



LEGAL BRIEFS

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Back to Basics: The Importance of Patient Respect

Patients' evaluation of the administration of anesthesia is more results-oriented than most any other facet of healthcare. Patients want to fall asleep, feel no pain, wake up safely, and return to their lives. However, fewer aspects of healthcare require a greater level of trust. There is an inherent vulnerability in allowing someone to take away your consciousness.

Recent events have reminded us that there are healthcare providers who are capable of abusing that trust.

According to media reports, newly filed court documents allege that a "doctor who denied taking snapshots of Joan Rivers in a clinic operating room did actually photograph the comic before her death."¹ According to those same news reports, the anesthesiologist noted in medical records that these pictures had been taken and is alleged to have informed Ms Rivers' family "that HIPAA [Health Information Portability and Accountability Act] laws may have been violated."

In another recent case, an anesthesiologist was ordered to pay the lion's share of a \$500,000 judgment for defamation, malpractice, and punitive damages resulting from inappropriate mocking of a sedated patient and falsifying medical records.² The underlying facts of that case involved ridiculing a rash on the unconscious patient's genitals, mocking his fear of needles, and issuing an apparently false diagnosis of hemorrhoids.

I have the honor of provid-

ing Certified Registered Nurse Anesthetists (CRNAs) and other healthcare professionals with substantial and substantive training regarding the challenges and risks of navigating a complex healthcare system, including the risks of healthcare fraud. It never, however, entered my mind to start by addressing common decency and respect for those patients to whom they provide care.

The American Association of Nurse Anesthetists (AANA) has always been a leader in advocating for the provision of high-quality care by qualified administrators of anesthesia. To that end, this article seeks to provide a gentle reminder of the importance of respecting your patients, with an accompaniment of the consequences for failing to do so.

What are the top 10 consequences for disrespecting your patients? Let's start with potential legal consequences.

Legal Consequences

Rest assured, if you engage in conduct of this type, you will be sued. Often. In many ways.

1. Malpractice. Medical malpractice is a lawsuit rooted in professional negligence. It often requires an act or omission by a healthcare provider in which the conduct (usually the treatment provided or withheld) falls below the accepted standard of practice in the community. The remaining component is damage—some injury or harm to the patient.

Conduct of this nature will invariably be deemed below the accepted standard of care in *any* community. Thus, the defense will be that the patient was not really harmed. This is not the "moral high ground" on which healthcare professionals should find themselves.

The quotation from one juror in the anesthesiologist patient-mocking case exemplifies how those issues are often (and practically) resolved: "We finally came to a conclusion that we have to [impose a penalty], just to make sure that this doesn't happen again."²

2. Defamation. Defamation involves making untrue statements about another that damage his or her reputation. How those statements are made (published, in legal terms) defines the offense. If they are printed or broadcast, it constitutes libel. If stated orally, it is slander.

In briefly analyzing the allegations contained in the recent patient-mocking case, it seems to me that the conduct of untrue statements disparaging the patient and suggesting the presence of communicable diseases certainly could constitute slander. The apparently false documentation in the patient's chart of hemorrhoids could rise to the level of libel.

Damages for such conduct can be enhanced by how widespread the publication of the defamatory information was. Consider if the documentation had been contained in an electronic medical record, which was submitted to the billing

department and then issued to the insurer. Each additional disclosure has the potential of increasing the damages for the aggrieved party and thus the exposure for the improper actor (person acting improperly).

3. Intentional Infliction of Emotional Distress. Intentional infliction of emotional distress can provide a basis for one person to seek damages from another. Generally, intentional infliction of emotional distress has 4 elements: (1) The conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) the victim must experience severe emotional distress; and (4) the conduct must be the cause of the severe emotional distress.

Inappropriate conduct in the operating room is going to appear almost per se reckless. CRNAs are there to ensure that the patient is safe and sedated, and survives (inasmuch as this is within the province of the anesthesia provider). Any healthcare professional will be hard pressed to argue that his or her focus was on the proper administration of healthcare if the professional were engaged in conduct that would be deemed inappropriate on any college campus. Photographing oneself and others or openly mocking an individual who is unconscious is sophomoric even for sophomores.

