

Desperate Measures for Desperate Times: Can Physicians Refuse to Treat Unvaccinated Patients?

MICHAEL CONKLIN*

INTRODUCTION

In January 2021, new COVID-19 cases in the United States peaked at over 300,000 daily.¹ Due largely to the distribution of three COVID-19 vaccines, these numbers dropped to less than 12,000 new cases in June 2021.² Unfortunately, a new, more contagious variant of the virus—Delta—began spreading bringing the daily average back up to around 180,000 by the end of August 2021.³ As of August 23, only 51.8% of the U.S. population was fully vaccinated.⁴ Alabama was hit particularly hard in August with 55% of the state’s intensive care unit beds occupied by COVID-19 patients.⁵

In August 2021, a physician in Alabama made headlines when he refused to treat patients who had not received COVID-19 vaccinations.⁶ He stated that while he “will not force anyone to take the vaccine, [he] also cannot continue to watch [his] patients suffer and die from an eminently preventable disease.”⁷ This Essay examines whether such a refusal to treat unvaccinated patients is legally justified and further notes what potential exceptions exist. Finally, pragmatic arguments for and against the practice

* Powell Endowed Professor of Business Law, Angelo State University

¹ *Coronavirus: United States*, WORLDOMETER, <https://perma.cc/JS4H-24JT/> (last updated July 9, 2022, 19:41 GMT) [hereinafter *Coronavirus: United States*]

² *See id.*

³ *See id.*

⁴ *U.S. COVID-19 Vaccine Tracker: See Your State’s Progress*, MAYO CLINIC, <https://perma.cc/YDP9-R7BJ> (last visited July 9, 2022).

⁵ *Alabama’s ICU Bed Deficit Balloons to 53 as COVID-19 Surge Continues*, WSFA NEWS (Aug 23, 2021, 6:31 PM EDT), <https://perma.cc/2X7R-LMG9>.

⁶ Antonio Planas & Caroline Radnofsky, *Alabama Doctor Pledges to Stop Treatin Unvaccinated Patients*, NBC NEWS (Aug. 20, 2021, 1:25 PM EDT), <https://perma.cc/PC9Y-3ZPD>.

⁷ *Id.*

are presented for consideration.

ANALYSIS

There is already established precedent for non-emergency physicians being able to refuse to treat unvaccinated patients. In general, unless an individual needs emergency care or has an existing patient–physician relationship, a physician has no duty to treat a given patient.⁸ The American Medical Association’s Principles of Medical Ethics states, “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.”⁹ And indeed, a pre-COVID-19 survey conducted in 2015 found that 21% of pediatricians reported dismissing families for refusing infant vaccines.¹⁰

The best argument against allowing non-emergency physicians to refuse to treat unvaccinated patients is likely to attempt to link racial minority status with vaccination rates. White people are more likely to have received at least one dose of the COVID-19 vaccine compared to Black people.¹¹ Therefore, a policy of withholding medical treatment for the unvaccinated will disproportionately impact Black people. However, the current lower vaccination rates for Black people would likely not constitute disparate impact discrimination. The significance of the disparity in vaccination rates between Black and white people decreased over the summer of 2021 and continues to do so as of late August.¹² Additionally, there is no evidence that the Alabama physician implemented his policy in order to discriminate against Black people.

While the Pfizer vaccine received full approval from the Food and Drug Administration (FDA) on August 23—before the Alabama physician’s policy became effective¹³—this is ultimately irrelevant because he would have been able to implement the policy even while the vaccine had only emergency use

⁸ See June M. McKoy, *Obligation to Provide Services: A Physician-Public Defender Comparison*, 8 VIRTUAL MENTOR 295, 332 (2006).

⁹ Am. Med. Ass’n, *AMA Principles of Medical Ethics*, AMA, <https://perma.cc/83QF-AKHQ> (last visited Apr. 15, 2022).

¹⁰ Sean T. O’Leary et al., *Characteristics of Physicians Who Dismiss Families for Refusing Vaccines*, 136 PEDIATRICS 1103, 1105 (2015).

¹¹ Nambi Ndugga et al., *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, KAISER FAM. FOUND. (Apr. 7, 2022), <https://perma.cc/7VKG-H8EV>.

¹² See *id.*

¹³ Scott Hensley, *Pfizer-BioNTech’s COVID Vaccine Gets Full Approval from the FDA*, NPR, <https://perma.cc/MY9T-F87R> (last updated Aug. 23, 2021, 2:58 PM ET).

authorization from the FDA.

