Medical Malpractice Implications of Alternative Medicine

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Although use of alternative therapies in the United States is widespread and growing, little is known about the malpractice experience of practitioners who deliver these therapies or about the legal principles that govern the relationship between conventional and alternative medicine. Using data from malpractice insurers, we analyzed the claims experience of chiropractors, massage therapists, and acupuncturists for 1990 through 1996. We found that claims against these practitioners occurred less frequently and typically involved injury that was less severe than claims against physicians during the same period. Physicians who may be concerned about their own exposure to liability for referral of patients for alternative treatments can draw some comfort from these findings. However, liability for referral is possible in certain situations and should be taken seriously. Therefore, we review relevant legal principles and case law to understand how malpractice law is likely to develop in this area. We conclude by suggesting some questions for physicians to ask themselves before referring their patients to alternative medicine practitioners.

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MANY AMERICANS seek medical care from practitioners of alternative medicine. (We define *alternative medicine* as medical interventions not taught widely at US medical schools or generally available at US hospitals.[1]) In 1990, chiropractors, acupuncturists, massage therapists, naturopaths, and a variety of other practitioners of alternative medicine received 425 million visits, for which patients paid $10.3 billion in out-of-pocket expenses.[1] Financial analysts have suggested that consumer spending on alternative medicine may have surged 69% since 1989,[2] and the market may be growing as fast as 30% annually.[3] Employers and insurers, including several major managed care organizations such as Oxford Health Plans and Health Net, have recently begun to respond to this demand by adding alternative therapies to their insurance products.[4-8] As well, state legislatures have enacted laws that require health insurers to include alternative treatments in the benefits they cover.[9]

Despite this activity, coordination between alternative and conventional medical care remains poor. An estimated 90% of patients using alternative medical care are not referred by their physicians (MDs or DOs) but are, instead, self-referred.[1] This lack of communication and the absence of proactive referral for alternative treatment or, when appropriate, professional advice to avoid alternative care are unfortunate from a quality perspective. Various measures to improve the coordination between physicians and alternative medicine practitioners have been proposed.[10]

Improved quality of care in this area is frustrated by a long-standing professional rivalry between organized medicine and unorthodox health care practitioners.[11,12] However, a more fundamental obstacle is physicians' lack of knowledge about the appropriateness and efficacy of alternative medicine. While anecdotal evidence abounds, only a few well-designed clinical studies have examined the efficacy of alternative medicine therapies.[13-19] Additional outcomes studies and randomized trials are only now being launched.[20]

A subset of these general doubts and concerns about alternative medicine relates to medical malpractice.[2,21-25] We believe physicians worry that they will be sued if a patient they refer to an alternative medicine practitioner suffers a poor outcome. Even when patients have independently chosen to submit to alternative treatment, physicians may be reluctant to discover or discuss this care with them for fear that, if they know about it, they will be deemed to endorse it.

To address these issues, we have examined available data on rates of claims against chiropractors, acupuncturists, and massage therapists. Next, we explore the kinds of situations in which physicians may be exposed to liability for the referrals they make. Finally, we note the approach courts have adopted in assessing the malpractice liability of alternative medicine practitioners. We conclude that malpractice concerns alone should not inhibit physicians from referring patients to alternative medicine practitioners, particularly where those practitioners are licensed and accredited. A caveat to our conclusions is that legal principles in this area are not well devel-

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Table 1.—Selected Claims Information for Massage Therapy, Chiropractic, and Medicine, 1990-1996

	Claims per 100 Policy Holders			Average Indemnity Payment per Paid Claim, $			Claims Paid, %		
Year	Massage Therapy*	Chiropractic†	Medicine (Primary Care)‡	Massage Therapy	Chiropractic	Medicine (Primary Care)§	Massage Therapy	Chiropractic	Medicine (Primary Care)
1990	. . .	2.7	7.7 (5.9)	. . .	33 625	137 900 (129 213)	. . .	49.1	31.9 (32.5)
1991	. . .	2.7	8.2 (5.7)	. . .	43 670	159 788 (148 533)	. . .	49.0	33.1 (32.0)
1992	. . .	2.8	9.1 (6.9)	. . .	40 621	183 541 (143 730)	. . .	47.5	33.2 (33.9)
1993	0.2	3.0	9.8 (7.1)	12 011	52 231	185 243 (147 084)	38.5	56.9	30.3 (30.7)
1994	0.2	2.7	9.5 (6.7)	4251	65 597	182 003 (151 001)	44.8	46.0	31.7 (30.2)
1995	0.2	2.6	9.0 (6.2)	4864	52 385	179 732 (149 028)	63.0	49.5	30.2 (30.3)
1996	0.1	2.2	. . .	4253	60 985	202 772 (166 379)	23.8	46.0	28.6 (29.9)