Professional Consequences

Let us now consider the professional consequences that could result from inappropriate behavior. I will not even mention getting fired because that is such an absolute guarantee that it does not merit inclusion in a top 10 list. Even business owners who engaged in this type of conduct should fire themselves. But worry not; the court of public opinion will likely resolve that issue.

4. Adverse Licensure Action.

Every state licensing body has provisions enabling it to discipline the professionals they are tasked with regulating for engaging in unpro-

fessional conduct. Addressed more fully below, when instances like this occur, they tend to become very public. The political, social, and media pressure for initiating an adverse action against the offender's professional license would be overwhelming. Often, for conduct like what has been recently revealed, it will be warranted and pursued.

The consequences for disciplinary action against one's professional license will, obviously, be dictated by the state agency involved. However, the potential consequences will often include censure, reprimand, suspension, or revocation of the professional license. Besides the immediate impact on the ability to practice one's chosen profession, it can affect the ability to participate in various healthcare programs, conduct research projects, receive grants, or obtain professional privileges.

5. Discipline From Certification Body and/or Professional Association. Had the conduct referenced earlier involved a CRNA, both the National Board of Certification & Recertification for Nurse Anesthetists (NBCRNA) and the AANA would have been hard pressed not to evaluate the potential for discipline.

If it is determined that a CRNA engaged in unprofessional behavior or unethical conduct, the NBCRNA's established procedures afford it the discretion to take appropriate disciplinary action.³ This can include revoking a nurse anesthetist's certification, recertification, and/or eligibility for future certification or recertification.

Similar powers rest with the AANA regarding an individual's membership in the AANA. The AANA Code of Ethics provides multiple examples wherein treating a patient with disrespect could yield potential discipline from the AANA. Consider the following sections from the *Code of Ethics for the Certified Registered Nurse Anesthetist*⁴:

Section 1.8 The CRNA does not exploit nor abuse his or her relationship of trust and confidence with the patient or the patient's dependence on the CRNA.
Section 3.2 The CRNA practices in accordance with the professional practice standards established by the profession.
Section 3.4 The CRNA is responsible and accountable for his or her conduct in maintaining the dignity and integrity of the profession.

I do not know if disciplinary action was taken against the physicians involved in these instances. However, media reports about the patient-mocking incident included comment from Dr J. P. Abenstein, president of the American Society of Anesthesiologists (ASA), who called the incident "very disappointing" while acknowledging that the guidelines of the American Medical Association and the ASA prohibit such behavior.⁵ It will be worth watching to see if the AMA or the ASA take any further action related to these incidents.

6. Health Insurance Portability and Accountability Act. In most cases, HIPAA provides coverage for what takes place in the operating room. However, that protection relates to the dissemination and exchange of information related to the *provision of care*. Mocking a patient's circumstances or conditions unrelated to the provision of care would not be afforded any such protection; nor is the dissemination of false information. Certainly, the taking of a photograph for nonmedical purposes and the potential for its dissemination raise concerns.

I am not aware of any circumstance in which the US Office for Civil Rights has initiated a case under HIPAA related to such conduct, but the potential certainly exists. It is not in the interest of any professional to be the basis for what would inevitably be a landmark case.

Real-World Practical Consequences

The consequences emanating from an incident like this will spill

beyond your employment and out of the courtrooms. It will affect your family. It will affect your friends. It will affect your finances, both current and future. It will affect you. And it is entirely avoidable. Having a bad day is allowed. It is human. It is understandable. Letting it follow you into the operating room or the procedure room is not. Taking it out on your patient is even less forgivable.

7. Public Stigma and Reputational Harm. The world in which we live has a fascination with other people's misfortune. There is a reason why national news broadcasts begin with a culling of the worst things to befall humanity since we went to sleep. Our society is fascinated with both travesty and tragedy. The only thing seemingly more appreciated is the overcoming of adversity (and, apparently, pictures of cats).

When incidents like this happen, they garner attention. If you treat a patient with monumental disrespect, the attention paid will be monumental. The world will know.

Even if you only offend a single person, as addressed in the next section, there are means for individuals to offer widespread accounting of their dissatisfaction that can have a lasting negative impact on you as a professional and as a person. It may not be a scarlet letter, but your career will never be the same. Your employability will be compromised. Your integrity will be marred.

Simply put, ask yourself if the anesthesiologist from Virginia who was recently held liable^{2,5} in the patient-mocking incident were to apply to your practice for a position. Would you feel comfortable tying your professional future to that individual?

