**

Discuss with your peers and learn from their experience. Learn how others do it by openly discussing the situation with another DC and ask how they would handle a situation, if you’re not sure. Attend meetings with your peers. Focus on solutions, and determine how you can handle situations better the next time.
6. RESPECT OTHERS

Personal effectiveness in any job is contingent on several things. How you act, move, and speak will determine how you are perceived by patients, co-workers, visitors, suppliers, service persons and other Doctor(s). Present yourself in a mature manner. Sometimes you can be so busy, things come out wrong. Think before you speak. Be clear and concise. Watch your language. Be aware of your body language. Show respect. Treat employees with respect.

Address every patient by their title and surname until they give you permission to call them something else. Be respectful and treat patients with human dignity. Maintain confidentiality. What you read, see or hear remains in the office. Even inside the office, discussions about patients should be related to health care issues only. Respect the laws that govern you and your profession. If the laws are contrary to the patient’s best interest seek to change the law. Always remember, patients are vulnerable and you should be aware of the personal trust they are placing in you.

Training Should Include

- Listen To Instructions
- Following Directions
- Being Attentive and Sensitive
- Pursue Excellence
- Continue to Learn
- Develop Your skills
- Think Before You Speak or Do
- Be Responsible
- Follow Through
7. **DEVELOP YOUR SKILLS**

Make it your priority to develop excellent communication skills. Thirty-five percent of communication is verbal and fifty-five percent of communication is non-verbal. That means only ten percent of what is being said by someone to you is the actual content. Listening and not filtering information is a communication skill that takes practice.

All performance skills take time and practice. Don’t get frustrated. Rome wasn’t built in one day either. Learn from your mistakes. And try, try again.

8. **BE RESPONSIBLE**

Maintain confidentiality. What you read, see or hear remains in the office. Even inside the office, discussions about patients should be related to health care issues only. Respect the laws that govern you and your profession. If the laws are contrary to the patient’s best interest seek to change the law.

9. **FOLLOW THROUGH**

Patients are just people with a problem. They are vulnerable and you should be aware of the personal trust they are placing in you. That said, you are who they are relying on.

CAs are your extended self to reach patients out-of-care. Tell (teach) them first, you cannot leave personal private medical information on an answering machine. It is against HIPAA law. Second, this is important. The patient needs to be seen by the Doctor. Your responsibility is to call all the patient’s telephone numbers, home, cell, at their work, or “In Case of Emergency” person(s) to leave the message: “Have Mr. B. call the office immediately.” You cannot give the reason to co-workers, or relatives even, but you should make every effort to leave the generic message with every human you speak with. Tell your Doctor who you’ve called and that you have left message(s). Make a notation in the patient’s file.

Boundaries exist and are specific as was previously listed. No training can be considered complete without reference to boundaries, unspoken, unseen, and oh so important. We need to acknowledge basic facts of healthcare before going on.
What Constitutes a Normal Doctor to Patient Relationship?

- A Relationship that begins with a patient’s needs and ends with the appropriate treatment and/or referral.

- Any services performed by a Doctor that would meet the criteria of a Standard of Care.

*Standard of Care is defined as: “treatment that would be reasonably expected or performed by other Doctors, C.A.s and/or other healthcare workers.”*
PATIENT RIGHTS

Do patients have rights? Very definitely, yes.

Patients have the right to have considerate and respectful care.

Patients have the right to their medical records, diagnosis, treatment and progress reports.

Patients have the right to their records and medical billing. And those records cannot be withheld because a patient has not paid their bill.

Patients have the right to a copy of their X-rays. You can charge a reasonable copying fee ($50). They have a right to review their X-rays and/or have their original X-rays forwarded to another healthcare facility. The patient must sign a release form that will be placed in their patient file.

Patients have the right to an explanation of their medical bill. If you can’t explain it, there is a problem! Before you send someone a bill, you should know what it is for i.e. deductible, co-pay, non-covered service, no show fee.

Patients have the right to know what coverage their insurance company is quoted during the insurance verification process. It is a good rule of thumb to have the patient sign that they were told about the benefits and limitations the insurance company quoted. Because insurance companies change their benefit/payment policies, it is good to include a disclaimer like:

“This is a summary of benefits, as quoted by your insurance representative and not a guarantee of benefits. All benefits and eligibility will be determined at the time a claim is processed. I understand that I am responsible for payment of all services and that this office bills my insurance company as a courtesy only.”

Patients have the right to know their specific treatment risks/benefits, expected duration of care, and alternative healthcare options. This is known as “Informed Consent”. Every patient must sign a form indicating that they have been given this information before undergoing treatment.

Patients have the right to refuse treatment at any time and for any reason. They also do not have to tell you why they are stopping their care.
Patients have a right to privacy.

No records or patient information can be shared (without the patient’s written consent). This includes phone calls, answering machine messages, insurance company requests and requests from other physicians. Intake forms usually include a “permission” form for the patient’s signature, authorizing the office to photocopy records for the purpose of collecting a debt or to assist the office in collecting payment from the insurance company.

The following are exceptions to a patient’s privacy. In the event of:

- births,
- deaths,
- threat of suicide,
- elder abuse,
- child abuse,
- gunshot wounds, or stab wounds

a patient’s records may be released.
What are the Different Types of Boundary Crossings?

- Sexual Misconduct (Sexual Violation and/or Sexual Impropriety)
- Acting Outside our Scope of Practice
- Sexual Harassment (employer/supervisor to employee)
- Discrimination
- Dual Relationships
- Gift Giving
- Self- Disclosures

We will discuss each different type of boundary crossing in this course.
There are two types of sexual boundary violations in a healthcare office.

What is Considered a Sexual Boundary Violation?

- Sexual Contact with a Patient
- Sexual Harassment

**Sexual Contact With A Patient**

You must not make any personal advances toward a patient. Dating of a patient is forbidden even if the relationship is consensual. Patients may be vulnerable to the power imbalance that exists in a Doctor – Patient relationship.

**Sexual Harassment**

Sexual harassment happens when boundaries are crossed in working relationships. This includes both the employer/employee and co-worker/co-worker relationships.
According to the U.S. Equal Employment Opportunity Commission (EEOC) sexual harassment is defined as:

“Any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

• submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual’s employment;

• submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or

• such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.”

“And include all of the following:

• suggestive or obscene letters or notes; requests for sexual favors as a condition of employment or as a condition for granting benefits such as pay, promotions or time off; sexually-oriented or degrading comments and jokes; unwelcome advances, sexually suggestive touching, body contact, threats or force; sexual gestures, and display of inappropriate, sexually explicit, objects or pictures.”

5 www.eeoc.gov
Critical Thinking Exercise

While performing a procedure on a patient, the patient reaches out and touches you (feels your leg).

What do you do?
Critical Thinking Answer

If a patient touches you in an inappropriate manner while you are performing any duty in the office, it is considered sexual harassment. No one should be harassed while working, not by patients, employees or employers.

