

Clinical Cases

Physician Work Stoppages as Activism

Physician work stoppages in response to rising malpractice insurance rates are designed with the hope of raising public awareness about this problem.

Commentary by Alan J. Lippman, MD

Case

Dr. Alex Nelson is an internist at a large private urban hospital. He is one of the more junior members of the practice and finished his residency training at the same institution only 2 years ago.

Malpractice insurance premiums for Dr. Nelson and other physicians in the area have skyrocketed over the last several years. The situation has become so serious that his more senior colleagues ask him why he stayed in the area to practice after residency. Some of them indicate that they are considering retiring or finding other practice opportunities in another state. Not only can they not generate comfortable incomes after paying for malpractice premiums, they say, but they are also beginning to have trouble finding companies that will offer them any coverage at all.

Local physicians—including many of Dr. Nelson's colleagues—recently held a rally at the state capitol to draw attention to the situation in the hopes that legislators would take action to make malpractice insurance more affordable in the state. They have also lobbied their federal congressmen through professional associations. Despite their efforts, legislation to address the growing crisis remains stalled.

Frustrated by the lack of action on the part of policymakers, Dr. Nelson's colleagues decide that more drastic measures, which circumvent the traditional advocacy routes, are needed. Specifically, they decide to plan a work stoppage. Based on physician work stoppages in other states, they decide to set aside one day on which only physicians who provide emergency care will work. They think this will draw more attention to the issue and force the legislators to move on the stalled bill. They plan the work stoppage for the following Monday and will hold another rally and a press conference on the same day.

Dr. Nelson is not quite sure how he feels about the issue. On one hand, he knows that the malpractice insurance crisis is real and appears to be worsening. He also knows that legislators might not realize how serious the situation has become. On the other hand, he isn't sure whether these tactics are ethical. How, he wonders, can physicians advocate for sustained access to care by denying care?

Still undecided about the planned work stoppage, Dr. Nelson is approached by one of his colleagues the Wednesday before the planned stoppage. "So Alex, we'll see you down at the rally on Monday?" asks Dr. Sally Young, one of the practice's most senior physicians.

"I'm not sure if I'm going to do it, Sally. I'm just not sure how I feel about it. I mean, is it right for us to deny patients care to make our point?" replies Dr. Nelson.

"Come on, Alex," replies Dr. Young. "Maybe you haven't been around long enough yet, but this is the worst this malpractice situation has been in years. After almost 30 years of practice, I'm wondering if I'm going to be able to get insurance at all, let alone make mortgage payments and maintain my kid's college fund. We need to send a message to these guys down at the Capitol that this is serious. And that's not going to happen unless we all stick together and are part of this. So are you in?"

Moved by Dr. Young's justification, but still unsure that what they're doing is ethical, Dr. Nelson decides. "Yeah, I'm in."

Commentary

Is It Ethically Permissible for Physicians to Participate in Job Actions? by Alan J. Lippman, MD

Our nation's professional liability insurance system is broken. Skyrocketing medical malpractice insurance premiums, in some cases exceeding \$100,000 per year, are forcing some physicians to limit services, retire early, or relocate to places where premiums are more affordable. The situation is particularly acute in some 30 states, where reductions in the physician workforce are already adversely affecting the availability of care in certain "high-risk" specialties, such as obstetrics and neurosurgery.

Major determinants of premium increases include escalating jury awards and the high cost of defending suits¹. Physicians practicing in states that have been severely affected have been vigorously calling for legislative reform that would support stabilization of the insurance market and provide relief from the pressures threatening to undermine fair access to health care.

Solutions to the problem, however, are controversial. The issues are complex and confounding. Data supporting the factual basis for various arguments is incomplete or subject to interpretation. Biases, on the parts of both physicians and trial attorneys, represent obstacles to resolution of the matter. In response to frustration in the legislative arena, many physicians have supported so-called "job actions," or "work stoppages," the purposes of which are to raise public awareness of the issues and to force legislators to act favorably on pending bills.

For many physicians, including Dr. Nelson, this situation creates a dilemma. How can a conscientious physician advocate for sustained access to care by denying care?

In my view, job actions and work stoppages represent no more than wake-up calls to a slumbering public and a lethargic legislature. Let it first be said that responsible job actions never deny needed care. Emergency care cannot logically or ethically be withheld and never is. Temporary postponement of procedures such as elective surgery or screening mammography does not constitute abandonment. Practice interruptions can easily be rectified in a timely manner. Job actions are not intended to be punitive and should never be. Instead, such activities merely serve to bring the issues into sharp focus and to demonstrate, in a brief and effective manner, the acuity of a desperate situation and the potential consequences of failure to address its resolution.

There are several elements that constitute what the medical profession regards as essential to effective tort reform including the establishment of limits ("caps") on noneconomic damages, appropriate statutes of limitations, preclaim review, alternative processes for dispute resolution, and improved standards for expert

witnesses. Beyond these, however, there is one essential element that, arguably, represents the cornerstone of any meaningful reform— successful implementation of methods to enhance quality improvement and patient safety.

The Institute of Medicine, in a series of recent reports, has called attention to the harms caused by preventable medical errors². Other reports show that patients are commonly harmed by problems arising from faults in the health care process itself, acts distinguishable from truly blameworthy behavior or system violations. The current tort system has been called a major driver of this problem by inappropriately apportioning blame and inhibiting system-wide improvements. Affixing blame should not be a prerequisite to compensation. In that "preventable, iatrogenic harm is inevitable," it is claimed, compensation should be "quick, equitable, fair, and timely." Change will require abandonment of a culture of blame and a shift away from tort toward "mediation" and "transparency"³.

In concert with this strategy, some have called for an alternative to litigation that does not predicate compensation on proof of practitioner fault; rather, it is based on a "no-fault" systems model, not unlike that utilized in workers' compensation or automobile liability matters. It has been estimated that the costs of such a system would not exceed those of the current tort system and might well be more affordable⁴.

In this context, can it be argued that physician job actions are ethical? I maintain that it can if the purpose of a job action is to call attention to a problem and not to be punitive and if the proposed solution is remedial. These actions are fully in concert with the moral principles that guide the profession, as encapsulated in the American Medical Association's *Principles of Medical Ethics*⁵.

These ethical principles represent the standards of conduct that define the essentials of honorable behavior for the physician. Among other things, these principles call for:

- Respect for the law and a responsibility to seek change when existing law may be contrary to the best interests of the patient.
- Responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.
- Recognition that care of the patient is
- paramount. Support of access to medical care for all persons.

Our broken professional liability system threatens to disrupt the integrity of American health care by placing insurance premium rates beyond reach for so-called "high-risk" practitioners, limiting access to care, and hindering improvements in quality and patient safety. Important as it is to address the causes of medical errors, it is just as important to correct the deficiencies in the liability system that provides compensation for inadvertent consequences. Physicians' efforts to support these actions are appropriate, timely, and commensurate with the profession's highest ethical principles.

References

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