Are Health Care Conflicts all that Different? A Contrarian View

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The question posed to us, "What makes health care conflicts different or more complex and difficult than other types of disputes," belies an assumption that health care conflicts are, in fact, different or more complex than other disputes. I may be the contrarian on this panel because when I first read the question my reaction was "compared to what?" Are health care conflicts more complex than international disputes where people fight wars for years over long-standing, entrenched differences that result in thousands of deaths and injuries? Are they more difficult than environmental disputes that involve industry polluters on one side, with pressures to keep production costs down and compete in a global economy, and environmentalists on the other, who bring law suits and stage protests to highlight wrongdoing and practices that pollute the atmosphere and threaten future generations? Are they more challenging than family disputes that sometimes have such emotional intensity they lead to physical and mental abuse and long-term damage to the psyche of family members?

As you can tell, I am not quite persuaded that health care disputes are necessarily more difficult, complex, or challenging than at least some other types of disputes. While health care disputes have unique features, if you consider comparable disputes, for example, disputes over services provided by doctors versus other professionals, such as architects, lawyers, or engineers, or disputes over services provided by hospitals in contrast to hotels, there are many similarities as well as differences. Within the spectrum of health care disputes there are also many variations so that some health care disputes have characteristics that are shared with other types of disputes and others have features that are

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wholly unique to health care. We need to be more precise both about the type of health care dispute we are talking about and the type of dispute to which we are comparing it.

Perhaps the most common type of conflict associated with health care is medical malpractice; yet health care conflicts are much broader than that. Such conflicts can include disagreements between health care providers and patients or their family members over patient treatment, particularly end of life care, as well as conflicts between health care providers over treatment issues, professional roles and boundaries. Conflicts can also arise due to limited resources, institutional priorities, contracts, or employment. They can include disputes between insurers and patients, or insurers and providers, over coverage of medical procedures or services, or between government regulators and providers over quality of care, necessity of services, fraud, public safety and professional behavior. Health care conflicts can encompass disputes between institutions over allocation of resources, legislative or regulatory proposals, or contract terms. Finally, health care disputes can arise in the public health arena where state action may infringe on individual rights. Examples of the latter include state efforts to regulate smoking or mandate vaccines or quarantine when an individual's contagious disease status threatens other members of a community.

As in most disputes, conflicts in health care often arise as a result of poor communication between individuals; lack of data or different interpretations of existing data; differing interests and needs (typically regarding money and time or procedures); structural impediments such as institutional rules or government regulations; or value conflicts. The range of possible health care disputes alone is too large and too varied to allow generalizations about how they compare to other types of disputes. But, we can hone in on one or two types of health care disputes and examine how they compare to other similar non-health care disputes. For example, for purposes of illustration, we might compare disputes over medical malpractice with disputes over legal malpractice.

At the most basic level, malpractice conflicts between lawyers and clients and between physicians and patients involve a harm inflicted on a vulnerable patient or client caused by a trusted professional. The conflicts may include communication issues; data or expert judgment disputes over whether a standard of care was violated; differences over the process used to deal with the dispute (apology, transparency, opportunity to be heard); differences over the procedure used to arrive at appropriate compensation as well as what constitutes appropriate compensation; structural barriers such as legal rules governing discovery and the introduction of evidence, and value judgments over whether the professional deserves to be punished for his or her wrongdoing.

In the professional services arena, at least with regard to doctors and lawyers, the relationship, ideally, is built on trust. In both scenarios, the patient or client is vulnerable. Typically, the patient is sick, weak, and emotionally wrought. The client obtaining legal services may also be vulnerable, facing criminal or civil penalties or damages. Such clients are often frightened and anxious, and concerned about the impact of the legal proceeding on their lives and families. Of course, the client does not take his clothes off in the lawyer's office as he does in the doctor's office, but legal clients can be vulnerable in other ways by sharing many intimate details of their lives with their lawyer that they might not share with their physician.

Both relationships are also similar in terms of the expectation and legal requirements of confidentiality on the part of the professional. Like physicians, lawyers have a duty to keep confidential information clients share with them. Moreover, the confidential nature of the professional-client relationship may be as important in the legal setting as it is in the medical setting.

