

'Curbside' consults: Know your liability



Douglas Mossman, MD

Dear Dr. Mossman:
Could providing a "curbside" consultation to a colleague leave me medico legally vulnerable if an adverse event leads to a malpractice lawsuit? If so, what can I do to address this risk?

Submitted by "Dr. W"

Medicine is a collaborative profession. Surgeons often combine skills to perform complex operations together, and specialists pool their expertise when they collectively manage patients with several medical problems. Doctors share their knowledge when they give lectures to medical audiences, write reports to referring physicians, or respond verbally to colleagues' requests for information or advice.¹

Doctors use the phrase "curbside consult" to refer (with humor and self-deprecation) to informal conversations with colleagues about patients' medical management—advice-seeking that falls short of asking a colleague to make recommendations based on a formal, personal examination. Many physicians seek or provide curbside advice several times a month.² Curbside consults transmit knowledge and cement professional bonds among physicians, making them "an integral part of our medical culture."³

More than a dozen legal decisions mention curbside consultations. Judges think informal information-sharing improves medical practice and don't want

doctors to stop soliciting ideas or offering suggestions because they fear lawsuits.^{4,5} However, courts have found that, under certain conditions, giving advice can create liability for a bad outcome, even though the doctor never met the patient who was harmed.

In this article, we'll look at:

- when such liability might occur, and
- what you can do to minimize it.

A doctor-patient relationship?

Legally, doctors are obligated to provide competent care for just 1 group of people: their patients. Therefore, to decide if plaintiffs could pursue malpractice claims in cases where doctors offered comments about patients they did not personally examine, courts have asked whether the circumstances, actions undertaken, or nature of information that was exchanged created a professional relationship.

*Reynolds v Decatur Memorial Hospital*⁴ describes an informal consultation that did not create a physician-patient relationship. In this case, a boy was admitted to a hospital after he had fallen. The treating pediatrician telephoned a neurosurgeon, who asked whether the boy's neck was stiff, discussed diagnostic possibilities with the pediatrician, and suggested doing a lumbar puncture. The neurosurgeon offered to see the boy if requested, but he never did, and he did not bill for the telephone consultation. Guillain-Barré syndrome was

DO YOU HAVE A QUESTION ABOUT POSSIBLE LIABILITY?



► Submit your malpractice-related questions to Dr. Mossman at douglas.mossman@qhc.com.

► Include your name, address, and practice location.

If your question is chosen for publication, your name can be withheld by request.

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Table 1

When it's *not* a 'curbside consultation'

Situation	Why it's not a curbside consultation
On call	If you are "on call" for an emergency room, get called about a patient with an emergency condition, and discuss the patient's symptoms, possible diagnosis, or treatment, you have a relationship with the patient that entails a duty of care ^{8,9}
Covering	If you have agreed to "cover" patients for a colleague, you have assumed a duty to properly care for the colleague's patients: they're your patients during the colleague's absence. Getting asked questions about managing those patients is not a curbside consultation, even if you've never met or spoken to the patient ^{10,11}
Supervising	Physician assistants, residents in training, and nurse practitioners do not practice independently of their supervising physicians. If you're a supervisor and get a call about managing a patient, you may bear vicarious liability for adverse results ¹²
Specifics and reliance	If responding to the informal consult requires you to give specific advice that the consulting colleague will rely on to make a diagnosis or select treatment, you are participating in the patient's care ¹¹

first suspected, but a spinal cord injury was discovered after the boy—who developed quadriplegia—was transferred to another hospital.

In a subsequent lawsuit, the boy's mother claimed her son's paralysis resulted from negligence by the first hospital and its doctors, but the trial court dismissed the case against the neurosurgeon. Affirming the trial court's ruling, an Illinois appeals court explained that the neurosurgeon had not been asked to provide medical services, conduct tests, or interpret test results. "A doctor who gives an informal opinion at the request of a treating physician does not owe a duty of care to the patient whose case was discussed," the *Reynolds* court said.

*Campbell v Haber*⁶ describes circumstances that differed slightly from those described in the *Reynolds* decision but appeared to create a doctor-patient relationship. *Campbell* concerned a patient who came to an emergency room (ER) complaining of chest pain. The ER physician's findings indicated possible heart muscle damage, so he telephoned a cardiologist (whom the ER doctor believed was "on call") and described the patient's symptoms and test results. The cardiologist

thought the test results were not consistent with a cardiac event. The ER physician told the patient and his wife about the cardiologist's opinion and, relying on what the cardiologist said, discharged the patient. Shortly after, the patient had a heart attack.

The patient sued not just the ER physician, but the cardiologist, who sought dismissal from the suit because he never saw the patient, had no treatment relationship with him, and never billed for services. However, the trial judge ruled that the patient could sue the cardiologist and the appellate court agreed, saying that a jury had to decide whether the cardiologist had incurred a doctor-patient relationship and might be liable. "An implied physician-patient relationship may arise when a physician gives advice to a patient," the appeals court said, "even if that advice is communicated through another health care professional."

Telling the difference

So what differentiates a no-liability curbside consult from a medical discussion that creates a doctor-patient duty and potential for liability for adverse results?

