May a Health Care Provider Refuse to Treat an Unvaccinated Patient?

Edna L. McLain and **Shannon McKeon** SmithAmundsen, LLC

According to the latest statistics, approximately 65.9% of people in the United States are fully vaccinated against COVID-19, meaning approximately one-third of the population is not vaccinated. During the last two-and-a-half years, arguments for and against vaccines remain polarizing. One example of this occurred earlier this year when a Boston hospital announced an unvaccinated organ transplant candidate was removed from the active transplant list due to the patient's vaccination status. This raised several ethical and legal questions about when, and if, a health care provider can refuse treatment based on vaccination status.

Generally, the determination of when a health care provider can refuse to treat a patient depends on a number of factors, including the context in which the care is being sought. In a private practice setting where a patient visits a physician's office, the American Medical Association's (AMA) Code of Ethics Opinion 1.1.2 states:

> Physicians must also uphold ethical responsibilities not to discriminate against a prospective patient on the basis of race, gender, sexual orientation or gender identity, or other personal or social characteristics that are not clinically relevant to the individual's care. Nor may physicians decline a patient based solely on the individual's infectious disease status. Physicians should not decline patients for whom they have accepted a contractual obligation to provide care.

However, even the AMA acknowledges that physicians are not ethically required to accept all "prospective" patients, and there are circumstances where a physician may decline to treat a new or existing patient. According to the AMA's Principles of Medical Ethics, "[a] physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care." AMA Opinion 1.1.2 outlines limited circumstances where a physician may decline to establish a patient-physician relationship with a new patient or to provide care to an existing patient. These circumstances include:

(a) A patient requests care beyond the physician's competence or scope of practice;
(b) A patient requests care that is scientifically invalid, is not medically indicated or not expected to achieve the intended clinical benefit;
(c) "A patient requests care incompatible with the physician's deeply held personal, religious or moral beliefs";
(d) The physician lacks the resources needed to provide the care;
(e) The requested care could seriously compromise the physician's ability to care for other patients; and
(f) The patient is abusive or threatening toward the physician, staff or other patients.

The AMA Principles of Medical Ethics also state, "[a] physician shall, while caring for a patient, regard responsibility to the patient as paramount." Therefore, termination of the patient-physician relationship should be done with extreme sensitivity and care, especially if the physician practices in an area with limited physicians readily accessible to the patient and few alternatives for care.

While AMA Opinion 1.1.2 allows for a physician to decline to treat a patient based on "deeply held personal, religious or moral beliefs," this rationale is not likely to apply in the COVID-19 vaccination context. "Conscience" laws have been adopted at both the federal and state levels and have been around for decades. Several states permit medical providers to refuse to provide medical services for religious or moral beliefs without being penalized by their employers. The language of these state conscience laws can be fairly broad. By contrast, the Federal Health Care Provider

Conscience Protection Laws are specifically geared toward protecting various individuals and entities for their refusal or willingness to provide sterilization or abortion procedures or participate in assisted suicide, so their protections are very limited.

During the COVID-19 pandemic, conscience laws were used by individuals seeking to avoid vaccine mandates in the workplace. However, physicians should consider AMA Opinion 1.1.7 entitled "Physician Exercise of Conscience" when determining when to act, or refrain from acting, "in accordance with the dictates of their conscience without violating their professional obligations." As AMA Opinion 1.1.7 recognizes, a physician's freedom to act according to his or her conscience is not unlimited:

> Physicians are expected to provide care in emergencies, honor patients' informed decisions to refuse life-sustaining treatment, and respect basic civil liberties and not discriminate against individuals in deciding whether to enter into a professional relationship with a new patient.

Additionally, Opinion 1.1.7 advises that physicians have "stronger obligations" when a physician-patient relationship exists, especially a long-standing one, when a patient is at imminent risk of foreseeable harm, when a delay in treatment may significantly adversely affect the patient's physical and emotional health, and when access to required treatment from another qualified physician is not reasonably available.