*Data from Albert H. Wohlers & Co, Park Ridge, Ill. Ellipses indicate data were not available prior to 1993.
†Data from the NCMIC Insurance Company, Des Moines, Iowa.
‡Data from Gonzales.[29]
§Data from PIAA Data Sharing System, Rockville, Md.

oped—a situation that is poised to change as conventional and unconventional medicine become increasingly integrated in health care delivery systems.[8]

CLAIMS EXPERIENCE

Alternative medicine accounts for approximately 5% of the total medical malpractice insurance market, and coverage is provided by fewer than 50 insurers.[26] We collected claims information from the leading indemnity insurers in the country serving chiropractors, massage therapists, and acupuncturists. Together these 3 groups of practitioners account for approximately two thirds of the estimated 425 million visits made annually to offices of alternative medicine practitioners.[1]

Chiropractic data were obtained from NCMIC Insurance Company (NCMIC) of Des Moines, Iowa. NCMIC insured 25 103 chiropractors in 1996, nearly half of all licensed chiropractors practicing in the United States.[27] We obtained data on claims against massage therapists from Albert H. Wohlers and Co of Park Ridge, Ill. Wohlers has provided professional indemnity insurance services to members of the American Massage Therapy Association (AMTA) since 1993 and currently insures approximately 27 000 massage therapists throughout the country—again, almost half of all licensed practitioners in this area. Acupuncture Insurance Services of Elmhurst, Ill, provided information on acupuncture claims. With approximately 1500 policyholders in 1996, it is the largest carrier of insurance for acupuncturists in the United States.

The data used to describe the claims experience of physicians are drawn from 2 sources. Information on claims paid against physicians comes from the Physician Insurers Association of America's (PIAA's) Data Sharing Project.[28] Information on claims frequency comes from the American Medical Association's annual core survey of a national sample of physicians. In contrast to our other claims data, the survey data reflect the experience of a general physician population (excluding federally employed physicians) rather than a discrete population defined by a specific insurer.[29]

To maximize comparability of the data, we specified a number of parameters: (1) a claim was defined as a formal demand for compensation arising from health care (ie, incident reports were excluded); (2) multiple claims against a single insured that related to the same incident were counted as a single claim; (3) claims against multiple practitioners relating to the same incident were counted separately; (4) all claims for which a nonzero indemnity payment was made to the plaintiff were counted as paid claims; and (5) claims were assigned to years according to file date, and payment figures were assigned to years according to closure date.

Table 1 compares the claims rates, average amount on paid claims, and percentage of claims among massage therapists, chiropractors, and primary care physicians for 1990 through 1996. Claims rates against chiropractors insuring through NCMIC have remained steady at 2 to 3 claims per 100 policyholders per year through the 1990s. The average severity of claims against chiropractors, as measured by average indemnity amounts on paid claims, increased by 81%. Conventional medicine experienced this same trend with a 47% increase. NCMIC resolved approximately half of its claims with payment, 18% more on average than did PIAA insurers. Table 2 shows the percentage of claims received by NCMIC in various injury categories during 1992 through 1996.

Table 1 also shows that rates of claims against massage therapists are less than one tenth of those against physicians and decreased in 1996. Table 3 shows the percentage of claims against AMTA members received by Wohlers in various injury categories during 1993 through 1996. Most claims (61%) relate to minor injuries, although a significant proportion (14%) relate to sexual misconduct.

Less information is available on rates of claims against other practitioners of alternative medicine. We were unable to obtain comprehensive data on claims against acupuncturists; however, some information on claims history was obtained from Acupuncture Insurance Services. Although this company insures one sixth of the 8900 licensed acupuncturists in the country,[30] it has had ongoing difficulties underwriting its policies because of its relatively small insurance pool.