Clinical Point

'Curbside consults' are an integral part of medicine; they transmit knowledge and cement professional bonds among physicians



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Clinical Point

Physician-patient relationships can happen indirectly through e-mail, by telephone, or through a family member or colleague

Table 2

Considerations that favor formal consultation

Complicated diagnostic situations
The consulted or requesting physician feels that giving good advice requires a personal examination
Advice is based on a detailed discussion and is specific to a patient's situation
The patient requested the consultation
The consultant will make a report for the patient's record
The consult bills for the consultation

Source: Adapted from references 3,17

You create a physician-patient relationship when you assume responsibility to diagnose or treat someone.⁷ Although typically this requires an in-person encounter with a patient, it can happen indirectly—electronically (through e-mail), by telephone, or through a family member or another professional. But if you do nothing that implies consent to act for the patient's benefit, you should have no actual malpractice liability if something goes wrong.^{3,8} As a Kansas Supreme Court decision explains, you “cannot be liable for medical malpractice” if you “merely consult with a treating physician and [do] nothing more.”⁵

Several legal cases discuss doctors' efforts to extricate themselves from lawsuits arising from clinical encounters that the doctors mistakenly thought were just curbside consults. *Table 1*⁸⁻¹² (page 43) lists situations in which talking about patients goes beyond just being “curbsided.”

How to respond

Should you decline to provide curbside consultations to keep yourself out of lawsuits? Some authors think so, pointing out that informally transmitted clinical data may be faulty, which means you may give bad advice based on incomplete informa-

tion or a verbal misunderstanding.¹³⁻¹⁶ These authors suggest that if you're curbsided you should ask to see the patient for a formal consultation, decline to give informal advice, or provide a response that lacks specifics.

Other authors feel that these approaches are needlessly cautious and would harm patients by impeding doctors' ability to help and learn from each other.^{3,17} These authors think the risk of incurring liability from a curbside consult is low. Also, getting advice from a colleague is a valuable risk management strategy; it helps you make sure you're on the right track, and it shows you are a thoughtful clinician whose patients benefit from your own and your colleagues' medical expertise.

Even if you're comfortable soliciting and providing curbside advice, sometimes circumstances make it wise to follow-up an informal initial inquiry with a formal consultation. *Table 2*^{3,17} lists examples of when you should follow-up with a formal consultation.

Documentation

Experts disagree about whether the requesting or receiving physician should document a curbside consultation, and if so, how. On one hand, making a notation in a patient's record documents the treating doctor's diligence and may provide a measure of liability protection in a malpractice action. Doing this, however, exposes the identity of the consultant, who might be named among the defendants in a lawsuit.

One commonly recommended strategy is to request the consultant's permission before identifying him or her in the record,^{13,16,17} a position that is defensible on grounds of courtesy alone. But omitting a consultant's name from record does not guarantee that the consultant's involvement won't be discovered in the course of litigation.³ For example, treating doctors who get sued often are asked during their

depositions about whether they talked with anyone about the case, and they have to answer honestly.

If a consulted doctor makes written notes, it might suggest that the consultation was more than the sort of informal information-sharing implied by the term “curbside.” However, in the unlikely event that a lawsuit arose and included the consultant as a defendant, documentation of advice given would help the consultant recall and defend what was said.

References

1. Perley CM. Physician use of the curbside consultation to address information needs: report on a collective case study. *J Med Libr Assoc.* 2006;94(2):137-144.
2. Kuo D, Gifford DR, Stein MD. Curbside consultation practices and attitudes among primary care physicians and medical subspecialists. *JAMA.* 1998;280(10):905-909.
3. Cotton VR. Legal risks of “curbside” consults. *Am J Cardiol.* 2010;106(1):135-138.
4. *Reynolds v Decatur Memorial Hospital*, 277 Ill App 3d 80 (Ill App Ct 4th Dist 1996).
5. *Irvin v Smith*, 272 Kan 112 (Kan 2001).
6. *Campbell v Haber*, 274 A.D.2d 946 (NY App Div 4th Dep’t 2000).
7. *Sterling v Johns Hopkins Hospital*, 802 A.2d 440 (Md Ct Spec App 2002), cert den, 808 A.2d 808 (Md 2002).
8. Emergency Medical Treatment and Active Labor Act, 42 USC § 1395DD.
9. *Lownsbury v VanBuren*, 94 Ohio St 3d 231, 762 NE 2d 354 (2002).
10. *Blazo v McLaren Regional Medical Center*, 2002 Mich App LEXIS 752 (Mich Ct App 2002).
11. *Kelley v Middle Tennessee Emergency Physicians, PC*, 133 SW3d 587 (Tenn 2004).
12. *Hammonds v Jewish Hospital*, 899 SW2d 527 (Mo Ct App 1995).
13. MAG Mutual Insurance Company, Inc. Curbing the curbside consult—a risk management perspective. *J Med Assoc Ga.* 2008;97(1):50.
14. Burns CD. Death of the curbside consult? *J Ky Med Assoc.* 2006;104(1):27.
15. Hendel T. Informal consultations: do new risks exist with this age-old tradition? *J Med Pract Manage.* 2002;17(6):308-311.
16. Manian FA, Janssen DA. Curbside consultations. A closer look at a common practice. *JAMA.* 1996;275(2):145-147.
17. Curbside consultations. *Psychiatry (Edgmt).* 2010;7(5):51-53.

Related Resources

- Grant-Kels JM, Kels BD. The curbside consultation: legal, moral, and ethical considerations. *J Am Acad Dermatol.* 2012;66(5):827-829.
- Kreichelt R, Hilbert ML, Shinn D. Minimizing the legal risk with ‘curbside’ consultation. *J Healthc Risk Manag.* 2008;28(1):27-29.
- Atkinson L. Curbside consults: what is your liability risk? *Iowa Med.* 2003;93(4):15.

Disclosure

Dr. Mossman reports no financial relationship with any company whose products are mentioned in this article or with manufacturers of competing products.

Clinical Point

Documenting a ‘curbside consult’ may provide some liability protection but also exposes the consultant’s identity

Bottom Line

Curbside consults build collegial bonds, facilitate information exchange, and promote better patient care. They create little risk of actual malpractice liability. If the circumstances make a formal consultation seem more appropriate, don’t hesitate to suggest it.