



CLINICAL JURISPRUDENCE COLUMN

Is the smartphone recording while the patient is under anesthesia?

⤵ Be careful what you say, it may come back to haunt you

Joseph S. Sanfilippo, MD, MBA, and Steven R. Smith, JD

CASE Physician defames sedated patient

Our case takes us to the Commonwealth of Virginia. A male patient preparing to undergo a colonoscopy was concerned that, because of grogginess brought on by anesthesia, he

might misunderstand postprocedure instructions or advice. He, therefore, turned his cell phone's record function "on" and put it with his clothes. His clothes were put in a plastic bag, which ended up under the table with him in the operating room.

Following the procedure, as his wife drove him home, the patient replayed the instructions on the cell phone and realized that it had recorded the entire procedure. It quickly became apparent that the medical personnel had engaged in a series of inappropriate and insulting comments at the patient's expense.

The anesthesiologist, talking to the now-unconscious patient, said, "after five minutes of talking to you in pre-op, I wanted to punch you in the face." The patient had reported he was taking medication for a mild penile rash. The anesthesiologist warned an assistant not to touch it or "you might get syphilis on your arm or something," but then noted, "it's probably tuberculosis of the penis, so you'll be all right." There was further mocking of the patient, including a question of whether he was homosexual.

The anesthesiologist and gastroenterologist wanted to avoid talking to the patient after the procedure, and the gastroenterologist instructed an assistant to lie to the patient and convince the patient that the gastroenterologist had already spoken to him following the

In this quarterly column, these medical and legal experts and educators present a case-based* discussion and provide clear teaching points and takeaways for your practice.



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The authors report no financial relationships relevant to this article.

**IN THIS
ARTICLE**

The patient's claims in this case

Page 44

Recordings and the law

Page 47

*The "facts" of this case are based on actual cases but are a composite of several events and do not reflect a specific case.



Congratulations to OBG MANAGEMENT Board of Editors member Joseph Sanfilippo, MD, MBA; Steven Smith, JD; and Contributing Editor Shirley Pruitt, RN, JD, for their recent Gold Award from the American Society of Publication Healthcare Editors for Best New Department! Launched in August 2014, *What's the Verdict?* features the lively and professional medical and legal commentary of this trio of experts and has quickly become a best-read section of OBG MANAGEMENT.

FAST TRACK

Awards for defamation, malpractice, and punitive damages were given in this case

colonoscopy but, "you just don't remember it." In addition, the anesthesiologist announced that she was going to mark "hemorrhoids" on the patient's chart, which she knew was a false diagnosis.

The patient, who is identified only by initials, is an attorney.¹ Of course, the smartphone was "good documentation" of what came out of what the health care team said.

The lawsuit

The patient (now plaintiff) claimed that he was verbally brutalized and suffered anxiety, embarrassment, and loss of sleep for several months.

On the first day of trial, the gastroenterologist was dismissed from the case. The trial went on against the anesthesiologist and the anesthesia practice.

WHAT'S THE VERDICT?

The patient was awarded \$500,000, as follows:

- \$100,000 for defamation, (\$50,000 each for the syphilis and tuberculosis comments),
- \$200,000 for medical malpractice
- \$200,000 in punitive damages (including \$50,000 the jury found that the anesthesia practice should pay).

Caveat. The above facts about this case come from the plaintiff's complaint¹ and various professional commentaries and news sources.²⁻⁵ Such sources are not always reliable, so they may not describe accurately all of the relevant events and statements.

Neither of the authors of this column attended the trial or heard the testimony

presented. For the purposes of discussing the issues below, however, we treat as true the facts stated above. In addition, some of the legal claims in this case are uncertain. It is entirely possible that an appeal will be made and accepted, and some or all of the damages could be reduced by the trial court or an appellate court. The jury award, therefore, is not necessarily the last word.

Medicolegal takeaways from this case

This case raises a number of professional, ethical, and legal issues. Most fundamentally, the health care team is always expected to prioritize the patient's best interest. Respect for the patient is an essential element of that.

Behaviors such as those reported about these physicians are "absolutely not to engage in any time," stated President of the American Society of Anesthesiologists John Absentein, MD.⁶ A former president of the Academy of Anesthesiology, Kathryn McGoldrick, MD, added some common sense advice that such discussions are "not only offensive but frankly stupid." As she notes, "we can never be certain that our patients are asleep and wouldn't have recall."⁷

The actions of the physicians also may violate ethical obligations. The very first principle of medical ethics is that the physician shall provide care "with compassion and respect for human dignity and rights."⁸

The legal claims included defamation, infliction of emotional distress, privacy (related to medical records), and malpractice. We will take a very brief look at each of those causes of action and then say a word about punitive damages (which the jury awarded in this case).

It is important to remember that state law, rather than federal, is providing the legal principles on which these claims were decided. Federal law might provide some relevant principles in such cases (for example, the First Amendment freedom of speech limits the state defamation rules), but that is the exception. State law is the rule.

CONTINUED ON PAGE 46



Defamation—award of damages

At its core, defamation is publishing (that is, telling someone other than the plaintiff) something untrue that may be harmful to another person. Generally the harm is reputational and the plaintiff may be affected by loss of business, mental suffering, or loss of esteem in the community.⁹

Defamation claims are not typical in health care cases. However, these claims are not rare: instances of health care professionals defaming other health care professionals, patients giving negative “reviews,” or health care professionals releasing false information to employers certainly do exist.

