

## **DOCTORS' LEGAL VERSUS ETHICAL OBLIGATIONS TO DISCLOSE MALPRACTICE TO PATIENTS\***

In order to put this subject in proper context, it is important to recognize that doctors' medical errors are not uncommon and often cause serious harm and injury to patients. According to the Institutes of Medicine Report, "To Err is Human; Building a Safer Health System" <sup>1</sup>, over one million preventable adverse events (medical errors) occur each year in the United States hospitals as a result of healthcare. Of these events, an estimated 100,000 caused patients serious harm, while between 44,000 and 98,000 led to death. According to this report, more people die annually in the United States from preventable medical errors than die in motor vehicle crashes, breast cancer or AIDS. This grim report shows how common it is for medical practitioners to make errors in their day-to-day clinical practice.

When errors occur, what should be the attitude of the medical profession? Should it be to withhold or conceal such information on the guise that "what they don't know can't hurt them"? Alternatively, should medical errors or medical malpractice be honestly disclosed to patients and appropriate measures taken to redress and prevent any such errors from recurring in the future? Do doctors have a legal duty to disclose medical errors that cause injury to patients versus an ethical and moral obligation to make timely disclosure? Although New York law currently does not impose a legal duty upon doctors to make such disclosure nor impose legal liability for mere concealment of malpractice there are compelling ethical and moral reasons to do so.

Let's first discuss the applicable law. This issue usually arises in cases in which the patient is suing for damages caused by both medical malpractice and fraudulent concealment of the malpractice and as an excuse and reason for dismissing the statute of limitations defense to the late filing of the action. In these cases, the courts have held that the practitioners' mere concealment of or failure to disclose the malpractice does not give rise to an independent cause of action in fraud. In order to be actionable, the fraudulent concealment of malpractice requires affirmative malpresentations by the doctor which were relied upon by the patient and causing damages distinct from those caused by the malpractice. See **Simcuski v. Saeli, 44 N.Y. 2<sup>nd</sup> 442 (Ct. of Appeals**

**1978).** The patient must also prove due diligence in commencing the action within a reasonable time after learning of the malpractice and fraudulent concealment. The fraud claim requires proof by clear and convincing evidence. If proven, the statute of limitations for fraud is six years as opposed to the shorter 2 and ½ years generally for medical malpractice claims.

So, for example let's discuss the **Simcuski** case where the doctor in surgically removing a mass on the patient's neck negligently severs the spinal accessory nerve causing serious injury. However, the doctor intentionally doesn't disclose this error to the patient. Instead, when the patient subsequently complains to the doctor about loss of sensation and movement in the neck, shoulder and arm he lies and informs the patient that this is only a temporary problem requiring physical therapy treatments and will ultimately resolve. The patient after undergoing the recommended PT without improvement learns from another practitioner after the expiration of the statute of limitations that he suffered a severed spinal accessory nerve during the initial surgery causing permanent injury and disability. That had this severed nerve been timely disclosed and surgically repaired he had a good chance for a complete recovery. Within a few months after discovering the malpractice and the doctor's deceit but after the statute of limitations has expired the patient brings an action against the surgeon for fraud and medical malpractice causing permanent injuries. The doctor's defense is that the medical malpractice statute of limitations has expired. In this case the patient has set forth valid claims for malpractice and fraudulent concealment of the malpractice which he relied upon to his detriment in following the doctor's advice and going for PT resulting in permanent injury by depriving the patient of timely surgical repair and lost chance for a full recovery. Further, since the patient exercised due diligence in bringing the action shortly after discovery, the statute of limitations defense was dismissed. **Simcuski, supra.**

Now let's discuss the doctors' ethical obligations to timely disclose medical errors to patients under similar circumstances. In reality most doctors and hospitals choose not to disclose malpractice or medical errors to patients. Rather, they engage in extensive coverups under the guise of protecting the doctor-patient relationship and not causing harm to patients. However, it can be strongly argued that medical practitioners and institutions non-disclosure of medical errors is an egregious violation of ethical principles. By not disclosing

medical errors the medical provider has chosen to place their self-interest ahead of the patient's interest thereby violating a patient-centered ethic. Hospitals and institutions encourage the cover up of errors by choosing not to implement policies and guidelines providing for disclosure of errors and properly train staff on how to make disclosures. Instead, institutions should focus on fostering disclosure and the study of root causes of medical errors which is critically important to prevention of future errors and improve patient safety protocols and practices.

