

NOTE

STOPPING DOCTOR EVIL: HOW TO PREVENT THE PREVALENCE OF HEALTH CARE PROVIDERS SEXUALLY ABUSING SEDATED PATIENTS

I. INTRODUCTION

Susan Hyman went to her dentist, Dr. Marvin Teicher, for a wisdom tooth extraction.¹ Ms. Hyman was skeptical that the Novocaine would alleviate her pain from the procedure, so Dr. Teicher graciously offered Ms. Hyman another alternative; he injected a mysterious fluid into her arm.² The next thing Ms. Hyman remembers is waking up to something touching her face.³ It was Dr. Teicher's exposed penis.⁴ Dr. Teicher then slapped Ms. Hyman, kissed her, and groped her breasts and thighs.⁵

Amy Metzler, a nineteen-year-old college student, went to her oral surgeon, Dr. J. Phillip Kurtz, to have four of her wisdom teeth removed.⁶ After the extraction, and while Ms. Metzler was still overcoming the effects of anesthesia, Dr. Kurtz fondled her buttocks, rubbed her thigh, and rubbed her genitalia while she was in the recovery room.⁷ Ms. Metzler sued Dr. Kurtz for his misconduct, and three other women joined as plaintiffs alleging that Ms. Metzler was not a lone victim and that Dr. Kurtz did the same thing to them.⁸

N.X., a young woman, went to the hospital for removal of genital warts and thereafter was moved to a recovery room.⁹ While in the

1. *People v. Teicher*, 422 N.E.2d 506, 508 (N.Y. 1981).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Verdict and Settlement Summary, *Metzler v. Kurtz*, No. SSX-L-9-04, 2009 WL 531108, at *1 (N.J. Super. Ct. Law Div. Feb. 20, 2009).

7. *Id.*

8. *Id.*

9. *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844, 846 (N.Y. 2002).

recovery room and still overcoming the effects of sedation, N.X. awoke to find Dr. Andrea Favara, a surgical resident, pulling up her hospital gown and pushing her thighs apart.¹⁰ Dr. Favara demanded N.X. open her legs.¹¹ He placed his fingers inside her vagina and anus, despite N.X.'s countless pleas for him to stop.¹²

The Oath of Hippocrates, an oath that most physicians swear to, states, “[w]hatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female and male persons, be they free or slaves.”¹³ Despite this oath, sexual assault,¹⁴ as a general matter, continues to be a rapidly growing issue in the United States,¹⁵ with an incident of sexual assault occurring every 109 seconds.¹⁶ The response to this epidemic has been almost exclusively from universities and sexual assault groups,¹⁷ who recognize that there is no typical profile of the type of person who commits sex crimes.¹⁸ Despite this finding, the general public tends to perceive sexual abusers as “social misfits, strangers, or

10. *Id.*

11. *Id.*

12. *Id.*

13. Ben A. Rich, *Postmodern Medicine: Deconstructing the Hippocratic Oath*, 65 U. COLO. L. REV. 77, 86-87 (1993). This text is from the original version of the Hippocratic Oath. *See id.* at 86. Some medical schools have adopted new versions of the oath, while others have kept the original version. S G Pérez et al., *Doctor-Patient Sexual Relationships in Medical Oaths*, 32 J. INST. MED. ETHICS 702, 702-04 (2006). Despite the use of new versions of the oath, a 2006 study showed that, out of the fifty variations of oaths studied, forty-eight percent of them contained the prohibition against physician-patient sexual relationships. *Id.* at 703.

14. *Sexual Assault*, RAINN, <https://rainn.org/get-information/types-of-sexual-assault/sexual-assault> (last visited Nov. 26, 2016). Sexual assault is defined as “sexual contact or behavior that occurs without explicit consent of the victim.” *Id.* Sexual assault may take various forms, including “[p]enetration of the victim’s body, also known as rape”; “[a]ttempted rape”; “[f]orcing a victim to perform sexual acts, such as oral sex or penetrating the perpetrator’s body”; and “[f]ondling or unwanted sexual touching.” *Id.*

15. *See, e.g.*, Nick Anderson, *Sex Offense Statistics Show U.S. College Reports Are Rising*, WASH. POST (July 1, 2014), https://www.washingtonpost.com/local/education/sex-offense-statistics-show-us-college-reports-are-rising/2014/07/01/982ecf32-0137-11e4-b8ff-89afd3fad6bd_story.html; *see also* Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES, May 2, 2014, at A14; *Violence Against Women in the Workplace*, AFL-CIO, <http://www.aflcio.org/Issues/Civil-and-Workplace-Rights/Working-Women/Violence-Against-Women-In-The-Workplace> (last visited Nov. 26, 2016).

16. *Statistics*, RAINN, <https://rainn.org/statistics> (last visited Nov. 26, 2016).

17. *See, e.g.*, *About Us*, N.Y.C. ALLIANCE AGAINST SEXUAL ASSAULT, <http://www.svfreencyc.org> (last visited Nov. 26, 2016); *see also About the National Sexual Violence Resource Center*, NSVRC, <http://www.nsvrc.org/saam/sexual-assault-awareness-month> (last visited Nov. 26, 2016); *Sexual Assault & Violence Response (SAVR) Resources*, SUNY, <https://www.suny.edu/violence-response> (last visited Nov. 26, 2016).

18. A. NICHOLAS GROTH WITH H. JEAN BIRNBAUM, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 12 (1979).

‘dirty old men.’”¹⁹ Consequently, the image of a health care provider is rarely evoked during the discussion of sexual assault.²⁰ This is likely because patients tend to have trust in their health care providers,²¹ and often perceive sexual assailants as untrustworthy individuals.²² It is shocking that the prevalence of patient sexual assault is often overlooked, despite the fact that of 761 physicians disciplined for sex-related offenses from 1981 through 1996, seventy-five percent of those offenses involved patients, with at least fifty-two percent of such physicians committing various types of sexual assault.²³

The current laws and disciplinary actions that address health care providers who commit such acts are reactionary.²⁴ The laws and disciplinary rules may reprimand the provider and may impose civil, criminal, or licensing disciplinary penalties.²⁵ However, while civil, criminal, or other punishment might be a deterrent, it is insufficient protection for patients.²⁶ Instead, a preventive legal mechanism is necessary to combat this epidemic, as preventive efforts against sexual assault have proven successful.²⁷ Preventive mechanisms for sexual

19. Stacey Katz-Shiavone et al., *Myths and Facts About Sexual Violence: Public Perceptions and Implications for Prevention*, 15 J. CRIM. JUST. & POPULAR CULTURE 291, 293 (2008).

20. *See id.*

21. *See* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 92 (1998).

22. *See* Katz-Shiavone et al., *supra* note 19, at 293. Individuals are unlikely to place trust in “social misfits, strangers, or ‘dirty old men.’” *Id.*

23. *See* Christine E. Dehlendorf & Sidney M. Wolfe, *Physicians Disciplined for Sex-Related Offenses*, 279 JAMA 1883, 1885-86 (1998). The study does not specify whether these sexual offenses were consensual or non-consensual. *Id.* at 1886. Although there have been many recent cases of physician-patient sexual misconduct, Dehlendorf and Wolfe’s research appears to be the most recent study about physician-patient sexual misconduct. *See id.*

24. *See, e.g.*, CAL. BUS. & PROF. CODE § 729 (West 2012); FLA. STAT. ANN. § 491.0112 (West 2001); N.Y. PENAL LAW §§ 130.40–.52, .65 (McKinney 2009); S.D. CODIFIED LAWS § 22-22-29 (2006); *Atl. Container Line AB v. Aref Hassan Abul, Inc.*, 281 F. Supp. 2d 457, 466 (N.D.N.Y. 2003); *Thaw v. N. Shore Univ. Hosp.*, 12 N.Y.S.3d 152, 155 (App. Div. 2015); *Kirkman v. Astoria Gen. Hosp.*, 611 N.Y.S.2d 615, 616 (App. Div. 1994); N.Y. STATE DEP’T OF HEALTH, BOARD FOR PROFESSIONAL MEDICAL CONDUCT 2010 ANNUAL REPORT 7 (2010), https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2010/docs/report.pdf. *But see* Assemb. 255, 2015-2016 Leg. (Wis. 2015). The Wisconsin Assembly proposed a bill that would mandate video recording of surgical procedures when the patient is given a general anesthetic. *Id.* Upon request, the surgical facility must give the patient a copy of the video recording. *Id.*

25. *See supra* note 24.

26. *See* VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 2-3 (2010), <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

27. *See* Michael Castleman, *Sexual Assault Prevention Programs Work*, PSYCHOL. TODAY (June 30, 2014), <https://www.psychologytoday.com/blog/all-about-sex/201406/sexual-assault-prevention-programs-work>; *Sexual Violence: Prevention Strategies*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (last visited Nov. 26, 2016) (“Prevention efforts should ultimately decrease the number of individuals

assault crimes are imperative and are recommended by the Centers for Disease Control and Prevention.²⁸

Therefore, this Note proposes the creation of a state statute²⁹ that would give all patients sedated for any medical procedure³⁰ the right to have their procedure recorded.³¹ This statute also mandates the recording of the patient in the recovery room, as many instances of sexual misconduct occur in the recovery room while the patient is still overcoming the effects of sedation.³² A health care provider will then upload the recording to a password-protected Internet cloud, allowing patients to access the recording from any electronic device, including computers and smart phones.³³

Part II of this Note discusses numerous cases from the past forty years involving sexual assault of sedated patients by health care providers.³⁴ It also analyzes statistics about the frequency of health care providers sexually assaulting patients and why those statistics are likely

who perpetrate sexual violence and the number of individuals who are victims.”). The Centers for Disease Control and Prevention has found a few sexual violence prevention programs effective, including sexual abuse and harassment programs aimed at middle school, high school, and college students. *Id.* For example, before the University of New Hampshire began a campus-wide prevention program, thirty-seven percent of female students had said they had been sexually assaulted. Castleman, *supra*. After implementation of the program, this number decreased by more than half to sixteen percent. *Id.* Sexual assault prevention efforts have also proven successful in the military. *Id.*

28. *See supra* note 27.

29. *But see* Christopher B. Serak, *State Challenges to the Patient Protection and Affordable Care Act: The Case for a New Federalist Jurisprudence*, 9 IND. HEALTH L. REV. 311, 355 (2012) (stating that Congress has a “superior capacity to address national issues”). A federal statute for the solution this Note proposes would have several advantages, including comprehensiveness, since this is a national problem; consistency; and easier enforceability. *See id.* However, there are distinct challenges and disadvantages to a federal statute, namely the Tenth Amendment. *See* U.S. CONST. amend. X. It is highly likely that a federal statute giving patients the right to have their medical procedures recorded in order to combat sexual abuse by physicians would not pass constitutional muster because regulation of most sexual assault issues are reserved to the states. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 615-18 (2000).

30. Throughout this Note the author may refer to procedures or medical procedures being recorded. Hereinafter, the use of the word procedure, and the proposal of the recording of such procedures, only includes medical procedures in which sedatives are administered to the patient.

