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Malpractice: Will You Be Sued?

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Learning Objectives

At the conclusion of this course, the student will be able to:

1. Define and discuss: malpractice, liability, negligence, tort.
2. Name and explain the four things that must be proven under the Law of Torts.
3. Name the three kinds of damages likely in a malpractice case, and define each.
4. Explain why "cause and effect" is a key concept in establishing liability.
5. Name and define the six major categories of negligence in medical malpractice.
6. List the steps of a malpractice complaint and lawsuit and discuss each step.
7. List six guidelines for being in control of your testimony during a deposition.
8. List four things expert witnesses CANNOT do.
9. Define the concept of "recognized standards of care" and list them.

There are many legal issues involved in the practice of dietetics. Of particular concern is professional negligence or malpractice. This study will familiarize you with concepts relevant to the definition of, and rules about, malpractice as understood by the American legal system. This study will also update you on recent changes to the medical malpractice system, and likely ramifications for your daily practice

The American legal system has long required health professionals to bring a high degree of skill and care to their work, and a responsibility of duty to the patient. When things go wrong, malpractice can result.

Central to the definition of malpractice is the concept of *negligence*. Malpractice is negligence in one's capacity as a professional.

Negligence occurs when skill is not used. *Black's Law Dictionary* defines negligence as " . . . the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do" (*Black's,* 1968).

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The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) defines negligence as " . . . a failure to use such care as a reasonably prudent and careful person would use under similar circumstances." (JCAHO, 2004).

Another relevant concept is *fiduciary responsibility of professionals.* Fiduciary means "having the characteristics of a trust." In other words, as a professional, you have to act in the interest of your client, not yourself.

A certain course of treatment may be lucrative, or may involve a snazzy new instrument, or may provide material for a publishable study, or may involve a medicine of particular interest, but a doctor may not consider those factors when treating a patient. Lawyers say the doctor has a *fiduciary* responsibility to provide the patient with the best treatment possible. Not doing so is one key element of malpractice, which JCAHO defines as " . . . improper or unethical conduct or unreasonable lack of skill by a holder of a professional or official position (JCAHO, 2004).

Malpractice falls under the law of *torts*, which means "injuries." Tort law is not in the same category as contract or criminal law. Under tort law, adults are accountable for damage and harm caused to a person or property, whether intentional or unintentional. Personal injury litigation includes not only professional liability but automobile liability, product liability, air and rail liability, and home owner liability (Cross, 1988). Professional negligence implies that the injury was unintentional, but that the professional's conduct or judgment falls below the standard of care for the profession. Again, JCAHO: "Malpractice is a cause of action for which damages are allowed." (JCAHO, 2004) "Damages" means compensation, usually monetary, although remedial action may also be included.

Under the law of torts there are four things that must be proven. The injured person who sues (plaintiff) must persuade the court that the following *elements of proof* in the case have been satisfied:

- There is a *relationship of duty* by the defendant toward the injured person;
- There is a *breach of duty* to the injured person;
- The injury was caused by the breach of duty. (*i.e.* cause and effect); and
- There is an *actual injury*.

In the following sections, I'll discuss each of these points in detail.

Duty

In undertaking to provide care to a patient, a duty exists. This is generally not hard to prove. You see a newly diagnosed diabetic in your hospital outpatient clinic that has been referred by a doctor on staff at the hospital. A duty exists "once you have agreed to care for, begun to care for, or possibly even established a rapport with the patient." (Wood, 1993).

By accepting the case, you have assumed a legal responsibility. You imply that you possess the degree of education and training ordinarily possessed by other dietitians under the same or similar circumstances (Wood, 1993). If you profess to be a specialist (perhaps a Certified Diabetes Educator), your duty to provide a degree of care to this patient is greater than that of a general practitioner.

Along with duty comes the responsibility of knowing your capabilities in the practice of dietetics. If a special case comes your way that you do not feel prepared to treat on your own, it is your duty to refer the patient to a practitioner who has the training and/or facilities to better treat the patient. It could be considered negligent to demonstrate a "lack of diligence" in referrals (Wood, 1993).

The concept of duty also implies that as a dietitian you have an obligation to your patients to maintain a continuing education program keeping you abreast of new developments in the field.

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Breach of duty

In showing a breach of duty, the plaintiff will need to give evidence that a dietitian did something contrary to the *recognized standard of care* or neglected to do something by that standard. Under the concept of standard of care, the court will consider "how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances" (Richards, 1993).

Another aspect of this is the *respectable minority rule.* In cases where the majority standard of care was not followed, the defense may argue that the procedure used is one that is accepted by a respectable minority of practitioners.

In the food service area, breach of duty might apply if food was served under unsafe conditions, an unskilled employee was allowed to perform duties above his known level of training or the dietitian was negligent in properly maintaining equipment. In a classic example of this, the superintendent of a county hospital was sued for failure to supply a patient with wholesome food and therefore augmenting the patient's sickness. (*Drefahl v. Connell,* 1893).

Damages

The plaintiff will need to establish that there was an injury or loss. In general, this is not difficult to prove (Cross, 1988). The patient or family members will demonstrate that there were damages of a personal, emotional, or economic nature, as shown below.

Damages in a Malpractice Lawsuit

Personal:
- **loss of life; lost chance of survival;**
- **physical injury or disability;**
- **deterioration of the patient's condition or quality of life**

Emotional:
- **physical and emotional pain; suffering;**
- **emotional distress; mental anguish;**
- **disfigurement; loss of enjoyment; loss of companionship**

Economic:
- **lost wages; future lost earning potential; present and future**
- **medical expenses; special equipment needed for daily living**
- **special care; other direct consequences of injury**

Showing probable, hypothetical or alleged injury is not enough. There must be actual damage.

For example, if you instructed a patient on a renal diet and, through your miscalculations, the meal pattern you developed had twice as much potassium as ordered, this in itself is not an injury. If in realizing your mistake, you contact the patient by phone, fax a new meal pattern, and arrange an appointment the next day for further instruction, and the patient suffers no ill effects, an injury has not occurred.

As in the "no harm, no foul" philosophy of sports officiating, the legal rule is "no damage, no negligence." However, if you did *not* contact the patient and death occurred due to potassium overload, the plaintiff's heirs would have a negligence claim.

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Causation

The plaintiff will be responsible for showing that the injury suffered was caused by the actions of the defendant. A cause and effect must be established. In the previous case, as no harm resulted from the miscalculation, no judgment would be awarded.

Causation, or proximate cause, is one of the most difficult elements in negligence cases to prove. "The plaintiff must prove that no other intervening event, no act by another individual or by the plaintiff . . . has contributed to the injury" (Cross, 1988).

Theoretically, there is no "minimum" harm that a patient needs to prove. "Thus, merely proving that the dietitian's negligence caused discomfort over a period of time, or that it delayed or complicated the patient's recovery, constitutes sufficient harm on which to base a lawsuit" (Reidy, 1975).

