LEGAL VS. ETHICAL DILEMMAS IN DERMATOLOGY

Your heart says ‘yes,’ but your lawyer says ‘no’ — experts weigh in on how to make the right choice

By Emily Margosian, assistant editor

“Morality is more important than laws, because the law depends on morality,” philosopher Edmund Burke famously said. However, despite the gravitas of his words, declarations from 18th-century philosophers aren’t generally considered strong legal defense should one’s moral impulses land them on the wrong side of the law. While ethical standards and legal code of conduct would cleanly overlap in an ideal world, in reality — and modern medical practice — the two don’t always go hand-in-hand. How can physicians strike a balance when they find themselves torn between the Hippocratic Oath and practicing medicine within the law?

This month, *Dermatology World* consults with legal-medical experts on areas of legal versus ethical overlap for dermatologists, including:

- Treating patients who lose their insurance
- Treating family members
- Testing the limits of patient-doctor confidentiality
- Off-duty obligations in cases of medical emergency
- Pediatric autonomy in medical decision-making

CASE STUDY #1: PATIENTS WHO LOSE THEIR INSURANCE

Scenario: A long-standing patient has lost their insurance and is unable to pay out-of-pocket. Are you legally obligated to treat them?

A lawyer explains: No — with some important caveats, said Rob Portman, JD, MPP, a health care attorney with Powers Pyles Sutter & Verville in Washington, D.C., and general counsel for the AAD/A. “The most important thing is that you can’t abandon the patient,” explained Portman. “If they need treatment, the treatment has to continue one way or another." Portman recommends that dermatologists who find themselves unexpectedly faced with a patient who has recently lost insurance should proceed with the visit, while providing recommendations for where further treatment can be sought. "You can suggest they enroll in Medicaid or give recommendations for free clinics. The doctor should try to find alternatives and has to be vigilant about making sure they've given the patient all their options."

According to Portman, physicians may also want to take the extra step of following up with a recently uninsured patient to make sure they've secured alternative care. "While the patient has an obligation to follow-up on those alternatives, if the doctor has a particularly long-standing relationship with that patient, or wants to be super careful about not incurring liability risk, they might want to just call and say, 'How's it going? Did you find alternative treatment, and did you follow up?'"

While dermatologists have no legal obligation to continue to provide treatment for patients who are unable to pay, they can incur legal risk if they cease treatment for patients in an unstable condition. "The doctor shouldn't stop treating if doing so is going to increase the chances of a bad outcome. That's the liability side of the question," said Portman. "The last thing you want is a bad outcome. Obviously if they're in an unstable condition, then you need to stabilize them first."

But what if…your patient has lost their insurance, and you wish to offer them treatment for free, or at a significant discount. Is this allowed? "Generally, yes," suggests Portman, "with some important exceptions. If the patient is insured under Medicare or Medicaid — especially Medicare — and you start treating non-covered services for free, then that can lead to violations of the federal anti-kickback statute and other similar federal laws," he said. "If you give services for free in order to encourage patients to use you for Medicaid- or Medicare-covered services, you could violate these laws."

However, if a patient truly has no means of paying for care and a dermatologist is so inclined to continue treating them, there should be no legal roadblocks, according to Portman. However, he advises that physicians who choose to go this route carefully document the process to avoid trouble down the road. "It's good to have an established policy for giving free or discounted care, so you don't set a precedent that someone else may try to take advantage of. You want to avoid doing it on an ad hoc basis," he said.

And one more thing…what if the patient has lost their insurance but wants to continue paying out-of-pocket? "Generally, most doctors don't care whether patients pay by insurance or out-of-pocket, but they do have to be able to pay," he said. "That can be a little sensitive. A patient says, 'I lost my insurance,' but says 'I can pay you out-of-pocket.' Does the doctor believe them or not?" Ultimately, however, it's up to physicians how much trust they put in non-insured patients who seek to move forward with out-of-pocket payments for treatment. "In such cases, physicians are within their rights to request payment at the time of service and to discontinue treatment if the patient is unable to pay, as long as they don't abandon the patient while in an unstable condition," said Portman.