31. *See* Shokei Matsumoto et al., *Digital Video Recording in Trauma Surgery Using Commercially Available Equipment*, SCANDINAVIAN J. TRAUMA RESUSCITATION & EMERGENCY MED., Apr. 2013, at 1, 4. Advancements in video technology have allowed surgeons to record their own operations “for teaching, research, auditing, and patient education.” *Id.* Thus, a statute that mandates health care providers to record a patient’s medical procedure, if the patient chooses so, is feasible. *See id.*

32. *See, e.g.*, *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844, 846 (N.Y. 2002); *Verdict and Settlement Summary, Metzler v. Kurtz*, No. SSX-L-9-04, 2009 WL 531108, at *1 (N.J. Super. Ct. Law Div. Feb. 20, 2009).

33. *See What Is Cloud Computing?*, IBM, <http://www.ibm.com/cloud-computing/what-is-cloud-computing.html> (last visited Nov. 26, 2016).

34. *See infra* Part II.A–C.

underinclusive.³⁵ Part III demonstrates that, although sexually assaulted patients have remedies in the criminal, civil, and state medical board systems, there are no legal or disciplinary rules that focus on preventing health care providers from sexually assaulting patients.³⁶ Part IV proposes a solution to this legal problem—a mandate that patients who are being sedated for medical procedures have the opportunity to choose to have their medical procedure recorded.³⁷ Finally, Part V concludes this Note with the exhortation that preventive measures will be adopted, so patients can be confident of their safety and protected from sexual assault during medical procedures.³⁸

II. PREVALENCE OF HEALTH CARE PROVIDER-PATIENT SEXUAL MISCONDUCT IN THE LAST FORTY YEARS

Until recently, sexual assault committed by physicians or other health care providers was unheard of and consequently was unaddressed.³⁹ The first and only time the American Medical Association (“AMA”) Council on Ethical and Judicial Affairs (“CEJA”)⁴⁰ addressed the issue was in 1991.⁴¹ However, even the AMA did not address the full issue, since it focused its report solely on sexual misconduct by psychiatrists.⁴² There have been a scant amount of reports since then on the topic, but the few existing reports support the fact that health care provider-patient sexual misconduct is a growing issue.⁴³ This conclusion is supplemented by statistics offered by some state health departments.⁴⁴ This Part discusses the available statistics regarding

35. See *infra* Part II.A–C.

36. See *infra* Part III.A–C.

37. See *infra* Part IV.A–E.

38. See *infra* Part V.

39. See *infra* notes 40–43 and accompanying text.

40. *Council on Ethical and Judicial Affairs*, AMA, <https://www.ama-assn.org/content/council-ethical-and-judicial-affairs> (last visited Nov. 26, 2016). The CEJA has two main responsibilities: “[t]hrough its policy development function, it maintains and updates the 169-year-old AMA *Code of Medical Ethics*” and, “[i]n its judicial function, it promotes adherence to the Code’s professional ethical standards.” *Id.*

41. See Richard J. McMurray et al., *Sexual Misconduct in the Practice of Medicine*, 266 JAMA 2741, 2741 (1991).

42. *Id.*

43. See, e.g., Nanette K. Gartrell et al., *Physician-Patient Sexual Contact: Prevalence and Problems*, 157 W. J. MED. 139, 139–40, 142 (1992) (stating that estimates regarding the prevalence of sexual contact between patients and non-psychiatrist physicians are based solely on two small surveys, which were also geographically restricted).

44. See, e.g., N.Y. STATE DEP’T OF HEALTH, BOARD FOR PROFESSIONAL MEDICAL CONDUCT 2006 ANNUAL REPORT 12 (2006), https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2006/docs/report.pdf; Joan Jerzak, *Continuing Concerns About Sexual Misconduct*, CA.GOV, http://www.mbc.ca.gov/Licensees/Sexual_Misconduct/Continuing_Concerns.aspx (last

patient sexual assault.⁴⁵ It also explains that the available statistics are likely to underestimate the prevalence of patient sexual assault by health care providers, since the statistics rely on self-reporting and the meager amount of cases actually filed in court.⁴⁶ Lastly, this Part addresses the fact that despite the lack of reports on the issue and the possibility of underestimated statistics, countless recent cases regarding patient sexual assault by health care providers show this is clearly a growing problem that must be addressed.⁴⁷

A. Statistics on the Prevalence of Health Care Provider-Patient Sexual Misconduct

The CEJA often issues reports on ethical issues in the medical field.⁴⁸ However, the last time the CEJA reported statistics regarding sexual misconduct by health care providers on patients was in 1991, and this report dealt solely with the sexual misconduct of psychiatrists.⁴⁹ This report stated that between five and ten percent of psychiatrists reported having sexual contact with their patients.⁵⁰ Data for other specialties was not available at the time of this report, but a 1976 study, cited within the report, suggested that the percentage of non-psychiatrist physicians who had engaged in sexual contact with their own patients may have been comparable to the psychiatrist figure.⁵¹

The first report about physicians, not just psychiatrists, committing sexual acts against patients was in 1992 in the *Western Journal of Medicine*.⁵² The study found that nearly one in ten physicians acknowledged having sexual contact with their patients.⁵³ Twenty-three percent of physician-respondents reported knowledge of sexual encounters between their patients and other physicians.⁵⁴ The statistical inconsistencies between the lower figure of physicians admitting having sexual contact with their own patients and the higher figure of physicians knowing of other physician-patient sexual contact suggests that self-reporting, or lack thereof, may cause underestimates of the

visited Nov. 26, 2016).

45. See *infra* Part II.A.

46. See *infra* Part II.B.

47. See *infra* Part II.C.

48. Council on Ethical & Judicial Affairs (CEJA) Reports, AMA, <https://www.ama-assn.org/about-us/council-ethical-judicial-affairs-reports> (last visited Nov. 26, 2016).

49. McMurray et al., *supra* note 41, at 2741.

50. *Id.*

51. *Id.*

52. Gartrell et al., *supra* note 43, at 140.

53. *Id.* at 142.

54. *Id.* at 141.

prevalence of this issue.⁵⁵ Another study, conducted in 1998, shows that out of 761 physicians disciplined for sex-related offenses from 1981 through 1996, seventy-five percent of offenses involved patients.⁵⁶ From that group, an astonishing fifty-two percent of the physicians committed sexual offenses against patients such as sexual abuse and sexual assault.⁵⁷

Almost every state's health, or equivalent, department has a website committed to professional medical conduct.⁵⁸ However, many states' webpages do not provide statistics or information regarding the frequency of complaints for the specific acts that resulted in physician disciplinary actions.⁵⁹ New York is one of the few states that, to some extent, offers further information regarding complaints about medical professionals on their website.⁶⁰

The New York State Department of Health's Board for Professional Medical Conduct ("New York's Board") periodically issues reports that provide, among other things, statistics regarding the amount of complaints received; the most common categories of misconduct the complaints are based upon; and what action was taken for those complaints, if any.⁶¹ New York's Board did not give statistics detailing the specific allegations of the complaints.⁶² However, in the most recent reports, New York's Board revealed that sexual misconduct by medical professionals was in the top five areas of professional medical misconduct.⁶³ Specific statistics regarding physician sexual misconduct in New York are only available for 2006 and 2007.⁶⁴ In 2006, eight percent of final actions by New York's Board were for sexual

55. *Id.* at 142.

56. Dehlendorf & Wolfe, *supra* note 23, at 1885-86.

57. *Id.* at 1886. This study does not specify whether these sexual offenses were consensual or non-consensual. *Id.*

58. Charles Ornstein & Annie Waldman, *How to Investigate Doctors*, PRO PUBLICA (Jan. 8, 2015), <http://projects.propublica.org/graphics/investigating-doctors>.

59. See, e.g., *Disciplinary Actions*, ALA. BOARD MED. EXAMINERS & MED. LICENSURE COMMISSION ALA., <http://www.albme.org/actions.html> (last visited Nov. 26, 2016); *Disciplinary Actions*, DEL.GOV, <http://dpr.delaware.gov/boards/medicalpractice/documents/dispaction.pdf> (last updated Oct. 19, 2016); *Physician/Physician Assistant Disciplinary Actions*, CT.GOV, http://www.ct.gov/dph/cwp/view.asp?a=3143&q=388904&dphNav_GID=1830 (last visited Nov. 26, 2016).

60. N.Y. STATE DEP'T OF HEALTH, BOARD FOR PROFESSIONAL MEDICAL CONDUCT 2011-2013 REPORT 7-8 (2013), https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2011-2013/docs/2011-2013_opmc_final_rpt.pdf.

61. *Id.* at 4-5, 7-8.

62. *Id.*

63. *Id.* at 7; see also N.Y. STATE DEP'T OF HEALTH, *supra* note 24, at 7.

64. N.Y. STATE DEP'T OF HEALTH, *supra* note 44, at 12; N.Y. STATE DEP'T OF HEALTH, BOARD FOR PROFESSIONAL MEDICAL CONDUCT 2007 ANNUAL REPORT 17 (2007), https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2007/docs/report.pdf.

misconduct charges.⁶⁵ The following year, in 2007, a total of twenty-five final actions of New York's Board were for sexual misconduct.⁶⁶

The Medical Board of California also discloses only scant information on their website regarding the quantity of sexual misconduct complaints.⁶⁷ The last time the Medical Board of California issued an article or publication regarding physician sexual misconduct was over a decade ago, which revealed that during fiscal year 2000 there were 133 complaints of physician sexual misconduct, and the following fiscal year there were 134 complaints.⁶⁸

B. Why the Statistics May Actually Underestimate the Prevalence of Health Care Provider-Patient Sexual Misconduct

Since private studies on patient sexual abuse by health care providers rely on self-reporting, the studies carry the potential for bias in response.⁶⁹ As one author speculates, the bias in response is likely because health care providers may fear incriminating themselves if they were to disclose their reprehensible acts, despite the anonymity the surveys promise.⁷⁰ Furthermore, the statistics may be inaccurate because, of the health care provider sexual misconduct cases that are actually filed in court, many are settled out of court, and out-of-court settlements are not accounted for in most statistics.⁷¹ The statistics may also be underinclusive because a substantial number of patient sexual assaults committed by health care providers are likely never reported.⁷² The health care provider is also highly unlikely to report his own sexual misconduct and the patient may not report the incident either, possibly because the patient feels "ashamed, embarrassed, or polluted" or would prefer to ignore the situation rather than be publicly humiliated and exposed.⁷³

Health care providers who sexually assault patients sometimes commit the act in the presence of other medical professionals, who may actually witness the sexual misconduct.⁷⁴ However, there seems to be a

65. N.Y. STATE DEP'T OF HEALTH, *supra* note 44, at 12.

66. N.Y. STATE DEP'T OF HEALTH, *supra* note 64, at 17.

67. *See* Jerzak, *supra* note 44.

68. *Id.*

69. *See* Gartrell et al., *supra* note 43, at 142.

70. Victoria J. Swenson, *A Proposal for Texas Re: Non-Psychiatric Physicians Who Engage in Sexual Conduct with Their Patients*, 19 T. MARSHALL L. REV. 269, 278 (1994).

