To the Editor

I read with interest the article, “Pathology and Medical Malpractice,” by Allen et al. I am writing this letter to share some of my questions and comments, which focus mostly on the survey and some assertions about how our laws work.

Allen et al repeatedly talk about a “single standard of care.” They conclude that their survey results provide additional evidence that there is no single standard of care. But I am confused by what they mean. The legal standard of care is not a single thing but rather a spectrum of reasonable care in the circumstances. Cases that go to trial tend to be cases in which the “standard of care” is not clear. Most cases are settled, and presumably many of these have a more straightforward answer to whether the pathologist was negligent. The case only goes to a jury if there is expert testimony on both sides. The jury decides this question of fact (what is the standard of care and did the pathologist meet that standard) if there is evidence and a pathologist on both sides of this “standard-of-care” question. The authors seem to be searching for 100% agreement between all pathologists, but this is unrealistic and probably impossible.

Foucar’s editorial also suggests a second limitation of the survey. He describes the complexity of jury trials. In addition, there is the pretrial maneuvering and the significant differences between lawyering skills. The short descriptions in the survey are good but cannot capture the entirety of what happened. We do not see the glass slides and do not know many details, some of which may seem small but influence the outcome.

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Reference

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Normally, this dye is excreted by the patient in response to the ingestion of food. However, when the patient is taken to surgery in close proximity to the scan, there is no chance for the patient to eliminate the dye, and the radioactivity is retained in the gallbladder specimen.

In our hospital, the usual dose for a sentinel node is 1 to 2 mCi of technetium-99. The usual dose for a PIPIDA scan is 5 mCi. While most gallbladders are not radioactive, individual specimens may be among the “hottest” specimens the laboratory receives. We believe that while the policies that laboratory directors choose to set to address this issue may vary, the facts do not: radioactive specimens are routinely received in the laboratory from a variety of different patient sources, and the exposure of laboratory personnel to this radiation may be essentially eliminated by simply setting these specimens aside for a day or two.

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Third, Allen et al\(^1\) claim that the legal system is not sending the right message to pathologists. Perhaps. But I wonder how important it is for pathologists to understand the nuances of the relatively few cases that go to trial. I thought it was interesting that there was no difference in survey results between pathologists who had been named defendants and others who had not. Presumably, the pathologist who had been through the trial experience knows more about the medical malpractice system than most of us. The policy objective of professional negligence law is to encourage physicians to not be careless; it is not to make defense attorneys out of our doctors. The survey’s results do not really tell us about the day-to-day workings of the law’s message to pathologists. It is possible that on a daily basis, the law’s distilled message to practice good medicine in a reasonable manner is adequately communicated to practicing pathologists.

Allen et al\(^1\) are correct in asserting that the medical malpractice system is flawed. Defensive medicine is a problem, and the authors correctly caution us against additional not indicated tests. We know that the medical malpractice system is both underinclusive (many negligently injured patients never sue or, if they sue, don’t win) and overinclusive (there are too many frivolous lawsuits).\(^3,4\) Moreover, malpractice does not address patients injured by nonnegligent care.

Finally, Allen et al\(^1\) bring up many excellent points and ask us to ponder important issues that will become increasingly critical in our futures. The legal system and our interaction with it are important. And it is important to continue our conversations.

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References