The relationships are also similar in that there is a power imbalance between the professional and the client in large part resulting from a difference between the professional's and the client's expertise and knowledge about the substantive issues at stake. Patients and clients come to these professionals because

they do not know how to diagnose or treat medical problems or because they do not know the relevant law or how to bring a lawsuit. The difference in expertise in both scenarios also creates similar agency issues wherein the physician/lawyer is deciding on services that the patient/client needs. It is the physician, not the patient, for example who determines whether to order certain blood tests or x-rays, and it is the lawyer, not the client, who decides whether to file a motion to dismiss or object to the introduction of certain evidence.

The personal nature of both relationships may also make it emotionally trying and even devastating to the professional both to have taken an action (or failed to take an action) that resulted in harm to a patient/client and then be sued by that person. The fact that both sets of professionals take great pride in their work may also mean that they experience shame and disappointment at having failed in some way to be a "good" doctor or lawyer.

Conflicts in both scenarios also result from differences in the interpretation or understanding of what is required of the professional, i.e., the standard of care. I would tentatively concede that the type and number of errors that a physician can make that may lead to harm are greater than the number of material errors that a lawyer can make in the representation of a client. Lawyers, however, have multiple opportunities for harmful errors. Lawyer errors can include administrative oversights, such as failure to file a claim in a timely manner, failure to follow client instructions, mathematical calculation errors, inadequate investigation, failure to know the law, or conflicts of interest.[2] I might also concede that medical malpractice and legal malpractice differ by virtue of the fact that in the health care arena, harms to patients are often not

[2] ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, LEGAL MALPRACTICE CLAIMS IN THE 1990S 34 (1996). Lawyers, unlike physicians, can be sued for breach of fiduciary duty. "A number of courts have tried to distinguish the breach of fiduciary duty by stating that it sets forth a 'standard of conduct' as opposed to a 'standard of care.'" Buddy O. Herring, *Liability of Board Certified Specialists in a Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67, 74 (1998).

simply a failure on the part of the physician. Instead, they are more likely a "system" error involving hospital procedures and multiple individuals. In contrast, in the legal arena, mistakes are typically due to a failure on the part of a specific attorney.[3] In both sets of disputes, however, whether the professional's behavior *caused* the patient or client's harm is often a matter of disagreement.

Disputes between doctors and patients, and lawyers and clients may also share differences regarding views about the appropriate procedures that should be used to address the harm the professional caused and the appropriate remedy. In both relationships, the injured party may want an apology, to understand what happened and why it happened, to prevent the error from happening again, and may want monetary compensation. The professional, on the other hand, may be reluctant to apologize due to the legal implications of admitting fault or may not know how the error happened. Professionals may also want to minimize the damages to be paid either because those damages are coming out of their own pocket or because the amount of damages may affect their malpractice insurance premiums. In addition, in both cases, professionals will want to preserve their good name and standing in the professional community. Physicians, perhaps, have more to lose by a successful malpractice claim than do lawyers as they will be reported to the National Practitioner Data Bank -- a national repository that can be accessed by health care providers and state licensing boards across the country containing information that may affect a physician's future ability to be hired or obtain hospital privileges. There is no similar repository for lawyers who are sued for malpractice.

Arguably, healthcare disputes are different or more difficult to resolve than disputes involving legal services in that in health care the harms generally include physical injury and sometimes death. Yet, disputes over incompetent or negligent legal services

[3] Although, one could argue that poor oversight of associates in a law firm might also be considered a "system" error.

can also involve life and death consequences – criminal matters, at the most extreme, can include a death sentence, but also can include prison sentences and fines that can destroy someone's life and reputation. Moreover, negligence on the part of lawyers has resulted in clients losing their homes, the custody of their children, and their life's savings.[4] Admittedly, however, most medical malpractice claims are over personal injury while most legal malpractice claims are over money, i.e., a plaintiff was denied a damage award or received a lower damage award than he otherwise would have because of incompetent legal representation.

Conflicts between the two types of professionals and their clients also may reflect structural differences in the way the two services are delivered and paid for. This may affect the professional/client relationship and the willingness of harmed parties to sue. For example, physicians tend to be reimbursed in a way that gives them an economic incentive to spend a relatively short amount of time with each patient. Spending insufficient time with a patient may not only result in missing key facts essential to an accurate diagnosis or therapeutic response but also may lead to poor communication or missed opportunities to communicate. Lawyers, in contrast to physicians, are typically reimbursed on the basis of time or on a contingency basis. The first of these methods encourages the lawyer to spend more, rather than less, time with a client; the second encourages the lawyer to spend only as much time with the client as he believes is necessary to win or successfully settle the case. Under a contingency arrangement, the lawyer has an incentive to get as much information as he can from the client but not to spend excessive time that will eat into time that the lawyer could spend doing other things.

