The War on the Curbside Consult

Podcast Script

Victor R. Cotton MD, Esquire

August 8, 2019

Welcome to the Law & Medicine podcast. Today's topic is the war on the curbside consult. Curbside consults, where physicians informally solicit one another's opinion, are an integral part of patient care, and they are absolutely invaluable when formal consultation is unavailable or impractical. Unfortunately, the medical legal community views curbside consults as a sloppy and dangerous practice that carries unacceptable legal risk. And, for the past 20 years, they've warned us against curbside consults, encouraged us to avoid these interactions, and some malpractice insurers have gone as far as stating that curbsides are not appropriate in any situation.

In support of their position, the medical legal community has relied on a series of legal cases, none of which actually support what they say, but they now have two new cases, the first discussed in a Medscape article, and the other a Minnesota Supreme Court decision. The cases are said to make curbside consults even more dangerous. But, are the experts telling us the truth?

I first raised this question 10 years ago in a paper that was published in the American Journal of Cardiology. And what I said in that paper is the same thing I'm going to say today, and that is that our courts have repeatedly recognized the value of the curbside consult and consistently protected curbside consultants from liability. Unfortunately, my assessment doesn't fit the risk management narrative. And, as a result, when someone discusses the legal risks of curbside consults, my paper is never mentioned, even though my paper is titled Legal Risks of Curbside Consults. I'll admit that I've found this somewhat bothersome over the years. However, my longsuffering was eventually rewarded. A few months ago, the Minnesota Supreme Court decided a case titled Warren v Dinter, which involved an interaction that was arguably a curbside consult. And, in answering this question, the Minnesota Supreme Court issued a decision that

included a paragraph from my paper, and the Court even mentioned my name on page 15, which I believe gives my position some credibility.

And, here's what you need to know.

Every court that has ever considered the issue has held that a physician who is consulted as part of a curbside consult has no liability. I'll say that again. The physician who is consulted as part of a curbside consult has no liability. And no court has ever held otherwise. However, the protection applies only if the interaction is indeed a curbside consult.

And as a result, when it comes to curbside consults, the critical question is not whether curbside consultants have liability because it's clear that they do not. The question is whether the interaction is actually a curbside. In order to answer that question, the courts have relied on 7 criteria. If you want an interaction to be a curbside consult and free from liability, you must meet all 7 of these criteria.

#1 – The interaction must informal. You cannot have been formally consulted and your opinion must be offered as a professional courtesy to a colleague.

#2 The interaction must occur between 2 physicians or 2 healthcare providers neither of who is subordinate to the other. If the person who consults you is someone that you supervise, such as a resident, a fellow or a nurse practitioner, that interaction is not a curbside because that person would be under your authority and you would therefore responsible for his or her actions.

#3 The patient in question cannot be your preexisting patient nor a patient of someone for who you are covering. If another physician calls to discuss a patient who you saw last week, that discussion is not a curbside because you already have a relationship with that patient. In addition, if you are covering for me and another physician calls about one of my patients, that interaction is also not a curbside because you're covering my relationship, making that person your patient.

#4 The discussion does not pertain to patient in the ED with you being on call for the ED. There is a federal law, EMTALA, that creates an obligation for on call physicians. And, as a result, if you are on call for the ED and the ED calls about a patient, your discussion with the ED physician is not a curbside consult.

#5 The consult does not result in you having any interaction with the patient.

#6 The consult does not result in the generation of a written report.

And, # 7. You do not receive any payment.

If you meet all 7 criteria, the interaction is a curbside consult for which you have no liability. In the words of the Kansas Supreme Court "A physician who gives an informal opinion at the request of the treating physician cannot be liable for malpractice."

Now that sounds pretty good, but it gets even better. A Michigan appeals court refused to hold a curbside consultant liable even though he was consulted about the patient on multiple occasions, made specific recommendations, and reviewed the patient's chart. So, with all that why wasn't he liable? Because he met the 7 criteria, making the interaction a curbside consult, and a curbside consultant cannot be liable.

Now, you might be thinking. OK, Cotton, that sounds good, but the law could change tomorrow. No, it won't because the language these courts are using is very strong.

An Illinois appeals court wrote, and I quote, "making curbside consultants liable would have a chilling effect upon the practice of medicine. It would stifle communication, education, and professional interaction all to the detriment of the patient." So, that's how our courts view curbside consults.

Unfortunately, the risk management community views them differently, much differently. And, they've got 2 new cases to advance their agenda.

The first was published in Medscape in July of 2019. The author does not provide a name or a citation for the case, which is significant because the law is determined by published opinion. The cases that I've quoted are published opinions from the Kansas Supreme Court, a Michigan appeals court, and an Illinois Appeals Court. But, that's not what we have with this Medscape article. This is just an unnamed, unpublished case from somewhere. And, we have no way to verify whether it even happened.

But, in any event, the article is titled When does a Curbside Consult Becomes Patient Care. When does a Curbside Consult Becomes Patient Care.

And the answer is that a curbside consult never becomes patient care. There's no question about that, but the author disagrees. And, in the first sentence he states:

If you look at the record, you're involved. If you look at the medical record, you're involved and you're therefore liable. All you have to do is look at the record, which will come as news to the Michigan court which said that looking at the record was not enough.