In the scenario given, I would immediately discontinue the service and explain to the patient that it was inappropriate. You can do this in a non-confrontational way by making a joke “in some countries we would be married now”. Explain to the patient that you will not be able to continue the service and that if they would like to continue treatment, in the future, they can but not if they are going to behave in that manner.

Document the episode in the patient’s file.

If this was to happen to your staff member, what policies procedures do you have in place?

Another form of harassment is discrimination.

**Patient Discrimination**

Is when our choices are made based on our perceptions and are not made in the best interest of the patient.

- Racial, including:
  - Nationality
  - Color
- Socio-economic Status
- Sexual Orientation
- Age
- Gender
- Disability, including patients with Mental or developmental disabilities
- Physical Disabilities or HIV/AIDS
- Religious Biases
HOW CAN WE PREVENT BOUNDARY VIOLATIONS?

Obey The Law- The law(s) are created to protect the public. The “public” means, everyone; you, me, Doctors, C.A.s, patients, and visitors. Remember, good intentions will not prevent a lawsuit.

Honor The Therapeutic Relationship- The healthcare worker/patient relationship is based on trust and mutual respect. You are charged to help and not harm the patient. Think before you speak or act. This “think” demands that every healthcare worker is “self aware”. A DC must balance intimacy and power. You have access to a patient’s file and can read about personal facts and medical problems relating to the patient. The patient is aware of your knowledge of these intimate details and grants you the power this knowledge gives you over them. This information is only given so the Doctor/C.A. can make them feel better; i.e., perceived power vs. relief from pain.

Make it your personal commitment to uphold high principles of the healthcare professions. Use integrity when working with patients. Your knowledge, of a patient’s personal details among other things, clinical judgment and experience must be exerted when making decisions that could result in boundary violations. THINK FIRST.

CONTINUE TO EDUCATE YOURSELF-Offices should provide monitoring of all employees, and adequate supervision. On-the-job training should be provided. Taking other educational classes relating to inter-personal communications, harassment, sexual harassment and boundary training should also be considered.

BE AWARE OF DUAL RELATIONSHIPS When treating partners, family members and friends the relationship lines become blurred, especially for the patient. This is often a sticky situation, particularly for Doctors, because it is hard to define the lines which exist in the normal doctor patient relationship. Because of this duality many complicated situations arise when personal, healthcare and financial issues occur in the office.

Becoming Too Close To Your Patients. When you accept the role of being a caregiver, it can be very easy to step outside your scope of practice. Do not try to act as a social worker, therapist, counselor or financial adviser. Stick to what you know and do what you were trained to do.

SELF DISCLOSURE-In most states it is the law that if a Doctor has a monetary or personal interest or gain it must be disclosed to the patient. This includes any professional and or personal relationships
**GIFT GIVING:** It is easy to cross this boundary, because giving gifts is a way of showing appreciation. The giver feels good when they give a gift to someone and the receiver is pleased to receive it. There are, however, pitfalls with gift giving. The first is that the receiver (patient/C.A./Doctor) may misinterpret the gift as a sexual advance, or, they may accept it as an intimate gesture of the giver’s friendship. The second is that if gifts are used for promotions, or incentives for patient referrals, like gift certificates, free services, prizes, and/or entertainment tickets, it can be against the law. Usually, giving a patient anything of monetary value for referring a patient is considered a “bribe” and is illegal. Most states do not consider items such as logoed T-shirts, magnets, mugs, water bottles and/or key chains, gifts of value. Ever heard the expression “something for nothing”? When was the last time that happened to you?

*Check with your State Board.*

**How can we prevent boundary violations?**

- Obey the Law
- Honor the therapeutic relationship
- Think before you speak or act
- Be aware of Dual Relationships
- Avoid Becoming too Close to Your Patients
- Avoid Self Disclosure
- Don’t Give Gifts

Let’s look at a few examples.
Example: Marrying Patients

- A young Doctor starts dating a patient, who he later marries.
- Years pass and he subsequently cheats on his wife with another patient.
- The now wife that was a former patient is upset and contacts the Chiropractic Board.

Do you think she has a case of sexual misconduct?

ANSWER: YES, In fact, her complaint states she would never have married him had she not been influenced by his “bedside manners”. I was told this DC lost his license after an investigation by the CA State Chiropractic Board.
A Chiropractic Assistant has her father come in to her Doctor’s office for treatment of low back pain. Post treatment her father refuses to pay the Doctor for the care.

**Example: Treating Family**

**Is the father responsible for payment of services rendered in your office?**

**What should you have done?**

**What position does this put your CA in?**

**ANSWER:** You should have had the patient, before treatment, sign an informed consent form and an authorization to treat form. Family members of your staff should be treated as any other patient. In this scenario we would need to make sure that any efforts to collect payment would come from another staff member, so as to not make the CA uncomfortable.
Example: Socializing with Patients

A long-time, former football team mate and friend of the Doctor comes in for treatment of his neck pain the Monday following the Super Bowl. The friend loudly announces to all who are present and no one in particular, how much the Doctor drank at their day-long Super Bowl party.

What will staff and other patients think?

ANSWER: Staff and any other patients that overhear him, may lower their inherent confidence in the Doctor. Doctors are held to a higher standard at all times.
Critical Thinking: Standard of Care

Part of the education of a Chiropractor is the requirement to perform gynecological exams.

1. Should a DC perform gynecological exams in the office?
2. Would this meet “Standard of Care” Requirements?
3. Could this procedure be considered sexual misconduct?
4. If you still decide to perform this procedure, what precautions should you take to prevent allegations of misconduct?

ANSWERS:
1. No.
2. Standard of Care is related to whether other D.C.s in your area would perform this procedure. It is general practice for D.C.s to refer to a gynecologist.
3. Yes. This could be considered inappropriate touching of a patient.
4. Inform the patient, in detail, how the procedure is done. Have a chaperone, a female CA employee, be in the room during the examination. Document the entire procedure in the patient’s file. And I would check with the State Board in your State to see if it is in your Scope of Practice.
Patients can develop overly close relations between the Doctor and themselves when professional boundaries are crossed. Many situations can send mixed messages to the patient. Remember as a doctor it is your responsibility not theirs to prevent the miscommunication. The doctor patient relationship is not a peer or friend relationship. Here are some examples of mixed messages that ‘muddy the waters’. In the eyes of a patient and opposing counsel it can be used to sue you.

How Do Patients Get Confused?

- Preferential Scheduling
- Extending Session Times
- Excessive Talking (at appointment or on phone)
- Lax with Fees
- Doctor directs Patients personal life choices
- Engaging in non sexual socializing outside the office

More Ways Patients Get Confused…

- Doctor Disclosing feelings to a patient about the patient
- Lending Books
- Giving a Patient a Ride home
Preferential scheduling “a favored patient” last patient of the day. Preferential treatment schedules can give the patient a false sense of power over your staff which actually is a scheduling nightmare for the front desk, and can make it appear as if you want to do something with the patient after work, and or spend extra time with the patient.

