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Could Humor in Health Care Become Malpractice?

Scott J. Schweikart, JD, MBE

Abstract

Humor in the practice of medicine carries with it both benefits and inherent risks. Included within the risks are legal risks. Traditional causes of action involving the use of humor are breach of contract, defamation, trademark infringement, harassment or hostile work environment, and intentional or negligent infliction of emotional distress. However, in the medical context, there is precedent for humor or jokes used during the patient-physician encounter serving as a basis for medical malpractice claims as well. Physicians should be aware of the potential legal liabilities of humor and approach its use with caution and mindfulness.

Introduction

Medical research underscores the value of humor in the practice of medicine—specifically, the use of humor between physician and patient. In the medical practice setting, the value of humor is recognized both for patients—“as a coping mechanism to reduce the anxiety and frustration associated with being in the hospital”—and for physicians—as a tool to “deal with the stress of caring for patients who are in pain” while also helping to foster “good working relationships among colleagues.”¹ Despite these benefits, using humor in medical practice has real risks. From a legal standpoint, the risks of humor may manifest in the form of legal action or liability. Traditional forms of legal liability associated with jokes or humor are breach of contract (eg, was a statement a joke or a promise?), defamation, harassment (eg, sexual harassment or hostile work environment claims), trademark infringement cases (eg, parody of a protected mark), or intentional or negligent infliction of emotional distress.² In the medical context, another potential legal action remains possible: medical malpractice. Jokes or humor as the basis of a medical malpractice claim may seem, at first glance, to be outside the purview of what constitutes **medical malpractice**, as a claim must necessarily involve conduct stemming from the practice of medicine itself.³ Can humor or jokes ever be considered part of the practice of medicine? The answer is debatable and without a simple answer that covers all scenarios. However, there is legal precedent suggesting that, in certain instances, humor or jokes may be within the scope of medical practice and might be used to support medical malpractice claims. Such precedent is a reminder to physicians of the risks associated with using humor and that, depending on the

circumstances, a joke has potential to become the basis of a medical malpractice claim—pushing the legal risk of humor into a sphere beyond traditional legal claims.

Traditional Legal Risks Associated With Humor

As noted above, legal risk associated with jokes and humor has traditionally taken the form of legal claims, such as breach of contract, defamation, trademark dilution or infringement, harassment, and infliction of emotional distress. Regulation of humor by law—as these causes of action allow—is a complicated and controversial subject. As Laura Little notes, “regulation of expression risks muting outlying values and tastes, which society might beneficially evaluate and debate.”² Note that these causes of action are ones for which all members of society share risk of liability, not only medical professionals. However, while none of these claims are medically oriented in a general sense, physicians should still be mindful of them because—depending on the clinical situation involving humor between physician and patient—any of these claims may be possible in the medical context.

Breach of contract. With regard to humor, a breach of contract claim may arise from a dispute about whether a joke or jesting by one party was taken as a serious offer or acceptance by another party in order to establish an enforceable contract.³ A famous example was a Pepsi promotional campaign wherein consumers could redeem gifts by collecting Pepsi Points. The advertising campaign featured a teenager winning a Harrier fighter jet by amassing 7 million Pepsi Points. A lawsuit emerged when a plaintiff accumulated 7 million points and demanded a Harrier jet.² The debate centered on whether the advertisement was a “joke” or whether it was a valid offer to win a Harrier jet; the court ultimately found in favor of Pepsi, deeming the advertisement as humor and not a valid contractual offer.² However, a joke may sometimes form a contract; a Virginia court once held a “comedic exchange” of a contractual nature to be enforceable, as it found “persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter.”⁴

Defamation. Defamation is another cause of action often associated with humor or jokes. In US common law, a defamatory statement is one that harms the reputation of another; key elements of the claim are that the statement at issue be both defamatory and false.⁵ When evaluating the actionable defamatory nature of a humorous statement, the requirement of falsity brings complexity to the analysis. As Little notes, humor or jokes do “not fit easily into the paradigm of truth and falsity. Humor is by definition not ‘serious,’ thus suggesting that it operates outside the realm of anything one could verify.”⁵ There is recent precedent for **defamation liability** in the medical context, as occurred in *D.B. vs Ingham*, in which a Virginia anesthesiologist made disparaging and untrue statements about her patient undergoing a colonoscopy while he was under anesthesia.⁶ These remarks may have been intended to be jokes between colleagues; however, a jury awarded the patient a six-figure award for his defamation claim against the physician.⁶