71. *See id.* at 276.

72. *Id.*

73. KAREN J. CARLSON ET AL., THE NEW HARVARD GUIDE TO WOMEN'S HEALTH 536 (2004); Gartrell et al., *supra* note 43, at 142.

74. *See* Liz Kowalczyk, *Indications of Code of Silence on Fertility Doctor*, BOS. GLOBE (May

“code of silence” amongst some health care providers—they are reluctant to report the sexual misconduct.⁷⁵ For example, in the case of a fertility doctor at the Fertility Centers of New England, a nurse observed Dr. Roger Ian Hardy’s fingers on a woman’s breast while the patient was under anesthesia.⁷⁶ The nurse reported Dr. Hardy’s misconduct to her superiors but was allegedly warned “not to cause a stink or blow the whistle . . . [o]therwise she would be labeled a disgruntled worker.”⁷⁷ Another nurse claimed she observed Dr. Hardy rub the nipple of a patient in the recovery room.⁷⁸ She reported the alleged misconduct to her supervisor.⁷⁹ The nurse’s supervisor said she reported the alleged misconduct to someone else who had responded that “Dr. Hardy was a good doctor” and the conversation ended there.⁸⁰ When another physician heard rumors about Dr. Hardy’s alleged sexual misconduct, he approached the nurse who had originally reported the incident, and she said she did not want to discuss it further.⁸¹

The state’s Board of Registration in Medicine eventually investigated Dr. Hardy and found allegations of sexual misconduct—as early as during Dr. Hardy’s undergraduate schooling.⁸² Dr. Hardy ultimately surrendered his medical license amid these allegations.⁸³ However, the aforementioned example highlights some of the difficulties faced by victims and others in reporting sexual misconduct committed by health care providers, thus strongly suggesting that statistics, whether from private studies or state medical boards, could be higher than what is reported.⁸⁴

C. *Recent Cases Illustrating Health Care Provider-Patient Sexual Misconduct*

Despite the possibility of imprecise statistics, recent cases suggest that there is a continuing issue of patient sexual abuse committed by

2, 2014), <https://www.bostonglobe.com/lifestyle/health-wellness/2014/05/01/sexual-misconduct-allegations-against-fertility-doctor-date-back-college/zJRGn2Hyo9Xz9Lss3MOzcL/story.html>.

75. See MARTY MAKARY, UNACCOUNTABLE: WHAT HOSPITALS WON’T TELL YOU AND HOW TRANSPARENCY CAN REVOLUTIONIZE HEALTH CARE 17 (2012).

76. Kowalczyk, *supra* note 74.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*; *see also* Gartrell et al., *supra* note 43, at 142; Swenson, *supra* note 70, at 276.

health care providers.⁸⁵ For example, in January 2016, a woman went to Mount Sinai Hospital for treatment for a shoulder injury and alleged that the emergency room doctor, Dr. David Newman, gave her extra morphine even after she told him she had already been given an initial dose from a nurse.⁸⁶ She told investigators she fell in and out of consciousness, incapacitated by the sedation, but still felt Dr. Newman grab her breasts and ejaculate on her body.⁸⁷ She told police that she had kept the hospital gown, which allegedly had Dr. Newman's semen on it in a plastic bag, in order to preserve the evidence.⁸⁸ Soon thereafter, Dr. Newman was charged with sexual abuse and forcible touching.⁸⁹ A few days after the alleged incident, allegations of Dr. Newman groping a second woman came to light.⁹⁰ The second woman claimed that she went to the emergency room in September for a cold, and Dr. Newman groped her breasts.⁹¹ Dr. Newman was charged with sexual abuse for that alleged incident as well.⁹²

In 2014, a Canadian anesthesiologist was convicted of sexually assaulting twenty-one sedated women during their respective surgeries.⁹³ For one of the victims in particular, it was found that the doctor fondled the woman's breasts, kissed her, put his penis in her mouth during the surgery, and afterwards made comments to her alluding to the fact that he sexually assaulted her while she was under anesthesia.⁹⁴ In another case, an Oregon doctor pled guilty to eleven counts of first-degree sex abuse and one count of first-degree rape.⁹⁵ The doctor sexually abused six patients who were all sedated at the time of the sexual assaults.⁹⁶ The

85. See Gartrell et al., *supra* note 43, at 142; Swenson, *supra* note 70, at 276; see, e.g., *People v. Teicher*, 422 N.E.2d 506, 508 (N.Y. 1981); *Wodja v. Wash. State Dept. of Health, Dental, Quality Assurance Comm'n*, No. 63318-o-I, 2010 WL 431455, at *1 (Wash. Ct. App. Feb. 8, 2010); *Canadian Doctor Sexually Assaulted 21 Sedate Women*, USA TODAY (Feb. 26, 2014, 5:16 AM), <http://www.usatoday.com/story/news/world/2014/02/26/canadian-doctor-sexual-assault/5828297>; Bonnie King, *Oregon Doctor Sentenced to 23 Years After Pleading Guilty to Rape and Sex Abuse*, SALEM-NEWS.COM (Sept. 25, 2012), http://www.salem-news.com/articles/september252012/drfield-rapist_bk.php; Kowalczyk, *supra* note 74.

86. Benjamin Mueller, *E.R. Doctor at Mt. Sinai Hospital Charged with Sexual Abuse of 2 Patients*, N.Y. TIMES (Jan. 19, 2016), http://www.nytimes.com/2016/01/20/nyregion/er-doctor-at-mt-sinai-hospital-charged-with-sexual-abuse-of-2-patients.html?_r=0.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Canadian Doctor Sexually Assaulted 21 Sedate Women*, *supra* note 85.

94. *Id.*

95. King, *supra* note 85.

96. *Id.*

victims stated that the doctor touched their vaginas or breasts or forced them to touch his genitals.⁹⁷

Furthermore, another former physician, John G. Thomas of Washington, admitted that over the course of his over twenty-year practice, he inappropriately touched the breasts of about fifteen female patients while they were under anesthetics.⁹⁸ In 2011, a former California plastic surgeon, Peter Chi, pled guilty to sexually battering thirty-six female patients.⁹⁹ The victims ranged in age from fifteen to sixty-two years old, and many were under anesthesia at the time of the attacks.¹⁰⁰

In 2013, another California doctor was convicted of sexually assaulting three of his female patients while they were unconscious.¹⁰¹ The physician, Yashwant Balgiri Giri, was caught in the act for two of the three sexual assaults of which he was convicted.¹⁰² While his sixteen-year-old patient was unconscious, Giri sexually assaulted her when the operating room nurse had her back turned, preparing tools for the surgery.¹⁰³ When the nurse turned around, she witnessed the assault and subsequently reported Giri.¹⁰⁴ The next offense by Giri occurred in March 2011, when another hospital employee witnessed him fondling the breasts of a thirty-six-year-old female patient while she was under anesthetics for an outpatient surgical procedure.¹⁰⁵ Yet another instance was reported in May 2011, after Giri's arrest, by a woman who Giri allegedly sexually assaulted while anesthesia was being administered but before the patient was unconscious.¹⁰⁶ He claimed he had been performing an examination, but the examination was found to have no legitimate medical purpose.¹⁰⁷

In another case, a female patient went to a dentist, Christopher Wodja, for an incision and drain procedure for a mouth abscess.¹⁰⁸

97. *Id.*

98. *See State: Doctor Admits to Molesting Patients, Taking Drugs*, KOMONEWS.COM (Jun. 27, 2014), <http://www.komonews.com/news/local/State-Doctor-admits-to-molesting-patients-taking-drugs-264993651.html>.

99. Scott Smith, *Tracy Doctor Gets Six-Year Prison Sentence*, RECORDNET.COM (Apr. 5, 2011, 12:01 AM), http://www.recordnet.com/article/20110405/A_NEWS/104050312.

100. *Id.*

101. Rick Rojas, *Doctor Gets 6 Months in Jail for Fondling Unconscious Patients*, L.A. TIMES (Feb. 20, 2013), <http://latimesblogs.latimes.com/lanow/2013/02/oc-doctor-sentenced-for-sexually-assaulting-unconscious-patients.html>.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Wodja v. Wash. State Dept. of Health, Dental, Quality Assurance Comm'n*, No. 63318-o-

Among other things, Wodja prescribed the patient six 0.25 milligram tablets of triazolam—a sedative.¹⁰⁹ Wodja instructed the patient to take two of the 0.25 milligram triazolam tablets an hour before her scheduled procedure, and the patient did so.¹¹⁰ The patient had her roommate drive her to the appointment.¹¹¹ Wodja called the patient's roommate about forty-five minutes after she dropped the patient off, asking her to bring the rest of the triazolam tablets.¹¹² When the roommate entered Wodja's office to give him the remaining tablets, she saw her friend, the patient, wearing no pants or underwear.¹¹³ Later, when the patient's roommate came to pick her up, she noticed her roommate could barely open her eyes and seemed sedated.¹¹⁴ She called the police, and the police brought the patient to the hospital, where she was examined for evidence of a possible sexual assault.¹¹⁵

Unfortunately, minors are also affected by the sexual misconduct of health care providers.¹¹⁶ In one case, a young boy (a minor) visited his doctor on numerous occasions, and on each occasion was sedated and sexually assaulted.¹¹⁷ The doctor touched the boy's penis, rubbed his penis against the boy's penis, placed his mouth on the boy's penis, and placed the boy's penis in his rectum.¹¹⁸ In another case, a New York pediatrician sexually abused three minor patients through purported "medical treatment" that was actually conducted solely for his sexual gratification and not for any medically accepted purpose.¹¹⁹ The pediatrician, Rakesh Punn, recorded the sexual assaults and used

I, 2010 WL 431455, at *1 (Wash. Ct. App. Feb. 8, 2010).

109. *Id.*

110. *Id.* For dental procedures, 0.5 milligrams of triazolam is the maximum recommended dosage for adults. Richard C. Robert, *Enteral Sedation Agents*, in ANESTHESIA COMPLICATIONS IN THE DENTAL OFFICE 133 (Robert C. Bosack & Stuart Lieblich eds., 2014).

111. *Wodja*, 2010 WL 431455, at *1.

112. *Id.* Since the patient had already taken the maximum recommended dosage of triazolam before she arrived at Wodja's office, and Wodja had the patient's roommate bring more tablets, it is likely that Wodja gave the patient doses of triazolam exceeding the maximum recommended dose. *See id.*; *see also* Robert, *supra* note 110 ("The recommended dosage of triazolam is 0.25-0.5 mg for adults . . .").

113. *Wodja*, 2010 WL 431455, at *1.

114. *Id.*

115. *Id.*

116. *See, e.g.*, Robert G. *ex rel. v. Herget*, 505 N.W.2d 422, 423-24 (Wis. Ct. App. 1993).

117. *Id.* at 424.