The truth is that doctors enjoy a special confidential relationship of trust and fidelity with their patients. This is akin to a fiduciary relationship, "one who owes to another the duties of good faith, trust, confidence and candor."<sup>2</sup> The basic maxim incorporated in the Hippocratic oath required of practitioners' states *Primum non nocere*: "Above all (or first) do no harm ". Consequently, a medical error threatens the very foundation upon which doctors practice. The American Medical Association Principles of Medical Ethics states, "A doctor shall....be honest in all professional interactions."<sup>3</sup> Moreover, when "a patient suffers significant medical complications that may have resulted from a doctor's mistake... the doctor is ethically required to inform the patient of the facts necessary to ensure understanding of what has occurred."<sup>4</sup> Thus, a doctor is ethically bound to admit medical errors to the patient. In plain English, this is the right thing to do. This is also part and parcel of the patient's right to be kept informed of his/her medical condition and all treatment options.

The overriding principle of justice dictates disclosure of medical errors to ensure fair and just compensation to patients. At the heart of non-disclosure is deception motivated by self-interest and avoiding accountability. Timely disclosure of preventable errors will help patients obtain fair and just compensation for their injuries, harms and losses. Concerns about patient distress should not be used as an excuse not to make disclosure. In fact, concealment may act to compound the original medical error by forcing patients to suffer additional emotional and psychological distress and anger when subsequently learning that their injuries were preventable and their doctor choose not to disclose the error. By the doctor being truthful in making timely and full disclosure litigation may be avoidable as patients will likely welcome the

doctor's honesty, prompt corrective treatment to avoid further injury and good faith opportunity to resolve their claims at an early stage.

## **CONCLUSION**

Although moral obligations do not impose a legal duty on the doctor to disclose medical errors, the medical profession, institutions and insurers must recognize and accept their responsibility to enforce timely disclosure to patients of preventable medical errors that cause serious injuries. Excuses that nondisclosure protects patients from unwanted distress is false. The opposite is more likely true. Disclosure upholds the fundamental basis of the fiduciary doctor- patient relationship. Patients have a right to know the truth from their doctors. Doctors have no moral right to place their own self-interest above the patient's interest. Moreover, it can be argued that failure to disclose causes a double jeopardy to patients by delivering substandard care in the first instance and concealing the error may deprive the aggrieved party of fair and just compensation for their injuries which they are entitled to receive. In sum, the doctor's oath to patients "Above all do no Harm "should also encompass "disclose all harm."

If you have experienced a serious injury at the hands of medical providers call our experienced team at Duffy & Duffy, PLLC 516-394-4200 for a free initial consultation with one of our attorneys or staff. We are dedicated to protecting your rights and holding wrongdoers accountable for injuries, harms and losses suffered by negligent or substandard medical care and treatment.

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- 1. 1. Kohn LT, Corrigan JM, Donaldson MS, editors. To Err is Human: Building a Safer Health System. Washington, DC: National Academy Press; 2000. [Google Scholar]**
- 2. Rich B. Strange Bedfellows: How Medical Jurisprudence Has Influenced Medical Ethics and Medical Practice. New York: Kluwer Academic / Plenum Publishers; 2001. p. 50. [Google Scholar]**
- 3. American Medical Association, author. [April 26, 2007]; Principles of Medical Ethics. <http://www.amaassn.org/ama/pub/category/2512.html>.**
- 4. AMA Council on Ethical and Judicial Affairs and Southern Illinois University School of Law, author. Code of Medical Ethics, Annotated Current Opinions. Chicago, Ill: AMA; 1994. [Google Scholar]**