A concept that is getting more attention in the courts in establishing causation is that of *lost chance of survival*. This approach attempts to compensate plaintiffs for the percentage of harm actually caused by the negligent health professional (Boggs, 1992). The courts in such cases look at the "loss of a less than even chance," and even "increases in the potential for harm to result" as a result of professional negligence.

For example, if a frail, elderly patient admitted to the hospital with pneumonia receives contaminated food and death occurs, a plaintiff might argue that the injury resulting from the improper preparation of the patient's meals gave the patient less than an even chance of surviving.

The scope of medical malpractice

Dietitians have been somewhat immune to the crisis in medical malpractice suits. I know of no cases where a dietitian was successfully sued for malpractice. Undoubtedly, dietitians have been sued and have settled cases before they were brought to trial, but these cases are not part of published opinions in the legal system. Therefore, it is difficult to determine the scope of the malpractice issue for dietitians. We can look, however, at some available figures to ascertain the dietitian's risk in professional liability.

The Institute of Medicine estimates that at least 44,000 people — perhaps as many as 98,000 — die in hospitals each year frommedical errors that could have been prevented. The report defines medical error as "the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim."

Medical errors are estimated to result in total costs (including the expense of additional care necessitated by the errors, lost income and household productivity, and disability) of between $17 billion and $29 billion per year in hospitals nationwide (IOM, 1999).

In 1986 the National Practitioner Data Base (NPDB) began collecting information about health care practitioners who, as the result of judgments in malpractice suits, have entered into settlements, had disciplinary action taken against them that resulted in licenses being revoked or privileges to practice being limited, or had to pay monetary awards (or whose employers or insurance carriers have had to pay monetary awards.)

In the case of settlement of a medical malpractice claim it may occur due to reasons that do not necessarily reflect on the professional competence or conduct of the provider. For example, the provider's insurance policy might allow the insurance carrier to settle without the policyholder's consent.

The latest report of the NPDB looks at data from 2002. Seven of 10 reports submitted are for medical malpractice. Of these, physicians are responsible for eight of 10 and dentists one of 10 Malpractice Payment Reports. All other practitioners were responsible for the remaining 18,690 reports (8.1 percent).

Physicians have large fees to pay when defending malpractice claims. Defense costs averaged $91,803.00 per claim in cases where the defendant prevailed at trial. In cases where the claim was dropped or dismissed, costs to defendants averaged almost $16,160 (Bartholome, 2003).

From September 1, 1990 to the end of 2002, 14,390 reports were filed with the NPDB for nurses and nursing-related practitioners. This figure is for all reports, including malpractice. In 2002, 460 malpractice payments were for nurses, with the mean payment being $310,867 (NPDB, 2002).

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Croke (2003) examined 253 case summaries of trials held between 1995 and 2001 where a nurse was a defendant in a civil lawsuit while engaged in the practice of nursing. She identified six major categories of negligence issues that prompted malpractice lawsuits. These are:

- failure to follow standards of care;
- failure to use equipment in a responsible manner;
- failure to communicate;
- failure to document;
- failure to assess and monitor; and
- failure to act as a patient advocate (such as questioning incomplete medical orders).

From September 1, 1990 to the end of 2002, only seven individual dietitians have had reports filed with the NPDB (NPDB, 2002).

One doctrine of law that has tended to protect the dietitian is the concept of *respondeat superior* — or "Let the master answer." This doctrine holds that the employer, either a doctor or the hospital, is responsible, at least in part, for negligent acts of the employee — the employees are acting upon orders and are performing their duty. But, practically speaking, lawsuits are brought against doctors and institutions more often because both carry higher limits of insurance (Hassan, 1977).

Although historically dietitians have fared well, the potential for malpractice among dietitians is a growing concern. Dietitians are accepting more responsibility through increased expertise, exposure and responsibility, which tends to make us more vulnerable.

Specifically, dietitians are expanding further into areas of private practice and are not directly employed by a physician or institution, where the *respondeat superior* doctrine will not generally apply. For example, if a dietitian in private practice follows through on a diet order from a referring physician that she thinks is erroneous, the courts might hold the dietitian negligent in executing it rather than trying to correct it.

There is a push among nutrition professionals to gain order-writing privileges for Registered Dietitians. RDs Heidi Silver and Nancy Wellman explore the benefits of these additional privileges for ensuring better continuity of care (Silver, 2003). The liability issues will need to be addressed will expanding practice.

Anatomy of a malpractice suit

A doctor once told me, "Everybody gets sued at least once in their life." Unless you have been involved in a lawsuit it is difficult to know what to expect. The following is a "practice scenario" of a malpractice suit involving an RD.

Your lawsuit may begin with a conversation with a disgruntled patient who claims that under your care he was injured. The first formal step, however is when a patient files a complaint (a pleading) and backs it up with factual statements, allegations of negligence, and a request for compensatory or punitive damages. In either case, you should contact your insurance carrier when you sense that a malpractice claim is a possibility. If you work in an institution, you will want to take it to your facility's risk manager.

Most malpractice insurance policies require that the dietitian report all claims and significant procedural events in the prosecution of claims within a specified time period. In communicating with your insurance carrier regarding an incident, you must give a written description of the event. Include with this the time, place and circumstances concerning the incident. As much as possible, list the names and addresses of the injured party or parties and any witnesses.

Your patient is now a plaintiff. Your relationship, while it may have been one built on considerable rapport, now has an adversarial quality. Do not expect that you can talk the patient out of the decision. In fact, it is advised that you avoid the plaintiff as much as possible, keep detailed notes of conversations should they occur,

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and follow the instructions of your insurance carrier. Under some conditions, you may continue to treat the patient and/or his family. When concerns come up in this regard your best approach is to seek legal advice.

Most states require that a malpractice suit be brought within a specified period of time of the injury. Such legal rules are called *statutes of limitations.* In most states this period is within two or three years or, in cases where the injury cannot be discovered easily, within six months to three years after the injury is discovered.

According to the NPDB 2002 report, the average time elapsed between a malpractice incident and payment by physicians was 4.54 years (NPDB, 2002).

Reviewing the case

The insurance carrier will want to see a copy of the letter or request for records you have received. When information is requested, it is important to give the facts. Offer details including the treatment, summaries of the records and recollections of unrecorded conversations (Leaman, 1993). Your carrier will often hire an outside consultant, usually an adjuster, to review the case.

Do not discuss the case with anyone not connected with the insurance carrier. Avoid discussions with colleagues, acquaintances and associates. These conversations may come back to haunt you at trial! The insurance carrier or its consultant will make the decision to bring in a defense attorney. You may, however, at any time consult your personal lawyer regarding the case.

In some states, pretrial screening panels are used to review cases before they go to court. Panels may be voluntary or mandatory. The merits of the case are reviewed, and depending on the state, the panel can render opinions on damages or liability. The panel's judgment, however, may not prevent the parties from eventually going to court (US Congress, 1993).