Extending sessions beyond scheduled time or giving patients extra time that it is not medically needed can make the patient feel special and make other patients feel neglected (They notice!)

Excessive talking: during scheduling appointments or during phone calls.

Lax with fees: Charging less or not charging for some patients, and charging full price to other patients.

Directing patient’s work or personal life choices, in chiropractic our patients may seek our counsel with regards to their personal life choices. However, even when solicited we should not offer advice. Counseling patients is not part of our education and does not fall under the DC license.

Engaging in non-sexual socializing outside the office with patients. Meeting outside the office for any reason can result in patient confusion. That includes dining (breakfasts, lunches, dinners) weddings, and graduations. Both the Doctor and Patient can develop feelings. Even non romantic feelings can make decisions harder when a friendship develops.

Doctor disclosing feelings to a patient about the patient: This is a form of sexual misconduct.

Lending books: Again this can be misconstrued as a gift. The best way to handle this request, is to give them the name of the book and a bookstore to buy it from.

Giving a patient a ride home if a patient’s car breaks down is a bad idea. Wow, this situation can go oh, so wrong. No witnesses. Avoid situations where fantasy on either side can play out. Call Triple A or a tow truck.
According to RI Simon, the author of Transference in Therapist-Patient Sex: The Illusion of Patient Improvement and Consent. Part One. Psychiatric Annals, 24, 509-515 (1994, P.514) there are a few very helpful tips to developing safe, reliable, and useful professional boundaries.

Developing Boundaries

- Avoid the appearance of wrong doing
- Foster psychological separateness
- Obtain informed consent
- Interact verbally with client
- Minimize physical contact
- Establish a stable fee policy and always bill the patient
- Provide care in a consistent, private and professional setting
- Minimize social contact with patients
- Maintain patient privacy
- Define length and time of sessions
- Remind the patient that this is a professional not social relationship
- Don’t use first names, have patients call you “Dr so and so”
- Address Patients with their Title (ie. Mr. James)
Inappropriate actions between doctors and patients have been being addressed forever this is not a new dilemma, but, even in Ancient Greece it has been considered unacceptable.

Let’s look at some quotes on the matter.

“In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill doing and all seduction, and especially from the pleasures of love with women or men, be they free or slaves.”

--Hippocrates

In the 1992 paper “Doctor/Patient Sexual Involvement” produced by The College of Physicians and Surgeons of Alberta states:

“There are no circumstances, none,
in which sexual activity between a patient and a doctor is acceptable.
It always represents sexual abuse.”

--College of Physicians and Surgeons of Alberta
According to the American Medical Association,

“Sexual or romantic relationships between a physician and a former patient may be unduly influenced by the previous physician-patient relationship. Sexual or romantic relationship with former patients are unethical if the physician uses or exploits trust, knowledge, emotion, or influence derived from the previous professional relationship.”

--American Medical Association
What is Unprofessional Conduct?

- Sexual Misconduct
- Dating A Patient
- Theft, stealing or embezzlement
- Sexual Harassment
- Referral Compensation
- False Advertising
- Fraudulent Billing
- Breaking Patient Confidentiality
- Practicing Medicine without a License
- Harming A Patient

Conduct that would be “unprofessional” is any behavior that is against the law or if you are employed by someone would get you fired in a chiropractic office. We will not be discussing all areas of unprofessional conduct in this course.

Physician Sexual Misconduct is sexual contact of any kind with a patient. Sexual advances toward a patient, including propositions for dates, even ‘lunch’.
According to the Federation of State Medical Boards:

**What is Physician Sexual Misconduct?**

“Physician sexual misconduct exploits the physician-patient relationship, is a violation of the public trust, and is often known to cause harm, both mentally and physically to the patient.”

“This behavior may be verbal or physical, and may include expressions or thoughts and feelings or gestures that are sexual or that reasonably may be construed by a patient or patient’s surrogate as sexual.”

Surrogates include spouse, parents, guardians or care givers.

Sexual misconduct not only harms the patient but it ruins the integrity of the whole profession. (www.fsmb.org/pdf/GRPOL_Sexual%20Boundaries.pdf)

There are two types of Sexual Misconduct

1. Sexual Impropriety
2. Sexual Violation

**Sexual Impropriety**

Any behaviors, gestures or expressions that are seductive, suggestive and/or are disrespectful of patient privacy or sexually demeaning to a patient.
Sexual Impropriety includes:

1. Not draping or robing a patient
2. Not giving the patient privacy to dress or undress
3. Not giving the patient the right to refuse an examination in the presence of a student or staff member—Informed Consent
4. Touching of genital mucosal areas without the use of gloves
5. Inappropriate comments-about underclothing, demeaning comments, criticizing sexual orientation or potential sexual performance of a patient or employee
6. Soliciting a date or relationship with a patient
7. Initiating conversation about sexual problems, preferences or fantasies of the physician with a patient
8. Performing intimate examination without clinical justification, without explaining the need for examination
9. Requesting details of sexual history, patient’s likes and or dislikes, when not clinically indicated
10. Using the power of a position to influence sexual favors.
Sexual Violation

Any physical sexual contact between physician and patient, whether or not initiated by the patient and/or engaging in any conduct with a patient that is sexual or may be reasonably interpreted as sexual.

Sexual Violation includes but is not limited to:

1. Sexual intercourse
   - Genital to genital contact
   - Oral to genital contact
   - Oral to anal contact
   - Genital to anal contact

2. Kissing in a romantic or sexual manner

3. Touching breasts, genitals, or any sexualized body part for any purpose other than appropriate examination or treatment, or where the patient has refused or has withdrawn consent

4. Encouraging the patient to masturbate in the presence of the physician or masturbation by the physician while the patient is present

5. Offering to provide practice-related services, such as drugs, in exchange for sexual favors
Dating of patients is prohibited.

_The healthcare office should not be used as a dating pool._

In rare cases, personal connections are formed while a patient is undergoing treatment. To protect healthcare providers and to prevent misguided feelings, ‘Worker’s and Patient’s Protocols’ have been established and include a mandatory three (3) month waiting period. Patients who are being terminated must be given sufficient time to find another healthcare provider.

**Stage 1.** If the patient, has not completed the regime of care prescribed by the Doctor. The patient should be transferred to another facility to complete their treatment.

**Stage 2.** The patient has completed their regime of care. The patient should be dismissed from care and given a written letter stating that the patient has been released from care because they have reached maximum chiropractic improvement.

In both instances the file should document that there is a three month cooling off period after which time the patient and the C.A. or D.C. can then date if they mutually desire to.

It is easy to see that dating a patient is a no win situation for the office.

If, the patient likes you, and you don’t like them. They will be coming in for treatments and it will cause tension.

If you like the patient and they don’t like you. They may drop out of care just to avoid seeing you!

If you both like each other, then the patient needs to discontinue treatment at your office.

