Commentary: Consensual Adolescent Sexual Activity With Adult Partners—Conflict Between Confidentiality and Physician Reporting Requirements Under Child Abuse Laws

Anoja Bala Madison, JD*; Lori Feldman-Winter, MD*; Martin Finkel, DO‡; and Gary N. McAbee, DO, JD§

Over the past several decades, sexual activity between unmarried adolescents and adult partners has received increased public scrutiny, especially as it relates to teenage pregnancy.1 Although the total adolescent birth rate has declined over the past decade, the birth rate for teenagers younger than 15 years has remained stable.2 Adult fathers are responsible for one quarter of births to adolescents <15 years of age, and they typically are nearly 9 years older than the mothers.3

Because this sexual behavior is associated with an increase in teenage pregnancy, with all of its associated social consequences, public policy has dictated better enforcement of laws that prohibit such activity. This is one reason for the revision and increased enforcement of many state statutory rape laws that criminalize certain sexual activity between adolescents and adult partners. Individuals, however, generally do not have a legal duty to report a crime. Thus, physician reporting of such sexual behavior under these criminal statutory rape laws is premised on ethical and other considerations.

Physicians encountering teenagers involved in sexual relationships with adults may, however, be mandated to report such activity because of reporting requirements of child protection laws (ie, abuse and neglect), if the sexual activity is construed as abuse or neglect. A physician who becomes aware of sexual activity between an adolescent and an adult partner must then decide between confidentiality and disclosure. Physicians may be ethically troubled about maintaining confidentiality when parents are unaware of such activity, particularly if reporting to child protection agencies is also needed. Conversely, confidentiality between adolescents and their physicians is essential for their continued participation in medical care.4,5 In fact, physicians who specialize in treating adolescents prefer to maintain confidentiality about most consensual sexual situations between adolescents and adult partners, except for those relationships with a large age difference between the sexual partners.6 This issue is also confounded by the civil liability and criminal penalties that can be incurred by physicians for failing to report behavior proscribed by child protection laws.

We analyzed the child protection laws in all 50 states and the District of Columbia as they relate to the potential mandatory reporting of “consensual” sexual activity between an unmarried adolescent and an adult partner (who lives in a different home and who has no custodial control over the adolescent; Fig 1). This analysis was based on the hypothesis that child protection laws may consider such sexual activity to be “sexual abuse.” Readers of this commentary should be aware that: most child protection laws as they relate to sexual abuse apply to “children” <18 years of age; these laws consider adult “perpetrators” as persons 18 years of age or older; the type of sexual activity that is defined as “sexual abuse” varies from state to state; and the laws are frequently silent on the issue of consensuality. This commentary focuses only on the issue of mandatory reporting and does not address discretionary reporting when the physician chooses to report because of the belief that the relationship is harmful to the adolescent. Because some of these laws are ambiguous and subject to differing interpretations, this commentary should not be relied on as a source of legal advice in any particular jurisdiction.

LAWs WHERE MANDATORY REPORTING MAY EXIST

In 18 states (35%), the laws can be interpreted as requiring reporting of this “consensual” sexual activity. Some laws specifically include sexual activity between an adolescent and an adult in its definition of “sexual abuse.” In other states, the laws include language that such activity is reportable if a parent “allowed . . . or permitted the activity to be committed” (guardians, custodians, and adult caretakers are delegated the same responsibilities as parents). This phrase implies that reporting is predicated on parental knowledge of the behavior. An example of this category is the following state law that requires mandatory reporting of:

“abuse which includes sexual abuse, as defined in...
ORS chapter 163 . . . ORS chapter 163 includes sexual abuse in the third degree which occurs when a person subjects another person to sexual contact and . . . the victim is incapable of consent by reason of being under 18 years of age” (italics ours).7

Other variables that may affect reporting under this category include the nature of the sexual activity (eg, fondling vs kissing vs intercourse vs sodomy) and the age of the adolescent.

