Does Medical Error Disclosure Violate the Medical Malpractice Insurance Cooperation Clause?

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Abstract

Medical malpractice insurance policies customarily contain a "cooperation" clause requiring insureds to cooperate with the insurer's efforts to defend the insured against a claim. A common stipulation in this clause forbids the insured from "admitting liability" to an injured or harmed party. Health professionals often understand this clause to have a chilling effect on the truthful disclosure of medical error, which is morally required of physicians when they know that a harm-causing error has occurred. This paper offers a two-part response to the fear that medical error disclosure might result in a denial of malpractice insurance coverage. Part one describes various legal precedents wherein insurers successfully invoked the cooperation clause to deny coverage in instances of liability admission. This paper shows, however, that the legally sanctioned reasons for denying coverage in these cases address factors other than an insured's truthful and honest disclosure of what happened to a claimant. Consequently, these cases do not support the belief that legal precedents discourage the truthful disclosure of harm-causing medical errors. Part two of this paper proposes that the cooperation clause's prohibition of admission of liability in instances of medical error disclosure might well be unenforceable, and that the clause might not even be actuarially sound.

Introduction

The appearance of the Institute of Medicine's 2000 report, *To Err Is Human,*[1] marked a watershed in the patient safety movement in the United States. Galvanizing the attentions of the lay public, health professionals, and various regulatory and legislative groups, the report described the extent of the problem of medical errors and laid out a fairly elaborate set of recommendations whereby patient safety measures could be dramatically improved.

Other than remarking that a serious medical error "if discussed at all, is discussed only behind closed doors" (p. ix), the report did not elaborate on the health professional's ethical duty to disclose harm-causing errors, perhaps because the American Medical Association (AMA) had already done so nearly 20 years before. Section 8.12 of the AMA's Code of Medical Ethics: Current Opinions clearly states,

> *It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients. Patients have a*

> *right to know their past and present medical status and to be free of any mistaken beliefs concerning their conditions. Situations occasionally occur in which a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment. In these situations, the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred. Only through full disclosure is a patient able to make informed decisions regarding future medical care.*
>
> *Ethical responsibility includes informing patients of changes in their diagnoses resulting from retrospective review of test results or any other information. This obligation holds even though the patient's medical treatment or therapeutic options may not be altered by the new information.*
>
> *Concern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with a patient.*[2]

This statement nicely captures the moral rationale for error disclosure: Patients have a categorical right to a reasonable disclosure of truthful information about their health conditions, to the extent that information is available to and known by their treating professionals.[3–6] Historical anecdotes amply demonstrate, however, that when a patient's adversity results from a medical error, the truth-telling and disclosure obligations described in section 8.12 are frequently disappointed, and primarily for the very reason that the section identifies: the professional's concern regarding legal liability. A 2002 study of disclosure practices reported from more than 200 hospitals stated,

> *More than half of respondents reported that they would always disclose a death or serious injury, but when presented with actual clinical scenarios, respondents were much less likely to disclose preventable harms than to disclose nonpreventable harms of comparable severity. Reluctance to disclose preventable harms was twice as likely to occur at hospitals having major concerns about the malpractice implications of disclosure.*[7]

That finding ought not be surprising. A considerable body of literature attests to how the threat of a malpractice action, along with feelings of inadequacy and incompetence, causes immense anxiety among health professionals, and how they adopt a variety of defensive mechanisms—including rationalization, distortion, blame shifting, and omitting mention of the error to the harmed party—when faced with the commission of a harm-causing error.[8–11]

In addition to the fear of inviting a lawsuit by truthfully disclosing error to the harmed party, another factor that health lawyer Jack Schroder described as "more subtle yet potentially more damaging" is also present.[12] It is that many malpractice insurance policies contain a clause that states, "The insured shall not, except at his own cost, make any payment, admit any liability, settle any claims, assume any

obligations or incur any expense without the written consent of the company."[13] This clause, which obligates the insured to cooperate with his or her insurer and desist from cooperating or colluding with the injured party, has a chilling effect on many error disclosures. The frank admission of a harm-causing error—e.g., "Mrs. Jones, an error occurred in your care that was responsible for the harm you experienced, and we apologize for the harm it caused"—is a slam-dunk admission of liability. Because it violates the cooperation clause, the honest disclosure of harm-causing error risks the possibility that the insurer will refuse to cover whatever associated costs, principally from a lawsuit, might occur to the insured from the error.