So where does the author get this idea? Well, let's look at the case. The patient presented to the ED with neurologic symptoms, and the ED doc spoke with the on call neurologist. So, we can stop right there and say that that conversation was not a curbside because the patient is in the ED and neurologist was on call, and that's one of the 7 criteria. So, at that instant, because of EMTALA, the neurologist became legally obligated for the patient's care.

The neurologist suggested getting an MRI, which was negative for stroke. The patient became hemodynamically unstable and was admitted to the ICU without ever being seen by the neurologist. It's not clear what happened next, but the patient died and the family filed a lawsuit which included the neurologist, even though he never saw the patient and was never formally

consulted. Of course, none of that matters because he was roped in by the call from the ED. We already know that.

The author then writes: An issue in the litigation was the extent of the neurologist's responsibility to the patient.

No. That's not an issue, he was fully responsible from the time of the phone call.
The author continues:
Though he was on call, the neurologist did not consider his discussion with the ED as making him part of the patient's "care team."

It doesn't matter what he thought. Federal Law says he's responsible.

During discovery, the plaintiffs' attorney found that the neurologist had logged into the patient's EHR at the time of his call with the ED, and then again later to review the MRI. And, because his electronic fingerprint was in the record, the neurologist couldn't say that he wasn't involved, and he had to settle the case.

None of which makes any sense, but it doesn't matter because he was already responsible. So, this case, assuming it's even real, does not change the law with respect to curbside consults and viewing someone's medical record does not make you liable for that person's care. No court has ever held that it does. And, in fact, at least one court has specifically held otherwise. In addition, if what the author says here is correct, that looking at the chart makes you liable, then everyone from the coders in the billing department, to the quality improvement nurses, to the people who do audits for Medicare, to everyone who views a chest X-ray at morning report, is going to be sued for malpractice because they all looked at the chart. So, what the authors says here is nonsense and you should ignore it.

The second case is Warren v Dinter from the Minnesota Supreme Court. This is the case that mentions my paper and here's what happened.

A nurse practitioner was practicing independently, which is permissible in Minnesota, and she was seeing patients in an office setting. And, because she's independent, she's not being supervised by a physician.

However, she did not have privileges to admit patients. If she wanted to admit someone, the institutional policy was that she had to call the hospitalist and he would do the admission.

So, the NP calls the hospitalist about a patient and says that he needs admission. The hospitalist listens to the story and says no I'm not going to admit him, he can be treated as an outpatient and here's what you should do. The NP did as the hospitalist suggested and the patient died. The patient's family sued the hospitalist for denying the admission and he defended himself saying that his conversation with the NP was just a curbside consult for which he cannot be liable.

In analyzing the situation, the Minnesota Supreme Court began by stating that this was not a curbside consult because the interaction was not informal. Remember the first criterion is that the interaction has to be informal, but the court noted that this was not the case because the NP did not call the physician to pick his brain in a collegial manner. On the contrary, she had already decided that admission was needed and called in accordance with institutional policy. And, the hospitalist declined to admit the patient. In the words of the court, he acted as a gatekeeper and made a decision to not open the gate. And, because the interaction was a formal one mandated by hospital policy, the hospitalist was not protected as a curbside consultant. And, I agree with that conclusion.

But, the most important thing I want you to see is that the legal question here was not whether curbside consultants should be liable but rather whether this was a curbside. Remember, that's

always the critical question. And, because it wasn't a curbside, the hospitalist faced liability. But, that liability had nothing with being a curbside consultant because this wasn't a curbside.

Unfortunately, that's not how the medical legal community interpreted the case. And, over the past few months, here are some of the papers which have appeared:

An article on Kevin MD was titled

How a Minnesota Supreme Court decision could affect curbside consults

That's great.

An article on the ASCO post was titled
"Curbside Consults: New Liability Risks to Avoid."

And, not to be left out, the Minnesota Medical Society issued a Malpractice Alert that summarized the case in the following manner:

A hospitalist was sued for malpractice after he received a call from a nurse practitioner to discuss whether the NP's patient should be admitted. The hospitalist relied upon the information provided to him by the NP and the two discussed whether hospitalization was appropriate. The patient was not admitted, subsequently passed away from an infection and the hospitalist was held liable.

So, what they've described sounds like a classic curbside consult. But, that's only because they omitted some critical facts. They left out that the phone call was placed accordance with institutional policy, that the hospitalist was required to field this call, that the NP was trying to get the patient admitted, that going through the hospitalist was the required way of doing so, that the hospitalist was a gatekeeper who closed the gate, and that the court held that this was not a curbside consult. They conveniently left all of that out to make it sound like a curbside, which will discourage you from doing curbsides because they hate curbsides.

The piece goes on to say

This decision has the unfortunate effect of potentially increasing physicians' liability following informal consultations.

And this is blatantly untrue. The court specifically said that this was not an informal consultation. It was a formal interaction in accordance with institutional policy and the court's decision therefore has no impact on informal interactions such as curbside consults.

As I said in the beginning, the risk management community is at war with the curbside consult. They want to see curbside consults abolished. And, one of their methods is to present cases in a skewed manner, leaving out key facts, to mislead you into thinking that curbside consults are dangerous. And, while they are certainly entitled to their own opinion about curbside consults, they are not entitled to their own version of the facts.

Thanks for listening to me today.