

# Issues in Surgical Ethics

## Physicians judging medical negligence: A conflict of values

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### Physicians judging medical negligence: CME objectives

The learning objectives provided by this ethical challenge deal with the conflict encountered when a physician has the opportunity/obligation to participate in the legal system, specifically, the conflict of values that occurs when asked to serve on the jury in a case involving medical negligence, including (1) The time commitment which takes you away from patient care; (2) The obligation to fulfill your civic duty; (3) The conflict that will arise by siding with the plaintiff against another physician; (4) The restriction by the judge from using your reliable outside sources of information to better understand the details of the medical situation; (5) The undue influence a physician may have over the other members of the jury; and (6) The increased understanding and increased interest in further participation in the legal system once you better understand how it works and how it can ultimately improve patient care.



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## THE CASE

You, as a general surgeon, fulfill your civic duty by responding to a summons to serve on a petit jury. While in *voir dire*, or the interrogatory phase of jury selection, you find out that the case being tried is to evaluate possible medical negligence. To provide further background for jury elimination, the plaintiff's attorney reveals that his client is a woman who, a few weeks after a normal pregnancy and delivery, sought her obstetrician, desiring contraception. The woman and her obstetrician decided on an intrauterine contraceptive device (IUD), and through a series of events to be explored in trial, the plaintiff was later diagnosed with twin pregnancy and IUD *in situ*. She eventually lost her twin pregnancy in the early second trimester. If selected to serve on this jury, your goal will be to determine whether the placement of the IUD was negligent and whether that act resulted in, or significantly contributed to, the loss of the pregnancy.

The attorney asks you, "As a physician, will you automatically side with the defendant physician?" You answer, "No." The attorney then asks, "Do you think that you are able to fairly judge this case only by the evidence presented herein, and if you find that the defendant's actions were negligent thereby resulting in harm, will you find for the plaintiff?"

You have the following options before you:

1. "No." You will try to excuse yourself from this case.
2. "Yes." If you end up on the jury, you will assess evidence to the best of your ability, and based on the testimony, you will undoubtedly produce a verdict.
3. "Yes." You agree with this statement; however, you are not sure that you can come to a verdict because the area examined is not your specialty.
4. "Yes." You wish to be on the jury because as a physician, you are better able evaluate medical evidence, and you want to make sure the jury reaches the "right" verdict.

## THE ISSUES

**To be, or not to be, on the jury.** There is no question that as physicians, our first responsibility is the care of our patients.<sup>1</sup> Our profession is characterized by a "code of ethics and a duty of service that puts patient care above self-interest."<sup>2</sup> This responsibility is woven inextricably through the fabric of our profession and is derived from the fiduciary relationship between doctor and patient. We hold the privilege of providing a

necessary service to society; yet, we are required, as citizens, to fulfill the whole of our civic duties, including jury service. Although this is a duty that is in tension with our professional responsibility because of potentially lost time with patients, previously protected groups such as doctors, lawyers, law enforcement, and even judges have lost their exempt status recently in many places. For example, in 1996, New York State removed exemptions from jury eligibility,<sup>3</sup> thereby leaving the court to evaluate on a case-by-case basis which potential jurors might be excused. In fact, while in office, Mayor Rudy Giuliani served as foreman in a personal injury suit in 1999, Senator John Kerry served as foreman on a jury in 2005, US Supreme Court Justice Elena Kagan appeared for jury duty in 2011, and even Vice President Biden traveled from Washington to Delaware in 2011 to appear for jury service.

### Option one—excusing yourself from the jury.

Although the civic requirement of jury duty cannot be abridged, are there cases in which we have an obligation to excuse ourselves? In the case in which a member of our own profession is being judged, it may be that we, unconsciously or not, give favor to our fellow physician, whether through empathy, solidarity, or personal history of litigation. Alternatively, one might think that civil litigation is an inappropriate mediator for the broken patient–physician relationship. This belief may stem from the perceived incentive for patients to file claims not necessarily for harm as the result of medical negligence but simply for negative outcomes, which would likely result in bias against the plaintiff. Conversely, some might be inherently biased in favor of the plaintiff, because we are well-accustomed to being patient advocates. Thus, we may act as harsh critics toward other physicians when judging an apparently failed patient–physician relationship. Regardless, in cases of bias, sober reflection should be able to determine whether one is sufficiently able to displace bias in favor of justice.

The solution is not as readily apparent when there is potential conflict of interest. Aside from the clearly biased situations (ie, the defendant is your department chair, a partner in your practice, and so on), how would your consideration change if the defendant is a general surgeon in a neighboring town, or as in this case an obstetrician in the same city? A negative outcome for the defendant might affect your career opportunities, referral network, or have other untoward consequences. As long as there is a question that, outside of evaluating the evidence presented

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