

Technology in Medicine — Rose or Thorn

by Max Wright, JD

Max Wright, JD, is a Midland, Texas, attorney with a practice focused on the professional liability defense of physicians and hospitals. He is chairman of the Texas Association of Defense Counsel medical malpractice substantive law committee.

In a corner of the garden grew beautiful roses, and their delightful fragrance healed the soul and soothed the spirit. But these roses also had deadly thorns. . .

If a physician of the 1950s wandered into a hospital today, he would stand awestruck in the radiology department, looking at CT scanners and MRI machines. His amazement would be no less in the hospital laboratory, and his sense of wonder would be even greater as he toured a critical care unit, with its monitors flashing instantly available layers of information. Today's physician can quickly gather more information about a patient than that physician from forty years ago could have ever imagined. Who then would have dreamed of the advances in the treatment of cancer, the manipulation of human genes to produce some modern therapies, the use of lasers in surgery, and countless other advances in medical technology? Computers now put the resources of the whole world at the fingertips of every physician.

Does all of the marvelous medical technology available today have a dark side, the potential to negatively impact the human spirit? Can technology have an adverse effect on a physician's relationship with patients? Can it raise patient expectations unreasonably?

Physicians would do well to explain to patients the technology

to be used and how it will be used. When faced with complex health care issues, most Americans probably do not fully understand what they are told by physicians

not necessarily widespread. In the medical arena, patients being treated with the latest medical technology expect perfection, an expectation that is driven in part by patient



and have little concept of the role of medical judgment in diagnosis and treatment. They do understand, however, that computers have changed almost everything about their lives. This, in turn, has conveyed the perception that computers don't make mistakes; mistakes are made by humans. We know, of course, that computers are only as good as the humans who design them, program them and input data, but that perception is

awareness of the cost of such technology. They believe that any new and costly piece of equipment should be able to come up with all of the right answers, whereas, in fact, most technology only produces data, and that data, whether contained in laboratory reports, radiographic studies or in any other form, must still be interpreted by a physician.

Continued on page

Technology in Medicine (continued)

It is important that physicians communicate to patients the limitations of technology and the role that the physician plays. Physicians need to pay attention to the way things are said as well as what is said; both transmit information to the patient. When a physician says to a patient, “Your MRI shows . . . ,” the physician makes technology the master diagnostician. Perhaps a better way of introducing the same information might be, “The radiologist and I have reviewed your MRI films, and in our opinion, . . .” This communication emphasizes the interpretation of the data.

Technology should not build a wall between the physician and the patient. Face-to-face communication with patients is one of the most important aspects of medical practice. Patients want the

physician’s time, attention and touch. They want to know that their doctor cares about them as persons, not as cases. The information the physician gains from technology may be just as important as information gained by examining and listening to the patient, but from the patient’s perspective, face-to-face time with the physician is far more important. A physician may spend thirty minutes discussing an MRI with a radiologist and then spend five minutes telling the patient the result. To the patient, that counts as five minutes, not thirty-five. Patients may be frightened by modern medical technology, and the time that a terrified patient spends in an MRI machine, separated from human contact and listening to the magnets banging around his head, is not time for which the physician will be given

credit by that patient. The procedure will yield important information, and from the physician’s perspective, the time spent in the MRI is valuable healthcare time. Both perspectives are valid, and a physician ignores the patient’s perspective at his or her own potential peril.

Patients particularly need to understand that the use of the technology does not guarantee a perfect result. It is also important for physicians to remember that computers are not perfect and to avoid over-reliance on new technology. Medicine has always been as much art as it is science. The art should be practiced, studied and nurtured by physicians together with the science so that the value of both is continually communicated and demonstrated to patients in every patient encounter.

HIV/STD Reporting Changes

Starting January 1, 1999, Texas laboratories and health care providers began reporting confirmed cases of HIV infection by name to the local surveillance authority. Name-based HIV reporting is the most significant of the reporting changes approved by the Texas Board of Health for certain common sexually transmitted diseases (STDs). The Texas Department of Health (TDH) implemented these changes January 1, 1999.

Reporting requirements were changed for HIV, AIDS, chancroid, Chlamydia trachomatis infection,

gonorrhea, and syphilis. Other key provisions remove the definitions of HIV and AIDS from the general communicable disease definition section of the law to eliminate redundancy, consistently define STD to include HIV and AIDS, and consistently list all the reportable STDs together. Definitions of HIV, AIDS and STDs were amended to be consistent with those used by the Centers for Disease Control and Prevention (CDC).

People who do not want to have their real names placed on their HIV tests can be tested anonymously.

TDH is committed to making this option available in all areas of the state. The names of persons who test positive with anonymous tests will not be reported. However, most HIV service providers require a confidential positive test result — one with the client’s real name — before they will provide services. Anyone can call (800) 299-AIDS to find out the closest location where anonymous HIV testing is available.

To report cases, providers can call (800) 705-8868, which automatically connects the caller to the proper health authority.

This is the second in a 3-part series on Y2K compliance for the medical office

Y2K: The Big Three

It's everywhere. Y2K countdown clocks are on the store shelves beside Y2K baseball caps and Y2K tee shirts. On an almost daily basis, newspapers report Y2K compliance or the lack of it. We all know that the Year 2000 will follow the Year 1999, and we all know that computer problems may occur when it does. Attorneys agree that "I didn't know about Y2K," will not be a plausible defense in the face of a professional liability claim arising from Y2K computer or equipment problems.