118. *Id.*

119. *Long Island Pediatrician Pleads Guilty to Child Sexual Exploitation*, U.S. DEP'T JUST. (Apr. 24, 2014), <http://www.justice.gov/usao-edny/pr/long-island-pediatrician-pleads-guilty-child-sexual-exploitation>. The author of this Note contributed to the defense of Rakesh Punn, but all information provided by the author in this Note is information from public record.

chloroform on patients to ensure they were unconscious when he sexually abused them.¹²⁰

The cases set forth in this section are not inclusive of all instances of sexual misconduct by health care providers involving sedated patients.¹²¹ Furthermore, there are likely additional health care provider sexual misconduct cases that are not reported because neither the patients nor the health care providers desire to report them.¹²² And, out of the few cases that are filed in court, many reach out-of-court settlements and, thus, are not included in research.¹²³

III. CURRENT SEXUAL ABUSE LAWS LACK PREVENTIVE MEASURES TO COMBAT HEALTH CARE PROVIDER-PATIENT SEXUAL MISCONDUCT

Health care providers who commit sexual misconduct against their patients generally face penalties from three different systems: (1) the criminal legal system,¹²⁴ (2) the civil legal system,¹²⁵ and (3) state medical boards.¹²⁶ However, each system lacks preventive measures.¹²⁷ This Part explores the options a patient has in the criminal legal system, and the fact that despite the array of crimes the health care provider can be charged with, none of the statutes implement preventive measures.¹²⁸ This Part also addresses the civil causes of action a patient can use when sexually assaulted by his or her health care provider, and how similarly

120. *Bethpage Pediatrician Rakesh Punn Pleads Guilty to Sexually Abusing Patient*, NEWS 12 LONG ISLAND (Sept. 6, 2014, 10:29 AM), <http://longisland.news12.com/news/bethpage-pediatrician-rakesh-punn-pleads-guilty-to-sexually-abusing-patient-1.9243897>; *Long Island Pediatrician Pleads Guilty to Child Sexual Exploitation*, *supra* note 119.

121. *See, e.g.*, *Panion v. United States*, 385 F. Supp. 2d 1071, 1077-78 (D. Haw. 2005); *St. Paul Fire & Marine Ins. Co. v. AAOMS Mut. Ins. Co.*, Civ. A. No. 94-3903, 1995 WL 46683, at *1 (E.D. Pa. Jan. 30, 1995); *Lindheimer v. St. Paul Fire & Marine Ins. Co.*, 643 So. 2d 636, 637 (Fla. Dist. Ct. App. 1994); *State ex rel. Wilhoit v. Wells*, 356 So. 2d 817, 819 (Fla. Dist. Ct. App. 1978); *Bunn-Penn v. S. Reg'l Med. Corp.*, 488 S.E.2d 747, 748 (Ga. Ct. App. 1997); *Kaufmann v. Jersey Cmty. Hosp.*, 919 N.E.2d 1077, 1079 (Ill. App. Ct. 2009); *People v. Jones*, 392 N.E.2d 973, 974 (Ill. App. Ct. 1979); *Doe v. Shapiro*, Nos. 273950, 273962, 2008 WL 583556, at *1 (Mich. Ct. App. Mar. 4, 2008); *Verdict and Settlement Summary, Metzler v. Kurtz*, No. SSX-L-9-04, 2009 WL 531108, at *1 (N.J. Super. Ct. Law Div. Feb. 20, 2009); *Travis v. United Health Servs. Hosps., Inc.*, 804 N.Y.S.2d 840, 841 (App. Div. 2005); *NCED Mental Health, Inc. v. Kidd*, 214 S.W.3d 28, 31 (Tex. App. 2006); *Standard Fire Ins. Co. v. Blakeslee*, 771 P.2d 1172, 1173 (Wash. Ct. App. 1989).

122. *CARLSON ET AL.*, *supra* note 73; *Gartrell et al.*, *supra* note 43, at 142.

123. *See Swenson*, *supra* note 70, at 276.

124. *See, e.g.*, N.Y. PENAL LAW §§ 130.20–52, .55–65 (McKinney 2009); *see also* FLA. STAT. ANN. § 491.0112 (West 2001); S.D. CODIFIED LAWS § 22-22-29 (2006).

125. *See Atl. Container Line AB v. Aref Hassan Abul, Inc.*, 281 F. Supp. 2d 457, 466 (N.D.N.Y. 2003); *Thaw v. N. Shore Univ. Hosp.*, 12 N.Y.S.3d 152, 155 (App. Div. 2015); *Kirkman v. Astoria Gen. Hosp.*, 611 N.Y.S.2d 615, 616 (App. Div. 1994).

126. *See Ornstein & Waldman*, *supra* note 58.

127. *See infra* Part III.A–C.

128. *See infra* Part III.A.

to the criminal system, the civil system lacks preventive mechanisms to combat patient sexual assault.¹²⁹ Lastly, this Part explores the option of the patient-victim filing a complaint to the medical board of his or her state.¹³⁰ So, while it may be true that the patient has many options available after they become a victim of sexual assault committed by their health care provider, none of these options are actually effective in *preventing* patient sexual assault.¹³¹

A. Criminal Charges

When a patient alleges their health care provider sexually assaulted them, the patient can contact the police reporting the incident.¹³² From there, the police will determine whether they have probable cause to arrest the person.¹³³ Then it is within the prosecutor's discretion whether or not to proceed with the charges.¹³⁴ Using New York law as an example, the prosecutor may be able to charge the health care provider under the following statutes, depending on the specific allegations: criminal sexual act in the first degree,¹³⁵ criminal sexual act in the second degree,¹³⁶ criminal sexual act in the third degree,¹³⁷ forcible touching,¹³⁸ sexual abuse in the first degree,¹³⁹ sexual abuse in the second degree,¹⁴⁰ sexual abuse in the third degree,¹⁴¹ sexual misconduct,¹⁴² rape in the first degree,¹⁴³ rape in the second degree,¹⁴⁴ and rape in the third degree.¹⁴⁵

Moreover, several states have sex crime statutes that have provisions specifically aimed at the sexual misconduct of health care

129. *See infra* Part III.B.

130. *See infra* Part III.C.

131. *See* Dehlendorf & Wolfe, *supra* note 23, at 1886; David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78, 80 (2002); N.Y. STATE DEP'T OF HEALTH, *supra* note 60, at 8.

132. *See* Lauren Baldwin, *Pressing Charges for a Criminal Act*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-offense/pressing-charges-a-criminal-act.htm> (last visited Nov. 26, 2016).

133. *Id.*

134. *Id.*

135. N.Y. PENAL LAW § 130.50 (McKinney 2009).

136. *Id.* § 130.45.

137. *Id.* § 130.40.

138. *Id.* § 130.52.

139. *Id.* § 130.65.

140. *Id.* § 130.60.

141. *Id.* § 130.55.

142. *Id.* § 130.20.

143. *Id.* § 130.35.

144. *Id.* § 130.30.

145. *Id.* § 130.25.

providers.¹⁴⁶ For example, Idaho has a statute that finds any medical care provider guilty of sexual exploitation when the medical care provider “engages in an act of sexual contact with a patient or client.”¹⁴⁷ Moreover, California has a sexual exploitation statute specific to physicians, surgeons, psychotherapists, or substance abuse counselors, which makes it an offense punishable by either imprisonment or fine to engage “in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a patient.”¹⁴⁸ Some states have expanded their preexisting sex crime statutes to include charges for when the offender is a health care provider.¹⁴⁹ Additionally, ten states have criminalized acts where a health care provider uses purported medical treatment or examination as a guise for committing sexual acts.¹⁵⁰

What all of these criminal statutes have in common, whether aimed specifically at health care providers or not, is they only address the issue of patient sexual assault by health care providers after the alleged sexual assault happens.¹⁵¹ None of these statutes have a built-in mechanism to prevent sexual assault.¹⁵² Rather, the occurrence of sexual assault is a prerequisite for a charge under each statute.¹⁵³

B. Civil Causes of Action

In addition to the option of filing criminal charges, the patient-victim of a health care provider’s sexual misconduct also has the option of filing a civil suit¹⁵⁴ under the following causes of action depending on

146. See, e.g., ALASKA STAT. ANN. §§ 11.41.410(a)(4)(A)–(B), .420(a)(4)(A)–(B) (West 2007); COLO. REV. STAT. ANN. § 18-3-404(1)(f)–(g) (West 2013); CONN. GEN. STAT. §§ 53a-71(a)(6)(A), 71(a)(7), 73a(a)(5) (2012); DEL. CODE ANN. tit. 11, § 761(j)(4) (2015); IDAHO CODE § 18-919(a) (2016); MINN. STAT. §§ 609.344(k), .345(k) (2014); MISS. CODE ANN. §§ 97-3-95(2), -5-23(2) (West 2005); N.H. REV. STAT. ANN. § 632-A:2(I)(g)(1)–(2) (2016); 11 R.I. GEN. LAWS ANN. §§ 11-37-2(4), -4(3) (West 2015); TEX. PENAL CODE ANN. § 22.011(b)(9) (West 2011); UTAH CODE ANN. § 76-5-406(12) (LexisNexis 2015); WASH. REV. CODE §§ 9A.44.050(1)(d), .100(1)(d) (2007); WYO. STAT. ANN. § 6-2-303(a)(viii) (2015).

147. IDAHO CODE § 18-919(a).

148. CAL. BUS. & PROF. CODE § 729 (West 2012).

149. *Id.*; see also ALASKA STAT. ANN. §§ 11.41.410(a)(4)(A)–(B), .420(a)(4)(A)–(B); MISS. CODE ANN. §§ 97-3-95(2), -5-23(2); TEX. PENAL CODE ANN. § 22.011(b)(9); UTAH CODE ANN. § 76-5-406(12); Falk, *supra* note 21, at 95.

150. COLO. REV. STAT. ANN. § 18-3-404(1)(f)–(g); CONN. GEN. STAT. ANN. §§ 53a-71(a)(6)(A), 71(a)(7), 73a(a)(5); DEL. CODE ANN. tit. 11, § 761(j)(4); MINN. STAT. §§ 609.344(k), .345(k); N.H. REV. STAT. ANN. § 632-A:2(I)(g)(1)–(2); 11 R.I. GEN. LAWS ANN. §§ 11-37-2(4), -4(3); WASH. REV. CODE §§ 9A.44.050(1)(d), .100(1)(d); WYO. STAT. ANN. § 6-2-303(a)(viii).

151. See *supra* notes 135-46, 148.

152. See *supra* notes 135-46, 148.

153. See *supra* notes 135-46, 148.

154. See WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, A SURVIVOR’S GUIDE TO FILING A CIVIL LAW SUIT 3, 9-10 (2004), http://www.svlawcenter.org/section_resources/resource_files/

the circumstances: battery,¹⁵⁵ assault,¹⁵⁶ negligent hiring,¹⁵⁷ and intentional infliction of emotional distress.¹⁵⁸

The aforementioned civil measures a patient can take if sexually assaulted by their health care provider require the sexual misconduct to have happened first.¹⁵⁹ For example, to plead a cause of action for assault, “a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact.”¹⁶⁰ Like assault, to plead a cause of action for battery, a plaintiff must allege there was “bodily contact, made with intent,” which was “offensive in nature.”¹⁶¹ Like the criminal statutes, each civil sexual misconduct-related cause of action has no built-in mechanism to prevent the sexual assault from happening in the first place.¹⁶² The occurrence of the sexual assault is a prerequisite for each law’s applicability.¹⁶³

C. Discipline by State Medical Boards

Each state has a medical board in charge of disciplining professional medical misconduct¹⁶⁴—for example, New York’s Board.¹⁶⁵ New York’s Board, amongst its other duties, investigates complaints

AGuidetoCivil_Law_Suits.pdf.