As an illustration that the cooperation clause is indeed taken seriously, consider the following: About 2 years after the Institute of Medicine's report, *To Err Is Human,* appeared, I posted an article on Emory University's Center for Ethics Web log that not only urged the disclosure of error, but also recommended that the professionals involved in the error request forgiveness from the harmed party. A colleague referred my article to a senior medical administrator, who responded almost immediately with the following:

> *An admission of fault exposes the doctor and/or institution to damages* per se. *And the medical malpractice…insurance policies usually provide that an admission of the insured of error voids coverage for the related claims for damages. In today's world, that situation is simply not one that a doctor or hospital, etc., can accept. In fact, a physician will not be admitted to the staff of most hospitals without evidence of effective coverage under an adequate med mal policy.*[14]

The physician who wishes to act ethically and disclose a harm-causing error is therefore confronted by the possibility of financial, and, perhaps professional, disaster. In what follows, however, I argue that (1) reported cases where insurers successfully denied coverage to insureds who violated the cooperation clause exhibit factual situations that bear no resemblance to a health professional's disclosure of harm-causing medical error, as morally required; (2) as applied to the truthful disclosure of medical error, the cooperation clause might be unenforceable; and (3) as a strategy for conserving the insurer's loss reserves, the practice of concealing error might be entirely counterproductive, i.e., concealing error might cost the insurer more than would truthful disclosure of harm-causing error. I end this article by describing how various States have enacted legislation that has removed certain fears connected with admitting error and apologizing to the harmed party. Therefore, a more felicitous legal environment may be emerging that encourages professionals to conduct harm-causing error conversations in a patient-centered way.

Part I: Some illustrative cases

A physician's admission of liability to a harmed or injured party appears to constitute a theoretical violation of the cooperation clause. Yet, I have been

unable to locate any case in which an insurer successfully denied coverage to an insured party whose ethical code required truthful error disclosure and who did so. There are cases where insurers have successfully denied coverage for an insured's violation of the cooperation clause, but these cases exhibit fact situations that bear no resemblance to an insured health professional's promptly admitting fault to a patient who has been harmed from error. While health professionals might still choose to conceal error information from patients or an insurer might try to deny coverage to the health professional who admits liability, an historical review of legal precedents does not support the belief that coverage revocation is a likely response from an insurer to a health professional's disclosing harm-causing error. Let us examine some of these cases.

A fairly representative group of cases illustrates situations wherein an insured admits liability to an injured party, but then makes no effort to inform or cooperate with his or her insurer's attempt to manage the injured party's subsequent claim. A commonly cited example—indeed, one of the seminal cases—is the 1955 case of *Pennsylvania Insurance Company* v. *Horner*.[15] Mr. Horner, who was one of the insurance company's insureds, was driving his vehicle when it struck a government-owned mail truck that was occupied by a postal worker named Kerr. Mr. Horner was eventually charged with hit-and-run driving. Fearing federal prosecution, he signed a statement admitting that the accident was his fault and, thus, ostensibly violated the cooperation clause. Pennsylvania Insurance, however, only became aware of the mishap when, some 5 months later, Mr. Kerr brought suit. The insurance company contended that Mr. Horner violated the cooperation clause not so much by admitting liability, but by failing to give the company adequate notice of the accident, as stipulated by the policy, and failed to comply with any of the requirements of the clause (e.g., assist in investigations, answer questions, etc.). Upon review, the Supreme Court of Tennessee found in the insurance company's favor, not so much for Horner's admission of liability but because "no notice whatever was given by the insured Horner, nor did he cooperate with the company in any particular."