From a liability standpoint, there are three big areas of Y2K concern in a medical practice:

1. Medical equipment used in your office (which may contain a computer chip),
2. Computer hardware and software used in your office, and
3. Computer networks linked to your office computer(s) (including local and wide area networks, client server systems and mainframe systems).

Once you have accounted for these in your practice and prioritized them, a legal audit of all the information you have available about "the big three" is recommended. Look at warranties, contracts, sales agreements, maintenance agreements and upgrade notices, possibly with the help of an attorney. What do these documents say about Y2K compliance? More important, what do they not say? Keep copies of all relevant documents.

If there is any question about Y2K compliance, contact the supplier and/or manufacturers with a standardized letter, requesting the following information:

1. Definition of compliance
2. Testing methods
3. Test results
4. Potential effect of Y2K date change.

Samples of standardized letters have been mailed to all TMLT insured physicians as attachments to an Important Announcement Concerning the Year 2000 Problem. Additional copies are available from the TMLT Risk Management Department by calling Shanna Homann at (800) 580-8658, ext. 5910.

If certification of Y2K compliance is not available, consider testing for Y2K compliance. For assistance in testing, you may wish to contact ECRI, a non-profit health services research agency, at (610) 825-6000. Testing is often a very complicated process, but in some situations, it may be the only option available. Testing should not be undertaken lightly because it may permanently damage equipment and void any applicable warranties.

careful consideration. If partially Y2K compliant equipment does not present a risk to patients and does not pose an unreasonable burden to the practice, the following measures are suggested:

1. Document what the manufacturer reported to you about the defect. Note that the equipment was tested and found to have a known defect. Explain the defect. Attach the manufacturer's letter.
2. Document what the manufacturer reported about the effect of the defect. Do not guarantee that the equipment will function correctly.
3. Describe what you will do to compensate for the defect, e.g., technician will cross out the incorrect date and write the correct date in ink.

Documentation of your attention to "the big three" in the light of Y2K compliance may be what stands between you and a lawsuit and/or

"Patient safety is the primary reason for taking action, but good risk management dictates repair or replacement of Y2K non-compliant 'big three' items as a means of avoiding needless litigation."

When necessary and appropriate, make repairs or purchase replacements. Patient safety is the primary reason for taking action, but good risk management dictates repair or replacement of Y2K non-compliant "big three" items as means of avoiding needless litigation. Equipment that is partially Y2K compliant requires

what demonstrates your due diligence regarding Y2K matters. As those countdown clocks keep counting, physicians would do well to focus their attention on preparing for the impact of Y2K on "the big three" in their practices.



TEXAS MEDICAL LIABILITY TRUST

P.O. Box 160140

Austin, TX • 78716-0140

Tel: 800-580-8658 or 512-425-5800

Fax: 512-328-5637

E-mail: scott-berglund@tmlt.org

URL: www.tmlt.org

Editor: Scott R. Berglund

Managing Editor: Judith H. Fine, RN, MSN

Staff: Natalie Gilmore

Graphic Design: Laura Hale

© 1999 TMLT

May/June, 1999

Printed on recycled paper

Bulk Rate
U.S. Postage
PAID
Permit No. 90
Austin, Texas

All articles and any forms, checklists, guidelines and materials are for general information only, and should not be used or referred to as primary legal sources nor construed as establishing medical standards of care. They are intended as resources to be selectively used and always adapted — with the advice of the organization's attorney — to meet state, local, individual organizations and department needs or requirements. The Reporter is distributed with the understanding that neither Texas Medical Liability Trust's Risk Management Department nor Texas Medical Liability Trust is engaged in rendering legal services.

Inside INSURANCE

Does your carrier need your consent to settle a claim?

by Lou Pantermuehl, TMLT Senior Underwriter

When your insurance carrier has investigated a claim against you and deems it necessary to make a monetary payment in order to settle the claim, do they ask for your consent? Can they settle the claim without your consent? The TMLT professional liability policy stipulates that “the Trust shall not settle any claim or lawsuit without first obtaining the consent of the Named Insured.”

Not all writers of malpractice in our state put a similar provision in their policies. Some are silent on the issue, while some others stipulate that they retain the power to settle a claim as they deem necessary. In some cases, a company may demand that the policyholder agree to a settlement offer within five days or be forced into expedited mediation to resolve the “consent to settle”

issue. How would you feel about being placed under such pressure? Worse still, some policies contain a “hammer clause,” stating that if you refuse a recommended settlement, the insurance company will pay no more than the dollar amount of the recommended settlement, leaving you to pay any judgement in excess of that amount.

Professional Liability coverage is a promise to perform at a later date should a claim arise. How a company performs at this critical time is the crucial, and many times hard to determine, factor. Experience, commitment, responsible and fair pricing and knowledge of the local legal arena are good indications of how a company will perform in the future.

We at TMLT are very proud of our performance record in dealing

with claims. We have earned a reputation as a vigorous defender of claims and lawsuits involving our policyholders, and we do not settle claims without a policyholder's consent. A claims professional will personally oversee your case, providing you with information concerning the claim process and will regularly analyze, evaluate and, when indicated, negotiate on your behalf. We have established a strong monitoring system to oversee legal defense during the entire life of a case, and we utilize the most qualified defense law firms in the state for policyholder defense. Our track record of success in the courtroom was over 88 percent for 1998, and we closed almost 86 percent of our cases with no indemnity payment.