155. *Thaw v. N. Shore Univ. Hosp.*, 12 N.Y.S.3d 152, 155 (App. Div. 2015).

156. *Id.* A claim for assault in the situation of a doctor assaulting a patient under sedation can only be made if the patient is somewhat conscious during the assault because in order to plead a cause of action for assault a plaintiff must allege “intentional physical conduct,” which “plac[ed] the plaintiff in imminent apprehension of harmful contact.” *See id.*

157. *Atl. Container Line AB v. Aref Hassan Abul, Inc.*, 281 F. Supp. 2d 457, 466 (N.D.N.Y. 2003). In the instance of a physician’s sexual misconduct toward a patient, the patient may not prevail on a theory of vicarious liability but only under a theory of negligent hiring, retention, or supervision. *See id.* To prevail, patient-plaintiff must prove that the party knew or should have known of the physician’s “propensity for the conduct which caused the injury.” *Id.* In other words, the patient would have to prove that the party in charge of the hiring, retention, and supervision of the physician was aware of the physician’s tendency to sexually abuse patients. *See id.*; *cf. Kirkman v. Astoria Gen. Hosp.*, 611 N.Y.S.2d 615, 616 (App. Div. 1994). It is not enough that the patient-plaintiff merely proves that the sexual misconduct occurred, since there is no cause of action for “vicarious liability on the part of the employer for torts committed by the employee solely for personal motives unrelated to the furtherance of the employers’ business.” *Id.*; *see also N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844, 846 (N.Y. 2002). Sexual assault committed by physicians is not in furtherance of the employer’s business and thus cannot be a basis for vicarious liability. *N.X.*, 765 N.E.2d at 846.

158. *See Ruggiero v. Contemporary Shells, Inc.*, 554 N.Y.S.2d 708, 709 (App. Div. 1990).

159. *See Atl. Container Line AB*, 281 F. Supp. 2d at 466; *N.X.*, 765 N.E.2d at 846; *Thaw*, 12 N.Y.S.3d at 155; *Kirkman*, 611 N.Y.S.2d at 616; *Ruggiero*, 554 N.Y.S.2d at 709.

160. *Thaw*, 12 N.Y.S.3d at 155.

161. *Id.*

162. *See supra* notes 135-46, 148, 155-58 and accompanying text.

163. *See supra* notes 155-58 and accompanying text.

164. Ornstein & Waldman, *supra* note 58.

165. N.Y. STATE DEP’T OF HEALTH, *supra* note 60, at i.

made against physicians, physician assistants, and specialist assistants, and prosecutes them if they are charged with misconduct.¹⁶⁶ Once a complaint is submitted to New York's Board, it is reviewed to determine if an investigation is necessary.¹⁶⁷ If an investigation shows no evidence of misconduct, the case is closed.¹⁶⁸ If evidence of misconduct is found, New York's Board Investigation Committee ("Investigation Committee") reviews all allegations of misconduct and recommends whether a hearing is necessary.¹⁶⁹ If the Investigation Committee finds a hearing to be necessary, the physician and his or her attorney have the opportunity to bring forth evidence on the physician's behalf.¹⁷⁰ Finally, the Investigation Committee comes to a decision and imposes a penalty, if any.¹⁷¹ The N.Y. State Department of Health or the physician may appeal the decision from the hearing to a Review Board, which issues a final order.¹⁷² The N.Y. State Department of Health's *Board for Professional Medical Conduct 2011-2013 Report* outlines the spectrum of penalties a medical professional may face: "[p]enalties can range from a censure and reprimand to license revocation, including suspension of a physician's license, limitation of his or her practice, requiring supervision or monitoring of a practice, or a fine."¹⁷³

If a patient decides to seek justice through his or her state medical board, there must be an allegation of misconduct first, otherwise there would be no reason for a complaint.¹⁷⁴ Again, despite the availability of the multi-level quasi-legal process state medical boards offer, there is nothing in their process that aims to prevent sexual misconduct from occurring.¹⁷⁵ Further, one may be of the opinion that the threat of disciplinary action taken by a medical board is enough of a deterrent for health care providers, but this is unlikely.¹⁷⁶ For example, despite the formal process that New York's Board has established to ensure patient safety, the last three years of available reports reveal that sexual misconduct by health care providers is still in the top five areas of health care provider misconduct.¹⁷⁷

166. *Id.*

167. *Id.* at 3.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 7.

174. *Id.* at 3-4.

175. *Id.* at 3.

176. *See id.* at 7; *see also* Dehlendorf & Wolfe, *supra* note 23, at 1886.

177. N.Y. STATE DEP'T OF HEALTH, *supra* note 24, at 7; N.Y. STATE DEP'T OF HEALTH, *supra* note 60, at 7.

The inadequacy of discipline by medical boards is not exclusive to New York's Board.¹⁷⁸ A large number of state medical boards do not provide statistics or any information regarding the disciplinary result, if any, of patient sexual assault claims.¹⁷⁹ However, a study showed that 44.4% of physicians disciplined for sex-related offenses through a medical board from 1989 to 1994 either had their licenses revoked or voluntarily surrendered their licenses.¹⁸⁰ Another 26.3% of the physicians' licenses were only suspended, and less serious actions were taken against the remaining 29.2%.¹⁸¹ Thus, over half of the physicians who were disciplined for sex-related offenses by their state medical boards did not have their licenses revoked and, therefore, are probably still practicing physicians.¹⁸²

There is concern that physicians, and other health care providers who commit sexual offenses, will continue to offend.¹⁸³ This is based on recidivism studies, which show alarming rates of reoffending among sex offenders.¹⁸⁴ In addition, cases in this area show repetitive criminal sexual acts among offending individuals, rather than merely isolated instances of sexual abuse.¹⁸⁵ Therefore, because over half of the physicians disciplined for sex-related offenses did not have their licenses revoked, they are inclined to commit sex-related offenses on their patients again.¹⁸⁶

Another issue is the apparent disconnect between physician discipline in hospitals and the reporting of that discipline to state medical boards.¹⁸⁷ A 2011 study shows that out of all the physicians in the United States who had their clinical privileges¹⁸⁸ revoked or

178. See Dehlendorf & Wolfe, *supra* note 23, at 1886.

179. See *supra* note 59 and accompanying text.

180. Dehlendorf & Wolfe, *supra* note 23, at 1885.

181. *Id.*

182. See *id.*

183. See, e.g., Lisak & Miller, *supra* note 131, at 78, 80; *Canadian Doctor Sexually Assaulted 21 Sedate Women*, *supra* note 85; King, *supra* note 85; Smith, *supra* note 99; *State: Doctor Admits to Molesting Patients, Taking Drugs*, *supra* note 98.

184. Lisak & Miller, *supra* note 131, at 78, 80.

185. See, e.g., *Canadian Doctor Sexually Assaulted 21 Sedate Women*, *supra* note 85; King, *supra* note 85; Smith, *supra* note 99; *State: Doctor Admits to Molesting Patients, Taking Drugs*, *supra* note 98.

186. See *supra* notes 180-84 and accompanying text. Studies have shown that after an individual commits a crime and does not receive punishment for it, he or she is more likely to commit the crime again. Lisak & Miller, *supra* note 131, at 78.

187. ALAN LEVINE ET AL., PUB. CITIZEN, STATE MEDICAL BOARDS FAIL TO DISCIPLINE DOCTORS WITH HOSPITAL ACTIONS AGAINST THEM 3 (2011), <https://www.citizen.org/documents/1937.pdf>.

188. See *Privilege Delineations*, EPR MEDKINETICS, https://reportal.medkinetics.com/ImplementationDocuments/EPR_PrivilegeDelineationImplementation.pdf (last visited Nov. 26, 2016) ("The delineation of clinical privileges is the process in which the organized medical staff

restricted by their employer, fifty-five percent of those physicians were not subject to state licensing actions for the behavior that caused the clinical privileges to be revoked or restricted.¹⁸⁹ Included in the behavior resulting in clinical privilege revocation or restriction were instances of sexual misconduct.¹⁹⁰ In fact, sexual misconduct fell in the top six categories of actions resulting in clinical privilege revocation or restriction.¹⁹¹

Although all the physicians in the above study were subjects of some sort of disciplinary action from their hospital workplace, this alone is not enough to prevent the sexual misconduct from occurring again, since the hospitals' disciplinary reports are generally unknown to the public.¹⁹² Subsequent state medical board disciplinary actions do a better job of ensuring that the public will be informed of the physician's misconduct, since disciplinary actions are generally publicly available from the state's medical board via phone, email, or their website.¹⁹³ However, based on the large disconnect between employer disciplinary action and medical board disciplinary action, it is evident that the current response of medical boards regarding health care provider sexual misconduct is inadequate.¹⁹⁴

IV. A STATUTE MUST BE IMPLEMENTED ALLOWING SEDATED PATIENTS THE RIGHT TO A RECORDING OF THEIR MEDICAL PROCEDURES, UPLOADED TO A SECURE INTERNET CLOUD

In order to reduce the frequency of sexual assaults on patients by their health care providers, a preventive system must be enacted since the current legal ramifications for offending health care providers are unsuccessful in stopping this behavior.¹⁹⁵ A likely successful solution to this problem is to give all patients who will be sedated for a medical procedure the opportunity to have their medical procedure recorded.¹⁹⁶

evaluates and recommends an individual practitioner be allowed to provide specific patient care services in their healthcare facility within well-defined training criteria.”).

189. LEVINE ET AL., *supra* note 187, at 5.

190. *Id.* at 6.

191. *Id.* at 7.

