

Follow the money



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Motive is never part of a medical-malpractice plaintiffs' burden of proof. Why a doctor chose to perform a risky, expensive, but unnecessary, surgery is simply not an element of the cause of action. Which is not to say motive is irrelevant; far from it, particularly where greed is an issue. Patrick Malone, author of "Winning Medical Malpractice Cases," writes, for maximum jury appeal: Follow the money. In cases where financial incentives may have influenced clinical decisions and outcome, motive becomes very important. As Malone writes: Money-driven decisions are dangerous for patients. The American Medical Association (AMA) apparently agrees.

The AMA released a policy statement, "AMA Principles for Physician Employment." The policy is intended to provide guidance regarding the inherent conflicts of interest that arise when physicians reach employment and contractual agreements with hospitals, group practices and health-care groups. Employed physicians face challenges as they seek to protect professional, ethical and financial interests while maintaining the inviolability of the patient-physician relationship.

The guidelines reaffirm that a physician's first responsibility is to his or her patient but acknowledge that an employed physician also owes a duty of loyalty to his or her employer. This divided loyalty, the AMA writes, can create conflicts of interest such as financial incentives to over- or undertreat patients.

The AMA drafted its guidelines in response to increasing numbers of employed physicians. According to the American Hospital Association (AHA), between 2000 and 2010, the number of physicians employed by hospitals grew by 32 percent, to a total of 212,000. With the advent of federal policies in the Patient

Protection and Affordable Care Act, which encourage health-care organizations to purchase physician practices, it is reasonable to assume that the trend has accelerated.

Dr. Jerry Kennett of the American College of Cardiology recently told the *New York Times* that he was aware of cases where a hospital told its physicians not to implant defibrillators in Medicaid patients because its a money-losing proposition for the hospital. He also described cases in which hospitals told doctors they had to use the hospitals' laboratory and radiological services, even if they believed the patient would be better served elsewhere.

The AMA's proposed solution is a combination of aspirational statements and a call for disclosure. The new policy states that in situations where the economic or other interest of the employer conflicts with patient welfare, patient welfare must take priority. The policy states that physicians should always make treatment and referral decisions based on the patient's best interest and that patients should be informed when a hospital or other employer provides financial incentives that encourage, discourage or restrict referrals or treatment options. But can physicians be trusted to recognize conflicts and resolve them appropriately? According to an article in the *Journal of Law, Medicine and Ethics*, maybe not. The article describes a study in which researchers surveyed a group of physicians, a group of financial planners and a control group regarding the reasonableness of conflict of interest policies for their own and other professions.

The results revealed a strikingly consistent pattern of motivated bias for both physicians and financial planners. Both sets of professionals reacted negatively to policy provisions which applied to themselves but evaluated the same or similar provisions which applied to

another profession as perfectly reasonable. Zachariah Sharek, the lead author of the study, stated that the results suggest that people with vested interests are not only biased, but that they are not aware that they are biased.

There is no reason to believe that physicians and financial planners are unique in this regard, Sharek added, so it would be reasonable to assume that this pattern of decision-making influenced by subconscious factors would apply generally. Indeed, psychologists and jury consultants have been teaching for years that much of human decision-making, and juror decision-making in particular, is performed at a subconscious level. The AMA's conflict of interest guidelines can be distilled to one, overriding rule: A doctor should always put the patient's interests first. A smart trial lawyer will always seek to determine in every case how and why the defendant broke this rule.

Was the nursing home using CNAs or LPNs to cut costs? Did the hospital pressure health-care providers to perform a certain amount of procedures or see a certain number of patients per hour? Did the doctor fail to rule out a dangerous but rare condition in the differential diagnosis in favor of reaching for the more common and more time-efficient diagnosis?

A plaintiff does not have to answer any of these questions to prove a prima facie case and get to a jury, but a smart plaintiff lawyer will always try to do so. The medical facts and expert testimony are essential, to be sure, but the successful lawyer must strive to fit those facts into what Malone calls the values and belief framework that jurors walk in with. Persuasive evidence of financial motive, conscious or unconscious, will help integrate the medical facts with jurors' personal experiences. ■

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