**What if my employee was dating someone before they became a patient?**

It is impractical for healthcare offices to prohibit employees from continuing to date someone they were seeing prior to their becoming a patient. Therefore, this is the one exception to the rule. A notation should be made in the file of this pre-existing relationship to prevent future litigation and/or claims of sexual harassment. Both parties dating should sign this notation.
Real Cases: Dating A Patient

Doctor engaged in a sexual relationship with a patient during her treatment.

Once the sexual relationship began the doctor ignored the patients presenting difficulties.

What do You Think Happened after she consulted with an Attorney?

Answer to Exercise: According to Winer & McKenna Law Firm, LLC this case was settled without any litigation or discovery and the patient was awarded $600,000. [http://www.wmlawyers.com/cases/140.html](http://www.wmlawyers.com/cases/140.html)
What are the Legal Consequences of Sexual Misconduct of a Doctor?

- Monitoring-Supervision at workplace, chaperones attesting to examinations, periodic onsite review of practice
- Practice Limitations
- Regular Reports from ongoing physician evaluations
- Continuing Education & Training in Professional Boundaries
- Suspension of Professional License
- Revocation of Professional License
- Jail
- Loss of Insurance Provider Contracts
- Settlements and out of pocket Attorney Fees because most malpractice insurance carriers exclude sexual misconduct.

Most Doctors lack the resources to pay awards. Many awards can exceed a million dollars.

In 2011, the settlements or monetary benefits; not including benefits obtained through litigation was $ 52.3 million dollars for sexual harassment.  
http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm
In most states, a doctor who is not of good moral character or who is found guilty of unprofessional conduct (including sexual harassment of an employee and / or crossing sexual boundaries with a patient) is grounds for revocation of their Chiropractic license.

**Why do we need to maintain boundaries?**

Boundaries need to be maintained whether they are with our patients or with our staff at the workplace for several reasons.

<table>
<thead>
<tr>
<th><strong>IT’S THE LAW</strong></th>
<th><strong>WORK PLACE PROBLEMS</strong></th>
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<tbody>
<tr>
<td>• Legal Issues / Lawsuits</td>
<td>• Sense of Entitlement</td>
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<tr>
<td>✓ Sexual Harassment</td>
<td>• Flippant Attitude</td>
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<td>✓ Discrimination</td>
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<td>• Protects Patients</td>
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<td>• Protects Reputation of Doctor</td>
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**We maintain boundaries:**

To protect our self from legal issues and avoid sexual harassment, harassment and discrimination law suits. To protect our patient’s from both physical and mental harm. To protect our own reputation, and business reputation. If the media got hold of a story in your community true or not, how would it affect your business?

In the workplace other situations can arise when boundaries are crossed and patients can sense the discord in the office. We want our patients to focus on healing and not on the issues the office staff is having. The types of workplace problems that occur when boundaries have been crossed are:

Employees developing a sense of entitlement, a flippant attitude, use of a disrespectful language, and in certain situations even employee power shifts can occur. When these changes happen employees may notice and follow the leader or become jealous of what they perceive to be preferential treatment.
Sexual Harassment and Harassment are forms of boundary crossing. Patients and employees subjected to sexual misconduct or harassment can suffer mentally. They may feel some or all of the following.

**Consequences of Harassment**

- A lack of self confidence
- Feelings of humiliation and embarrassment
- Fear to go to work
- Fear of being fired
- Fear of retaliation from harasser
- Fear of being found out by co-workers
- Helplessness
- Depression

When harassment occurs boundaries can become blurred, unresolved conflicts occur and an attitude of resentment develops toward the manager and/or Doctor. As with any resentment that is not resolved quickly the employee will resign. Resignation may or may not mean the employee quits, they may just quit working, leading to poor productivity.

Relationships that exist prior to employment can make boundaries even more convoluted, because of the duality of the relationship. For example, a girlfriend or a wife working for a husband, or a parent working for a grown child, or a grown child working for a parent. It may be even more difficult for the manager or Doctor to redefine the lines of acceptable behavior in one place (like the office) and acceptable behavior in another place (like home).
According to the ACA Code of Ethics Section III,

“Doctor-Patient relationships should be built on mutual respect, trust and cooperation.”

With regards to patients sexual misconduct I am sure you would all agree this does not create a mutual respect or trust. And as we previously have discussed, mentally patients can feel ashamed, fearful, and helpless.

Let’s look at another section of the ACA Code of Ethics Section VI.


**ACA Code of Ethics**

“VI. The doctor-patient relationship requires the doctor of chiropractic to exercise utmost care that he or she will do nothing to exploit the trust and dependency of the patient. Sexual misconduct is a form of behavior that adversely affects the public welfare and harms patients individually and collectively. Sexual misconduct exploits the doctor-patient relationship and is a violation of the public trust.”

According the American Chiropractic Association ACA,

“This ACA Code of Ethics is based upon the acknowledgement that the social contract dictates the profession’s responsibilities to the patient, the public, and the profession; and upholds the fundamental principle that the paramount purpose of the chiropractic doctor’s professional services shall be to benefit the patient.”

HARMING A PATIENT

The role of healthcare professionals is simple, “Help people, do not harm people.”

BEHAVIOR

Our perceptions can affect each and every one of our choices, our actions and our responses. For most people reactions are innate, fundamental and rarely challenged. We, and they, do not even realize, let alone know, how large the role of culture plays in the making of choices.

Being aware and sensitive is more difficult because often the individual may not even know why they make the choices they do. “We don’t know what we don’t know.”

Most people are influenced by watching and mimicking the people around them (parents, family, teachers, friends, mentors, co-workers, or their boss). These inter-personal behaviors are often learned at an unconscious level.

Are there other factors that shape our perceptions? Yes. Our environment, economic level, genetics, and psycho-social status all have real and differing influences on us.

PROJECTION

Assuming that your beliefs are the same as another person is a form of projection. In other words because you wouldn’t care doesn’t mean they wouldn’t care. So projection may lead to inappropriate behavior and misinterpretation. When we project, we assume that the person will act the way we would act in a given situation, or will place the same importance on, or have the same concerns and/or values that we would have in a similar situation.

Boundary training is an integral part of any Chiropractic Office. It protects our Doctors, Supervisors, Employees and Patients from ethical violations. It helps us maintain high principles of the Chiropractic profession. It is important that we continually self evaluate our office procedures to improve the ability for our patients and staff to feel confident that they will be in a safe, productive and non hostile environment, and that any grievances will be handled in a timely and efficient manner.
There are many factors that go into the State Boards decision to revoke or suspend your license. I believe that understanding of how the board makes their decisions, can help the Doctor understand how they can limit exposure to false accusations and prevent harm to their patient.

Your State Board will consider the following things when investigating a sexual misconduct accusation:

1. Patient harm
2. Existence of social support system
3. Opportunity
4. Severity
5. Context
6. Culpability of licensee
7. Psychotherapeutic relationship
8. Existence of a physician-patient relationship
9. Scope and depth
10. Inappropriate termination
11. Age and competency of the patient
12. Vulnerability of patient
13. # of times behavior occurred
14. # of patients involved
15. Period of time relationship existed
16. Evaluation and assessment results of doctor
17. Prior professional misconduct / disciplinary history/ malpractice
18. Recommendations of assessing treating doctors
What will happen if you are accused?