192. *Id.* at 4; *Public Information*, NPDB, <http://www.npdb.hrsa.gov/footer/publicInformation.jsp> (last visited Nov. 26, 2016). Reports stored in the National Practitioner Data Bank (“NPDB”) are not available to the general public, but the general public may request certain information from the NPDB. *Id.* However, any information received via public request will not identify the practitioner. *Id.*

193. See Ornstein & Waldman, *supra* note 58.

194. See LEVINE ET AL., *supra* note 187, at 3, 5.

195. See *supra* note 24 and accompanying text.

196. See Assemb. 255, 2015-2016 Leg. (Wis. 2015).

The recording will be made part of the patient's medical record.¹⁹⁷ The health care provider will upload the video onto a secure Internet cloud for the patient's viewing.¹⁹⁸ This Part addresses why there is a need for preventive measures¹⁹⁹ and explains patients' rights under a proposed statute.²⁰⁰ This Part explains the obligations the proposed statute will impose on health care providers.²⁰¹ It also describes the consequences for health care providers who do not comply with the recording procedures pursuant to the statute.²⁰² Lastly, this Part addresses the potential effects on and anticipated reactions of the medical community regarding medical procedures being recorded.²⁰³

A. Preventive Measures Must Be Executed

The remedies for patient-victims of sexual misconduct by health care providers all share one common trait: they are all reactionary measures—whether criminal, civil, or by a state medical board—which only address sexual misconduct after it has already occurred.²⁰⁴ For example, a criminal charge of sexual misconduct states that a person is guilty of sexual misconduct when “[h]e or she *engages in sexual intercourse with another person* without such person's consent” or “[h]e or she *engages in oral sexual conduct or anal sexual conduct* with another person without such person's consent.”²⁰⁵ Similarly, a civil charge of battery requires a plaintiff to “prove that *there was bodily contact, made with intent,*” that was “offensive in nature.”²⁰⁶ The list goes on, with both the criminal and civil systems only addressing sexual misconduct *after* it occurs and not prior to such sexual misconduct.²⁰⁷ Thus, there are no laws that seek to prevent predatory sexual misconduct committed by health care providers on their patients.²⁰⁸

197. *See id.*

198. *See* PETER MELL & TIMOTHY GRANCE, NAT'L INST. OF STANDARDS AND TECH., THE NIST DEFINITION OF CLOUD COMPUTING 2 (2011), <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

199. *See infra* Part IV.A.

200. *See infra* Part IV.B.

201. *See infra* Part IV.C.

202. *See infra* Part IV.D.

203. *See infra* Part IV.E.

204. *See supra* note 24 and accompanying text.

205. N.Y. PENAL LAW § 130.20(1)–(2) (McKinney 2009) (emphasis added).

206. *Thaw v. N. Shore Univ. Hosp.*, 12 N.Y.S.3d 152, 155 (App. Div. 2015) (emphasis added).

207. *See supra* notes 24, 205-06 and accompanying text; *infra* notes 209-10 and accompanying text.

208. *See supra* notes 24, 204-06 and accompanying text; *infra* notes 209-11 and accompanying text.

Discipline by medical boards also fails to prevent sexual abuse among health care providers, considering that despite the disciplinary process followed by every state medical board, sexual misconduct is still a top area of medical professional misconduct.²⁰⁹ This is further supported by a 2011 report, which showed that over half of physicians who received some sort of clinical discipline from their employer for sexual misconduct were never disciplined by their state medical board—hindering the ability of the public to learn of the misconduct.²¹⁰ And, according to a 1998 study, over half of the physicians in that study who were disciplined by their state medical board did not have their license revoked and could still be practicing.²¹¹

Most of the aforementioned cases involve pervasive recurring sexual abuse.²¹² Thus, the claimed deterrent effect of possible discipline does not appear to prevent sexual abuse among health care providers.²¹³ Additional protections are needed when health care providers continuously sexually assault and abuse several patients over the course of many years before it is brought to the attention of the public, legal system, and regulatory entity assigned oversight.²¹⁴ The lack of consequences gives a disturbing message to physicians: you will probably not get caught committing sexual misconduct against a patient, and if you are, it may not even jeopardize your career.²¹⁵ The lack of firm discipline gives sexually abusive health care providers the opportunity to prey on other patients.²¹⁶ Therefore, current civil laws, criminal laws, and disciplinary measures by medical boards do not prevent health care provider-patient sexual misconduct.²¹⁷ Preventive measures are necessary to reduce, and hopefully eliminate, this prevalent issue.²¹⁸

209. See, e.g., N.Y. STATE DEP'T OF HEALTH, *supra* note 60, at 7-8; see also Dehlendorf & Wolfe, *supra* note 23, at 1886.

210. LEVINE ET AL., *supra* note 187, at 5; *Public Information*, *supra* note 192.

211. See Dehlendorf & Wolfe, *supra* note 23, at 1885.

212. See, e.g., *Canadian Doctor Sexually Assaulted 21 Sedate Women*, *supra* note 85; King, *supra* note 85; Smith, *supra* note 99; *State: Doctor Admits to Molesting Patients, Taking Drugs*, *supra* note 98.

213. See WRIGHT, *supra* note 26, at 2.

214. See *supra* note 212.

215. See Dehlendorf & Wolfe, *supra* note 23, at 1885; *supra* note 212.

216. Lisak & Miller, *supra* note 131, at 78, 80.

217. See *supra* note 24 and accompanying text.

218. See *Prevention of Sexual Harassment*, STOP VIOLENCE AGAINST WOMEN, <http://www1.umn.edu/humanrts/svaw/harassment/explore/5prevention.htm> (last visited Nov. 26, 2016).

B. Patients Should Have the Right to Request That Their Medical Procedure Be Recorded and Be Informed of This Right

This Note proposes a state statute be enacted declaring that all health care providers²¹⁹ who administer sedatives²²⁰ for patient medical procedures²²¹ must inform patients of their right to have the medical procedures recorded.²²² If the patient is an incapacitated person or a minor, the patient's parent, guardian, or legal custodian can elect to have the medical procedure recorded on the patient's behalf.²²³ The health care provider must inform the patient or the patient's parent, guardian, or legal custodian of this option once the patient consents to the medical procedure.²²⁴ However, when the patient is in an emergency situation, the health care provider does not have to provide the option to have the medical procedure recorded.²²⁵ This exception is based on the health care provider's professional judgment that an immediate medical procedure is necessary to keep the patient alive, or if there are other circumstances showing that the delay caused by administering the video

219. 45 C.F.R. § 160.103 (2014). A health care provider is "a provider of medical or health services." *Id.*

220. *Sedative*, FREE DICTIONARY, <http://medical-dictionary.thefreedictionary.com/sedative> (last visited Nov. 26, 2016). A sedative is an agent that "depress[es] the central nervous system, which tends to cause lassitude and reduced mental activity." *Id.* Wisconsin's proposed statute giving all patients the right to have their surgical procedures recorded only gives that right to patients who are administered general anesthesia. Assemb. 255, 2015-2016 Leg. (Wis. 2015). Although this Note often references Wisconsin's proposed statute, it broadens the scope of recording of medical procedures to procedures where patients are administered sedatives, and not just general anesthesia, in order to target more cases of sexual abuse. See Pat Ferguson, *Conscious Sedation Versus Anesthesia: Know the Difference Before You Consent!*, VIRGINIAN-PILOT: QUICK TIPS FOR WELLNESS (Apr. 17, 2012, 7:29 AM), <http://hamptonroads.com/2012/04/conscious-sedation-versus-anesthesia-know-difference-you-consent> (stating that sedation includes conscious, moderate, and deep sedation whereas anesthesia is solely the use of deep sedation); *Sedative*, *supra*.

221. *Medical Procedure*, FREE DICTIONARY, <http://www.thefreedictionary.com/medical+procedure> (last visited Nov. 26, 2016). A medical procedure is "a procedure employed by medical or dental practitioners." *Id.* Wisconsin's proposed statute gives patients the right to a recording for a surgical procedure only. Wis. Assemb. 255. Although this Note often references Wisconsin's proposed statute, it broadens the recording of procedures to all medical procedures, rather than merely surgical procedures in order to target more cases of sexual abuse. See *Medical Procedure*, *supra*; *Surgical Procedure*, FREE DICTIONARY, <http://www.thefreedictionary.com/surgical+procedure> (last visited Nov. 26, 2016). A surgical procedure is "a [type of] medical procedure involving an incision with instruments." *Id.* But, not all medical procedures are surgical procedures. *Medical Procedure*, *supra*.

222. See Wis. Assemb. 255 (proposing that surgical facilities must offer surgical patients the option to have their surgical procedure videotaped).

223. See *id.*

224. See *id.*

225. See *id.*

recording would result in “a serious risk of substantial and irreversible impairment of one or more of the . . . patient’s bodily functions.”²²⁶

C. Health Care Providers Have the Obligation to Record the Patient’s Medical Procedure if It Is Requested by the Patient

The proposed statute includes the obligations of health care providers in (1) conveying the proper information to the patient about the option to have the surgery recorded, (2) ensuring the medical procedure is recorded if the patient so requests, and (3) providing the patient with access to the recording.²²⁷ This Subpart explains that the health care provider must inform patients of their right to have the surgery recorded, including what information the health care provider is required to convey.²²⁸ It also discusses the health care provider’s obligation to obtain written consent from a patient who chooses to have her surgery recorded pursuant to the statute.²²⁹ This Subpart then establishes the recording requirements imposed on health care providers, such as that all recordings have audio and video capabilities.²³⁰ Finally, this Subpart explains that the health care provider must store the recordings on a secure Internet cloud accessible by the patient.²³¹

1. The Health Care Provider Must Orally Inform the Patient of Her Rights Under the Statute

Under the proposed statute, the health care provider has a duty to orally inform a patient of her option to have her medical procedure recorded.²³² This must be expressed to the patient or the patient’s legal representative within a reasonable time after the patient has consented to the medical procedure.²³³ The health care provider must explain to the patient, or the patient’s legal representative, that the upcoming medical procedure falls under this statute, which allows the patient the option to consent to have their medical procedure recorded.²³⁴ The health care

226. *See id.* The Wisconsin proposed statute refers to the patient as a “surgical patient.” *Id.*

227. *See infra* Part IV.C.1–4.

228. *See infra* Part IV.C.1.

229. *See infra* Part IV.C.2.

230. *See infra* Part IV.C.3.

231. *See infra* Part IV.C.4.

232. *See* Assemb. 255, 2015-2016 Leg. (Wis. 2015).

233. *See Individual Access to Medical Records: 50 State Comparison*, HEALTH INFO. & L. (Sept. 24, 2016), <http://www.healthinfo.org/comparative-analysis/individual-access-medical-records-50-state-comparison>. When a patient requests access to their medical records, many state laws require the medical records be given to the patient within a reasonable amount of time. *Id.*

234. *See* Wis. Assemb. 255 (requiring health care providers to inform patients of their right to have their surgery recorded).

provider must inform the patient that he or she has the right to request to view the recording through an Internet cloud at any time after the procedure by contacting the health care provider.²³⁵ Then, the health care provider must explain that the recording is a protected medical record under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and thus is covered by all privacy and security protections set forth under HIPAA, including, but not limited to, safeguards to ensure that the video is not disclosed improperly and that the video will not be disclosed to third parties without the patient’s authorization or unless the law so provides.²³⁶

2. The Health Care Provider Must Obtain Written Consent from the Patient if the Patient Elects to Have Her Surgery Recorded

After health care providers orally inform patients of their right to have medical procedures recorded, patients that choose to exercise this right must be provided a written consent form by their health care providers.²³⁷ The consent form should reiterate the same information that health care providers tell patients orally. Specifically, it should summarize patients’ statutory rights, including a restatement of the right to consent or decline the recording, as well as the right to view and obtain a copy of the recording.²³⁸ In addition, the consent form will state that the video is part of a patient’s medical record and will not be seen by anyone else or released for any purpose without written authorization from the patient, except pursuant to a court order or subpoena, or if required by law.²³⁹ Furthermore, under HIPAA, the consent form will notify patients of their right to request alternative means to receive the recording of their procedures.²⁴⁰ For example, patients may receive their recorded procedures on DVDs instead of having them uploaded to the cloud.²⁴¹ Patients that choose to have their procedures recorded must sign this consent form verifying that they elect to have the procedure recorded.²⁴²

235. *See id.*

236. Pub. L. No. 104-191 (codified in scattered sections of 18, 26, 29, 42 U.S.C.); 45 C.F.R. §§ 164.502(a), .530(c)(1) (2014). HIPAA trumps state privacy regulations except when state privacy regulations offer greater patient protection. 45 C.F.R. § 160.203 (2013).