The decision

The insurance company may decide not to defend the case. Settlement considerations are largely economic for the insurer (Hirshfeld, 1991). If the insurer recommends not to defend the case, you should carefully consider the reasoning. For example, it may have been determined that there was a breach of standard care or there may be insufficient documentation to defend the case.

After consideration, and depending on the terms of your policy, you may have a voice in deciding how to proceed from this point. If you agree with the decision not to defend the case, a settlement will be offered. The plaintiff can either reject or accept the offer.

The insurance carrier will generally decide to defend the case if it determines that care or conduct were appropriate and within a reasonable standard of care. A claims adjuster for the company will contact the plaintiff's attorney with the decision. The plaintiff's attorney will then decide whether or not to file a malpractice suit.

During this period, it is the dietitian's responsibility to keep abreast of the proceedings through the insurance carrier or its agents, consultants and attorneys. It cannot be emphasized enough the importance of keeping information about the case within a close group. Avoid discussing the specifics of the case with others.

The complaint

When a suit is filed, the defendant will receive a *writ of summons* (or *complaint*). This may be hand-delivered or may come by certified mail. A complaint "tolls the statute of limitations," meaning that a legal document has been filed before a prescribed time (usually within three years for medical malpractice pertaining to adults).

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It is possible, however, that a suit may be filed after the statute of limitations. In such cases, the *discovery rule* applies, which gives the person the benefit of two years after the time of the relationship between the alleged malpractice and when the injuries are discovered. This ruling will be made by the court (Leaman, 1993).

A complaint is a legal document that gives the defendant information concerning the facts upon which the plaintiff is supporting the demand. It lists the damages the alleged negligence caused. At this time, mediation proceedings may be commenced. If, however, they are not commenced or are bypassed, begin preparing for a jury trial.

Preparing for trial

When a complaint is filed, the lawsuit enters a new phase, the *pleading* stage. The dietitian and defense counsel will draft an appropriate response to the complaint. This response will either be an *objection(s)* or an *answer* to the complaint.

It is up to the defendant to protest portions of the complaint that are vague or contain theories of liability or requests for damages that are not permissible under the law (Leaman, 1993). This is called objection. Upon receipt of the RD's response, the plaintiff must respond to the objections.

Your attorney will prepare a written answer to the complaint on your behalf. When in doubt, the attorney may question whether or not you owed a duty of care to the plaintiff.

The answer that may be filed to the complaint is of great importance to the defendant because one may be required to swear to its accuracy. Take every precaution to note that some facts are not omitted, misstated or inaccurate (Leaman, 1993). The dietitian as defendant will want to work closely with the lawyer to develop a thorough understanding of all the issues involved.

The answer is always prepared with a defense strategy in mind, for, in many jurisdictions, if defenses are not raised at this point, they may be waived automatically. It should be noted that answers may generally be amended throughout the lawsuit. When there are multiple defendants, pleadings address the conflicts that arise among the parties involved.

Discovery

Discovery involves the fact-finding process used by lawyers. These proceedings are big consumers of resources and time, and are a costly part of hiring a defense team. Discovery takes several forms: persons may be directly asked questions (*oral deposition*), persons may be sent written questions for response, and persons may receive requests to provide documents.

Oral depositions allow lawyers to develop a case by following up on inquiries and by determining the credibility of a witness. Any witness may be deposed; this form of discovery is not limited to a party in the lawsuit. Each party has the right to be present and to question the witness, usually through lawyers. Potential witness for deposition include:

- plaintiff;
- defendant;
- office personnel;
- other health professionals;
- expert witnesses;
- family member of plaintiff; and
- plaintiff's employer

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Although the deposition process is often described as informal, it is anything but. The witness must swear an oath to tell the truth. Everything said at the deposition is recorded by a court reporter and may be used at trial if a witness changes his testimony. The only thing informal about the procedure is that it is held outside of the courtroom, often in a lawyer's office.

The purpose of a deposition is to verify the facts. At the same time, however, it gives a lawyer an opportunity to evaluate the witness. If you are deposed, your credibility will be exposed as well as your temperament and personality traits. Strive to remain calm so you won't be tempted to a make a rude or sarcastic response.

When you are deposed, it is important that you be fully prepared. There are not many restrictions on what can be asked in a deposition. It may last more than a day. Dress professionally and show up early. As a witness, be familiar with the legal documents that have been filed so far (the complaint, answers to interrogatories, defined below) and have a complete understanding of all aspects of the case. Be prepared to talk about your educational background and your work experiences. Beforehand, review your recent continuing education efforts. You may be asked questions about any conversations you have had regarding the case. These questions are certainly proper, with the exception of conversations you have had with legal counsel, which are privileged.

Martin and Cepero (1999), who are Registered Nurses, offer these guidelines for staying in control of your testimony during a deposition:

- Listen attentively to all questions and respond honestly;
- Answer only what's asked;
- If you don't understand the question, don't guess at the meaning. Ask the attorney to explain or to re phrase the question;
- Don't allow yourself to be interrupted or rushed;
- Be polite without being overly friendly; and
- Keep your head if an attorney tries to pressure you into making unwise comments through intimidation, silence, belittling remarks about your competence or credentials, or non-verbal tactics, such as intimidat ing body language or facial expressions (Martin, 1999).

Written discovery

Occasionally a deposition may be conducted as a series of written questions. The questions may be asked of any person or entity, not just persons named in the litigation. Objections may be raised to the proposed questions by the parties of the lawsuit beforehand. In a deposition by written questions, a third party is present to attest that the questions are properly asked.

Another form of written discovery is the *interrogatory*. This is limited to the plaintiff and defendant only. Interrogatories are written questions posed by one party to the other. The questions will be similar to those in a deposition, but may ask for greater detail. You may be asked about how you keep records, your customary procedures, how you handle medical information (Leaman, 1993).

You must answer all of the questions unless there is a legal basis on which to object. The answers to interrogatories should be accurate. If an answer is incomplete or inaccurate, it could have serious consequences on the outcome of the case. Lawyers will be looking for the consistency of your answers over all areas of discovery. An effective defense will depend on a consistent foundation of information.

Written discovery may also take the form of *requests for admissions*. These questions are directed to parties in the litigation only. Each question is phrased so that it must be answered as "admitted" or "denied." This form does not allow narrative answers. This form of discovery helps to delineate facts before trial. A sample question might be, "Admit or deny that you counseled plaintiff on January 15, 2003."

Your lawyer has the right to object to questions that are genuinely ambiguous. Lawyers must take care in this, however, as frivolous objections are cause for a judge to impose sanctions (penalties) on the lawyer.

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Requests for production

A request for production applies to certain documents or classes of documents and petitions. The party either provides copies or produces documents at a convenient time for inspection by the requesting lawyer. Motions for production are a valuable way to develop evidence, and may be asked of anyone. It is critical to comply fully with such requests unless your lawyer has reason to contest the order.