8. Social Media Impact. There is this technology called the Internet, which has these contraptions called search engines. Apparently, it is harder than it used to be to keep your private missteps private. Depending on whom you mistreat

or how severe the mistreatment is, the impact could be global. How many CRNAs reading this article have fielded questions about the anesthesiologist in Virginia (who, media reports inform, has already relocated to Florida²) who was recorded by her patient?

Prospective employers are routinely using online information to evaluate potential employees. Social acquaintances might occasionally perform searches on each other (only out of a healthy degree of curiosity, of course). Individual patients have portals available to offer very candid and critical accounts of your professional capabilities.

Obviously, not everything reported on the Internet is true. However, consider the earlier discussion regarding defamation. One important component regarding an allegation of defamation is that truth is a defense. If you were to be disrespectful to a patient—and his or her accounting were true and accurate—it could preclude your efforts to recover from the patient if you felt the comments were defamatory. Moreover, the additional attention brought by a lawsuit generally undermines the goal of minimizing the exposure of alleged negative conduct.

Treating your patients with respect is a great way to avoid this and, interestingly, even a good way to receive positive accounts on social media.

9. Financial Impact. There is no value in dwelling on this, but these incidents cost money. There will be the loss of revenue if you lose your job or experience a decrease in business. It does not need to be mentioned, but every one of these lawsuits will likely include the need for a lawyer, and lawyers tend to cost money. Even if you are successful in defending the entirety of allegations and experience no fines, penalties, or punishment of any kind, you will still have the cost

(both financial and emotional) of defending the allegations. Moreover, people rarely remember the result but often remember the allegations.

My initial legal background and training came as a prosecutor. Depending on the facts, I see the potential for criminal charges to be filed under the right circumstances.

10. Possible Criminal Charges. Although criminal charges would not necessarily be likely, I would argue they could be a possibility, and even the potential provides an additional reason to conduct yourself properly. Every state has a “catch-all” law that allows the government to bring charges for unreasonable or outrageous behavior that is likely to cause a bigger problem. In Illinois, that charge is Disorderly Conduct, 720 ILCS 5/26-1.

This Illinois statute provides that “A person commits disorderly conduct when he or she knowingly: (a) Does any act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace”.⁶ In nonlegalese: When you engage in conduct that shocks the world around you and is likely to get you punched, we reserve the right to put you in time-out. As a society, we don't want to have to wait for the fight to happen.

Conclusion

The reason not to engage in conduct disrespectful of your patients has nothing to do with the consequences outlined in this article. It is rude. It is wrong. It is indefensible. It is unbecoming of any professional who administers anesthesia. A patient who requires the administration of anesthesia is being placed in an inherently defenseless position. He or she is forced to and should be able to trust you. It is your obligation to advocate for and protect your patients; anything less is unbecoming a CRNA.

Allowing improper conduct to occur will damage the respect that the CRNAs have worked incredi-

bly hard to obtain and from which the profession has benefited. It will also impair the future of CRNAs who depend on each other to act honorably. Most importantly, it will undermine the confidence that patients should have in CRNAs.

Anything you do on a daily basis has the potential of becoming routine. However, the uniqueness of anesthesia and the accompanying anxiety are real for patients and their families. There is no value in adding to their burden. It produces disappointment and yields anger. ABC News quoted Melissa Rivers regarding the treatment of her mother: “The level of medical mismanagement, incompetency, disrespect and outrageous behavior is shocking and frankly, almost incomprehensible. Not only did my mother deserve better, every patient deserves better. It is my goal to make sure that this kind of horrific medical treatment never happens to anyone again.”⁷

One of the lessons I have learned in my exposure to this exceptional profession is that there is inherent value to what is at the center of being a CRNA: your nature as a registered nurse. Never give that up. It will protect you, it will protect your patients, and it will inspire the confidence the public has (whether they

know it or not) in CRNAs.

When someone has already summarized an issue better than you ever could, it is best to leave it to that person. In *Watchful Care*, Ira Gunn reflected her belief “that the attitudes of compassion, protection, and support of patients fostered in schools of nursing are essential ingredients to the development of responsible, safe anesthetists.”⁸ Well said, Ira. Don’t take my word for it; take hers, and conduct yourselves accordingly.

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