CASE STUDY #2: TREATING FAMILY MEMBERS

Scenario: One of your immediate family members is distraught over a suspicious lesion and wants to come to your office to have you take a look. Should you treat them?

A lawyer explains: "The role of a physician-family member is challenging. There are legal, ethical, and pragmatic considerations," said Clifford Lober, MD, JD, in his August 2017 *Dermatology World* Legally Speaking column. While in strictly legal terms, most states do not prohibit physicians from treating patients who are related to them, ethically speaking, there are significant challenges. "As a physician-family member, there is concern that your professional objectivity might be compromised, especially when intimate medical or personal history or physical examination is needed," said Dr. Lober. Likewise, the "patient may be hesitant to express their desire for another physician for fear of offending the physician-family member. Their autonomy may be compromised."

The AMA Code of Medical Ethics also advises against physicians providing medical care to family members, raising similar concerns about the ability to maintain professional objectivity, compromised patient autonomy, and strain on the physician's personal relationships.

Dr. Lober recommends physicians ask themselves the following questions before agreeing to treat their family members:

- Would you be able to maintain professional objectivity?

- Would you feel comfortable doing a thorough examination, should it involve intimate parts of a relative or friend's anatomy?
- Would they truly feel comfortable with your performing the appropriate physician examination?
- Would you be comfortable performing surgery on a family member?
- If a complication arises, such as a wound infection, might this affect your personal relationship with the patient?

In general, Dr. Lober advises that dermatologists refer family members to another board-certified physician to avoid any potential conflicts of interest, while still providing the patient with quality medical care.

But what if...I want to write prescriptions for family members? In general, while most states do not explicitly prohibit you from treating relatives, they may limit or restrict your ability to prescribe them certain medications — especially controlled substances. "Even when permitted, however, I respectfully caution you against prescribing sedatives, stimulants, narcotics, pain medications, and other potentially addictive drugs for your immediate family," said Dr. Lober. "Many pharmacies will not fill a prescription for such medications written by a physician for an immediate family member."

And one more thing... If I treat family members, will I get paid? Short answer: don't bank on it. "Contracts with private insurance companies may exclude reimbursement for care provided to immediate family members and any incidental costs associated there within, even if the care is appropriate and medically indicated," said Dr. Lober. "Similarly, Medicare will not reimburse you for treating a family member."

CASE STUDY #3: TESTING THE LIMITS OF PATIENT-DOCTOR CONFIDENTIALITY

Scenario: During a visit, your patient seems unusually agitated. They mention that they recently discovered their partner has been cheating on them, with a remark that the next time it happens they'll "take action," and that they recently purchased a firearm. Do you have a moral obligation to report this as a threat? Legally, does it pass the bar as a legitimate exception to patient-physician confidentiality?

A lawyer explains: While physicians might have an immediate impulse to sound the alarm to authorities, legally, the doctor must proceed very carefully. "The issue here is whether you can or must violate the patient's confidentiality, which is inherent and expected in the patient-doctor relationship," said Dr. Lober in his February 2015 *DW* Legally Speaking column. "One of the few times state laws make an exception to the duty of confidentiality is when there is a credible threat of violence against another person."

However, what constitutes a credible threat? According to Dr. Lober, state law varies, but generally there must be "a clearly identifiable intended victim, and an imminent, credible expectation that the patient is capable of and truly intends to commit the violent act."

But what if...I don't report a threat of violence made by one of my patients against a third party. Will I suffer any legal repercussions? Ultimately, it depends on the state in which you live. "Some jurisdictions impose a duty to warn the potential victim. This duty permits you to contact the intended victim and tell them of the foreseeable danger," explained Dr. Lober. "The duty to warn may be mandatory, meaning that you must warn the intended victim, or merely permissive, in which case you have the option of warning the intended victim. The duty to warn always necessitates violating the patient's confidentiality. Other jurisdictions impose a different requirement, called the duty to protect, which allows or requires that you take action to protect the intended victim, such as notifying the police."

