

Legal Anxieties and Medical Mistakes

Barriers and Pretexts

Disclosing significant medical mistakes to patients or their surrogates ordinarily is the ethical and clinically proper course of action for physicians to follow, as explained persuasively by Wu and his colleagues in their provocative essay in this issue.¹ Physicians are not always convinced, however, that good ethics and clinical practice also constitute good legal risk management for themselves.² As Wu et al. briefly acknowledge, physicians' worries about exposure to litigation and legal liability as a result of admitting medical errors sometimes keep them from implementing an organized strategy to identify, prevent, mitigate, and rectify medical errors, which are ethically and clinically troublesome—but not uncommon.³

Physician apprehensions in this regard may be based in some instances on an accurate understanding of the legal environment. More frequently, though, these anxieties are founded on incorrect premises about the law and the operation of the legal system. Like many of the other legal misperceptions widely shared by physicians about malpractice exposure, the idea that defensively covering up medical errors is the best risk management strategy is dubious. Ironically, as Wu et al. correctly note, that reaction probably is counterproductive. There is convincing evidence that most patients expect their physician to disclose medical mistakes—both large and small—to them, and that fulfilling the patient's expectation may reduce rather than exacerbate the physician's legal risk.

Although openly admitting mistakes may lead to some malpractice lawsuits, more lawsuits are likely when the physician tries to hide an error that the patient suspects or later discovers through other means.⁴ A patient who thinks the physician has violated the duty of fidelity or honesty by not revealing the truth about a medical error is more inclined to bring a malpractice action in the event of an adverse clinical result, especially if the patient was psychologically unprepared for a bad outcome.

Unfortunately, liability may be imposed on a physician precisely because of failure to reveal a medical error, since such failure deprives the patient of a timely chance to treat iatrogenic injuries.⁵ Moreover, fraudulent concealment of an error may make it easier for a plaintiff in a negligence case to prove that there was compensable injury and proximate causation. Also, the applicable statute of limitations may be extended if the physician knowingly and intentionally hid negligent error from the patient (*Detwiler v. Bristol-Myers Squibb Company*, 884 F Supp 117 [SDNY 1995]).

Whether they are accurate or erroneous, physicians' apprehensions about the legal consequences of admitting their mistakes are sincerely held. In many situations, however, legal anxieties may serve as a conscious or—more probable—an unconscious pretext to avoid directly confronting other, more difficult issues.

Holding up the legal system as a readily available, hugely unpopular scapegoat may allow physicians to dance around some of the more negative implications of their "culture of infallibility."⁶ Under tort law, physicians must provide reasonable care appropriate to the circumstances, which is judged by comparing the levels of knowledge and skill practiced by the physician to those of professional counterparts in similar situations. By contrast, most physicians expect a much more demanding standard from themselves and their peers, namely, the standard of perfection.⁷ As one study concluded, "In a profession that values perfection, error is virtually forbidden."⁸ In such a culture, errors in patient care are seen by physicians themselves not as isolated technical missteps, but rather as manifestations of unacceptable character flaws.

This attitude may help to explain why many physicians understand risks and benefits—both medical and legal—only in absolute, rather than relative or statistical, terms. Crucial treatment decisions frequently derive from "training biases resulting in avoidance of error rather than analysis of net benefit."⁹

Moreover, most physicians are much worse than judges or juries in distinguishing between honest misjudgments and negligent errors, often confusing blameworthy deviation from acceptable professional standards and blameless misfortune or bad luck.¹⁰ Even in circumstances in which they would not be found legally liable, physicians often still picture themselves as lifeguards upon whose shift no one should be allowed to drown. Physicians cannot be psychologically immunized against their own emotions. With or without the added fear of legal involvement, errors associated with bad patient outcomes may be "etched indelibly" in the physician's mind.¹¹

Whatever its source and validity, physicians' chronic discomfort, bordering on obsession, about legal exposure frequently endangers rather than promotes patients' well-being. The health care system's long-standing paralysis in identifying, mitigating, and eliminating its own errors illustrates dramatically the failure of the stick approach, rather than the carrot alternative to influencing human behavior. Fear of blame, especially for the singled-out culprit, has prevented physicians from paying real attention to the sorts of systemic improvements that should decrease harmful medical errors. Addressing that fear and its consequences must be part of a comprehensive agenda that will help every medical practitioner reduce medical errors.—**MARSHALL B. KAPP, JD, MPH**, *Office of Geriatric Medicine and Gerontology, Wright State University School of Medicine, Dayton, Ohio.*

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