In this case, in addition to saying that the patient had syphilis and tuberculosis (both untrue), the physicians said he was a “wimp.” One interesting concept of defamation law that has developed over the centuries is “negligence per se.” This means a falsehood has been published about someone and the falsehood is likely to cause serious reputational harm. Claims that someone has a contagious disease traditionally have been considered negligence per se. Syphilis

and tuberculosis fall in that category. On the other hand, saying someone needs to “man up” is usually a matter of opinion, so defamation for such comments is unlikely without special circumstances.

From the anesthesiologist’s perspective, the question is whether anyone who heard the publication really believed that the patient had either of the diseases. A joke that nobody believes to be based on fact generally is not defamatory because it has not harmed the plaintiff.¹⁰ It is apparent that the jury felt the patient had been defamed, however, given the \$100,000 award for defamation.

In the United States there is special sensitivity to defamation awards because they may implicate the First Amendment’s protection of free speech. That being the case, this award may be particularly open to review by the judge and appellate courts.

Emotional distress—no award of damages

There are 2 kinds of “emotional distress” claimed in this case:

- intentional infliction

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- negligent infliction.

Intentional infliction usually requires outrageous conduct by the defendant who acts intentionally or recklessly to inflict severe mental pain on the plaintiff.¹¹ In this case, the element of “intentional” or “reckless” is interesting. While the conduct was outrageous, it is doubtful that there was any way the anesthesiologist could have imagined that these outrageous statements would have been transmitted to the patient/plaintiff.

As for **negligent infliction** of emotional distress, most states have been wary of opening a Pandora’s Box of litigation. Therefore, they generally require significant physical manifestations of great stress to allow recovery.¹² It appears that the jury did not find the elements of either intentional or negligent infliction of emotional distress in this case.

As a side-note, this kind of emotional distress is viewed by the law as different from emotional distress that is incidental to a physical injury (pain and suffering). All states recognize that form of emotional distress.

Privacy—no award of damages

The privacy of medical records has, of course, become a major concern in the last few years. Both federal and state law provides significant penalties for the unauthorized release of medical information. However, in this case, it does not appear that medical information was improperly revealed.¹³

The patient’s complaint suggested that the anesthesiologist’s discussion during the colonoscopy of the medication for the penile rash was unnecessary for health care purposes.¹ Therefore, it claims, the discussion violated the state health records privacy law. At the same time there was no indication in the public reports that this caused any harm to the patient.

Medical malpractice—award of damages

Malpractice usually involves professional practice that is unacceptable to the profession itself. It most commonly is negligence, or carelessness, that causes injury to the

Patient–physician recordings and the law

State laws differ regarding when it is legal to record in-person conversations. When everyone in the conversations knows about the recording, it is permissible and can be used in a court of law. In most states it is legal to record when only one party to the conversation has agreed to it, even though others in the conversation are not aware of it (which was the situation in the case discussed here).

In theory, physicians (by contract with patients) might try to limit patients’ rights to record medical services. But that practice would be difficult to implement or enforce in many circumstances. The reality is that audio and video recording devices are so ubiquitous that it is not sensible to avoid all recording of patient contact.

Physicians also might consider the potential such recordings have in some circumstances to improve communication with patients. Permitting the patient to record the patient–physician exchange, for instance, allows the patient the ability to review the advice after having left the office. This could be beneficial from a patient care perspective.

patient. The gross disregard for professional medical standards here was certainly negligence.¹⁴ The plaintiff claimed that discussing the medication for the penile rash and falsification of the medical records constituted malpractice.¹

Presumably the jury award for medical malpractice means the jury found that the misconduct of the medical staff caused the emotional harm that the plaintiff experienced (described as embarrassment, loss of sleep, mental anguish, and anxiety), and that those injuries warranted a \$200,000 award.

Punitive damage—award of damages

The jury also awarded \$200,000 in “punitive” or “exemplary” damages. These are unusual damages, given not so much to compensate the victim but rather as a deterrent for the future. Generally the defendant’s conduct must have been egregious and completely unacceptable.¹⁵ Those elements were apparent to the jury from the facts of this case.

What about loss of practice privileges?

It is not unlikely that one or more of the medical professionals might, beyond civil



The malpractice claim was based on discussion of medication for a nonexisting condition and talk of recording false information on the patient’s medical record



liability, be subject to licensure discipline by the Virginia board. In addition, there are other secondary consequences of this lawsuit. The employment of those involved may be interrupted. (The anesthesiologist is said to have moved to another state, for example.) Hospital privileges also may be affected, as may insurance rates. The results of this award likely will have to be reported to the National Practitioner Data Bank.

As physicians, what's our takeaway?

Conduct unbecoming a physician remains front and center with a recent essay published in the internal medicine literature.¹⁶ The anonymous author attests to witnessing a male gynecologist making sexual comments regarding the patient at the time of vaginal surgery preparation and

an obstetrician singing and dancing to a Mexican song while treating his Hispanic patient for postpartum bleeding.

The unusual case of the anesthesiologist that we address was made even more unusual by the fact that it was recorded. Recordings, however, are likely to become ever more common. The advice of everyone's grandmother is well taken: "Always act as though what you do will be published on the front page of the newspaper." The ubiquitous presence of video and audio cameras and untold other devices means that someone may well be watching.

Aside from the risk of getting caught, respect for patients and clients is the very foundation of respect and professional care. It is distressing that the anesthesiologist was so disrespectful of a patient. It is equally disappointing that nobody put a stop to it. ❌

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