Another group of cases involves an insured's giving his insurer notice of an incident, but then compromising the insurance company's efforts to defend the case. An example of this occurred in *Royston Moore* v. *General Accident Insurance Company and Donald Swofford.*[16] Mr. Swofford was an architect hired by Mr. Moore to refurbish and remodel Mr. Moore's home. Mr. Moore brought suit against Mr. Swofford for negligent acts and breach of contract. Mr. Swofford's insurer, General Accident Insurance Company of America, loyally defended him throughout the investigation leading up to trial. On the day before the trial and against his insurer's wishes, however, Mr. Swofford entered a motion in court that admitted his wrongdoing. Ten days later, when the court awarded Mr. Moore damages in the amount of $160,000, Mr. Swofford promptly declared bankruptcy. Faced with paying the entire damage award, General Accident refused, claiming that Mr. Swofford had cogent defenses to Mr. Moore's charges but that Mr. Swofford's admission of guilt precluded the insurance company's defending the claim and possibly conserving its losses. Significantly, Mr. Swofford did not privately confess wrongdoing to Mr. Moore, but made his

admission in court. Consequently, while this case certainly illustrates an admission of liability that violated the cooperation clause, the insured's actions and intentions did not appear to be motivated by ethical obligation nor did they occur within the privacy of a professional-client relationship. Rather they smacked of a carefully conceived plan intended to make it impossible for Mr. Moore to recover the damages he was awarded. Ultimately, General Accident was not obligated to pay, largely because Mr. Swofford sabotaged his insurer's efforts to defend his claim.

A third group of cases shows that even a straightforward violation of the cooperation clause might not be enough to enable the insurer to revoke coverage, as a number of jurisdictions have held that the insured's actions must make the insurer's attempt to defend itself unreasonably difficult. Various courts have found that the insurer might fail to prove that a breach of the cooperation clause occurred if—

- an insurer fails to inform an insured of his or her obligation to attend depositions or trial;
- the insured can show that his or her failure to comply with the cooperation clause was due to mistake and not bad faith; or
- the insured can show that his or her cooperation with the insurer would be immaterial to the insurer's defense.[17]

For example, in *St. Paul Fire and Marine Insurance Company* v. *Albany Medical Emergency Center*, St. Paul unsuccessfully invoked the cooperation clause to deny coverage and its obligation to defend Albany Medical against a series of negligence allegations.[18] St. Paul argued that Dr. George Rawlins, who was covered under the policy and was on staff at the center, did not respond to its investigative efforts to locate him and that his failure to cooperate in any way thus voided the emergency center's coverage. In point of fact, however, Dr. Rawlins was not named as a defendant in any of the negligence actions filed against the medical center. This prompted the court to rule that although Dr. Rawlins was an insured of St. Paul's, he had no duty to cooperate since he had no material relationship with St. Paul in this litigation. The court simply refused to read the cooperation clause "so broadly as to require cooperation of anyone named in a policy of insurance issued by the insurer, regardless of the holder's relationship to the lawsuit." Dr. Rawlins's participation in the lawsuit was immaterial and thus could not, in the court's opinion, adversely affect the insurance company's defense.

These cases show that insurers have successfully invoked the cooperation clause to deny coverage when an insured's lack of cooperation amounted to sabotaging the insurer's efforts to defend against a claim. No case illustrates that a truthful disclosure of what happened, in and by itself and especially as it might occur within the ethical ambit of a professional-client relationship, resulted in an insurer's revoking coverage. Indeed, as we proceed to part two of this article, there is reason to think that the cooperation clause would not even be enforceable in instances of medical error disclosure.