Trademark infringement. Trademark cases are also relevant because humor, like parody, may be a defense against a claim of trademark infringement. Little notes that such claims are “designed to protect against harm both to consumers who may be misled into buying something they did not expect and to trademark owners who are deprived of sales.”² She adds that with regard to “a true parody, an infringement cause of action will not succeed,” as consumers would understand the alleged infringement is

merely parody and “would not likely confuse the protected product with the challenged product or communication [ie, the parody or joke].”²

Harassment or hostile work environment. Harassment and hostile work environment claims are particularly relevant in society, as there is greater recognition and awareness of these claims. There are many cases in which jokes, banter, and humor in the workplace amounted to legally cognizable claims of harassment or of a hostile work environment. As Robert Gregg notes, jokes in the workplace about “race, sex age, ethnicity, religion” are risky and generally “not appropriate.”⁷ Mindfully approaching such risks, Daniel Sokol recommends that physicians ask themselves before making any such jokes or banter in the workplace (either with patients or other colleagues): “‘Would a reasonable, impartial observer consider this remark to be inappropriate?’ If the question cannot be answered with conviction, it is best not to crystallise the potentially offensive thought into words.”⁸

Intentional or negligent infliction of emotional distress. The common law tort of infliction of emotional distress (either intentional or negligent), consists of 4 elements, summarized by Constance Anastopoulos and Daniel Crooks as “(1) intentional or reckless conduct that is (2) outrageous in nature, beyond the bounds of human decency, and intolerable in a civilized community, and that (3) causes emotional distress that is (4) severe such that no one should be expected to endure it.”⁹ In the context of humor and jokes, Richard Bernstein notes that “[c]ourts have already held that derisive humor, parody, unorthodox religious doctrine, and abhorrent political ideas can be found extreme and outrageous” and that “[j]udges and juries will be more likely to find the joke extreme and outrageous and impose liability when they find the speaker’s underlying point of view objectionable.”¹⁰ *Abadie vs Riddle Memorial Hospital*, a Pennsylvania case, provides an example of an emotional distress claim arising in the context of humor and medicine, wherein a patient (Abadie) sued a hospital (Riddle) for intentional infliction of emotional distress when the patient was distressed by hospital employees’ loud and disruptive birthday celebration that included noisy laughter, vulgar language, and a hired stripper in a gorilla costume—all of which may have been humorous to hospital employees but were offensive to the patient.¹¹ Although the hospital ultimately prevailed in the case because the plaintiff did not allege any physical injury (Pennsylvania requires an allegation and finding of physical injury to prevail on a claim of emotional distress),¹¹ the case still serves as a cautionary reminder for medical professionals that jokes between colleagues may also cause emotional distress to patients.

Humor and Malpractice

While physicians (and all members of society) must be mindful of the traditional legal risks of humor outlined above, it is possible that a physician’s use of humor could give rise to a medical malpractice claim. When analyzing whether humor could be part of a medical malpractice claim, it is important first to understand the elements of the claim. The common law elements of medical malpractice are as follows: “(1) the existence of a duty running from the physician to the injured party; (2) the physician’s breach of this duty; (3) an injury to the patient that is proximately caused by the doctor’s breach of duty; and (4) damages arising from the injury.”¹² Essential to the physician’s duty to the patient is that the physician “use reasonable skill in his or her professional practice,” thus requiring that “any negligence for medical malpractice must necessarily arise out of the practice of medicine and the physician’s treatment of the patient.”³ The key question then becomes what constitutes the practice of medicine such that it legally

falls within the scope of the physician's duty to the patient in a medical malpractice claim. For example, a "doctor's sexual relationship with the patient's spouse" would not allow for a valid claim of malpractice, as such conduct falls outside the practice of medicine.³

