Refusing to Treat: Are There Limits to Physician "Conscience" Claims?

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Once a patient and a physician have voluntarily entered into a treatment or care relationship, the relationship may be terminated by mutual consent because the physician and patient cannot agree on treatment goals, because of personality conflicts which make the situation uncomfortable or too difficult, or because the services sought are no longer covered by the patient's health insurance. A patient may unilaterally terminate a physician-patient relationship for any reason. Physicians do not have the same flexibility though, and are duty-bound to continue to treat a patient once treatment has begun except under carefully defined circumstances. Both federal and state laws limit physician conduct, although both allow termination of patient treatment for reasons of conscience under certain circumstances. When a physician does unilaterally terminate a treatment relationship with a patient for reasons of conscience, it is usually for religious reasons though a matter of conscience need not be religious in nature.

Palliative medicine and end-of-life care raise legitimate questions about the extent to which a physician must assist a patient secure supra-pharmacological doses of narcotics for pain management, obtain illegal drugs for symptom control (e.g. marijuana for intractable nausea), or assist the patient in ending their life (physician-assisted suicide). Specific care sought by patients will more are most likely to conflict with legitimate physician conscientious objections in reproductive medical areas such as provision of contraception and assisted reproductive technology. The most frequently cited example of a conscientious objection is when a pregnant patient elects to have an abortion. An obstetrician can refuse to perform the procedure for what is generally recognized as a valid conscience or religious reason. This particular set of circumstances is common enough to be recognized and protected by laws in several states, including Texas.

2 Id.
3 Id.
4 Id.
5 Id.
7 David Samuels, Dr. Kush. How medical marijuana is transforming the pot industry, THE NEW YORKER, July 28, 2008, at 49.
9 The American College of Obstetricians and Gynecologists, ACOG Committee Opinion, The Limits of Conscientious Refusal in Reproductive Medicine, Number 385, November 2007 (Washington D.C.).
10 Tex. Occ. Code § 103 (Right not to perform abortions).
Gynecologists\textsuperscript{12} support this position and have noted that physician refusal to treat in such circumstances is both ethical and legal.\textsuperscript{13}

There are two different protections for physicians who refuse care for reasons of conscience: (1) statutory protection afforded such conduct under state legislation containing “conscience clauses” and (2) the First Amendment, which protects actions guided by sincerely-held religious beliefs.\textsuperscript{14} The former generally concerns specific instances (such as refusing to perform or participate in an abortion); the latter is more general, and would control in situations in which the two protections were at odds.

The precise limits of a physician's right/ability to refuse to care for a patient for reasons of conscience remain undefined. This is at least partially due to a paucity of relevant court decisions. This may be about to change, as a case which has been working its way through the California courts for the past decade directly addresses the conflict of a physician’s fiduciary duty with both state anti-discrimination law and First Amendment protection of religion, and also highlights how a physician might potentially use religious or conscience claims as a way of discriminating against groups of patients found socially objectionable.

The Case of Guadalupe Benitez

Guadalupe Benitez received employee health insurance through Sharp Health Plan of San Diego, California. Sharp in turn contracted with the North Coast Women’s Care Medical Group to provide fertility services for its beneficiaries. In August 1999, Benitez became a patient of Dr. Brody, an obstetrician-gynecologist with the North Coast group. Benitez stated that she disclosed that she was a lesbian during her first patient encounter with Dr. Brody for infertility care.\textsuperscript{15} Brody indicated that she would be unable to perform intrauterine artificial insemination (IUI) because it was against her religious beliefs to perform IUI on unmarried women, whether gay or heterosexual, but would refer her to another physician in the group to provide this service.\textsuperscript{16} After eleven months of unsuccessful infertility therapy Benitez was referred to a physician outside the North Coast group for IUI. Benitez sued, alleging that the IUI service was not performed because of her sexual orientation and not her marital status, and also claimed that she was told by the medical staff at North Shore that she would not be provided fair or timely medical care because of her sexual orientation.\textsuperscript{17}

The California court dispute aside, it is not clear why marital status should have been a factor for a religion-based claim. If the physician were Catholic, for example, artificial insemination either for married or unmarried women would be proscribed because it is not “natural”; the author is not aware of any religions where the marital status per se would be the determining factor in whether a physician could not in good conscience

\textsuperscript{12} The American College of Obstetricians and Gynecologists, \textit{supra} note 9.
\textsuperscript{13} \textit{Id.} and American Medical Association, \textit{supra} note 11.
\textsuperscript{14} U.S. CONST. amend. I.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
perform intra-uterine insemination. But, so long as the religious belief is sincerely held U.S. federal courts will not delve into the logic or veracity of such a claim as this would unduly entangle government with religion. One way around this is for individual states to pass specific statutes governing physician “conscience claims” for specific clinical situations, such as providing abortion services. Such a state statute does not exist in California.

The core factual dispute over whether treatment was refused because the patient was a lesbian or because she was unmarried was never resolved. The trial court sided with Benitez in 2004, ruling that physicians in a for-profit medical practice group must comply with California anti-discrimination law whether they have religious objections to the requested medical care or not. The appellate court overturned the lower court decision and ruled in favor of the physicians at North Shore Medical, holding that the lower court decision violated the religious rights of the physicians, and the case was appealed to the California Supreme Court, which framed the legal question of this case as follows: "does a physician have a constitutional right to refuse on religious grounds to perform a medical procedure for a patient because of the patient's sexual orientation?"