After working through several offshore underwriters during the 1980s, a relatively stable relationship with a domestic underwriter was disrupted when a single acupuncturist apparently infected 35 people with hepatitis B,[31] 21 of whom filed claims (Martin Shaw, president, Acupuncture Insurance Services, oral communication, March 1997). The other major

Table 2.—Categories of Claims Against Chiropractors, 1992-1996*

Type of Injury	Total Claims, %	Paid Claims, %
Disk	27.1	27.6
Failure to diagnose	12.2	11.3
Fracture	13.5	10.3
Aggravation of existing condition	7.6	9.9
Cerebral vascular	5.4	2.9
Vicarious liability	3.5	4.5
Other	30.7	33.5

*Data obtained from the NCMIC Insurance Company, Des Moines, Iowa.

Table 3.—Categories of Claims Against Massage Therapists, 1993-1996*

Type of Injury	Total Claims, %
Minor†	61
Major‡	5
Grave§	1
Nonphysical	15
Sexual misconduct	14
Other	4

*Data obtained from Albert H. Wohlers & Co, Park Ridge, Ill.
†Includes soft tissue injuries, minor fractures, and minor scarring with no residuals.
‡Includes fractures, serious internal injuries, serious back injuries (ie, fusions, ruptured disks, laminectomies), loss of vision in 1 eye, and serious scarring.
§Includes brain damage, quadriplegia, severe burns, fatalities, dismemberment of 1 or more major limbs, and extremely serious multiple fracture cases.

claims experienced by Lincoln in its 15 years of operation include a case of irreversible nerve damage, several burns, and 2 cases involving pneumothorax.

The best explanation for the relative infrequency and lower severity of claims against alternative medicine practitioners concerns the nature of alternative therapies. Since rates of medical injury increase with invasiveness of therapy,[32] fewer bases for suit are likely to present in the largely noninvasive alternative medicine setting. Moreover, injuries that do occur may not be as severe.

Another explanation may be the immature state of medical malpractice law and claims consciousness outside conventional clinical medicine—a phenomenon that may change as use and awareness of alternative therapies grow and as these therapies are progressively integrated into health care delivery systems. A third explanation may be that personal characteristics of alternative medicine practitioners and their patients or the dynamics of that patient-practitioner relationship are associated with a reduced propensity to sue, whether or not negligence occurred.

From the perspective of a physician who is concerned about the malpractice implications of referring to alternative medicine practitioners or comanaging patients with them, these findings should offer a degree of reassurance: they diminish the practical importance of situations in which practitioners might be exposed to liability for mere referral. Nonetheless, such situations can arise and should be taken seriously, particularly in light of uncertainty about how courts will decide medical malpractice cases.

LIABILITY FOR REFERRAL TO ALTERNATIVE MEDICINE PRACTITIONERS

As a general rule, a physician's mere referral of a patient to another physician, without more, does not expose the referring physician to liability.[33-35] This rule has been applied by courts throughout the country in cases involving referral among physicians. Yet in certain circumstances—alluded to in the qualification, "without more"—the rule does not hold. These exceptional situations in the context of alternative medicine can be divided into 2 categories: (1) situations in which a decision to refer the patient for alternative medical treatment is negligent and (2) situations in which the referring physician is held liable for the treating practitioner's negligence because the physician supervised the care, jointly treated the patient, or knew the practitioner to whom the physician referred the patient was incompetent.

In the first category, the referral itself falls short of the reasonable practice standard and is sufficient to form the basis of a malpractice lawsuit, regardless of the quality of care delivered by the practitioner to whom the referral is made. The law still requires that the patient suffer injury causally related to the substandard referral. But if, for example, a physician refers a patient to an alternative medicine practitioner instead of to some other, more appropriate practitioner and the referral delays, decreases, or eliminates the opportunity for the patient to receive important care, the referring physician could be held liable.[36]

Available empirical evidence on alternative medicine use suggests that this type of referral liability may be a theoretical concern more than a practical one: the most commonly used alternative therapies treat minor ailments or serious conditions for which conventional medicine can offer little in the way of therapeutic benefit.[1] Nonetheless, it does highlight an important reason why physicians who refer to alternative medicine practitioners should be familiar with the efficacy of various alternative therapies. As knowledge about the appropriateness of alternative therapies expands, courts may determine that physicians act negligently when they refer patients for particular therapies that they know or should know offer no practical benefit to the patient.[37]

