SURGICAL ETHICS CHALLENGES

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Medical expert witness litmus

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Several years ago, Dr G. Breaking was the foremost proponent of a new surgical procedure, which was named after him. At a recent national meeting, he discussed a paper that modified the procedure and criticized the presenter's revisions as dangerous—risking increased paralysis. GB's unedited comments were published last month in the specialty's leading journal. Today, an attorney called the office representing a surgical patient who suffered paralysis after undergoing the modified procedure. GB has unremittingly avoided involvement in litigation. The plaintiff's attorney asks him to serve as an expert witness against the surgeon. What should GB do?

A. Refuse involvement because the medical tort system is a farce.
B. Explain that opinions expressed in his published critique represented intellectual jousting.
C. Claim that he is too busy and decline to be involved.
D. Agree to review the records objectively.
E. Testify and establish a Web page advertising further availability as a plaintiff's witness.

Yep, son, we have met the enemy and he is us.

—Pogo, 1972.

With the exclusivity of independent legal professionalism granted to physicians came the obligation to self-regulate. Medical boards, professional organizations, and medical facilities all have physicians determining standards of practice—including medical tort, where the regulators are least regulated.

The mention of medical liability from malpractice claims to a physician provokes many considerations, all negative. Medical tort has lofty legitimate intents, seeking compensation for those injured through negligence, identifying and chastising inadequate practitioners, and thus, improving medical services and patient care. Physicians are properly disturbed by what they perceive as a tempest of frivolous claims, misplaced blame, disproportionate monetary awards, and contemptible insurance premiums. And they are mostly correct. The report card of medical tort law is dismal.

"In reviewing 500 malpractice cases from the United Kingdom, a much more conservative legal environment than the US, only 19% were considered to involve incompetent care."[1] In a large multistate US study, 46% of those awarded judgments did not experience malpractice and 41% of those suing and compensated did not experience an adverse event from medical practice.[2] Further studies confirmed this: almost half of successful suits were from cases with incorrect allegations,[1] and about half of cases that received monetary awards had no clinical errors.[3] More disturbing, of the billions of dollars doled out by insurers, to compensate alleged victims of malpractice, a shocking 88% went to attorneys and trial costs.[4,5] Medical tort raises the cost of medicine by encouraging defensive medicine as a shield. It is estimated to increase the cost of medical practice by as much as 9%.[6]

When authors examined >14,000 medical records and determined a group of patients they categorized as having been harmed by negligent care, they found only 3% found attorneys willing to file tort claims.[7] This illustrates the first flaw in the system: legal contingency. Troubled patients or their families consult with attorneys, and the attorney decide whether to invest considerable time and money in a lawsuit. Plaintiffs' attorneys profile and accept cases based on the size of the economic burden, severity of the injury, and worthiness of the defendant physician.[8] The defining criteria are: is the case winnable and will it pay enough to take the gamble?

Many states have legislated medical tort reform of differing types, with varied successes. Since the motivation is money, limits to the nonfinancial awards works best to limit lawsuits. One major medical center in Texas found that the rate of malpractice cases filed dropped fivefold after medical tort reform.[9] Thus, medical tort reform has done a

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great deal to lessen the professional liability burden, but medical tort remains a multibillion-dollar problem.

The second step in the litigation process is to have a handsomely paid medical expert opine four things, all required to establish tort liability: (1) that there was an injury; (2) that there was a standard of care breech; (3) the injury was the result of that breech; and (4) the injury resulted in loss. At this point, the attorney has already decided to take the case if the expert decides there was malpractice. The expert's present and future compensation depends on a conclusion of malpractice. This arrangement hardly provides a bastion of objectivity. Expert medical witnesses provide opinions deeply influenced by self-interest.

When a panel of experts examined litigated surgical medical records separately, there was full agreement concerning malpractice issues only 10% of the time.[10] When shown the results, the experts recommended that more than one expert should be required for each side. When pairs of experts reviewed tort cases, they reached agreement 62% of the time.[11] Suggested recommendations to improve expert testimony include independent court-appointed experts, central filing of opinion letters by experts with authoritative text citations, and a sanction process by courts and/or authorized boards for testimony that is deemed inaccurate, false, or contradictory to the standard of care.[12]

All of the stakeholders in the professional liability crisis share an ethical obligation to preserve the integrity of the legal system.[13] The moral logic of this obligation is that it constrains the self-interests of plaintiff and defense lawyers, plaintiffs and defendants, and especially, expert witnesses. Expert witnesses who do not fulfill this obligation become the medical tort system's Achilles' heel because they violate their ethical obligation to provide quality medical expert testimony. The integrity, especially truth-value, of medical tort legal processes depends on the trustworthiness of medical expert testimony.

Not to participate because a necessary system is flawed is inadequate because GB should fulfill his professional obligation to improve the system. Option A is out, because it rests on false belief and is also dangerously self-serving.

Dismissing what was proposed at a major professional meeting, the most important means for disseminating information, reflects poorly on the character, professionalism, and integrity of GB. If in fact his refutation was egotistical gamesmanship, he deserves rebuke for polluting scientific literature. Likewise, lying as an excuse not to do one's duty is unjust. Option B is ethically twice bad.

Option C, that GB cannot spare his time to defend a clinical advance of his own device against dangerous misuse, abandons his professional responsibility to protect the integrity of surgery. Moreover, Dr Breaking's legitimate self-interests are not served by this posture, making option C completely unacceptable (however understandable it might be as a matter of mere personal convenience).

Option E provides an example of egregious self-interest and, therefore, should be eschewed by all professionally conscientious physicians who provide expert testimony.

Option D, providing expert testimony consistent with GB's published opinions about this surgical procedure, after objectively reviewing the case records, is the correct ethical course. Such testimony may or may not support the plaintiff's claim. Being retained by one side or the other in litigation activates self-interest that must be promptly and effectively disciplined by fulfilling one's ethical obligation to the integrity of the legal system. In addition, providing integrity-based expert testimony honors GB's responsibility to participate in the medical profession's self-regulation obligation, that medical judgments remain within the province of those professionally competent to make them. He may help to protect future patients from similar injury while articulating the medical profession's disapprobation of physicians who practice recklessly and despite the cautions of experts in their own specialty. As for the notion that expert testimony on behalf of a plaintiff betrays colleagues and weakens the medical profession, the process actually demonstrates how medicine places scientific truth and responsible treatment above a guild mentality of unquestioning self-protection that violates the ethical concept of medicine as a public trust. By confirming these ideals, we justify rather than diminish the public trust and the esteem in which our profession is widely held.

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