Documents Typically Requested

By plaintiff:

- patient records, office policy and procedure manuals,
- documents about the dietitian's credentials
- dietetic practice history; personnel file

By defendant:

- employment records; educational records;
- past tax returns; medical records;
- divorce decrees and settlements

Other discovery orders

Subpoenas are written orders requiring that a person or documents be brought to a certain place at a certain time. Subpoenas may be requested of any person. They can be used to require that a person appear at a set time or to request that a person be available to testify during the course of the trial.

Subpoenas may be made for physical objects. Items requested might be medical records, office diaries or prescribed eating plans. If subpoenas request documents for persons other than the plaintiff, perhaps for other patients, your lawyer will want to investigate the validity of the request.

Privileged information

Not all information in a lawsuit is admissible. It is up to the trial judge to control the discovery in the case through the discretion granted in the rules of procedure for that jurisdiction (Richards, 1993).

Protected information may include the defendant's tax forms, business records that do not bear on the case, and other matters that are not judged to be part of the plaintiff's case.

Legal privilege, or the lawyer-client privilege, maintains that communication between a lawyer and client is protected from discovery. This statutory doctrine is intended to encourage people to use legal counsel in the hope that it will increase compliance with laws (Richards, 1993). In *Bassette vs Health Management Resources Corp.*, the court upheld that information disclosed by a patient in the course of treatment must remain confidential and may not be disclosed without written authorization from the patient or a court order. Communication that is not protected includes intent of a client to commit a serious crime or intent of a client to critically harm him or herself.

Conversations with your spouse, personal physician, psychotherapist, clergyman, risk manager, and liability insurance company representative are also protected from discovery (RMF, 2004).

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Proceeding to trial

When the parties are ready, the case is placed on a list with the courts. The trial judge will usually schedule a pretrial conference. The conference is designed to help organize the case for trial. It will establish what motions need to be ruled upon, and what agreements can be made. Procedures will be agreed upon. The judge may use this time to act as a mediator, discussing the prospects for settlement with the parties. The judge may ask the parties to compromise for a settlement. Many judges also require that parties submit a *pre-trial order*. Hirshfeld (1991) explains:

The pre-trial order usually contains a summary of the case, an agreed statement of the facts and legal conclusions of law, the lay witnesses and expert witnesses that will be called by each side, together with a description of their expected testimony, materials which the parties have agreed may be admitted into evidence, such as deposition transcripts and patient records, proposed jury instruction and other matters.

The trial

A malpractice case can be tried before a jury, as each party has this right. Sometimes the parties agree to waive their rights to a jury and the matter is tried before a judge.

During a jury trial the judge rules on questions of law and the jury functions as the finders of fact. The steps in a trial are:

- selection of the jury;
- opening statements by the parties;
- presentation of the evidence;
- closing statements; and
- verdict.

During this process, each party presents its side of the case, bringing in evidence from the discovery period. The defense will challenge the sufficiency of the evidence introduced by the plaintiff. The plaintiff bears the responsibility of proving, by substantial evidence, that there is a reasonable probability that the dietitian's negligence was the cause of the patient's injury.

You might think that with all of this organization and preparation the case is virtually decided before trial. However, the judge and jury are working with the facts as they are presented. Judges have to use discretion in weighing the credibility and testimony of witnesses. Their judgment is susceptible to persuasive arguments and this may sway the jury process to a decision that could even seem unreasonable.

Judgment and beyond

The *judgment* is the official decision of the court upon the respective rights and claims of the parties to the suit (*Black's,* 1968). The judge denotes the reason the court gives for its decision — this is sometimes referred to as an *opinion*. The jury awards damages at this time.

A motion for *summary judgment* can be made at any time during the pre-trial and trial process. It is usually made when discovery is closed. The requesting party asks that the judge enter judgment without a trial. In malpractice cases, summary judgment motions generally do not end the litigation, but tend to be used to narrow the issues for trial (Hirshfeld, 1991).

Judgment does not necessarily end the court proceedings or the case. Each party has the right to appeal the trial court's decision to an appellate court.

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An appeal is a complaint to a superior court of an injustice done or error committed (*Black's,* 1968). Only certain issues may be raised on appeal, such as evidence that does not support the verdict, a verdict or instructions to the jury which were erroneous, or testimony which was inadmissible.

For example, the trial judge admits the testimony of a nurse practitioner regarding the standard of care for a dietitian in a dietetic malpractice trial. The issue of the NP's competence on the standard of care may be raised on appeal by the dietitian. New evidence cannot be introduced unless it was unavailable at the trial.

After notice of appeal, both sides submit a brief. The court hears oral arguments and issues a written opinion deciding the appeal.

Settlement

A lawsuit can be settled at any time. Through a series of negotiations, the decision is reached. The most likely points during the course of a lawsuit at which an effort to settle might be made are at the inception of the lawsuit, just before trial, during the trial, and before an appeal.

Factors to consider in settling a case include the merits of the case, the aspects of the case that might influence the jury, and the effect of the settlement on licensure and other privileges (Hirshfeld, 1991).

Insurance policies have clauses that describe the dietitian's control over settlement.

A Case for the Books

Malpractice lawsuit decisions are not published in law journals unless the case reaches the court of appeals. On April 30, 2003 a Florida appeals court looked at a case where a patient sued a hospital for negligence after she received a nonhypoallergenic diet during hospitalization that caused her allergic-reaction symptoms to worsen.

In *Puentes v Tenet Hiaheah Healthsystem*, 843 So. 2d 356 (Fla. App. 2003), the Court held that a patient's diet was part of her medical treatment. Therefore when she sued the hospital for dietetic malpractice, her case was dismissed because she failed to follow the statutory requirement necessary to pursue a medical malpractice case. Thus, dietitians may be entitled to the same statutory safeguards which are enjoyed by physicians and hospitals.

Alternatives to lawsuits

Because litigation is costly and cumbersome, many people advocate other methods for resolving malpractice claims. The *pretrial screening panel* mentioned above is used to weed out non-meritorious cases. *Voluntary binding arbitration* allows an arbitrator (usually a retired judge or experienced lawyer) to hear evidence and render the decision in lieu of the judge or jury. Decisions reached during arbitration are final and not appealable.

Mediation is another form of alternative dispute resolution. Mediation is a settlement conference conducted by a disinterested settlement facilitator or mediator (usually a retired judge, experienced lawyer or even a health care professional).

By becoming familiar with the process a lawsuit takes, you can be more prepared. Your understanding should include events leading to the decision to defend the case, the complaint, the pleading stage, the trial process and judgment.