Another complicating issue with regard to the choice of referral is the increasingly complex set of influences brought to bear on physician decision making. Guidelines, incentives, and restrictions aimed at influencing physicians' referral decisions are hallmarks of the managed care environment.[38,39] Managed care organizations typically seek to minimize the use of specialist care and limit expensive tests that offer little or no marginal benefit.[40,41] Analogously, a plan that covers alternative medicine services may, for example, determine that its enrollees should be referred to chiropractors rather than to orthopedic surgeons, given certain clinical indications. Were liability for this type of referral to be considered by the court, the plan's guidelines or incentives could potentially mitigate the referring physician's exposure to liability, although such "reallocation" of liability has been slow to develop because of a range of barriers to holding managed care organizations liable for malpractice.[42] Yet another complication is the increasingly common practice of using alternative medical care as an adjunct to allopathic care.

The second category of exceptions to the general rule of nonliability for referral arises when the practitioner to whom a patient is referred renders negligent care that injures the patient and for which the referring physician is then considered partially or wholly responsible. There are several situations in which courts may impute liability in this way, all of which involve *vicarious liability*, defined as liability of a person or organization for the negligence of an employed individual. (Vicarious liability includes liability of supervisors [*respondeat superior*] and apparent authority, that is, when one individual apparently represents an organization.)

First, when physician A refers a patient to physician B and then exerts authority over the way physician B treats that patient, physician A may be held liable for physician B's negligent acts. In finding vicarious liability, the law considers that physician B merely acts as physician A's agent. The question of whether an agency relationship exists and hence whether vicarious liability may be appropriate for that reason depends on the level of actual (or apparent) control maintained by the referring physician.

Courts have generally been reluctant to find that one physician controls another, setting a fairly high threshold for plaintiffs who attempt to establish liability on this basis.[35,43-45] However, referral to an allied health professional—for example, a nurse practitioner or physician assistant—presents a slightly different situation. A physician may be held liable for the negligent acts of allied health professionals, such as nurses, when the physician takes charge or supervises the care provided.[46,47] The same is true if a health care organization supervises the allied health professional. Moreover, by requiring the adoption of written protocols for collaboration, professional regulation in many states explicitly commits physicians to a supervisory role over allied health professionals such as nurse practitioners, physical therapists, and physician assistants, particularly in the area of drug prescription.[48,49]

Leading cases addressing this type of vicarious liability have considered care delivered in the operating room setting, rather than referrals[46,47,50]; they have also involved practitioners using the same approach to healing (ie, conventional medicine). Nonetheless, the manner in which alternative medicine services are integrated with conventional medical services will be important in determining whether referral involves the requisite level of actual or apparent control that courts have demanded to establish the agency relationship and so constitute an exception to the general rule of nonliability for referral.

Physicians who maintain a supervisory role over the patient's care or who refer in circumstances where the patient might reasonably expect that care will be supervised could be held to account for the negligent acts of the treating practitioner. From the perspective of physicians and health plans, the agency exception to the general rule of nonliability for referral would suggest good reasons for allowing alternative medicine practitioners to practice their craft freely once referral is made and also for ensuring that patients understand that referral initiates a new and separate patient-practitioner relationship. These recommendations would, however, be qualified if the alternative medicine practitioner is not licensed or is in an organization subordinate to the referring physician.

Second, liability may be extended to the referring physician in situations when the care given exhibits characteristics of a joint undertaking. Cases that have bound defendants together in this manner have looked for a fairly high degree of unity in the practitioners' approach to treatment.[51,52] In fact, joint undertakings typically involve practitioners who act in concert, simultaneously administering treatment to a patient, rather than being separated by the referral process.

Under current health care arrangements, it seems unlikely that this kind of situation will arise between physicians and alternative medicine practitioners. However, it could emerge as a possibility if the practitioners are employed by the same hospital or health plan and collaborate closely in providing patient care. This level of collaboration could also exist in situations where physicians and alternative medicine practitioners render care in a jointly owned or operated clinic. Similarly, as alternative medicine practitioners begin to deliver care alongside physicians in "integrated" units within a hospital or clinic, the possibility of a joint-undertaking situation does arise.