1. State boards should investigate, intervene and take appropriate action to ensure protection of the patient and public
2. Each case should be judged on its own merits
3. Review of previous complaints to identify patterns of behavior
4. Interview with the physician,
5. Interview with the complainant
6. Interview with staff
7. Information should be gathered for evidence about details of event
8. Including identifying marks on physician-only would be seen if Dr was disrobed
9. Articles of clothing worn-collect for DNA
10. Billing records
11. Patient records
12. Appointment book
13. Phone records
14. Written communication
15. Motel or hotel receipts
16. Credit card receipts
17. Wire taps
18. Administrative Hearing conducted in public (testimony of the patient may be done in closed hearing to protect patient privacy-non disclosure of patient)
19. Standard of Care testimony
20. Expert witness testimony
21. Witnesses
22. Dr must consent to be evaluated to determine if there is any psychiatric, psychological, medical or cognitive impairment.
23. Dr may be required to be screened for substance abuse.
Employer Discrimination

Title VII of the Civil rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin. It provides relief against discrimination in public accommodations, facilities and education. The Equal Employment Opportunity Commission was created to develop policies and practices that assist the states to implement and enforce EEOC legislation, orders and policies and to extend the Commission on civil rights and establish the EEOC. Since 1964 there have been many law changes and additions for example: The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) Section 102 of the CRA provides for recovery and compensatory and punitive damages in cases of intentional violations of the Title VII Americans with Disabilities Act of 1990 and section 501 of the Rehabilitation Act of 1973.
Title VII of the Civil Rights Act of 1964

- Employers cannot limit, segregate or classify employees and/or applicants, or refuse to hire or train someone because of their race, religion, sex or national origin.
- Employers cannot apply different standards of compensation, or different terms, condition or privileges of employment as the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Two Types of Discrimination

1. **Blatant** - race, color, religion, sex and national origin

2. **Disparate Impact** - when an employer enacts a policy or regulation that is on its face non-discriminatory, but in its application, has an impact on a particular protected class.

According to the Attig law firm

“A common example is an older hiring practice of refusing employment to applicants that have been arrested. On its face, it seems this doesn’t seem to be a problem, but it has been held that in certain cities and in certain industries, such a policy can effectively result in excluding some ethnic groups from the federal workplace”

www.attiglawfirm.com/eeoc-faq#impact

For an employee to file a claim they must provide proof of not only that the act of discrimination happened, but that it resulted in a change or condition of employment.
Harassment

Harassment is a form of employment discrimination that violates Title VII of the Civil rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA). It is illegal to harass an employee because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.
Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

**Forms of Harassment**

- Slurs
- Offensive Jokes
- Name calling
- Graffiti
- Offensive derogatory comments
- Physical assaults or threats
- Intimidation
- Ridicule, Mockery or insults
- Offensive objects or pictures
- Interference with work performance
- Harassment outside the workplace if there is a link with the workplace. (ie if a supervisor harasses an employee while driving the employee to a meeting.)

The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.

The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct. Unlawful harassment may occur without economic injury to, or discharge of, the victim. The victim does not have to be of the opposite sex.

The harasser's conduct must be unwelcome.
Employers are liable for harassment by a supervisor resulting in a negative employment action such as termination, failure to promote or hire, and loss of wages. If a supervisor's harassment results in a hostile work environment, liability can be avoided if they can prove that they:

1. Reasonably tried to prevent and promptly correct the harassing behavior, or
2. that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The employer is liable for any non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if they are aware of the harassment and fail to take prompt and appropriate corrective action.

**The law does not prohibit:**

- Simple teasing
- Offhanded comments
- Isolated incidents that are not serious
- Unless they become serious and/or there is a pattern of conduct that the harassment is considered to be a hostile work environment or when it results in an adverse employment decision (victim being fired or demoted.)

[www.eeoc.gov/laws/practices/index.cfm](http://www.eeoc.gov/laws/practices/index.cfm)

**Harassment becomes Unlawful When…**

1. Enduring the offensive conduct becomes a condition of continued employment
2. The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.
Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment.

Harassment Policy

- Communicate to employees that harassing conduct will not be tolerated.
- Establishing a complaint or grievance process
- Provide anti-harassment training to managers and employees
- Take immediate and appropriate action with every complaint
- Create an environment in which employees feel free to raise concerns
- Encourage employees to inform the harasser directly that the conduct is unwelcome and must stop
- Employees should also report harassment to management at an early stage to prevent escalation

Jokes or comments that are off color, with regard to sex, gender, sexual preference, race, ethnicity or religion are inappropriate for the healthcare worker and/or the patient to say. Patients will often ask permission before telling a joke like this because they know it may be offensive to some. Do not give anyone permission to tell anything “spicy”.

If you slip up and/or misspeak, we are all human and do make errors, immediately apologize. Saying “I’m sorry” shows humility and assumption of responsibility. It is a very mature thing to do.
In this case Ani Chopurian, PA was a cardiac surgeon who was harassed by fellow surgeons. Her claim stated that “One surgeon purposely stuck her with a needle, one called her ‘stupid chick’ and another surgeon greeted her with a pat on the bottom each morning and the comment ‘I’m Horny’.

She stated she was also teased because of her Armenian heritage.

Upon filing of a complaint she was terminated in less than a week.

ANSWER: She was awarded $125 million in punitive damages as well as $42.5 million in lost wages and for mental anguish. You know it is all fun and games til you have to pay that out of pocket expense.
A male police officer received an on the job back injury.

He sought the treatment of a chiropractor who amongst other things grabbed the plaintiff’s genitals during a single appointment.

The chiropractor denied the sexual conduct, but the police officer was a highly credible witness at his deposition and his lawyers were able to obtain a settlement for this one-time sexual assault, despite the fact that the officer did not receive any psychological treatment.

How much do you think his settlement was?

ANSWER: $150,000   www.wmlawyers.com/significant
Critical Thinking Exercise

A manager in your office makes sexual advances towards a subordinate employee.

What do you do?

ANSWER: It is illegal for a manager to make sexual advances to an employee.

Employers should document and date each event of misconduct by the manager. (Many employees do not report these types of cases because they fear losing their job or retribution from the offender)

Every allegation must be investigated. Upon investigation of the manager, take appropriate action. (Conflict resolution meetings, suspension or termination)

Make sure every incident, all actions and follow up are documented and placed in both manager and staff members files. Employees can’t be fired for reporting sexual harassment.

Both, Doctor/Owner, and Manager can be sued for sexual harassment.

The Doctor/Owner can be sued for wrongful termination if they do not act appropriately and do not act as your employees advocate.
SEXUAL HARASSMENT

YOU ARE FIRED
The Equal Employment Opportunity Commission can imposes penalties and takes the following actions:

Liability recovery of back pay for up to two years preceding the filing of the charge, payment for attorney fees and court costs, payment for investigation and intervention, equitable relief as the court deems appropriate.