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Typical Categories of Control over Settlement

Control usually falls within the following areas:

Final say:
•if dietitian rejects a settlement initiative, insurer is obligated to continue defense

Final say, but challenge ability:
•allows insurer to challenge decisions if it feels they are unreason able

Final say, but insurer recommends a settlement:
•dietitian still has final say and defense continues, but insurer is not obligated to pay any damages awarded to plaintiff that exceed recommended settlement amount

Insurer control:
•insurer has control over settlement decisions

Quality issues

The Agency on Healthcare Research and Quality (AHRQ) of the US Department of Health and Human Services (DHHS) has given us a definition to start from in discussing quality. The AHRQ states that, "Quality health care means doing the right thing in the right way for the right person and having the best possible result." (AHRQ, 2004) McClusky (2003) works in patient satisfaction and has written:

> In healthcare, it is our customers (patients) who are really driving the quality improvements. Not only are they physically sick, they are also sick of having to endure excuses, blame and generally cold and unfeeling treatment from healthcare providers. They dislike this kind of treatment when they are well, but they dislike it even more strongly when they or a family member are ill. We see clients at a time when they are most needy.

Donabedian (1988) explains that there are two elements for which quality may be assessed in the performance of practitioners: *technical* and *interpersonal*. The knowledge and judgment used in arriving at the appropriate strategy and the skill necessary in implementing those strategies is considered technical performance.

The interpersonal process is the vehicle by which technical care is implemented. Conduct in the interpersonal process must meet individual standards and social expectations. Some virtues that interpersonal relationships are expected to have are: privacy, confidentiality, informed choice, concern, empathy, honesty, tact and sensitivity (Donabedian, 1988).

Professionals may use a variety of practice guidelines in assuring quality, including standards of practice, standards of care and standards of performance. Practice guidelines are developed to define care that is medically necessary and appropriate in the identification, treatment, or management of specific conditions (Monk, 1995). Standards of care are what patients, employees or customers can expect to receive from the dietitian.

A standard of performance is how the dietitian or employee must perform to meet expectations established in the standard of care (Kane, 1992). Standards are typically developed through consensus by leaders in the professional community. Typical standards are what everyone would like for every patient, rather than an objective statement of how things really are (Moniz, 1992).

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In practice, care may vary from established standards depending on what the dietitian knows about the patient at the time and because of differences in professional judgment among practitioners. There may be conflicts in the standards of care between different entities — national, state, voluntary regulatory agencies and even specific institutions. If you notice a significant conflict, you should consult your lawyer before proceeding.

The American Dietetic Association's Standards of Professional Practice, are statements of dietetic practitioner's responsibility for providing quality nutrition care. These "describe the minimum level of performance expected of DTRs and RDs" (ADA, 2004).

The Nutrition Care Process and Model is a standardized process for dietetics professionals. This process supports individualized care, not standard care (Lacey, 2003).

Medical nutrition therapy (MNT) protocols are now being developed through a consultative process by experts and practitioners. These protocols are a plan or set of steps that incorporates current professional knowledge and available research. The protocols are meant to serve as a general framework for working with clients with particular health problems.

The ADA cautions, however, "the protocols are provided with the express understanding that they do not establish or specify particular standards of care, whether legal, medical, or other (ADA, 1999).

Expert witnesses

A traditional method for clarifying performance is the use of "expert witnesses." Both parties in a lawsuit bring in expert witnesses to show that the patient was treated with reasonable or unreasonable care and judgment. The law looks to what is ordinary skill or care. The expert witnesses and testimony regarding standards of care bring evidence as to what is reasonable.

While useful for clarifying issues, experts will not perform some activities. Experts cannot:

- assign guilt or innocence;
- attempt to determine that a law was broken;
- testify beyond their scope of practice; and
- discuss the case with anyone without the permission of the attorneys and the court (Alford, 2003)

Some state statutes specify qualifications for an expert witness. In Ohio, for example, an expert witness is required to spend 75 percent of her professional time in the active practice of her specialty (Andersen, 1996). In a recent case of nursing negligence in Illinois, the courts struck the testimony of a physician on the grounds that a physician is not qualified to testify as to the standard of care of the nursing profession. (*Sullivan v Edward Hospital*) In malpractice liability the court is deciding whether or not the patient received reasonable care by a reasonably prudent professional. More and more, judges and juries are learning about reasonable care through published policies, procedures, protocols and standards (Moniz, 1992).

Presently, standards of care may not be used alone to establish reasonable care. The existing rules of evidence limit the use of guidelines in establishing the legal standard of care (US Congress, 1993). Guidelines may not be able to reflect the changes in medical practice. Much is still left to the professional's discretion; guidelines are not enough to be used as standards of care.

Some sources for practice guidelines are listed on the following page.

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Sources of Practice Guidelines for Dietitians

- American Dietetic Association, and its practice groups
- Joint Commission on Accreditation of Healthcare Organizations
- Standards of regulatory agencies
- Standards of other professional organizations
- Employer policies and procedures
- Diet manuals
- Dietetic practice acts
- Authoritative dietetic texts and journals

Locality rule

In the past, it was felt that the accessibility to facilities and experience of professionals would vary regionally, and that this needed to be considered in establishing reasonableness of care. This *locality rule* was used in professional liability to determine reasonable competence of the care provided. The locality rule has been mostly abandoned. Dietitians are subject to the standards of a national commission established for registration.

Standards of care for specialists

Determining a health professional's level of skill depends on whether or not the professional professes to be a specialist or a general practitioner. A specialist's legal obligation to a patient is generally considered to be that of an "average specialist," not an "average dietitian." In *Carbone vs. Warburton* (1953) the court said (using physicians as examples):

> The general practitioner must use normal care. One who holds himself out as a specialist must employ not only the skill of a general practitioner but also that special degree of skill normally possessed by the average physician who devotes special study and attention to the particular illness, having regard to the present state of scientific knowledge.

To that end, the performance of health professionals professing a specialty will be judged by different standards.

Negligence issues

Cases involving claims of negligence will look at whether or not technical and interpersonal skill and care were provided. Many issues for dietitians will be based on a failure either to act or to communicate. One of the central communication issues in malpractice is that of *informed consent.*

The elements of informed consent include disclosure of information, competence, understanding, voluntariness and decision-making (Sprung, 1989). For physicians, this is a very important topic. Entire books have been written on the subject.

Courts require that physicians disclose to the patient the diagnosis, the nature of the proposed procedure, the benefits and risks of the procedure, alternative procedures with their benefits and risks, and the consequences of not having the procedure. Tests of a causal connection between the physician's disclosure and the patient's injury have answered two concerns — whether or not the individual would have agreed to the procedure if disclosure was given, and what a prudent person in the patient's position would have decided if properly informed.

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Dietitians typically work in a low-risk environment concerning disclosure. However, the care we give our patients is certainly subject to scrutiny. We can learn something from the precedents set in courtrooms involving suits against physicians. Look at the way you conduct your dietetic practice. Are you giving your patients adequate information with which to make decisions? When counseling weight reduction clients, for example, are you holding out promises about the success of your counseling even though you realize most patients will gain the weight back, and sometimes more, in a matter of years? Do you counsel your patients on the health risks associated with their medical condition? Do they understand how noncompliance with the diet principles could put them at risk?

If someone questioned you about conversations with a patient, do you have them noted in the medical charts?