Part II: Ethical reflections on the cooperation clause

Preserving "sound morality" and the public interest

Insurance policies of any kind—e.g., life, health, casualty, liability, title—cannot anticipate that their contractual stipulations will be enforceable if those stipulations violate existing statute or public policy, or if the insured's enacting those stipulations smacks of some "prohibited activity."[17] In 1898, the U.S. Supreme Court ruled that any insurance policy, "the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment."[19] Therefore, if a medical malpractice insurer denies coverage to a physician on the grounds that the doctor violated the cooperation clause by informing a patient of a harm-causing error, the physician is likely to have a strong argument in court that he or she had a moral obligation under section 8.12 of the Code of Ethics. Put otherwise, the insurer that seeks to deny coverage by alleging a cooperation clause violation should be prepared to argue to the court why a physician concealing an error is not "subversive of sound morality"—because medical ethics is categorical on the physician's moral obligation to disclose error to a patient who has been harmed by it.[4] Furthermore, as health care professionals increasingly understand "patient-centered care" as synonymous with "ethically sensitive care," it is important to note that patient survey respondents overwhelmingly say they would want to be informed of error if they were harmed from it.[20] As such, formal ethical obligations coalesce with patient expectations in the honest disclosure of medical error. Indeed, perhaps because considerations bearing on "sound morality" so strongly encourage error disclosure, no insurer appears to have successfully invoked the cooperation clause as grounds for denying coverage when the only issue was the health professional's truthful error disclosure to a harmed party.

We should further note how concealing error information from harmed parties might in certain cases be tantamount to fraud. Liability insurance particularly requires that the occurrence for which the insured is claiming coverage be an accident and not intended by the insured.[17] Consider, however, the following hypothetical case:

> *Dr. Jones leaves a surgical instrument in Mr. Smith's abdomen after an operation and then neglects to x-ray the surgical site to determine that all surgical artifacts have been removed. Mr. Smith immediately begins running a high temperature, and an x-ray taken a day later clearly shows the surgical instrument. Dr. Jones informs Mr. Smith of his need for additional surgery. Because of his fear that admission of the error would count as a violation of the cooperation clause, Dr. Jones only tells Mr. Smith that the additional surgery is required because of "complications" arising from the surgery done the day before.*

Should Mr. Smith learn of the real reason for his surgery, he would have excellent grounds for suing Dr. Jones for uninformed consent. Indeed, Dr. Jones's failure to inform Mr. Smith truthfully might be seen as an intentional fraud, and his insurer might then refuse to defend that part of any malpractice action undertaken by Mr. Smith that alleges uninformed consent. In certain instances, then, the nonadmission of liability can appear tantamount to fraudulent behavior and result in an insured's loss of coverage. But if adherence to an insurance contract's stipulation of cooperation can result in the insured's committing a putative and uninsurable fraud, the coherence and enforceability of such a stipulation is questionable, at the very least.

An actuarial consideration

It seems eminently fair to say that the central reason the cooperation clause exists is because carriers believe it advances their company's interest in conserving its financial assets and loss reserves. However, to the extent that the clause prohibits its insured health professionals from admitting liability to patients they might injure by error, serious doubts might be raised about whether such nonadmissions eventuate in these kinds of financial savings.

For example, a number of studies point to the importance of physician-patient communications in sustaining the integrity of that relationship and how communicational failures can be a significant stimulus for lawsuits.[21–23] Gerald Hickson and his colleagues at Vanderbilt have conducted empirical research on communicational lapses and have shown how the professional's assuming emotionally distant, brusque, uninformative, and uncommunicative behavior was the primary factor in encouraging malpractice actions.[24]

Moreover, and as mentioned above, additional data show how persons harmed by error invariably demand to know the truth and, when they are deprived of it, consider litigation. A British study found that 37 percent of families and patients bringing suit claimed they might not have done so had there been a full explanation and an apology, while another study placed the figure at 29 percent.[21, 22]

In a paper published only in 1999 but already cited frequently in the literature, Dr. Steve Kraman and attorney Ginny Hamm described their experience at the Veterans Affairs Medical Center in Lexington, Kentucky, which has endorsed an "extreme honesty" policy in disclosing medical errors since 1987.[25] Persons harmed from error at the hospital are not only told about the error in a comprehensive manner, they are also informed of their right to file a tort claim and are given additional advice about available remedies against the Government.