The EEOC can take the following actions:

Issue temporary restraining order or other order granting preliminary or temporary relief, reinstatement or hiring of employees, forced promotion or increase pay, forced posting of notices.

“Employer must post in conspicuous place excerpt from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.”

The EEOC can charge a $100 fine per offense for not posting notices of employee complaint proceedings.  [http://www.eeoc.gov/laws/statutes/titlevii.cfm](http://www.eeoc.gov/laws/statutes/titlevii.cfm)

EEOC Role in Sexual Harassment:

Has the right in cases of sexual harassment or discrimination to:

- Grant Relief to the Victim
- Seek Relief from such Practice
- Institute Criminal Proceedings
  - Unlawful Employment Practices
  - Discrimination in Compensation
- Impose Penalties
- Take Action
Who Is a Supervisor?

“Someone who meet one of the following:

- The individual has authority to undertake or recommend tangible employment decisions: Hiring, firing, promoting, demoting and reassigning, decision causing a significant change in benefits, even a change in job title that is less prestigious (with or without economic consequences)

- The individual has authority to direct the employee’s daily work activities: increase workload or assign undesirable tasks.

- Any person the employee reasonably believes that had such power: doctors, doctors spouses and even favored customers”

www.eeoc.gov/policy/docs/harassment

An employer is responsible for Supervisor to Staff Boundaries and liable for the acts of its supervisors that result in tangible employment action. This can be very costly we will look at some specific settlements later in the course.

What can you do to protect yourself?

Employers should be encouraged to prevent harassment. And employees should be encouraged to avoid or limit the harm from harassment. Most businesses think “it can’t happen to me”, but according to the EEOC and Fair employment practice agency the number of sexual harassment charges filed in 2011 was 11,364.

www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm
Protect Yourself from Harassment

An employer needs to exercise reasonable care to prevent and correct harassing behavior and establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.

Employee’s must reasonably take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. www.eeoc.gov/policy/docs/harassment

Let’s look at two different cases:

In Barrett v. Omaha National Bank 726 F.2d 424, 33 EPD 34, 132 (8th Cir. 1984)

“The victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner.

Within four days of receiving this information the employer investigated the charges, reprimanded the guilty employee placed him on probation, and warned him that further misconduct would result in discharge.

A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim’s behalf or reporting the conduct.

The court ruled that the employer's response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.
In Zabkowicz v West Bend Co., 589 F. Supp. 780, 35 EPD 34, 766 (ED Wis. 1984)

Coworkers harassed the plaintiff over a period of nearly four years in a manner the court described as ‘malevolent’ and ‘outrageous’.

Despite the plaintiff’s numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company’s policy against offensive conduct.

The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. www.eeoc.gov/policies/docs/currentissues.html

The court held that this employer was liable because it failed to take immediate and appropriate corrective action.
Critical Thinking Exercise

A manager in your office makes sexual advances towards a subordinate employee.

What do you do?
Critical Thinking Answer

It is illegal for a manager to make sexual advances to an employee.

Document and date each event of misconduct by the manager. (Many employees do not report these types of cases because they fear losing their job or retribution from the offender)

Every allegation must be investigated. Upon investigation the manager must take appropriate action. (meeting, suspension or termination)

Make sure every incident and all actions and follow up are documented and placed in both manager and staff members files.
Staff to Staff Boundaries

Dating Between Staff

It's not illegal but there are 3 major concerns for employers.

1. Liability

2. Overflow of affection or animosity

3. Employee Alliances

When staff has a mutual attraction there is nothing illegal about them dating outside of the office. But there are three major concerns for employers.

1. Liability-Things change, what was once a desired affection is now unwelcomed advances (harassment)

2. Overflow of affection between dating staff or animosity between recently separated staff can cause discord in the office and lead to charges of sexual misconduct

3. Employee alliances can form and can create power shifts (2 against 1)
So, how as an employer do we prevent or intervene?

Establish an Employee Prevention Intervention policy that:

- Prohibits employees from dating each other
- Establish and enforce a dress code
- Train employees to: think before they speak
- Train employees to maintain a 2 foot personal boundary space when possible.
- Train employees not to stare or gawk
- Employees should: Never touch another co-workers private parts in the office or touch an employee anywhere, without getting their permission
- Encourage employees to speak up: Tell the person that it is inappropriate, just say “no”, and ask them to “stop” and then tell a manager if it happens again
- Remind employees that we are all different. Be sensitive to other sensitivities. We’re not all built the same or have the same experiences.

According to Amy Epstein Feldman general counsel of the Judge Group a PA based consulting group and author of “So Sue Me, Jackass”....

“Workers have different levels of tolerance for physical contact of any type.”
Supervisor to Staff Boundaries

- Are the same as Doctor to Staff Boundaries
- If you get a staff complaint it should be evaluated and
- Witnesses should be solicited
- Determine if manager was aware and if any adverse employment action was taken.

Evaluate every complaint

Sexual misconduct may happen in private with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus the resolution of a sexual harassment claim often depends on the credibility of the parties. The investigator should question the charging party and the alleged harasser in detail searching for corroborative evidence of any nature.14

Witness should be solicited. Many times it’s the credibility of the victim and a persuasive complaint that is all that is needed.

Determine whether an employer/manager was aware of the harassment. In a "quid pro quo" case, firing an employee after sexual harassment complaint has been filed can result in additional violations.
Management Intervention

- Establish a written code of conduct
- Take a written complaint
- Investigate every complaint
- Establish policies that outline the offices procedures and punishment for offensive or sexual harassment
- Management should never touch an employee
- Management should never allow an employee to touch them
- Don’t date or fraternize with employees outside of work
- Communication between employees and management should be in writing when possible
- Evaluate your office to determine if a hostile work environment exists.

www.cnn.com/2010/LIVING/worklife/02/08/cb.getting.physical.at.work/index
According to the Code of Federal Regulation Title 29 of the Labor Codes [44 FR 23805, Apr. 20, 1979] § 1604.11 Sexual Harassment is defined as:

Sexual Harassment

- “Any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
  - Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual’s employment;
  - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or
  - Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment.”

According to the EEOC,

**Sexual Harassment Includes…**

- *Suggestive or obscene letters or notes*;
- *Requests for sexual favors as a condition of employment or as a condition for granting benefits such as pay, promotions or time off*;
- *Sexually-oriented or degrading comments and jokes*;
- *Unwelcome advances*;
- *Sexually suggestive touching*;
- *Body contact*;
- *Threats or force*;
- *Sexual gestures, and*
- *Display of inappropriate, sexually explicit objects or pictures.*

[www.eeoc.gov](http://www.eeoc.gov)

**Sexual Harassment Cont…**

- *It also covers discrimination or job preferences based on the sex of the person (Title VII Section 703)*
- *The harasser can be a victim’s supervisor a supervisor in another area, a customer who is not an employee of the employer, such as a client or customer.*
- *Employees have 180 days to file a charge.*

[www.eeoc.gov](http://www.eeoc.gov)
Let’s look at a real sexual harassment case and see how much they settled for.