237. *See* RONALD W. SCOTT, LEGAL ASPECTS OF DOCUMENTING PATIENT CARE FOR REHABILITATION PROFESSIONALS 114 (3d ed. 2006) (describing the need to somehow document informed consent).

238. *See* Wis. Assemb. 255; *supra* notes 232-36 and accompanying text.

239. *See* 45 C.F.R. § 164.512(a) (2009).

240. *See* 45 C.F.R. § 164.522(b)(1)(ii) (2014).

241. *See id.*

242. SCOTT, *supra* note 237, at 114. Health care professionals must always use documentation to show that the patient manifests assent. *Id.* The contents and layout of the form may vary. *Id.*

3. The Health Care Provider Must Record the Procedure and Ensure the Recording Complies with the Requirements Set Forth in the Statute

The health care provider must ensure the video recording contains audio and color video and begins at the point the patient consciously walks into the room where the medical procedure will occur.²⁴³ The video recording must not end until after the patient leaves the recovery room or any other room designated for patient recovery.²⁴⁴ The reason for this is that sexual misconduct by health care providers is not exclusive to the room in which the procedure is done.²⁴⁵ In fact, many sexual assaults of patients occur in the recovery room while the patient is still overcoming the effects of sedation.²⁴⁶ The cameras must be placed in a position where all entrances and exits, the patient, and the medical staff can be seen at all times.²⁴⁷ The health care provider must pay for the installation and upkeep of the cameras in its facilities.²⁴⁸ Moreover, at no point will the health care provider have the right to decide that the medical procedure be recorded.²⁴⁹ Consequently, if the patient does not want the recording, the medical procedure will not be recorded.²⁵⁰

243. See Wis. Assemb. 255; see also 18 U.S.C. § 2518(5) (2012). When the federal government makes the decision to conduct surveillance of the telephone calls of individuals, the interception must not be “for any period longer than is necessary to achieve the objective of the authorization.” *Id.* Having the recording of the medical procedure commence at the time the patient enters the room where the procedure will be conducted is not longer than necessary to achieve the objective of the statute—preventing sexual assault, considering many sexual assaults occur in the room in which the procedure is done. See, e.g., Kaufmann v. Jersey Cmty. Hosp., 919 N.E.2d 1077, 1079 (Ill. App. Ct. 2009); People v. Jones, 392 N.E.2d 973, 974 (Ill. App. Ct. 1979); Wodja v. Wash. State Dept. of Health, Dental, Quality Assurance Comm’n, No. 63318-o-I, 2010 WL 431455, at *1 (Wash. Ct. App. Feb. 8, 2010).

244. Wis. Assemb. 255 (proposing any entryway to or from the surgical suite be recorded if the patient chooses the option to have their surgery recorded).

245. See, e.g., N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844, 846 (N.Y. 2002); see also Verdict and Settlement Summary, Metzler v. Kurtz, No. SSX-L-9-04, 2009 WL 531108, at *1 (N.J. Super. Ct. Law Div. Feb. 20, 2009).

246. See *supra* note 245.

247. See Wis. Assemb. 255; *supra* note 243 and accompanying text.

248. See, e.g., *Paper Shredders Are Like Shoes; A Good Fit Is Important*, AMERIFILE, <http://www.amerifile.net/shredders.asp> (last visited Nov. 26, 2016). HIPAA requires medical practices to properly destroy patient information, rather than simply throwing out the patient information in a wastebasket. *Id.* This may require medical practices to purchase special equipment, for example, shredders, to ensure HIPAA compliance regarding the proper destruction of patient material. *Id.*

249. See JENNIFER JACKSON, TRUTH, TRUST AND MEDICINE 152 (2001).

250. See *id.*

4. The Health Care Provider Must Store the Recording Appropriately and Allow Patient Access

Upon a patient's request to view the recording of her medical procedure, the health care provider must upload the video to a secure Internet cloud within seven days of the patient's request.²⁵¹ Uploading files to an Internet cloud is known as "cloud computing."²⁵² Cloud computing is an "on-demand network" that gives individuals convenient access to a "pool of configurable computing resources" such as file storage and applications.²⁵³ Cloud computing allows individuals to conveniently access the network at any time through any platform with Internet access, including cell phones and laptop computers.²⁵⁴ Cloud storage is relatively inexpensive compared to alternatives, such as external hard drives or backup tapes, which necessitate the purchase of equipment and may involve labor costs from the manual uploading of files by employees.²⁵⁵ Furthermore, storage on an Internet cloud takes up no physical space.²⁵⁶ Cloud storage is also extremely secure, since the data on the cloud is encrypted, both during transmission and after, preventing those without authorization from accessing the data.²⁵⁷

Historically, cloud computing has been used predominantly by Internet companies such as Amazon.com, Inc. and Google Inc.²⁵⁸ However, a recent survey has found that cloud computing has made its way into the health care industry, with eighty-three percent of health care provider organizations using cloud-based applications by the middle of 2014.²⁵⁹ Health care provider organizations mainly use cloud computing for the hosting of clinical applications and data, health

251. See Wis. Assemb. 255; MELL & GRANCE, *supra* note 198, at 2; *Your Medical Records*, HHS.GOV, <http://www.hhs.gov/hipaa/for-individuals/medical-records/index.html> (last visited Nov. 26, 2016) (stating that patients have the right to access their medical records); see also *Individual Access to Medical Records: 50 State Comparison*, *supra* note 233. Once a patient requests access to their medical records, most states have a law addressing the time period within which the patient must receive their records. *Id.*

252. MELL & GRANCE, *supra* note 198, at 2.

253. *Id.*

254. *Id.*

255. See Katie Nielsen, *Top Ten Advantages of Using Online Storage Services* (Mar. 21, 2012), <http://online-storage-service-review.toptenreviews.com/top-ten-advantages-of-using-online-storage-services.html>.

256. *Id.*

257. *Id.*

258. Arif Mohamed, *A History of Cloud Computing*, COMPUTERWEEKLY.COM, <http://www.computerweekly.com/feature/A-history-of-cloud-computing> (last visited Nov. 26, 2016).

259. Louis Columbus, *83% of Healthcare Organizations Are Using Cloud-Based Apps Today*, FORBES (July 17, 2014, 10:04 AM), <http://www.forbes.com/sites/louiscolumbus/2014/07/17/83-of-healthcare-organizations-are-using-cloud-based-apps-today>.

information exchange, backups, and disaster recovery.²⁶⁰ The preexisting use of cloud computing in the health care industry will further simplify implementation of the proposed statute.²⁶¹

Cloud storage should be created and maintained by health care providers.²⁶² Within each health care provider's cloud account will be their individual patients' accounts, which is where the health care provider will upload each patient's recording.²⁶³ However, the recording will not be uploaded to the cloud until the patient requests to view it, which will save the health care provider from paying for extra cloud storage.²⁶⁴ Upon request to view the video, patients will be supplied with a username and password by their health care provider.²⁶⁵ The patient may use this username and password to log on to the cloud and view the recording from any location and from an electronic device of their choosing.²⁶⁶

D. Remedies for Non-Compliance Under the Statute Include Monetary Fines and Any Other Remedy Deemed Appropriate by Each State's Department of Health

Each state's department of health, or equivalent department, will be in charge of implementing and enforcing the recording procedure under the proposed statute, in any way it deems fit, such as by promulgating rules relating to recording equipment or the recording itself.²⁶⁷ The state's department of health will also have the duty of investigating allegations of non-compliance by health care providers and promulgating fines for violations of the requirements of the statute.²⁶⁸ The money collected from fines will be put toward subsidizing costs related to implementation of the statute.²⁶⁹ The department of health may

260. *Id.*

261. *See id.*

262. *See id.* (reporting that a large amount of the health care industry is already in the practice of using and maintaining cloud technology).

263. *See* MELL & GRANCE, *supra* note 198, at 2; Columbus, *supra* note 259.

264. *See The Real Costs of Cloud Computing*, COMPUTERWORLD (Dec. 5, 2011, 6:00 AM), <http://www.computerworld.com/article/2550226/data-center/the-real-costs-of-cloud-computing.html>.

265. *See* Assemb. 255, 2015-2016 Leg. (Wis. 2015); MELL & GRANCE, *supra* note 198, at 2-3.

266. *See* MELL & GRANCE, *supra* note 198, at 2.

267. *See, e.g., About HHSC*, TEX. HEALTH & HUM. SERVICES, http://www.hhsc.state.tx.us/about_hhsc/index.shtml (last visited Nov. 26, 2016).

268. *See* Wis. Assemb. 255.

269. *See* Kathleen Pender, *When Government Fines Companies, Who Gets Cash?*, SFGATE (May 6, 2010, 4:00 AM), <http://www.sfgate.com/business/networth/article/When-government-fines-companies-who-gets-cash-3189724.php>. Often, the money collected from fines imposed on private entities by the government remains with the government, but this depends on the type of fine and

desire to implement a fine system similar to the system set forth in the bill proposed in 2015 in Wisconsin, which gives patients the right to have a medical procedure recorded and imposes a duty on the health care provider to inform the patient of that right.²⁷⁰ The Wisconsin legislature provides the following:

[A] health care provider who knowingly refuses to comply with a Patient request for recording is subject to a forfeiture of up to \$25,000 for each violation. A surgical facility that fails to provide a required notice of the option for recording, including information regarding the procedures, fees, [and] conditions . . . is subject to a forfeiture of up to \$25,000 for each violation.²⁷¹

It is imperative that the state department of health, or equivalent department, has the ability to impose fines and other consequences on health care providers who refuse to comply with the law.²⁷² If the state department of health adopts a fine system similar to the one proposed in the Wisconsin bill, health care providers are likely to comply with the statute out of fear of the fine they will be required to pay if they do not comply with the statute's requirements.²⁷³

E. Potential Effects of and Reactions to Allowing Patients the Right to Have Their Medical Procedures Recorded

While the adoption of this statute would result in a victory for patients, health care providers are likely to view this statute as a burden on the medical profession.²⁷⁴ This Subpart reasserts the proposition that the recording of medical procedures when patients are sedated is likely to deter health care providers from sexually assaulting patients.²⁷⁵ It also acknowledges that health care providers are likely not to support medical procedures being recorded, but argues that the recording of medical procedures may actually benefit health care providers.²⁷⁶

who is assessing the fines. *Id.*

270. See Wis. Assemb. 255.

271. *Id.*

272. See *id.*; see also John Roman & Graham Farrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities*, 14 CRIME PREVENTION STUD. 53, 57 (2002) (finding that individuals and society make "implicit cost-benefit decisions . . . on an ongoing basis").