I. Exceptions

The general principle that a physician may refuse to treat unvaccinated patients is not without exception. A physician who offers emergency care would likely not be able to refuse to treat unvaccinated patients unless they presented a high level of risk to the physician and staff. The 1986 Emergency Medical Treatment and Active Labor Act requires all hospitals that participate in Medicare to provide medical services for patients needing emergency care.¹⁴

A patient who is unvaccinated due to a religious objection may be required to receive reasonable accommodation, especially if the physician is employed by a government-funded hospital. Likewise, a patient who is unvaccinated because an existing medical condition renders him ineligible for the vaccine would need to be accommodated to avoid a discrimination claim under the Americans with Disabilities Act (ADA).¹⁵

In order to terminate an existing patient–physician relationship, the physician must be careful to “do so in a manner that does not constitute abandonment.”¹⁶ The elements of medical abandonment are set at the state level but generally include the following:

“There is an existing provider/patient relationship.”¹⁷

“The provider unilaterally discontinues the relationship.”¹⁸

“The patient continues to need the services of the provider.”¹⁹

“The provider does not make provisions for another qualified provider to take over the care.”²⁰

The Alabama physician appears to not be at risk of a medical abandonment claim. He announced his policy in August, and it is not effective until October 1.²¹

Finally, if enough general practitioners in an area refused to treat unvaccinated patients, it could be argued that this would have the effect of

¹⁴ McKoy, *supra* note 8, at 332.

¹⁵ *The ADA: Questions and Answers*, EEOC, <https://perma.cc/Z8XJ-N97F> (last visited July 9, 2022) (explaining that physicians’ offices are explicitly considered places of public accommodation under the ADA).

¹⁶ Edie Brous, *Legal Issues in Dismissing Unvaccinated Patients*, 118 AM. J. NURSING 64, 65 (2018).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Planas & Radnofsky, *supra* note 6.

denying the unvaccinated access to life-saving medical care since referrals from a general practitioner are commonly required to see specialists. Although there is no broad federal right to receive medical care, as a practical matter, federal law governing insurance companies ensures that there is an adequate network of physicians for most—if not all—Americans.²²

II. Pragmatism of Refusing Unvaccinated Patients

Having addressed the legal issue, this Essay now turns to pragmatic arguments for and against refusing to treat unvaccinated patients.

A. Arguments For

Refusing to treat an unvaccinated patient creates a significant incentive for that patient to get vaccinated. For example, the Alabama physician who announced he would not treat unvaccinated patients said that three of his unvaccinated patients contacted him asking where they could get vaccinated.²³ Such an incentive is desperately needed during a pandemic that as of August 2021 was responsible for over 800 daily deaths on average.²⁴ Furthermore, such a policy may be advantageous even for patients who continue to refuse the vaccine and therefore have to find a new physician. This is because it is important for patients to trust their physicians: if the initial physician is unable to convince the patient to take the vaccine, perhaps a new physician will be a better fit to effectively communicate the importance of vaccination.

Refusing to treat unvaccinated patients may benefit a physician's overall reputation. Much like a craftsman acquires a reputation based on the quality of products he produces, a physician acquires a reputation—in part—by the healthy outcomes of his patients.²⁵ Refusing to treat the unvaccinated would likely result in better average patient outcomes by removing those at an increased risk of death from COVID-19 and protecting patients and staff from exposure to such people.

²² See generally 45 C.F.R. § 156.230 (2020) (requiring Qualified Health Plans, which are insurance plans offered on the Health Insurance Marketplace, to meet a number of network adequacy standards, including that they maintain a network sufficient “to assure that all services will be accessible without unreasonable delay”).

²³ Planas & Radnofsky, *supra* note 6.

²⁴ *Coronavirus: United States*, *supra* note 1.

²⁵ Michal Pruski, *Professional Objections and Healthcare: More than a Case of Conscience*, 35 ETHICS & MED. 149, 152 (2019).

B. *Arguments Against*

Refusing to treat unvaccinated patients could be viewed as punishing unvaccinated children for decisions their parents imposed on them. And it could be viewed as a coercive practice that does not appropriately respect patient autonomy. Such coercive measures could cause anti-vaccination patients to become even more ingrained in their position. Furthermore, it could be used as evidence to justify their perceived martyrdom status.

The practice of refusing to see the unvaccinated could cause patients to seek out physicians who agree not to bother them about vaccinations. In such an instance, it would have been better for these patients to have stayed with their current physicians, with whom they at least would continue to be encouraged to get vaccinated.

The practice of refusing to see patients based on vaccination status could set a dangerous precedent encouraging the practice of refusing to see patients for other reasons. For example, characteristics such as political affiliation, sports fan loyalty, participation in a community event, and not exercising and eating healthy are not protected classes; therefore, patients could be discriminated against on those bases without legal recourse.²⁶ This type of intolerance toward those with different beliefs and behaviors—while permissible under the law—is likely harmful to the healthy functioning of society.

Sadly, such a decision may be counterproductive to producing a safer medical office. While it does remove people who are at an increased likelihood of contracting COVID-19 and transmitting it to others in the office, this benefit may be offset by potential increases in the risk of harm to staff from anti-vaccination advocates. For example, a father in Tennessee was threatened just for speaking in favor of mandatory masking.²⁷

CONCLUSION

This Essay concludes that—with some exceptions—non-emergency physicians are legally allowed to refuse seeing unvaccinated patients. However, this should only be done after careful consideration of the consequences such an action may create.

²⁶ See generally *id.* at 152–53 (assuming that there was no other way to link such a characteristic to a protected class).

²⁷ Erin Snodgrass, *A Tennessee Father Who Was Threatened and Swarmed by Anti-Maskers at an Explosive School Board Meeting Said He's Still Traumatized*, BUS. INSIDER (Aug. 13, 2021, 7:58 PM), <https://perma.cc/EWB5-H3D8>.