Failure to act

Failure to act in malpractice negligence relates to the care that the patient is given. A professional is liable for the actions he takes as well as for his failure to perform.

Care is judged by the "reasonable and prudent person" standard described earlier. For example, hospital dietitians must provide the right therapeutic diet to the right patient at the right time. "Ordinary" diligence in carrying this out is expected. As the scope of practice widens, dietitians are required to demonstrate why a particular course of medical nutrition therapy was chosen and to show that they exercised professional judgment similar to that of a "respectable minority" of dietitians. Dietitians can avoid claims of negligence by being able to show the criteria employed in selecting the components of a particular therapy (Hassan, 1977).

Dietitians are a critical link in a chain involving the doctor, nurse and other health professionals. The dietitian could be the last qualified professional to prevent an incorrect therapy (Hassan, 1977). *Riff v. Morgan Pharmacy* (1986) found that a member of the health care team "has a duty to be, to a limited extent, his brother's keeper." It was found that:

> Fallibility is a condition of the human existence. Doctors, like other mortals, will from time to time err through ignorance or inadvertence. An error in the practice of medicine can be fatal; and so it is reasonable that the medical community including physicians, pharmacists, anesthesiologists, nurses and support staff have established professional standards which require vigilance not only with respect to primary functions, but also regarding the acts and omissions of the other professionals and support personnel in the health care team.

In food management, malpractice might be noncompliance with procedures or laws set up by regulatory agencies. Administrative dietitians may be responsible for protecting food from contamination, training employees in safety procedures, assuring the health of food service employees, evaluating meal service for accuracy, analyzing menus for nutritional adequacy, devising a system for equipment maintenance and repair, evaluating on-the-job injuries, developing an efficient procurement system, and providing for adequate lighting and ventilation in the department. Applicable regulations should be carefully reviewed.

Dietitians in private practice should consider the risks of performing a function which really belongs to another health professional. Negligence encompasses situations in which a dietitian fails to recognize that he or she is not capable of assisting a patient, but does so anyway, *e.g.*, advising a patient to discontinue taking thyroid medication without recommending she consult the physician prescribing it.

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Failure to keep current

Negligence can also be *failure to keep current.* If a patient requires medical nutrition therapy that the dietitian routinely undertakes and considers herself competent to perform, the dietitian is obliged to be "reasonably up-to-date" in knowledge, and to use a degree of skill, care and knowledge ordinarily exercised by dietitians in similar settings, in light of existing knowledge in the field. This implies a duty on the part of the dietitian to be aware of current developments in nutrition and dietetics and to practice accordingly.

Carelessness

The legal doctrine of *res ipsa loquitur* ("the thing speaks for itself") is allowed in certain types of malpractice cases. Plaintiffs with certain types of injuries do not have to introduce expert testimony of negligence.

In medical malpractice, a classic case occurs when a clamp or sponge is left in the patient's body after surgery. A comparable example of carelessness in the field of dietetics is serving contaminated food resulting in an outbreak of food-borne illness.

The dietitian as a defendant

As a defendant in a malpractice lawsuit, you may feel very helpless. You may feel as if the situation is out of your control, that the lawyer is in charge, that the lawyer's performance is all that can make a difference. This is an uneasy feeling. There is, however, a lot you can do to help in your own defense.

• Keeping a positive attitude under pressure may save you a lot of anxiety. Keep in mind that, in the practice of dietetics, perfection is not required. Just because your actions may have led to a bad result does not necessarily mean that you were negligent.

• Meet with your lawyer. Set aside adequate time to meet with your attorney. Review the case carefully. Remember that you will be the most valuable consultant and resource for your case. Prepare a narrative summary of the case for the attorney. Do not, however, keep this in the patient's chart. It is developed for your attorney, and it is privileged information. Help determine the names of any witnesses to the patient's care. Prepare medical literature dealing with the subject. Suggest individuals, recognized in the field, who might be contacted to review the case.

• Know the weaknesses in your case. If there are those that would disagree with your position, tell your lawyer early to avoid future surprises.

• Update your *curriculum vitae* for your lawyer. Compile a list of the seminars and conferences you have attended recently in maintaining your registration status. List the journals you subscribe to and read regularly, as well as study or journal groups you attend.

• Review material produced by the plaintiff with your lawyer. If you think the plaintiff should undergo testing that would help in the defense, such as psychological testing, offer these as suggestions.

• Review any records you have on the patient. If you feel medical, hospital or personnel records may not be complete, raise your concerns. Scrutinize these records carefully. You will later be asked to explain the case thoroughly. Never alter a medical record. You can correct an error by striking a line through the error, inserting the correction, and adding the date plus your signature. Be sure you can read all notations (even the illegible ones), can translate every abbreviation and symbol. Make notes of your findings and address them to your attorney, keeping your personal copy in a separate file. Remember, communication to your lawyer is privileged and does not need to be produced to your opponent.

• Consider using models or diagrams during your testimony. Demonstration in the courtroom can be effective. Slides, overhead transparencies and charts may be very useful. This allows the jury to see and touch the evidence, as well as to hear it. If you have "before" and "after" pictures of the patient, consider bringing these as evidence.

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Keep records of all telephone calls and other communication with the plaintiff. If any dispute arises, the records enhance the credibility of your position.

• Compile copies of appropriate guidelines and standards of care. Do a survey of the literature on similar topics. Recommend basic textbooks and journal articles for your lawyer to review. Educate your lawyer on the basics of nutritional therapy. Invite him/her to follow you around, to sit in on a counseling session, to be the subject of a nutrition assessment, and to watch videotapes on the subject. Go over your charting notes with him/her to make sure he/she understands the terminology and what is required of the dietitian. Your lawyer can best defend you if he/she can speak your language.

• Become aware of the plaintiff's witnesses. Attend depositions, and help your lawyer prepare for them ahead of time. Review the *curriculum vitae* of the expert witness. What do you know about this person's history and experience?

Depositions

In the book *Preventing Malpractice,* Leaman and Saxton have developed 10 rules for physicians preparing for depositions (Leaman, 1993). I have adapted these for the dietitian.

• Know the records and dietetics intimately. Look at office records, hospital charts statements by other health care professionals, pertinent literature and alternative practices. Do not bring into evidence notes that you made to yourself or when meeting with your attorney. If you refer to documents, the other side has a right to examine them.

• Listen carefully to the question. Respond only when you understand the question completely. Ask the lawyer to rephrase the question if necessary. Never help to rephrase a question or suggest a more appropriate one. If you do not know an answer, don't remember, or you're not sure, say so.

• Respond thoroughly, but directly and to the point. Do not volunteer information. Answer questions as briefly as possible, with a "yes" or "no" when possible. Avoid appearing uncertain with terms such as "maybe" or "I'm pretty sure." Remember, your defense does not depend on presenting all of the facts. When appropriate to your defense you may give a more comprehensive answer.