**Real Case: Employment Related Exam**

A hospital had 8 female new hires undergo an employment related medical examination. During the examination the Doctor asked them about the employee’s sexual practices and according to the EEOC the examination included invasive touching.

**How much do you think they won?**

**ANSWER:** The female workers at Lutheran Medical Center in Brooklyn, NY won a settlement of $5,420,000 in a sexual harassment lawsuit. EEOC v Lutheran Medical Center, No. 01-5494, E.D.N.Y.
Types of Sexual Harassment

There are two types:

1. **Quid Pro Quo**
   A supervisor bases your job duties or employment decisions on the employees’ consent or rejection to sexual acts.

2. **Hostile Work Environment**
   Title VII of the Civil Rights Act of 1964 29 C.F.R § 1604.11 (a) (2).

Both types of sexual harassment are actionable as forms of sex discrimination. Sexual harassment not only covers acts of sexual misconduct but it covers discriminatory acts based on sex including: Hiring, Discharging, Compensation, Conditions and Privileges of employment.

According to Title VII, 42 USC § 2000e-2(a), Section 703(a)(1),

“It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”

Hostile Work Environment

- Is defined as employees subjected to regular sexual misconduct.
- If the workplace is permeated with jokes, gestures, pictures or offensive touching. It is hostile even if the conduct is not directed at the person who is offended.

Title VII of the EEOC Guidelines 29 C.F.R § 1604.11 (a) (1) states that unwelcome conduct is:

Unwelcome Conduct

- Unwelcome conduct constitutes sexual harassment when—
  - “submission to such conduct is made either explicitly or implicitly as a term or condition of an individual’s employment”

According to The Eleventh Circuit "unwelcome conduct" is ...

**Henson v. City of Dundee, 682 F.2d at 903:**

“The sense that the employee did not solicit, or incite it and in the sense that the employee regarded the conduct as undesirable or offensive.”
As an employer all cases of sexual misconduct must be evaluated. The EEOC developed guidelines to help employers perform evaluations of their work place.

- All cases of Sexual Misconduct must be evaluated to:
- Determine the evidence of harassment;
- Determine whether a work environment is sexually “hostile”;
- Determine if the employers liable for sexual harassment by supervisors; and
- Evaluating preventive and remedial action taken in response to claims of sexual harassment.
TYPES OF SEXUAL HARASSMENT BEHAVIORS

Talking About Sex
Sometimes patients can misunderstand questions related to their medical history so try to avoid unnecessary questions about sexual activities or probing specifically into their personal life. It may be helpful to point to your own body area to help the patient understand that you are not being rude.

Exposing Or Touching Inappropriate Body Areas
If a patient is being treated for neck pain, exposure of or touching any other areas, i.e. breasts, vagina, penis or buttocks, etc. is considered sexual harassment. In some instances the above mentioned (private) areas may need to be exposed or touched for medical reasons. A chaperone of the same sex as the patient should be utilized during such an examination and/or treatment. The Doctor should explain to the patient, in detail, the procedure before proceeding. Appropriate gowning/draping should be in place before the healthcare worker starts such a procedure. Never touch a patient before explaining the procedure and getting their permission.

Hugging, Patting, Pinching And Tickling
These are all inappropriate in a healthcare office. Better behaviors are high fives, firm hand shakes, and smiling. Do not consider children exempt. Parents can see it as unprofessional and there are children that do not like hugs from “strangers”.

Commenting On A Patient’s Physical Attributes
Even if meant as a compliment, all such comments can make a patient feel uncomfortable.
Let’s review a case.

**Vinson v Taylor** 753 F.2d 141, 36 EPD 34,949

The plaintiff had alleged that her supervisor constantly subjected her to sexual harassment both during and after business hours, on and off the employer’s premises; she alleged that he forced her to have sexual intercourse with him on numerous occasions, fondled her in front of other employees, followed her into the women’s restroom and exposed himself to her, and even raped her on several occasions. She alleged that she submitted for fear of jeopardizing her employment. She testified, however, that his conduct had ceased almost a year before she first complained in anyway, before filing a Title VII suit, her EEOC charge was filed later.

The supervisor and the employer denied all of her allegations and claimed thye were fabricated in response to a work dispute.

The court in this case ruled that a victim’s "voluntary" submission to sexual advances had "no materiality whatsoever" to the proper inquiry: whether "toleration of sexual harassment [was] a condition of her employment." The court further held that an employer is absolutely liable for sexual harassment committed by a supervisory employee, regardless of whether the employer actually knew or reasonably could have known of the misconduct, or would have disapproved of and stopped the misconduct if aware of it.

3) **Supreme Court’s Opinion** – The Eleventh Court held the following:

a) "Hostile Environment" Violates Title VII - "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult whether based on sex, race, religion, or national origin.

b) **Conduct Must Be "Unwelcome"** - "The fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." also seen in 106 S. Ct. at 2405.  

**Henson v. City of Dundee**, 682 F.2d 897, 902, 29 EPD ¶ 32,993 (11th Cir. 1982)
Amy Feldman is the author of “So sue me jackass”. Many times "quid pro quo" and "hostile environment" harassment occur together. When a supervisor abuses his power over employment decisions to force the victim to endure or participate in the sexual conduct it can create a hostile work environment.

“While inappropriate touching can be a component of either type of sexual harassment, you don’t have to be inappropriately touched to be sexually harassed, nor have you necessarily faced sexual harassment just because you’ve faced inappropriate touching.” -- Amy Feldman

www.cnn.com/2010/LIVING/worklife/02/08/cb.getting.physical.at.work

According to the court case 106 S. Ct. at 2406 (Henson v. City of Dundee, 682 F.2d at 904)

**106 S. Ct. at 2406 Henson V City of Dundee, 682 f.2d at 904**

*Hostile Work Environment Exists when conditions…..*

“Sufficiently severe or pervasive to alter the Condition(s) of [the victim’s] employment and create an abusive work environment.”

“Unreasonably interferes with an individual’s work performance”

or creates

“an intimidating, hostile, or offensive working environment.”
Let’s take a look at another example.

**EXAMPLE**

Charging party alleges that her coworker made repeated unwelcome sexual advances towards her.

An investigation discloses that the alleged “advances” consisted of invitations to join a group of employees who regularly socialized at dinner after work.

Would this be considered sexual harassment?

**ANSWER:** No. The coworker’s invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.
Questions to determine if a Hostile Work Environment Exists with any Complaint?

1. **Was the conduct verbal or physical, or both?**
   
   If a victim is the target of both verbal and non-intimate physical conduct, a hostile work environment exists.

2. **How frequently it was repeated?**
   
   Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally does not create an abusive environment. However, a pattern of behavior or one incident of sexual harassment that denies an employee, employment or promotion is considered a hostile work environment.