Third, the general rule of nonliability for referral may not apply when the referring physician knows that the practitioner to whom she or he refers the patient is incompetent.[34,35,53] For example, if a physician is aware that a particular acupuncturist uses unsterilized needles or that the acupuncturist has recently been the subject of serious disciplinary action by a professional board, then the physician may be considered negligent if a patient referred to that acupuncturist suffers iatrogenic injury.

While the physician's own liability is certainly a consideration in the above scenario, the courts have been far more active in holding institutions accountable in this area. Hospitals[54] and managed care organizations[55,56] have a legal obligation to be diligent in selecting, retaining, and evaluating health care professionals; this same obligation will extend to their relationship with alternative medicine practitioners. Therefore, the plan that credentials an incompetent acupuncturist may face liability as a corporation when a physician refers a patient to this practitioner for treatment, especially when it has established incentives or guidelines to facilitate this referral.

All of the above recommendations are contingent on the assumption that courts are not prepared to make presumptive judgments about the incompetence of alternative medicine practitioners, based solely on their idiosyncratic approaches to health care. If the courts were so prepared, this possibility has serious legal ramifications because it would allow liability of the referring physician to be inferred in a much wider range of cases—not merely those in which there is knowledge about a particular practitioner's incompetence. Once again, the courts do not yet appear to have considered this issue directly. However, we can find important clues about how they might deal with the situation by returning to litigation against alternative medicine practitioners and examining more closely how these cases have been decided.

REGULATION AND LIABILITY OF ALTERNATIVE MEDICINE PRACTITIONERS

A widely accepted rule of medical malpractice states that "a physician is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs, and not by those of some other school."[57-60] Although this rule is most often used as a basis for delineating different standards of care among conventional medical specialties, it has also been used to set standards for practitioners of alternative medicine in schools ranging from chiropractic to homeopathy, naturopathy (the resurgent remnants of the "drugless practitioners" of an earlier era[61]), and even Christian Science healing.[62,63] An important rationale underlying school-specific standards is that, when a patient elects or gives informed consent to receive care from a particular practitioner, the patient is presumed to have also elected to be treated with an ordinary level of skill and care common to that practitioner's field of practice.[64]

But courts have not applied a school-specific standard of care in situations where they do not recognize the school to which a defendant claims membership. How do judges make this decision? Licensure has thus far been the decisive piece of evidence in determining whether an identifiable school of

Table 4.—Statutory Licensure of Alternative Medicine Practitioners

Chiropractic			
Licensed in 50 states and District of Columbia*			
Massage Therapy			
AL	§34-43-2	NM	61-12C-1
AK	§17-86-102	NY	§7802
CT	§20-206	ND	43-25-01
DE	24 Del C 5306	OH	§503.42
DC	§2-3305	OR	§687.011
FL	§480.033	RI	§23-20.8-1
HI	§452.3	SC	§40-30-110
IA	§152C	TN	§63.18-201
LA	37:3556	TX	4512K
ME	32 MRS 14306	UT	58-47b-304
MD	HOcc 3-5A-04	VT	26 VSA 3405
MA	c140 §51	VA	§54.1-3029
NE	§71-1278	WA	18.108.005
NH	328-B:4		
Acupuncture			
AK	§08.06.030	NH	328-E:12
AZ	§32-2901	NJ	45:9B-8
AR	§17-102-101	NM	61-14A-4†
CA	BPC §4925†	NY	§8214
CO	§12-29.5	NC	§90-455
CT	§20-206bb	OR	§677.759†
DC	§2-3302.3	PA	63 PS §1803
FL	§457.105†	RI	§5-37.2-12
HI	§436E-3	SC	§40-47-40
IL	225 ILCS 2/15	TN	§63-1-102
IA	§148E.3	TX	4495b
LA	37:1357	UT	58-72-101
ME	32 MRS 12511	VT	26 VSA 3401
MD	HOcc 1A-201	VA	§54.1-2900
MA	c112 §152	WA	18.06.050†
MN	§147B.02	WV	§30-36-1
MT	37-13-301†	WI	451.04
NV	§634A.120†		
Naturopathy			
AK	§08.45.020	ME	32 MRS 12521
AZ	§32-1555	MT	37-26-401
CT	§20-34	NH	328-E:14
DC	§2-3309.1	OR	§685.02
FL	§462.18	UT	58-71-102
HI	§455-3	VT	26 VSA 3401
KS	§65-2872a	WA	18.36A.030
Homeopathy			
AZ	§32-2915	NE	§630A.230
CT	§20-10	WA	18.36A.030