Finally, conflicts arising in the two types of professional relationships may differ in terms of the frequency with which they are a result of value- or belief-based differences. In health care, conflicts between doctors and patients or their families can arise

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[4] *See* Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the 'Captured' Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 478 (2002).

because of cultural, religious, or value differences regarding health, birth, and death. Certainly, this has created major disputes at a national policy level on issues such as abortion, stem cell research, and termination of life support. In contrast, such value conflicts are not typically the source of conflicts in the lawyer-client relationship.

In sum, I would argue that these two types of conflicts – physician/patient and lawyer/client are more alike than different, and that one type is not necessarily more complex or difficult than the other. I would concede, however, that their frequency differs, i.e., physicians tend to be sued more frequently than lawyers for malpractice, or at least there appear to be many fewer legal malpractice suits brought than medical malpractice suits.[5] Assuming this is true, we might want to ask, what accounts for this?

The available literature indicates that poor communication is a reason why people sue their doctors.[6] Similarly, many of the grievances filed against attorneys are based on failure of the attorneys to return phone calls.[7] This begs the question, is the nature of the doctor/patient and lawyer/client relationship different in a way that makes individuals want to sue their lawyers less and their doctors more? Do the structural differences in reimbursement discussed above mean that lawyers spend more time with their clients than doctors spend with their patients? Is it that there are more possibilities for error in medicine than law or that the harms associated with those errors are more significant and more

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[5] *See, e.g.*, MalpracticeLawyers.com, Malpractice Resources: Statistics, http://www.malpracticelawyers.com/malpractice-statistics.cfm (last visited Mar. 24, 2008) (stating that in 2002, 35,000 legal malpractice cases were brought and in 2000, 86,480 medical malpractice claims were filed).

[6] *See, e.g.*, W. Levinson et al., *Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 JAMA 553 (1997); Gerald B. Hickson et al., *Patient Complaints and Malpractice Risk*, 287 JAMA 2951 (2002).

[7] *See* Leonard H. Becker, *Avoiding Bar Discipline*, LITIGATION, Summer 1995, at 13 ("Failure to deal with [an attorney's] client's calls or letters generates more complaints to Bar Counsel than any other attorney misconduct charge.").

warranting of compensation? Or, is it that lawyers are more likely to take cases against doctors than cases against lawyers?

I would argue that the apparent difference in the frequency of legal and medical malpractice suits is a result of two factors. First, most medical malpractice litigation is a result of physical harm – loss of function, loss of limb, reduced life expectancy, pain or death. These are injuries that a court cannot reverse on appeal. In contrast, courts can reverse most legal injuries on appeal as they are easily quantifiable in terms of dollar loss. Second, attorneys may be less willing to bring legal malpractice cases, as the damages are often limited. While many states have instituted damage caps on non-economic damages that constrain awards in medical malpractice suits, there are more significant restrictions on damages in legal malpractice cases. For example, damages for pain and suffering are generally not available in a legal malpractice action.[8] Moreover, there are severe limitations on the ability of criminal defendants to sue their attorneys in most states.[9]

In conclusion, I believe that we have to look closely at the particular type of dispute in medicine that we are considering (doctor/patient, health care insurer/patient, doctor/nurse, regulator/provider) and the particular kind of dispute we are comparing it to, in order to decide whether and how the conflicts differ. While my example of professional malpractice disputes did not yield significant differences between conflicts over medical services and conflicts over legal services, the results might have been different if I had compared medical malpractice disputes with personal injury disputes resulting from auto accidents. By fine-tuning comparisons, we can identify ways in which health care conflicts are both similar to and different from other types of disputes and thereby improve our understanding of the causes of, as well as ways to resolve, certain types of health care conflicts.

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[8] *See* Kessler, *supra* note 4, at 477.

[9] *See* Johanna M. Hickman, Note, *Recent Developments in the Area of Criminal Malpractice*, 18 GEO. J. LEGAL ETHICS 797 (2005).