LAWS WHERE REPORTING MAY BE DISCRETIONARY FOR THE PHYSICIAN

In 27 states (53%), there were 2 major types of laws where one could infer that reporting is discretionary. Under the first type, the law required reporting for acts of “sexual abuse” (which may be construed to include consensual adolescent–adult sexual activity) if it results in damage to the psychological or mental welfare of the minor (italics ours). Under the second type, the term “sexual abuse” is not specifically defined. In both of these scenarios, one could argue that physicians have discretion in reporting by deciding whether the sexual behavior is either psychologically damaging to the adolescent or whether the physician believes that the behavior is “sexual abuse.”

LAWS WHERE REPORTING NOT MANDATORY

In 6 states (12%), reporting does not seem to be required. Typically, the term “sexual abuse” applies only to activity involving a parent, guardian, caretaker, or other adult in a position of authority.

CIVIL AND CRIMINAL LIABILITY, IMMUNITY, AND PATIENT–PHYSICIAN PRIVILEGE

Any dilemma related to reporting is confounded by additional variables in these laws. Under the child abuse laws in 43 states and the District of Columbia, a physician who desires to maintain confidentiality and who does not report proscribed activity may incur civil and criminal liability. However, the standard for not reporting in some states uses language such as “intentionally,” “willingly,” and “knowingly.” In addition, civil liability may result from an adolescent who incurs harm because of the sexual relationship.

Under 47 of the laws, civil and criminal immunity for “good faith” reporting was provided; under 4 laws, immunity was absolute. Under 38 laws, the legal privilege of nondisclosure based on patient–physician confidentiality is not applicable for purposes of the statute (in one, the privilege is inapplicable except for psychiatrists). Thus, the laws encourage reporting by eliminating “obstacles” for not reporting.

CONCLUSION

Child protection statutes may contain ambiguous language that produce dilemmas for physicians who may have a legal obligation to report sexual activity between an adolescent and an adult partner, yet desire to maintain confidentiality. If a law were construed to mandate reporting for such sexual activity, a physician may adopt a “don’t ask, don’t tell” approach. This may prevent any determination about whether the relationship is harmful to the adolescent. The failure to report such behavior may have the potential for civil and criminal sanctions to be imposed by regulatory agencies and/or civil liability from persons injured because of the failure to report. Furthermore, the legal privilege of patient–physician confidentiality may not protect the physician from this liability in most states.

RECOMMENDATIONS

As a result of this review of the child protection laws in all 50 states and the District of Columbia, it

Fig 1. Variations in state child protection laws as they relate to potential mandatory reporting of “consensual” sexual activity between an unmarried adolescent and an adult partner. Category 1 refers to states where mandatory reporting may exist; Category 2 refers to states where reporting may be discretionary; and Category 3 refers to states where reporting is not mandatory.
is apparent that there is significant ambiguity in these laws as they relate to sexual activity between adolescents and adult partners. The physician needs to balance the need for confidentiality and the protection of the adolescent patient against the potential for liability for not reporting. We recommend several general guidelines in the revisions of these laws:

1. The threshold for triggering mandatory reporting should be the physician’s determination that psychological harm or the threat of such harm is incurred by the adolescent; or the physician determines that the age or degree of immaturity renders the adolescent incapable of understanding the nature or consequences of the sexual contact;
2. “Sexual abuse” should be specifically defined in the law;
3. For laws that include activity, such as touching or kissing, in the definition of “sexual abuse,” physician reporting should be discretionary if the activity involves older adolescents (17 years of age and older);
4. Immunity from civil liability should exist for the physician for “breaching confidentiality”;
5. When an older adolescent (17 years of age and older) is involved, reporting should be mandatory only if the other partner is a custodial adult.

Clarifications such as these will assist physicians who treat adolescent patients in understanding their obligations, if any, under these laws. Until this occurs, physicians who treat adolescent patients should familiarize themselves with the child protection laws in their jurisdiction, as they relate to adolescent-adult sexual behavior.

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REFERENCES
7. Oregon Revised Statutes Annotated Section 419B.005; 1996
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