Applying the foregoing to the COVID-19 setting, a private practice physician could decline to accept a new unvaccinated patient seeking non-emergent care to protect his or her other immunocompromised or high-risk patients who are not medically able to be vaccinated. If the unvaccinated individual is an existing patient who medically can be vaccinated but chooses not to do so and the physician believes continued care of the unvaccinated patient may seriously compromise other existing patients and staff, the physician could terminate the relationship but must provide advance notice to allow the unvaccinated patient time to find another physician and provide necessary care of the patient in the interim to avoid any claim of abandonment. Another alternative is to institute policies and procedures in the private practice setting to minimize the risk an unvaccinated patient may pose to other patients and staff rather than outright refusing to care for unvaccinated patients, e.g., imposing screening, masking and other PPE requirements.

In the hospital setting, refusal to provide care is fraught with more risk due to the requirements of the Emergency Medical Treatment and Labor Act (EMTALA), which requires Medicare-participating hospitals with emergency departments (EDs) to, at a minimum:

- Provide a medical screening exam (MSE) to every individual who comes to the emergency department for examination or treatment for an emergency medical condition;
- Provide necessary stabilizing treatment for individuals with an EMC within the hospital's capability and capacity; and
- Provide for transfers when appropriate.

Therefore, regardless of vaccination status, if a patient presents to an ED with an emergency medical condition, the ED physician is required to provide a medical screening exam, necessary stabilizing treatment, and a transfer to another facility only if appropriate. Additionally, a hospital generally cannot refuse a patient transfer under EMTALA unless the hospital does not have the capacity and the specialized capabilities needed to provide the necessary care and services the patient requires.

In March 2020, before COVID-19 vaccines were available, CMS issued written guidance to hospitals to assist them in complying with their EMTALA obligations during the COVID-19 crisis. The guidance made it clear that CMS would take a hard line against a hospital with the capacity to provide the necessary care and services that refused a transfer of a COVID-infected patient. Given CMS stressing the importance of hospitals meeting their EMTALA obligations for COVID-infected patients, it is likely CMS would also frown upon a hospital refusing to accept a transfer based solely on vaccination status if the hospital had the capacity and capability to provide the necessary care the patient required.

Further, as was mentioned above, in emergency situations physicians may not ethically refuse to provide care based on the patient's vaccination status. Therefore, if a patient needs emergency medical care, the patient's vaccination status is irrelevant, regardless of the medical setting.

For elective procedures, there may be some flexibility. Conceivably, a physician could refuse an elective procedure out of concern that a patient's unvaccinated status may pose a risk to recovery and recommend to the patient that it be postponed either to a time after the patient is vaccinated or when the risk of COVID-19 is reduced. However, this does not alleviate the physician's obligation to provide necessary treatment in the interim or to suggest the patient seek care elsewhere from a different provider.

As seems to be the case in many legal scenarios, the answer as to whether a healthcare provider may refuse treatment to an unvaccinated patient depends on the circumstances. The better question may be whether a healthcare provider should refuse treatment to an unvaccinated patient. While vaccination status may be a legitimate consideration in whether accommodations need to be made to protect other patients and staff or whether the patient meets the criteria for certain procedures, it probably has little bearing on the day-to-day practice of medicine. In an emergency setting, the obligation is to evaluate and stabilize any emergency medical condition, regardless of vaccination status. In an office setting, communication with the patient may be the key. The better practice may be to try to find out why the patient is not vaccinated and discuss with the patient any issues that may arise as a result of not being vaccinated. If a physician has a large population of high-risk, immunocompromised patients, it is best to explain to a prospective or existing patient the risks he or she may pose to others, the concerns the physician may have and whether any services or interventions may be limited. Determine if any accommodations can be made, and if not, discuss with the patient alternative providers for care, taking into consideration the needs of the patient and reasonable access to other qualified physicians in the area. An open dialogue may prevent hurt feelings, and more importantly, lawsuits.

Edna L. McLain is a healthcare litigation partner in the Chicago office of SmithAmundsen and has represented hospitals, physicians, nurses and medical device manufacturers in state and federal court in Illinois and has tried several medical negligence cases to defense verdicts. Edna has been honored as an Illinois Super Lawyers Rising Star in 2011, 2014, 2015, 2016 and 2017. She also serves as an editor and contributing author for the Illinois Association of Defense Counsel's publication the IDC Quarterly. Contact: emclain@smithamundsen.com

Shannon McKeon is a healthcare litigation law clerk in the Chicago office of SmithAmundsen. Shannon is a graduate of the University of San Diego and a second-year student at DePaul University College of Law. Contact: smckeon@smithamundsen.com