*Mandates for coverage of chiropractic services are in force in all but 8 states (CO, HI, ID, NH, OR, SD, VT, WY) and the District of Columbia.
†Coverage of acupuncture services in health insurance products is mandated by state law.

medicine exists[65-67]; the regulatory apparatus that accompanies licensure defines its scope. As one court stated: "Through the enactment of this legislation, the legislature has recognized the practice . . . as a separate and distinct health care discipline."[66] Another piece of evidence likely to be important in signaling a school's identity and validity is state legislative mandates that compel insurance companies to cover certain alternative medicine treatments in all policies sold.

The chiropractic profession is the best example of an easily recognizable school of alternative medicine. Chiropractors are licensed in all 50 states and the District of Columbia (Table 4).[68] Forty-two states mandate coverage of chiropractic services in health insurance policies (Susan S. Laudicina, director of state services research, BlueCross BlueShield Association, oral communication, March 1998). Courts apply a standard of care in malpractice actions against chiropractors enunciated by experts in the chiropractic profession itself. They will rarely hear the testimony of a physician for purposes of establishing the appropriate chiropractic standard of care.[59,65,69]

Other schools of alternative medicine besides chiropractic have established systems of licensure and regulation (Table 4). Thirty-five states license acupuncturists (with 7 states mandating insurance coverage of acupuncture services), 27 states license massage therapists, 14 states license naturopaths, and 4 states license homeopaths. Few reported cases in the modern era have considered the liability of licensed practitioners of alternative medicine practicing in these areas. Nonetheless, it is entirely consistent with prevailing legal principles to expect that their conduct will be judged in the same way as chiropractic medicine.

In contrast, where practitioners of alternative medicine are unlicensed, courts tend not to recognize them as belonging to an identifiable school of medicine and hence do not apply a school-specific standard of care. Instead, the allegation of negligence will be judged according to conventional medical[70] or lay[65,67] standards of care. A court's decision to adopt either of these alternate standards, rather than standards set by the defendant practitioner's own school, has a significant bearing on case outcome: it becomes more likely that the conduct under scrutiny will be judged negligent.

CONCLUSION

Opening a professional dialogue between physicians and practitioners of alternative medicine is crucial to better health care for those patients who choose alternative therapies. This need can be expected to grow with use of alternative therapies, particularly as health insurance plans include such therapies in the benefits they offer. The larger solution lies with better education for physicians about alternative medicine and further outcome studies and randomized trials that comprehensively assess the efficacy and relative safety of alternative therapies. Some of this work has begun, spurred by such developments as the Office of Alternative Medicine at the National Institutes of Health.[71] However, clarification of the medical liability issues involved should remove a significant obstacle to integration and continuity of patient care.

Physicians who currently refer patients to practitioners of alternative medicine or who are contemplating doing so should not be overly concerned about the malpractice liability implications of their conduct. The same commonsense considerations applicable to other referrals will be a reasonably reliable guide regarding acceptable practice. However, it may be useful to ask the following questions. First, is there evidence from the medical literature to suggest that the therapies a patient will receive as a result of the referral will offer no benefit or will subject the patient to unreasonable risks? Second, is the practitioner licensed in my state? (Some added comfort can be derived from knowing that the practitioner carries malpractice insurance.) Third, do I have any special knowledge or experience to make me think that this particular practitioner is incompetent? And fourth, will this be the usual kind of referral (ie, basically at arm's length, without ongoing and intrusive supervision of the patient's management)?

If the answers to the first and third of these questions are no and the answers to the second and fourth questions are yes, then this should remove many of the concerns a physician has that the referral decision itself will be construed as negligent. This conclusion holds even if the patient suffers an injury caused by the alternative medicine practitioner's negligence. That practitioner should be held accountable for his or her autonomous actions and should be judged according to standards set by fellow practitioners.

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