3. **Was the conduct hostile and did it show a pattern of offensive behavior?**
   
   The more severe the offense the less pattern of behavior needs to be shown. If an employee's supervisor, sexually touches that employee just once it’s considered a hostile work environment.

4. **Was the alleged harasser a co-worker or a supervisor?**
   
   If it was not a supervisor or person who can affect their employment or job duties it is not sexual harassment.

5. **Did others join in perpetrating the harassment?**

6. **Was the harassment directed at more than one individual?**

7. **Would a reasonable person feel it was harassment?**
   
   Sexual flirtation, innuendo, vulgar language, petty slights that are trivial or merely annoying, would probably not establish a hostile environment. However, even though things are commonplace in an area that doesn’t mean it wouldn’t be considered a hostile work place for the victim.

Example-A workplace in which sexual slurs, displays of "girly" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.

106 S. Ct. at 2406 (quoting Henson v. City of Dundee, 682 F.2d at 904 29 C.F.R. § 1604.11(a)(3).
Non Physical Harassment

When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context and intended target of the remarks.

Questions to evaluate non physical harassment

1. Did the alleged harasser single out the charging party?
2. Did the charging party participate?
3. What was the relationship between the charging party and the alleged harasser(s)?
4. Were the remarks hostile and derogatory?

Sex Based Harassment

Just as in the case of harassment based on race, national origin or religion harassment directed at employees because of their sex. Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment.

When harassment like this occurs it is important to demonstrate to the court that the employer has an internal grievance procedure. We will be discussing this later under preventative and remedial action plans.

Here are some cited cases for further review:

Hicks v. Gates Rubber Co., 833 F.2d at 1416;


Hall v. Gus Construction Co., 842 F.2d 1014
An employee in your office participates willingly in conduct of a sexual nature with a supervisor. At some point the employee decides to discontinue the behavior and ceases to participate.

However, the supervisor continues to make sexual advances.

You, as the boss, had no knowledge of the sexual relationship or subsequent harassment.

Once the employee filed a complaint and you found out ‘the whole story’ you suspended both the employee and supervisor for inappropriate conduct.

Let’s look at a few questions:

1. Could this be considered a hostile work environment?
   
   Answer: This is a perfect example of a hostile work environment.

2. Is this considered Sexual Harassment?
   
   Answer: This is considered sexual harassment.

3. Could you be responsible for the supervisor’s actions?
   
   Answer: You would be responsible for the supervisor’s actions.

4. Can you be sued for suspending the employee?
   
   Answer: Yes, this is an example of quid pro quo harassment and because the employee was suspended after reporting the harassment and had a loss of income and employment due to reporting the harassing behavior you could be sued.

5. What actions should you take?
   
   Answer: Whenever an employee makes a report of harassment you should investigate and take immediate action to stop the harassment.
The EEOC’s Guidelines for Employers Prevention Action Plan Is:

Preventative Action Plan

- Write an Internal Grievance Policy & Procedure on Sexual Harassment & Harassment
- Affirmatively raise the subject
- Express Strong Disapproval
- Develop Appropriate Sanctions
- Inform Employees of their Right to Raise a Complaint
- Create Procedures designed to Encourage Victims to come forward
- Ensure Confidentiality
- Provide timely and Effective Remedies
- Protect Victim and Witnesses against Retaliation

The preventative program should include language that is clear and part of employee training procedures. These policies should be reiterated during team training and vocalized whenever an incidence occurs.
Remedial Action

- Create an environment free from discriminatory intimidation, ridicule and insult
- Remedy hostile or offensive work environments
- Eradicate hostile or offensive work environments
- Investigate and correct sexual harassment

Let’s look at the Courts findings in a few cases:

**Vinson, 106 S. Ct. at 2405**

*The Court found that every employee should have the “right to work in an environment free from discriminatory intimidation, ridicule and insult”*

**Farziano v E.L. Dupont de Nemours & Co., 818 F.2d 380, 388, 43 EPD 37, 171 (5th Cir. 1987)**

*“an employer is liable for failing to remedy known hostile or offensive work environments.”*
Bundy v Jackson, 641 F.2d 934, 947, 24 EPD 31,439 (D.C. Cir. 1981)

“employer violated Title VII by failing to investigate and correct sexual harassment despite notice.”


“employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel;

Failure to investigate gives tactic support to the discrimination because the absence of sanctions encourages abusive behavior.”
What type of Sexual Harassment is this?

An employee’s tangible job conditions are affected when a sexually hostile work environment results in the employee’s discharge.

ANSWER: Hostile Work Environment

What type of Sexual Harassment is this?

A supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply.

ANSWER: Quid Pro Quo

"Hostile environment" harassment may acquire characteristics of "quid pro quo" harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct.

Sexual harassment may culminate in a retaliatory discharge if a victim tells the harasser or her employer she will no longer submit to the harassment, and is then fired in retaliation for this protest.
So Let’s Review the differences between offensive, sexual and inappropriate behavior between coworkers.

### Boundaries and Behaviors between Coworkers

<table>
<thead>
<tr>
<th>Offensive</th>
<th>Sexual</th>
<th>Inappropriate behavior or Physical Contact</th>
</tr>
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<tr>
<td>Racial or Sexual Jokes</td>
<td>Misconstrued behaviors</td>
<td>Massaging the Shoulders</td>
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<tr>
<td>Offensive touching</td>
<td>Unwelcome sexual conduct:</td>
<td>Touching someone when angry</td>
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<tr>
<td>-A pat on the back</td>
<td>-grabbing arm</td>
<td>-poking a coworker to illustrate a point</td>
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<tr>
<td>-Slap on the behind</td>
<td>Touching</td>
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<td>Swearing</td>
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<td></td>
<td>Groping</td>
<td>Or</td>
</tr>
<tr>
<td></td>
<td>Grabbing</td>
<td>Two handed handshake while looking into someone’s eyes</td>
</tr>
<tr>
<td>Threatening or Sexual Gestures</td>
<td>Consent to sex</td>
<td>Handshake without washing after sneezing</td>
</tr>
<tr>
<td>Pictures</td>
<td>Commenting about someone’s body</td>
<td>Bad Breath</td>
</tr>
</tbody>
</table>

A sexual advance would be asking a patient out on a date or even to lunch.
# Matching Exercise

1. Blonde joke               | A. Sexual Harassment
2. Lunch with a Patient     | B. Inappropriate Behavior
3. Touching genitalia of Co-| C. Sexual Advance
   worker                  | D. Inappropriate Behavior
4. Staring at a Co-worker   | E. Offensive Behavior
5. Kissing a Patient        | F. Sexual Misconduct
6. Poking a Patient to prove a | G. Discrimination
   point
7. Demoting an employee for  |   not dating you the boss
   not dating you the boss  |   Refusing to hire someone over age 50
ANSWER: Answers can be used more than once.

1. E,
2. C,
3. F,
4. B,
5. F,
6. D,
7. A,
8. G.