FEATURE
HEALTH CARE LAW

MEDICAL PROFESSIONALISM AND MEDICAL DECISION-MAKING

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Medical professionalism means different things to different people. Medical decision-making is a much clearer concept; however, both of these concepts depend on the integrity and ethics of physicians and their ability to make decisions, unhindered by administrative or economic influence.

The beginning of medical ethics dates back about 2,300 years ago when Hippocrates articulated not only his well-known and well-recited Hippocratic Oath, but also his many works and aphorisms. It was Hippocrates who took medical practice out of the realm of philosophy and religion, and instead put it in the realm of science. Any physician or lawyer would be well-served to spend some time reading the Hippocratic works and, in particular, the Hippocratic Oath.

The Hippocratic Oath has many directives; in particular, there is a directive that a physician must enter a sick person's home with "no mischief in his heart." In addition, there is an admonition to keep the interest of the patient first and foremost, in the physician's mind — as their ultimate responsibility.

American medicine originated about the time of the Jamestown colony -when the first non-Native physician stepped foot in North America. Dr. Henry Kenton was the first non-Native American physician to set foot on American soil in 1603. From that point forward, there is ample evidence that the American physician was his own person, who possessed courage and independence of spirit.

Modern American law provides physicians with guidance on their behavior and expectations of their practice. First, the law of agency establishes the patient as the principal and the physician as his agent. This relationship gives the physician the responsibility to act only in the principal's interest. The behavior of the physician must be completely disinterested, meaning he has no other interest other than that of the principal at heart. The agent in a physician-patient relationship is the physician. Agency law gave a heightened level of scrutiny to the physician, where the agent bore the burden of showing disinterested behavior and undivided loyalty.

In the current day, we as patients — meaning the authors, the readers, your parents, kids, relatives, neighbors, and anyone else who may pick up this article — have the right to expect that a physician will act *only* in our best interest. Much of the expectations of medical practice have been codified in recent years and decades. For example, in California, jury instruction CACI 502 states clearly that a physician's obligation is to "exhibit the skill, knowledge, and due care that a like-trained physician would demonstrate," and "behave in a way that is reasonable and comports with community standard in every respect." There is no exception to this rule, and deviation from this standard results in negligence by statutory law.

At first, the practice and regulation of medicine seemed positive; however, the $4 trillion invested in the American healthcare system attracted many other interested parties to the practice of medicine. In many ways, these parties have inserted themselves into the medical exam room — interfering with a physician's duty and obligation to provide unhindered medical care. These interested third-parties insert themselves through administrative management or economic interference.

What is the duty of these other silent and invisible people who have inserted themselves into the exam room? Firstly, they have no professional obligation to patients. Milton Friedman in 1970 articulated the doctrine of corporate obligations. He stated that the only obligation and duty of a corporate entity is to increase profits for shareholders.

One highly likely interference is the fact that many physician orders will be scrutinized by direct hospital administration for prior-authorizations. These requests for prior authorizations will likely be sent to third-party payors, and the third-party payors will decide whether or not to authorize this treatment. This is the first and most likely economic and administrative interference with a physician's duty to a patient.

Subsequent to prior authorization requirements, the next interference in the medical decision-making process is the economic uncertainty of whether or not a patient's payor or insurer will actually provide and pay for the recommended treatment by the physician. This possibly leaves the patient with a huge medical bill. It is important that every person and patient, including the readers of this article, understand that these invisible individuals are in the room with them and their physician — possibly altering and modifying the course of treatment that the patient and treating physician have agreed to.

As a response to these economic and administrative interferences in healthcare, Cleveland's own Professor Maxwell Mehlman of Case Western Reserve University School of Law wrote an article asking the question: "Can Law Save Medicine?" In his 2015 article, Professor Mehlman articulated his belief that medicine has been unable to save its own professional ability to make unhindered decisions. He believes that the law has not done enough to save the ability of physicians and patients to direct their future medical care — unhindered by administrative and fiscal interference. We agree.

Limited by the brevity of this article submission, we would like to propose an idea that has recently been adopted by the California Conference of Bar Associations. We proposed a new definition of medical necessity to circumvent the current definition of the term, which is arbitrarily being defined by payors. It makes little sense to allow the payor of healthcare services to define what they will pay for. Our resolution stated that healthcare payors *must* pay for medically necessary care which, under our resolution, would be defined

as "reasonable care, that comports with the community standard." This is the criteria that the California Supreme Court stated in their decision of *Sarchett v. Blue Shield of California*, more than 40 years ago. If the law can demand physicians to provide a standard of care, then payors should be required by law to pay for that standard of care. Our resolution was adopted by the California Conference of Bar Associations this past October, and we are hopeful to get this into legislation and codified in the next few years. We hope this inspires other Bar and Medical Associations across the country to also deal with this particular problem of payors deciding what is "medically necessary."

This article is just the tip of the iceberg in terms of issues that need to be addressed in healthcare to ensure that physicians uphold, and are *able* to uphold every ethical and medical obligation they have towards their patients. We encourage all members of the Cleveland Metropolitan Bar Association and all interested persons in healthcare to attend the combined Case Western Reserve School of Law and School of Medicine Seminar scheduled for February 21st and 22nd of 2025 at Case Western Reserve Law School. We invite you to attend, in person or virtually, and contribute to this Conference that is dedicated to preserving physician autonomy, physicians' ability to discharge their duties to patients, and their duty to provide medical care that is unhindered by economic and administrative interference.

We will all become patients one day if we live long enough, and now is the time to contribute to having a say in the healthcare system before it has a life-altering say in your care or the care of your family.

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