



Tiptoeing Through the Legal Tulips — Our Collective Character

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Hope does not lie in a way out, but in a way through.

— Robert Frost

The article by Robert Ramsey, Esq. provides a backdrop to the legal stage upon which clinical practitioners in various facets of healthcare delivery must perform.

The activities of the Federal Trade Commission (FTC) and the Department of Justice liberalizing antitrust guidelines, rules of Medicare and Medicaid Programs and the myriad other rules and regulations applicable to the relationships and structures being formed between and among healthcare providers and institutions make for a complex and challenging environment in which to do business as healthcare professionals — or do they?

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In the last several decades there have been numerous changes in legal policy governing the way clinicians can work together in an increasingly commercially conscious environment. In the past, physicians have been somewhat insulated from commercial pressures, conflicts of interests and trade regulations by their professional norms — norms that allow for self-regulation and norms that recognized that individuals seeking medical care were not ordinary “consumers”. It was the professional associations that espoused professional ethics, that prevented fee splitting, self-referral, advertising, ownership of pharmacies by physicians and made strong statements about licensing and credentialing. These self-imposed norms were an attempt to separate financial considerations from what was viewed as the essence of medical practice, namely, placing the interest of the patient above the interest of the individual practitioner (patient advocacy). Granted, it was an imperfect arrangement that had the effect of restraining some competition which could buffer reduced physician income. Indeed, some physicians undoubtedly took advantage of opportunities to side-step self-regulation issues and violated professional

ethics. However, as we entered into an era of extreme cost consciousness and commoditization of medicine this gave rise to a new operational motif which tended to view the patient as a standard "consumer". Realistically, in our business environment, it has been the employers who have been the customers of the payors and the patients have, all too frequently, found themselves as pawns or passive observers in the restructuring of payment mechanisms.

The backlash against HMOs and other managed care structures results from a perceived rush to focus on controlling cost at the expense of the patient (the ultimate consumer of healthcare). The hoard of middlemen attracted to healthcare, acting as purchasing agents for *consumers* in procuring physician services, and hospital services have been successful in reducing the escalation of costs, for now, and have successfully redistributed a significant amount of finances to private and corporate coffers.

When analyzed critically, the current outcry against various abuses of some forms of managed care are a result of perceived denials of necessary medical treatment and incentivizing physicians to place their own economic interest before those of patients. Make no mistake, there have been abuses of the system prior to managed care and there were real financial conflicts, but a reasonably functioning professional ethic allowed for reasonable protection of the patient, especially in life-threatening situations and clinical scenarios where precise treatment courses and outcomes were often unclear.

The legal constructs which have come into existence provide an attempt to level a playing field. In many respects, the mounting legislative dictums and legal regulations are a less than subtle sign of what happens when you attempt to commoditize medicine. The application of supply and demand algorithms and the application of pure market forces proves difficult when you need to factor in such things as physician-patient relationships, expertise, and complex science and physiology. Please don't misunderstand, that is not to say it does not need oversight.

However, there are larger issues at stake. The tiptoeing we are doing really is about more than business. It is about ethics and our collective character. Moral lessons become instilled early and throughout our professional lives. Each profession, especially medicine, has taken great pains to evolve its code of ethics. It is a fact that all professional ethical codes and especially the medical

ethical code, are fragile structures. Moral reasoning based on defective premises occur in many settings. The idea that alignment of incentives is strictly a financial scenario should be challenged. The integrity of medical ethics needs to be valued by society, not as a protection for physicians, but because it is a buffer against the use of powerful medical knowledge for purposes other than the good of the sick and those who seek our care. The risk is that medicine will become the driving force for economic and political ends other than what it is meant to be, namely an instrument to protect and service the suffering and those entrusted to our care. Medicine that is legislated, manipulated, focused inappropriately loses its purpose, soul, and appeal. Cognizant of our need for legal analysis and guidance in our complex environment, a united, vocal and properly focused profession exerts a necessary collective character and a moral power which eventually is supported and is successful.

History bears witness to examples where ethics were felt to be subordinated to laws and demands of the times, where "rationale" decisions were made for the benefit of the many at the expense of the few. These lessons need to be remembered and more importantly it must be learned that, ethically speaking, some things should never be done irrespective of what the law may or may not permit. It is the collective character of a profession, which ultimately provides the moral boundaries within which we toil daily. Laws come and laws go.

It takes twenty years to build a reputation and five minutes to ruin it.

If you think about that, you will do things differently.

—Warren Buffett

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