• Use your patient records. An orderly record can be your best defense.

• Disregard theatrics. Theatrics are sometimes employed by the plaintiff's attorney to make the defendant uncomfortable and unsure of the response. The attorney may at times act surprised or shocked.

• Be consistent. If you do not give the desired response, the lawyer may ask the question over and over, often rephrasing it. This is generally done to get an inconsistent response.

• After finishing a response, wait for the next question. The lawyer will often use body language or pauses to encourage the defendant to ramble on or tell stories. Do not try to fill a void.

• Agree with only those questions with which you are comfortable. Be especially cautious of questions that begin "Is it a fair statement…" or "Let me summarize your testimony as follows..." Questions with absolutes like "always," "never" and "all" often require some clarification.

• Be careful of conversation during breaks. This is where the informality of the procedure may cause you to fumble. Do not engage in conversation in the office where the deposition is held. Unless both lawyers agree to go "off the record," the court reporter will continue taking transcription. Try to use the break period as a time to relax.

• Be courteous, professional, firm and credible. Your professional ability has been challenged. This is serious business, and is not a time for humor. At the same time, displaying anger and tossing out insults are not appropriate.

After the deposition, the court reporter supplies the person giving the deposition with a written transcript of the proceedings. If necessary, the transcript can be corrected and/or changed within a certain period, usually 30 days.

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Current malpractice reform issues

The Physician Insurers Association of America (PIAA) in 2003 called the current medical malpractice situation a "lawsuit lottery" for trial lawyers. They note that 70 percent of medical malpractice claims filed are resolved without anything being paid to the plaintiff. In the cases that do go to trial, judges and juries have found that 80 percent are without merit, therefore, no payment is made. The PIAA notes, "Our system is full of the wasteful costs of large numbers of meritless lawsuits." (PIAA, 2003)

Changes in tort litigation over the last century brought about the evolution of malpractice litigation as it stands today. Studdert *et al.* have presented an overview of medical malpractice. They note, "the latest tort crisis is characterized by both the decreasing availability of insurance coverage, as insurers again leave the market in response to deteriorating loss ratios, and the decreasing affordability of policies offered by the remaining insurers." (Studdert, 2004)

As medical malpractice has evolved, policies have been enforced by policymakers to bring about reforms. Some reforms have focused on limiting access to court through the inclusion of screening panels or the shortening of the statute of limitations. Other reforms have modified liability rules to bring about reductions in the frequency of claims or the size of payouts. More reforms have addressed the size of awards, some setting caps on damages.

Many who have examined the tort system would agree that still more changes are necessary. Studdert concludes that, "The leading recommendations can be divided into three approaches: using alternative mechanisms to resolve disputes, dispensing with negligence as the basis for compensation (no-fault), and locating responsibility for accidents at the institutional level (enterprise liability.) (Studdert, 2004)

Many who have studied malpractice law, including the American Medical Association, express that current malpractice law conflicts with the initiatives for a patient-safety movement. Studdert points out that we can not learn from mistakes in an atmosphere that thwarts openness about mistakes. (Studdert, 2004) The American Medical Association holds that the current litigation system does not encourage a culture of safety because it:

- encourages defensive medicine;
- creates a lottery mentality throughout the nation's court system; and
- enriches certain trial lawyers at the expense of patients and physicians. (AMA, 2004)

The AMA and others are working to replace the fault-based, adversarial liability system, which gives all parties strong incentives to conceal errors and system defects, with a system that encourages all parties to promote patient safety by reporting errors and system defects. (AMA, 2004) An Institute of Medicine report notes, "when an error occurs, blaming an individual does little to make the system safer and prevent someone else from committing the same error." (IOM, 1999)

Our legal system has provided for a way to deal with professional negligence. As dietitians, we are challenged to treat our patients, customers and employees with a level of skill and care of a reasonable minority of our peers. This requires that we practice within certain guidelines, commit to staying current in our field of specialty, and use common sense in referring patients to other professionals. Even the most prudent practitioners are not free from the cloud of liability. It is one of the challenges of the profession. We address these challenges by way of informed, competent practice methods.

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Review Questions

1. I do a weekly radio show in my community. Could listeners sue me for malpractice if they were harmed by something I said?

Answer: Probably not. You have not established a dietitian-patient relationship. Try to make your points general in nature. You can always recommend that callers make a personal appointment with an RD or physician.

2. I've been requested to produce medical records for clients not involved in a lawsuit. Do I have to comply?

Answer: No. The records are confidential. Do not release them until your lawyer advises you to and you receive a written authorization signed by the client.

3. Sometimes the court's judgment on cases simply doesn't seem reasonable to me. How can that happen?

Answer: The judge and jury are working with the facts as they are presented. Juries have to use discretion in weighing the credibility and testimony of witnesses. Their judgment is susceptible to persuasive arguments and this may sway the jury's decision.

References

Agency on Healthcare Research and Quality (USDHHS). A quick look at quality. http://www.ahrq.gov/consumer/qnt/qntool.htm. (Accessed 8/16/04)

Alford DM. The nurse expert witness. *Geriatric Nursing*, 24:4, 230, 2003.

American Dietetic Association. Medical nutrition therapy protocols: an introduction. *JADA* 99:3, 351, 1999.)

American Medical Association. *Medical Liability Reform—NOW!, June 14, 2004.* American Medical Association, 2004. http://www.ama-assn.org/gp/mlrnow. (Accessed 8/14/04)

American Dietetic Association. *Standards of Professional Practice*. http://www.eatright.org/public/governmentaffairs/98_9468.cfm (Accessed 8/16/04)

Andersen RM, Rice TH, Kominski GM. Medical malpractice, In: *Changing the US Health Care System.* Jossey-Bass Publishers, San Francisco, CA, 1996.

Bartholomew LA (of PIAA). Remarks to the American College of Radiology (May 13, 2003).

Bassette v. Health Management Resources Corp., 661 So. 2nd 317 (FL App., 1995.)

Black's Law Dictionary. West Publishing Co, St. Paul, MN. 1968.

Boggs BC. Lost chance of survival doctrine: should the courts tinker with chance? *Southern Illinois University Law Journal*, 16: winter, 421-449. 1992.

Carbone v. Warburton, 91A 2d 518, 94A 2d 680, NL 1952, 1953.

Croke EM. Nurses, negligence and malpractice. *Amer J Nurs*, 103:9, 54-63, 2003.

Cross AT. Malpractice liability in private practice of nutrition. *JADA*, 88:8, 946-948, 1988.

Donabedian A. The quality of care: how can it be assessed? *JAMA,* 260:12, 1743-1748, 1988.

Drefahl v. Connell, 55 N.W. 160 (Wis. 1893).

Hassan WE. Legal issues facing dietetic practice. *JADA*, 70:355-360, 1977.

Hirshfeld EF, Hatlie MJ. An introduction to malpractice litigation. In: *Physician's Survival Guide: Legal Pitfalls and Solutions*, National Health Lawyers Association, Washington DC, 13-39, 1991.

