

LEGAL ISSUES
and the
Practicing
Gastroenterologist

Richard E. Moses, D.O., J.D.

PSG 2009 Annual Scientific Meeting

October 2-4, 2009

Nemacolin Woodlands Resort

Farmington, PA

OVERVIEW

- 1. Medical Malpractice in Gastroenterology**
- 2. Legal Risks of Clinical Guidelines**
- 3. Physician Liability for Nonphysician Clinicians (NPCs)**

**MEDICAL MALPRACTICE
IN
GASTROENTEROLOGY**

3 Major CLAIM Categories:

- Failure to Diagnose
- Procedural/surgical complications
- Improper treatment
- Other:
 - Adverse reactions to anesthesia
 - Injection site injuries
 - Lack of informed consent

Floyd, TK et al. *Gastroenterology* 2008;134:1822-1825.

Conklin, LS et al. *Clin Gastroenterol Hepatol* 2008;6:677-681.

Type of Damages Awarded

- **Economic Damages**
 - **Compensate** lost wages & medical care costs
- **Noneconomic Damages**
 - **Compensate** pain & suffering
- **Punitive Damages**
 - **PUNISH** healthcare provider for conduct that is **malicious & reckless!!!**

Typical Damage Award

- Most recent data...difficult to obtain
 - 176% increase to \$1million (1994→2001)
- 8% of all awards → in excess of \$1 million
- Cases settling BEFORE trial
 - Mean settlement of about \$299K per defendant
- Jury **awards** & **settlement payments** have **steadily risen** over the past 2 decades!

Floyd, TK et al. Gastroenterology 2008;134:1822-1825.

US Dept. Health & Human Services (2003 March 3). <http://aspe.hhs.gov/daltcp/reports/mediab.pdf>

**LEGAL RISKS
OF
CLINICAL
GUIDELINES**

Standard of Care

- Develops in complicated way
- Involves **dynamic interaction** between:
 - ➡ **Leaders** of the profession
 - ➡ Professional journals (**articles**)
 - ➡ Professional **meetings**
 - ➡ Networks of **colleagues**

Clinical Practice Guidelines

- Institute of Medicine (IOM)
- Definition
 - ☞ “Systematically **developed statements** to assist the practitioner with patient decisions about **appropriate** health **care** for specific **clinical circumstances.**”

Institute of Medicine, TO ERR IS HUMAN: BUILDING A SAFER HEALTH CARE SYSTEM (1999)

Barry Furrow, et al., HEALTH LAW 267 (2nd ed. 2000)

Finder, J. Health Matrix: Journal of Law & Medicine 2000;10:67-115.

CPGs in Medical Malpractice Cases

- Already **affecting settlement** patterns according to survey of malpractice lawyers
 - Evidence of customary medical practice
 - Used as review article & authoritative expert
- Plaintiffs have used guidelines to their advantage
- **EXPERT TESTIMONY STILL NEEDED!**

A. Hyams, D. Shapiro, T. Brennan. 21 J.Health Pol., Pol'cy & Law (1996)

See, e.g., Miles v. Tabor, 443 N.E.2d 1302 (Mass.1982)

Basten v. U.S., 848 F.Supp. 962 (M.D.Ala.1994)

GUIDELINE WEBSITES

- www.guideline.gov
- Medical Societies (ACG)
 - ☞ www.acg.gi.org
- 3RD Parties



**Physician Liability
for
Medical Errors
of
Nonphysician Clinicians**

Background

- **Nonphysician Clinician (NPC)**
 - Physician Extender
 - Nurse Practitioner (CRNP)
 - Physician Assistant (PA)
- **Number & Use of NPCs → Increasing!**
- **Projected 94,000 jobs by 2012**

PHYSICIAN LIABILITY

Basis for Malpractice Claim:

- Based on acts or omissions of NPC
- **5 Areas for Claims v. Drs for NPC Mistakes**
 - **(1)** Lack of adequate supervision by Dr
 - **(2)** Untimely referral to consultant
 - **(3)** Failure to properly diagnose
 - **(4)** Inadequate examination
 - **(5)** Negligent misrepresentation

Moses RE et al. Am J Gastroenterol 2007;102:6-9.

Delman JL. J Legal Med 2003;24:249-80.

Cook JH. 72 Iowa L Rev 215 (1986).

**What is the underlying reason
for all of these claims???**

**INADEQUATE supervision of the NPC
by the supervising physician(s)!!!**

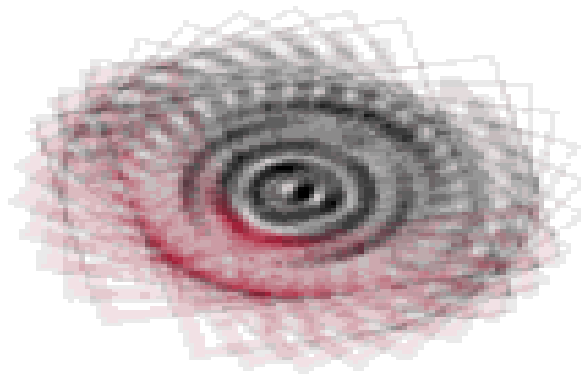
LEGAL THEORIES

- **3 Legal Theories Impute Liability**
to Dr from NPC:
 - 1) Vicarious Liability
 - 2) Negligent Supervision
 - 3) Negligent Hiring

AVOID LIABILITY

- Hire qualified NPC
- Know state rules
- Properly train NPC
- Check all credentials
- Check all references
- Proper supervision
- Follow state supervision requirements
- Review work regularly
- Encourage interaction
- Proper NPC intro
- Set high standards of care for NPC
- Make sure procedures are followed
- Stress documentation

SUMMARY & CONCLUSIONS



The End