It may appear controversial to consider humor coming under the scope of what constitutes the practice of medicine, but there is some precedent for the notion and for allowing such a medical malpractice claim to be possible. *D.B. vs Ingham* is a prime example. In that case, as mentioned above, the patient (D.B.) was undergoing a colonoscopy and the anesthesiologist (Ingham) made several severely insulting comments about the patient to the gastroenterologist she was working with.⁶ Ingham's statements regarding D.B. were vitriolic, mean-spirited, and extreme; she insulted the patient repeatedly and made false allegations about his sexual orientation and the presence of hemorrhoids. The jury found in favor of the plaintiff and awarded him 2 six-figure awards (along with punitive damages)—one award for a claim of defamation and the other for medical malpractice, presumably because such "jokes" between treating physicians were closely attuned enough to the patient's medical procedure to be considered within the scope of practice for medical malpractice purposes.⁶

Another example of malpractice involving humor is the Washington State Supreme Court case, *Woo vs Fireman's Fund Insurance Co.*¹³ While this case is technically one of insurance contract law, it has persuasive relevance for medical malpractice regarding what constitutes professional practice. In *Woo*, a surgical dentist (Woo) is suing his insurance carrier (Fireman's) for failing to defend him against a professional malpractice claim. The malpractice case arose because Woo, during a dental surgical procedure, placed boar tusk flippers in the patient's mouth as a "practical joke" at the patient's expense. Fireman's argued that it should not defend Woo, as such a "joke" clearly falls outside what constitutes the practice of dentistry under the policy. However, the Washington State Supreme Court concluded that "Fireman's had a duty to defend under Woo's professional liability provision because the insertion of boar tusk flippers in Alberts' [the patient's] mouth conceivably fell within the policy's broad definition of the practice of dentistry," reasoning that the "acts that comprised the practical joke were integrated into and inseparable from the overall procedure."¹³ While this holding is technically an interpretation of the insurance contract, it clearly demonstrates the Washington State Supreme Court's willingness to view such a practical joke as within the scope of professional practice.

However, there is reasonable debate over whether a medical practitioner's joke may validly fall within professional practice. For example, the dissent in *Woo* made a strong argument against the notion of including jokes within the scope of medical practice. The dissenting opinion—drawing a distinction between the joke and dental practice—explained that "the actionable behavior [of Woo] was the unauthorized porcine 'joke,' not the eventual and separate proper replacement of Ms. Alberts' [the patient's] teeth," concluding that "Woo was not practicing dentistry" while conducting his practical joke and that the joke itself "was not intended to treat any 'disease, pain, injury, deficiency, deformity, or physical condition.'"¹³ The dissent in *Woo* demonstrates the controversial nature of allowing jokes or humor to be part of the basis of a medical malpractice claim, and, while not all instances of jokes involved in the practice of medicine may allow for a malpractice claim, practitioners should be mindful that, depending on the facts, potential for such liability exists.

Conclusion

The above discussion serves as a cautionary reminder to physicians and other health care practitioners that jokes or humor in medicine can carry legal risks. While some legal risks may be obvious (eg, sexual harassment claims), some legal risks are not so intuitive. One notable example is that of medical malpractice in which a joke may indeed be deemed within the scope of the practice of medicine and give rise to a claim of malpractice in the right set of circumstances.

While considering these legal risks, it is important to remember that humor in medicine can have noteworthy positive and **therapeutic benefits** for the physician, patient, and the patient-physician relationship.^{14,15} Jeffrey Berger et al note that “careful use of humor can humanize and strengthen physician-patient encounters” but that physicians “should be assiduously conservative in selecting the content and manner of humor.”¹⁵ Caution and mindfulness are key when employing humor in the physician-patient encounter. As May McCreddie and Sheila Payne note, while initiating humor in the practice of medicine is a risk, it may just be “a risk worth taking.”¹⁶

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Scott J. Schweikart, JD, MBE is a senior research associate for the American Medical Association Council on Ethical and Judicial Affairs in Chicago, Illinois, where he is also the legal editor for the *AMA Journal of Ethics*. Previously, he worked as an attorney

editor and reference attorney at Thomson Reuters and practiced law in Chicago. Mr Schweikart earned his MBE from the University of Pennsylvania, his JD from Case Western Reserve University, and his BA from Washington University in St Louis. He has research interests in health law, health policy, and bioethics.

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