Kraman and Hamm's article reviewed their hospital's claim frequency and severity from 1990 to 1996, and compared it with other VA hospitals east of the Mississippi River during the same period. They found that while the Lexington facility placed in the top 25 percent of VA hospitals in the number of malpractice claims filed against it, its total payouts to settle or resolve these claims were in the

bottom 25 percent of comparable hospitals. This finding led the authors to conclude (p. 966),

> *[A]n honest and forthright risk management policy that puts the patient's interest first may be relatively inexpensive because it allows avoidance of lawsuit preparation, litigation, court judgments and settlements at trial.*

I suggest that these findings on the likelihood of litigation resulting from communications breakdowns, the psychodynamics of professional-patient interactions involving honesty versus concealment, and the cost savings that can accrue to institutions from truthful and comprehensive disclosure of harm-causing error cast considerable doubt on the wisdom of encouraging health professionals to desist from admitting liability when they know that harm-causing error has occurred. While never passing ethical muster, requiring that insureds not admit liability may indeed have contained costs for malpractice carriers a generation ago. Today, however, a positive correlation between concealing errors and containing costs seems less certain. Of course, while an organizational policy of truthful error disclosure might invite a considerable increase in the quantity of claims and, therefore, an increase in an insurer's claims-handling costs, if that policy nevertheless results in a significant reduction in claim severity or payouts, the trade-off would appear extremely attractive. What is obviously needed is research that can enlighten the industry on these kinds of economic questions.

The future

As noted above, many jurisdictions require insurers pleading an insured's breach of the cooperation clause to show not only that the clause was violated, but that the violation prejudiced or negatively affected the insurer's ability to process the injured party's claim or to defend its insured in court. A number of States have passed legislation that makes certain representations suggesting or implying liability inadmissible as evidence of liability and, therefore, presumably nonprejudicial to the insurer. For example, most States bar from admissibility any representations made by professionals with a view to settling a claim,[12] while offers to pay for medical expenses that are motivated by sympathy or benevolence are also barred from admissibility in most States.[26] Indeed, expressions of sympathy (e.g., "I'm/we're sorry") are explicitly protected from admissibility in at least seven States—Massachusetts, California, Florida, Texas, Washington, Oregon, and Colorado[27]—while Colorado has gone so far as to bar statements of fault.[28]

Additionally, a fairly recent trend has emerged wherein a number of States have held that, while actual admissions of error by professionals to patients might be admissible in court, certain admissions will not count as proof that a breach of the professional standard actually occurred—which is an essential part of the plaintiff's evidentiary burden.

For example, in *Senesac* v. *Associates in Obstetrics and Gynecology*, the plaintiff underwent a therapeutic abortion, during which her uterus was

perforated, necessitating an emergency hysterectomy.[29] The plaintiff alleged that shortly after the operation the physician told her that she, the physician, had made a mistake. The court ruled, however, that the defendant physician's allegedly saying she made a mistake, her expression of sorrow, and her remarking that it had never happened before

> *... does not establish a departure from the standard of care ordinarily exercised by a reasonably skillful [doctor]. The fact that the physician may have believed, and, if so, verbalized the belief that her performance was not in accordance with her own personal standards of care or skill, is not sufficient in the absence of expert evidence showing a departure from the standards of care or skill ordinarily exercised by physicians on similar cases.*

Although not all jurisdictions have adopted this approach, it might be read as an example of at least one court's encouraging health professionals to feel less inhibited about engaging in honest and truthful disclosures of error to patients, as the ruling amply recognizes the gap between admitting error and proving negligence.

Conclusion

It remains possible that a health professional who discloses harm-causing error, despite a stipulation in his or her malpractice policy that he or she refrain from doing so, will find the insurer refusing to provide coverage. A review of the legal literature up until now, however, does not offer compelling evidence that fuels fear of that likelihood. Furthermore, a growing body of research indicates that the truthful and honest disclosure of harm-causing error may well prove a cost-effective rather than a cost-prohibitive strategy for carriers. One hopes that these arguments and speculations will be further discussed and studied among health professionals and their insurance carriers. Obviously, the eradication of needless fears that compromise the truthful disclosure of harm-causing errors would serve to advance the development of patient-centered sensibilities, which is a very good thing. It would, furthermore, be a heartening development to find that the financial costs connected with error disclosure are significantly contained by the implementation of patient-centered ethical practices.

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