Institute of Medicine. *To err is human: building a safer health organization.* Institute of Medicine. http://books.nap.edu/html/to_err_is_human/reportbrief.pdf (Accessed 8/6/04)

Joint Commission on Accreditation of Healthcare Organizations. *Sentinel Event Glossary of Terms, 2004.* http://www.jcaho.org/accredited+organizations/hospitals/sentinel+events/glossary.htm. Accessed 8/10/04

Kane I, Frickey BJ. Correlating nursing care, nursing practice and nursing performance standards. *Perspectives in Psychiatric Care,* 28:3, 27-31, 1992.

Lacey K, Pritchett E. Nutrition care process and model: ADA adopts road map to quality care and outcomes management. *JADA*, 103:8, 1061-1072, 2003.

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Leaman TL, Saxton JW. Anatomy of a lawsuit, and Depositions: curse or blessing. In: *Preventing Malpractice: The Co-active Solution*. Plenum Publishing Corp, New York, 1993.

McClusky KW. Customer service in health care- dietetics professionals can take the lead. *JADA* 103:10, 1282, 2003.

Martin K, Cepero K. You're being deposed? Remain calm. *Nursing* 99:3, 60-61, 1999.

Moniz DM. The legal danger of written protocols and standards of practice. *Nurse Practitioner*, 17:9, 58-60, 1992.

Monk A, *et al.* Practice guidelines for medical nutrition therapy provided by dietitians for persons with non-insulin-dependent diabetes mellitus. *JADA,* 95(9):999-1006, 1995.

Physician Insurers Association of America. *Statement by the PIAA, January 29, 2003*. http://www.thepiaa.org/pdf_files/January_29_piaa_statement.pdf. (Accessed 8/14/04)

Reidy EG, Reidy DE. Malpractice law and the dietitian. *JADA*, 67:335-338, 1975.

Richards EO, Rathbun KC. Discovery, and Legal Standards. In: *Law and the Physician*. Little, Brown and Co, Boston, 1993.

Riff v. Morgan Pharmacy, 508A 2d 1247 (Pa 1986).

Risk Management Foundation. Frequently Asked Questions. http://www.rmf.harward.edu/FAQs_home/category_all.asp. (Accessed 8/13/04)

Silver HJ, Wellman NS. Nutrition diagnosing and order writing: value for practitioners, quality for clients. *JADA* 103:11, 1470-1472 2003.

Sprung CL, Winick BJ. Informed Consent. In: *Legal Aspects of Medicine.* Springer Verlag, New York, 1989.

Studdert DM, *et al.* Medical malpractice. *NEJM*, 350:3, 283-292, 2004.

Sullivan v. Edward Hospital, 2004 WL 228956 N.E.2d-IL.

USDHHS, Health Resources and Services Admin. *National Practitioner Data Bank: 2002 Annual Report.* USDHHS, 2004. http://www.npdb-hipdb.com//pubs/stats/2002_NPDB_Annual_Report.pdf (accessed 8/10/04)

US Congress, Office of Technology Assessment. Approaches to malpractice reform: states' experience and new ideas. In: *Impact of Legal Reforms on Medical Malpractice Costs*. US Government Printing Office, Washington DC. October 1993.

Wood CL. Historical perspectives on law, medical malpractice, and the concept of negligence. *Emergency Medicine Clinics of North America*, 11:4, 819-832. 1993.

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Examination for MAL07

1. Professional malpractice is a type of
   a. negligence
   b. fiduciary responsibility
   c. respectable minority rule
   d. element of proof

2. The law of torts includes
   a. criminal behavior
   b. hate crimes
   c. breach of contract
   d. medical practice which causes injury
   e. none of the above

3. Specialists are held to a higher degree of care than generalists in a profession.
   a. True b. False

4. In order to be named as a defendant in a malpractice lawsuit a/an ____________must be established with the plaintiff.
   a. relationship of duty
   b. exchange of information
   c. cause of action
   d. prior relationship of association
   e. litigatory non-disclosure agreement

5. Even if it is proven to exist, mental anguish is not allowable as a basis for damages claims in malpractice.
   a. True b. False

6. Medical errors and claims of malpractice against hospitals are
   a. rare
   b. usually not discovered
   c. probably underreported
   d. usually brought against the dietary department
   e. often settled without placing blame

7. Settling a medical malpractice claim
   a. admits guilt
   b. does not admit guilt
   c. is never wise
   d. can harm both parties
   e. none of the above

8. As dietitians take on more responsibility for patient care, they are more vulnerable to malpractice lawsuits.
   a. True b. False

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9. If your patient has already filed a lawsuit against you, you should:
   a. try to talk him out of it
   b. countersue
   c. explain your point of view
   d. warn colleagues about him
   e. avoid him

10. A decision to defend a case rests on:
   a. the defendant only
   b. the institution only
   c. the insurer only
   d. the plaintiff's attorney
   e. the arbitrator

11. What is divulged in an oral deposition can be used at trial, except:
   a. private opinions
   b. sexual history
   c. expert opinion
   d. irrelevant information
   e. it all can be used

12. The oral deposition process requires:
   a. the witness to swear an oath of truth
   b. a court reporter as recorder
   c. meeting at a pre-arranged location
   d. all persons who are summoned to comply
   e. all of the above

13. An expert witness must be
   a. employed by the same institution as the defendant
   b. certified by the bar association
   c. known to the public as an expert
   d. educated in the law
   e. none of the above

14. Which situation could bring about a case that would be tried under unintentional tort law?
   a. A person states she is a RD on a job application, but her registration is not current.
   b. A dietitian is charging Medicare for services that were not performed.
   c. The dietary department serves a patient undercooked chicken and the patient dies of *Salmonella*.
   d. A patient's pregnancy status is released to an employer without the patient's permission.

15. A malpractice lawsuit involves:
   a. breach of duty
   b. malice
   c. intent to deceive
   d. defamation of character

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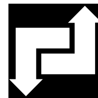
16. The *recognized standards of care* are the
 a. expectations that patients have of the care they will receive.
 b. guidelines for care that a professional establishes for her individual practice.
 c. management of patient care by other qualified practitioners under similar circumstances.
 d. protocols established by the court for what is reasonable care.

17. Which health care provider is most likely to have a report filed with the National Practitioner Data Base?
 a. nurse practitioner
 b. physician
 c. dietitian
 d. dentist

18. Another term for the initial complaint a patient will file with the courts is a:
 a. verdict
 b. settlement
 c. statute of limitations
 d. pleading

19. Which institution is one of the first you should contact if you suspect a lawsuit will be filed?
 a. bank
 b. professional association
 c. insurance carrier
 d. state licensing office

20. What is the main purpose of a pretrial screening panel?
 a. review the merits of the case
 b. opportunity to meet the judge and opposing counsel
 c. offers the defendant a chance to bring in character references
 d. review the court's rulings on similar cases



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