And one more thing...while you may feel morally compelled to warn a third party of an impending assault, even within the scope of the law that permits health professionals to breach a patient's confidentiality in the interest of public safety, dermatologists may not be covered. Typically, these laws are limited in scope to mental health professionals, such as psychiatrists, psychologists, and social workers. Refer to your state and local laws before proceeding to avoid litigation.

CASE STUDY #4: OFF-DUTY OBLIGATIONS

Scenario: You are midway through a transatlantic flight, when another passenger begins to suffer what appears to be a heart attack. As a physician, are you obligated to assist, and what is your liability?

A lawyer explains: There is no legal duty in the United States for a physician to aid a fellow passenger in medical distress (although some countries have made it mandatory). However, there is a strong ethical argument for lending assistance in a moment of need. “It is difficult to imagine a physician sitting by as a fellow traveler is truly suffering or possibly dying,” said Dr. Lober in his June 2017 *DW* Legally Speaking column.

Before assisting your fellow passenger, however, “You need to use your judgement in deciding whether to respond if you take sedative medication, have had a few drinks, or could otherwise be construed as impaired,” recommended Dr. Lober. Physicians who assist with a medical emergency on-board an aircraft should also be sure to document the encounter with forms provided by the flight crew, as well as in their personal medical records when they return home. They should also refrain from discussing the event with the media or other third parties to avoid violating patient privacy rights.

But what if…things go poorly. Can I be sued? According to The Aviation Medical Assistance Act of 1998, “Any individual should not be liable for damages in any action brought in a Federal or State court arising out of the acts or omissions of the individual in providing or attempting to provide assistance in the case of an in-flight medical emergency, unless the individual, while rendering such assistance, is guilty of gross negligence or willful misconduct.” It is important to note that liability protection is only provided for true medical emergencies, not non-urgent conditions.

And one more thing…can I accept compensation for assisting? According to Dr. Lober, “The Aviation Medical Assistance Act is silent on this subject. Although other attorneys may disagree, I recommend that you not accept compensation of more than nominal value.”

CASE STUDY #5: PEDIATRIC AUTONOMY

Scenario: A parent brings their child in for a consultation with a dermatologist and requests that the physician surgically remove milia from the child’s face. The child, age 10, is visibly and vocally opposed to treatment. Does the dermatologist need the child’s consent to proceed?

A lawyer explains: Dermatologists have several options in this scenario. Should the physician choose to move forward with the procedure, they would be protected under the law despite the child’s refusal to assent to care. “The dermatologist could say, ‘Okay, I’m going to bring in five medical assistants and we’re going to hold the patient down and remove these milia,’ and the state would support that because you had parental consent,” said Robert Buka, MD, JD. “Obviously though, that sounds awful.”

However, should a dermatologist feel ethically opposed to treating the child in this particular case, “There is no state mandate for physicians to treat anything that’s not life-threatening or medically necessary, and I do not believe the state would have any interest in prosecuting a doctor who said, “I declined to do it. The parent wanted it, but the child was not a good candidate, and I deemed it in the child’s best interest not to treat,”’ he explained. “I believe that’s a fair stance from a legal perspective where the state would likely remain silent on a physician’s determination to choose their patient. In this instance, the ethics match the legal guidance and a physician’s decision to ‘do no harm’ would be upheld.”

But what if…the child is requesting treatment, but the parent refuses to give consent? Depending on the scenario and type of treatment being requested, in certain instances a minor can seek and receive treatment without permission from a parent. “In the case of what the state would consider ‘serious harm,’ the court has overruled, for example, Jehovah’s Witnesses refusal of blood transfusions for children, because the court finds the state’s interest in protecting that child’s life more compelling,” explained Dr. Buka. “The next category are conditions considered to be ‘medically necessary,’ where we find issues like contraception, being treated for sexually transmitted diseases, substance abuse treatment, mental health services, treatment for sexual assault, and prenatal care — the court has allowed minors to seek those types of treatments without parental consent.”

Vaccinations, while a topic of hot public and legislative debate, have yet to be included in the list of ‘medically necessary’ treatments minors may seek without parental consent. “Essentially you’re weighing a public health risk of pathogen transmission against parental autonomy over their children,” said Dr. Buka. “And that’s very difficult to legislate.”