273. See Wis. Assemb. 255; Roman & Farrell, *supra* note 272, at 57.

274. See Tom Jackman, *Could Cameras in Operating Rooms Reduce Preventable Medical Deaths?*, WASH. POST (Aug. 25, 2015), http://www.washingtonpost.com/local/could-cameras-in-operating-rooms-reduce-preventable-medical-deaths/2015/08/25/fc2696c4-3ae2-11e5-b3ac-8a79bc44e5e2_story.html.

275. See *infra* Part IV.E.1.

276. See *infra* Part IV.E.2.

1. There Is Likely to Be Less Sexual Abuse of Sedated Patients by Health Care Providers When Medical Procedures Are Recorded

Health care providers are less likely to commit sexual misconduct against patients if they know they are being recorded.²⁷⁷ This is based on a psychological study, which concluded that it is probable that individuals change their behavior if they think they are being watched.²⁷⁸ The study placed images of human eyes in a cafeteria and found that the presence of the eyes made the individuals more likely to remove their garbage from their tables.²⁷⁹ The study concluded that individuals are more likely to choose to behave properly when they are subject to some form of “social scrutiny.”²⁸⁰ Thus, based on the results of these studies, health care providers are likely to refrain from sexually assaulting unconscious patients if aware they are being recorded.²⁸¹

2. Health Care Providers Are Not Likely to Support the Proposed Statute, but This Statute Actually Benefits Them

It is highly unlikely that health care providers will be accepting of the requirements set forth in the proposed statute for various reasons. For example, they may claim that recording medical procedures without their consent is an unjustified intrusion on the practice of medicine.²⁸² But, such intrusions are often supported when trumped by a large societal benefit.²⁸³ Here, the potential intrusion on a health care provider’s practice of medicine is inarguably trumped by the need to protect unconscious patients from being sexually assaulted by the very health care providers in whom they placed their trust.²⁸⁴

Another anticipated argument by health care providers against this proposal is that requiring them to comply with this statute would be putting an undue burden on them.²⁸⁵ Health care providers may further argue that recording medical procedures is an unnecessary and inappropriate interference, invading on the privacy rights of their

277. See Max Ernest-Jones et al., *Effect of Eye Images on Everyday Cooperative Behavior: A Field Experiment*, 32 *EVOLUTION & HUM. BEHAV.* 172, 176 (2011).

278. *Id.*

279. *Id.*

280. *Id.*

281. *See id.*

282. Jackman, *supra* note 274.

283. See ANITA L. ALLEN, *UNPOPULAR PRIVACY: WHAT MUST WE HIDE?* 19 (2011).

284. *See id.*

285. *See* Jackman, *supra* note 274. Jackman advocates the idea of cameras being installed in operating rooms in order to reduce preventable deaths. *Id.* However, a medical malpractice defense attorney is quoted in the article as saying that requiring the installation of such cameras will result in health care providers feeling that everything they say or do will be “second-guessed.” *Id.*

patients. However, both of these arguments are flawed.²⁸⁶ First, the history of the medical profession has shown that putting an additional burden on health care providers is acceptable and, in fact, encouraged when doing so will help protect patients.²⁸⁷ For example, HIPAA imposes numerous requirements on health care providers, which includes requiring health care providers to take steps to ensure patient medical records are secure by implementing security policies and procedures,²⁸⁸ requiring the designation of a security official whose job it is to develop and implement the aforementioned security measures,²⁸⁹ and requiring the health care provider to train its employees in such security policies and procedures.²⁹⁰ Second, recording patient medical procedures does not invade patient privacy rights, considering that a medical procedure will only be recorded if the patient consents.²⁹¹

In addition, the solution set forth in this Note is valuable to health care providers who become victims of patients who knowingly fabricate lies about them.²⁹² In fact, health care providers have expressed the need for “better protection from false allegations” against them by patients.²⁹³ A camera in the operating room, or any location where procedures occur, could be the better protection for which health care providers yearn.²⁹⁴ Patients will be less likely to knowingly make false allegations of sexual abuse against health care providers if procedures are recorded.²⁹⁵ Having a procedure recorded not only legally clears a health care provider against false allegations of sexual misconduct but also avoids reputational damage when such serious allegations are made.²⁹⁶

Surprisingly, patients could also unknowingly make false allegations against health care providers.²⁹⁷ Studies have shown

286. See *infra* notes 287-91.

287. See, e.g., *Summary of the HIPAA Security Rule*, HHS.GOV, <http://www.hhs.gov/oct/privacy/hipaa/understanding/srsummary.html> (last visited Nov. 26, 2016).

288. *Id.*

289. *Id.*

290. *Id.*

291. See *supra* notes 237-42 and accompanying text.

292. See Martin Samuels, *Preventing Damage from False Allegations*, *BMJ* (Mar. 25, 2004), <http://www.bmj.com/rapid-response/2011/10/30/preventing-damage-false-allegations>.

293. *Id.*

294. See *Cambridge University Study Shows On-Officer Video Reduces Use-of-Force Incidents by 59 Percent*, *TASER INT'L* (Apr. 8, 2013), <http://investor.taser.com/releasedetail.cfm?ReleaseID=754849>. One study found that the presence of video cameras on officers resulted in an 87.5% reduction in complaints against police officers. *Id.*

295. See Ernest-Jones et al., *supra* note 277, at 176.

296. See Richard C.W. Hall & Ryan C.W. Hall, *False Allegations: The Role of the Forensic Psychiatrist*, 7 *J. PSYCHIATRIC PRAC.* 343, 343 (2001); Samuels, *supra* note 292.

297. See B. Balasubramaniam & G. R. Park, *Sexual Hallucinations During and After Sedation and Anaesthesia*, 58 *ANAESTHESIA J. ASS'N ANAESTHETISTS GR. BRIT. & IR.* 549, 550, 552. (2003).

anesthesia and other similar sedatives can result in vivid sexual hallucinations that patients often believe to be real.²⁹⁸ For example, legitimate stimuli to the chest during surgery for medical purposes could result in an accusation of breast fondling.²⁹⁹ The placing of swabs in the perineum has resulted in accusations of genital touching.³⁰⁰ Again, use of cameras in the operating room provides an accurate account of what occurred during the procedure and, thus, could absolve innocent health care providers of false accusations and potential liability when patients believe that events taking place in sexual hallucinations were real.³⁰¹

Moreover, accurate documentation of medical procedures would be useful to parties in cases where the evidence is questionable on both sides, avoiding the need for speculation about what transpired.³⁰² For example, in a case in Oregon, when a woman's anesthesia wore off after a colonoscopy, she woke up "distracted and crying."³⁰³ A few days later, she went to a gynecologist who said it appeared that she had been raped.³⁰⁴ The woman was told to go to the hospital to be examined as a possible victim of sexual assault.³⁰⁵ She went to the emergency room, where it was found that the woman had "internal and external bruising and abrasions"; however, four days had passed since the alleged assault, so there was no viable DNA evidence to collect from the woman.³⁰⁶ All four health care providers involved with the woman's colonoscopy retained lawyers, and most refused to speak with the police—hindering the ability of the woman to find out what really happened that day.³⁰⁷

The woman would have had an accurate account of what happened during the colonoscopy if a camera recorded the procedure.³⁰⁸ She would have either found out that she was sexually assaulted or that nothing of the sort had happened thereby clearing the health care providers of the accusations—a more satisfying result for all parties involved.³⁰⁹

298. *Id.* at 549-50, 552.

299. *Id.* at 552.

300. *Id.*

301. *See id.* at 549-50, 552.

302. *See* Aimee Green, *Patient Wonders if She Was Raped While Under Anesthesia, Files Lawsuit Against Oregon Clinic*, OREGONLIVE (Mar. 10, 2015, 4:56 PM), http://www.oregonlive.com/portland/index.ssf/2015/03/mystery_at_oregon_clinic_patie.html.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *See* *People v. Teicher*, 422 N.E.2d 506, 509 (N.Y. 1981) (proving female patient was sexually assaulted by installation of a camera by law enforcement in the office of a dentist suspected of sexually assaulting sedated patients); Samuels, *supra* note 292.

309. *Teicher*, 422 N.E.2d at 509; Samuels, *supra* note 292.

V. CONCLUSION

It is clear that health care provider sexual misconduct committed on sedated patients is a serious issue that must not be ignored.³¹⁰ If nothing is done to prevent this misconduct, patients will continue to be sexually assaulted by their health care providers.³¹¹ The current remedies for patient-victims of sexual assault by health care providers do nothing to prevent the misconduct from happening, and therefore, it is necessary that preventive legal mechanisms be implemented.³¹² A preventive legal solution that would likely be successful is the proposal herein—a statute that grants all patients who are given sedatives for medical procedures the right to have their medical procedures recorded.³¹³ Further, such recordings should be uploaded to a secure Internet cloud to ensure that the patient will be able to easily access the video, and that the video will not end up in the hands of unauthorized persons.³¹⁴ This Note hopes to provide some insight on the plight of innocent patients who are sexually assaulted by their health care providers and how this appalling behavior could be prevented.³¹⁵ It is the goal of this proposal to severely limit or, hopefully, eradicate this terrible trend of patient sexual assault.³¹⁶

*Nanci Hamilton**

310. See, e.g., *Teicher*, 422 N.E.2d at 508; N.Y. STATE DEP'T OF HEALTH, *supra* note 60, at 7-8; McMurray et al., *supra* note 41, at 2741; Dehlendorf & Wolfe, *supra* note 23, at 1886; Gartrell et al., *supra* note 43, at 140-42; Swenson, *supra* note 70, at 271-73; *Canadian Doctor Sexually Assaulted 21 Sedate Women*, *supra* note 85; Kowalczyk, *supra* note 74.

311. See Lisak & Miller, *supra* note 131, at 78, 80.

312. See *supra* Part III.A-C.

313. See *supra* Part IV.

314. See *supra* Part IV.C.4.

315. See *supra* Parts II.C, IV.

316. See *supra* Part IV.

* J.D. Candidate, 2017, Maurice A. Deane School of Law at Hofstra University; B.A., 2014, State University of New York at Buffalo. First and foremost, I would like to thank my parents, Nancy and Raymond Hamilton, and my brother, Peter Hamilton, for their unconditional love and endlessly supporting me with everything I do. I also want to thank Mitchell Kraus for his love, support, and patience throughout this journey called law school. Thank you to Steve Zissou and everyone at Steve Zissou and Associates for preparing me for law school and teaching me valuable skills that have helped me succeed in law school. Thank you to Professor Paige Lescure and my Notes Editor, Nicole Della Ragione, for their assistance and great suggestions throughout the writing process. I would also like to thank the Volume 44 Managing Board, Peter Guinnane, Leron Solomon, and Michael Senders, as well as the Volume 45 Managing Board, Joseph De Santis, Michelle Malone, and Susan Loeb, for their diligent work and giving me the great honor of being published in the *Hofstra Law Review*. Thank you Ayda Suberoglu, Jessica Greenvald, Chris Cash and all of the Staff Members, who significantly contributed to the preparation of this Note. Last, but certainly not least, thank you to all of my friends who have always been there for me.