In a unanimous decision, the California Supreme Court ruled in favor of Ms. Benitez and held that a physician does not have this constitutional right. Physicians may not refuse medical treatment to gay men or lesbians for religious reasons; a physician’s or physicians group’s constitutional right to free exercise of religion does not exempt businesses which serve the public from obeying facially-neutral state laws which prohibit discrimination based on sexual orientation. Whether refusing to perform IUI on a woman as a matter of conscience simply because the individual is not married may or may not be a valid “conscience claim,” but that is not the legal issue the California Supreme Court chose to address.

**Freedom of Religion versus Right to Medical Care**

Ideally, there should be little doubt how the Benitez case would be decided by the U.S. Supreme Court. Although there is no general "federal" right to receive medical care for ordinary citizens (only inmates of federal prisons have a constitutional right to health care), at the federal level “conscience” claims are not valid religious exceptions to facially neutral discrimination laws. However, Benitez was a state case involving the practice of medicine, which is regulated by the individual states.

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19 Id.
20 Id.
22 Id.
24 *North Coast Women’s Care Medical Group et. al. v. Superior Court of San Diego County and Guadalupe T. Benitez*, Supreme Court of California Case No. S142892 (2008).
The California Unruh Civil Rights Act “prohibits denial of access to public accommodations based on specific classifications.”26 A for-profit medical practice and/or physician’s office which contracts with state and federal employees or obtains reimbursement from the same would seem to qualify as a public accommodation, at least according to the lowest court’s decision.27 The North Shore medical group’s discrimination against a group of individuals appeared to violate both state and federal law as well as a physician’s fiduciary duty towards patients under the Hippocratic Oath. Although unmarried women per se are not recognized as a protected class against substantive or procedural state or federal due process violations, gender and sexual orientation are.28 As the California Supreme Court framed the legal question, religious freedom was placed on a collision-course with due process rights. And, for the time being, at least in California, religious “conscience claims” are going to take a back seat to a patient’s ability to secure medical care without worry that he or she is going to be discriminated against because of factors such as sex or gender orientation.

No Easy Resolution of the Legal Issue At Hand

The California Supreme Court decision aside, there is something that does not seem quite right about physicians’ refusing to provide care to any patient for any reason, whether it is for religious reasons or otherwise. At the time of graduation from medical school physicians take the Hippocratic Oath, and there is nothing in the modern version of the text which countenances refusing to provide care.29

There clearly is a balance at work here. On the one hand, no one wants an individual health provider (physician, pharmacist, nurse) to engage in conduct which they find morally unacceptable (the primary reason why so many states have passed “conscience laws” which permit physicians and nurses to refuse to perform or participate in abortion services). On the other hand, there is no guarantee that refusals to provide care or counsel for medical services will be limited just to abortion. One can easily envision a quick slide down a slippery slope. It’s a relatively short step from refusing to perform an abortion to refusing to provide post-coital contraception,30 and an even shorter step from there to refusing to prescribe birth control pills or to even direct needy patients to other providers who can provide this service,31 all in the name of “conscience.” This is already an established aspect of pharmacy practice in some states; in Texas a pharmacist rejected a rape victim’s valid prescription for emergency contraception on the basis of personal moral grounds.32 Medical professionalism itself is no guarantee that physicians will not engage in blatant discrimination against large groups of vulnerable patient populations. A

26 Californa Civil Code § 51(b).
28 U.S. Const. amend. IV, § 1.
31 Id.
32 Id. See also Pharmacist refuses pill for victim, CHICAGO TRIBUNE, February 11, 2004 at C7.
recent issue of the *Journal of the American Medical Association* spent nearly a dozen pages apologizing for nearly a century of widespread racial discrimination by physicians against other physicians.

In characterizing the core legal issue of the *Benitez v. North Coast Women’s Care Medical Group* as one of religious freedom versus sexual orientation, the California Supreme Court has addressed an important question though one which has already been resolved by federal courts when faced with a religious conscience objection to a facially neutral anti-discrimination statute. Unfortunately, the California Supreme Court has also left unresolved the interesting and equally important legal question of whether unmarried women now constitute a separate class of citizens who also require protection of due process rights, and the standard under which actions against them will be judged.

For denials of medical care due to physician conscience, there is no bright line though many people would likely agree that refusing to perform or participate in abortion procedures is acceptable so long as the service can be obtained elsewhere. Refusing to provide medical care for legitimate conscience or religious reasons may be legal, and possibly even almost always ethical, but it should not be a blank check. The *Benitez* case may stand out because, at the outset, both parties claimed their higher ground (one of sexual orientation, the other of religion). Religious conscience claims have now gone further than refusals to destroy life or preventing conception for religious reasons. Now we are talking about excusing denial of care for creation of life.

Perhaps the solution is for patients to enter into progressively more comprehensive contractual arrangements with physicians, and for physicians’ conduct to be viewed under contract and business law instead of tort law and fiduciary duty, so treatment conflicts can be resolved in advance instead of pitting freedom of religion against classes of individuals not viewed favorably by individual medical practitioners. All in all, *Benitez v. North Shore* is a depressing commentary on the beating physicians' fiduciary duty has taken at the hands of the religious right.


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