# Legal Issues for the Gastroenterologist: Part I

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An unfortunate fact for many physicians practicing in the United States is that they will contend with medical malpractice suits at some point in their careers. While data specific to gastroenterology malpractice claims are difficult to find,[1] the Physician Insurers Association of America has reported that out of the 28 specialty fields of medicine analyzed from 1985 to 2004, gastroenterology ranked 21st in the number of claims reported,[2] representing about 2% of the total overall number of claims.

A 2007-2008 survey of 5,825 physicians, not limited by subspecialty, showed that 42.2% of all physicians had a malpractice claim filed against them at some point in their career.[3] Of all physicians aged 55 and older, 60.5% of respondents had been sued at some point during their career.[3] Incidents of medical liability claims were much higher among men (47.5%) than among women (23.9%). [3] The average cost to defend these cases through trial is more than $100,000, but the average cost diminishes to $21,163 with cases that are dropped, dismissed, or withdrawn prior to trial.[3]

In 2017, *JAMA Internal Medicine* published additional statistical findings related to medical malpractice claims.[4] *JAMA* reported that the rate of claims paid on behalf of all physicians had declined by 55.7% between 1992 and 2014; from 20.1 per 1,000 physicians to 8.9 per 1,000 physicians.[4] The mean payment for the 280,368 claims reported in the National Practitioner Data Bank during this time frame was $329,565 (adjusted to 2014 dollars).[4]

*JAMA* also reported that, between 2004 and 2014, diagnostic error served as the most prevalent basis for allegations of medical negligence against all physicians.[4] These allegations comprised 31.8% of claims during this period.[4] With respect to gastroenterologists, prior data for 1985-2004 similarly suggests that diagnostic interview, evaluation, or consultation results in the most claims against this group of physicians.[4] The most common allegations specific to gastroenterologists involve malignant neoplasms of the colon and rectum, followed by abdominal and pelvic symptoms, regional enteritis, colitis, and malignant neoplasms of the stomach.[2] Errors in diagnosing stomach, colon, and rectal cancers resulted in the highest average indemnity payment.[2]

## Professional liability

Patients can allege or establish malpractice liability against a doctor based on a number of things; we will discuss a few of the most common types of liability, offer suggestions as to how you might minimize your risk of being sued, and how best to cope when you are sued.

*Negligence*: One of the most common theories you may be sued under is negligence. To state a negligence claim against a physician, a plaintiff must show that the doctor owed the patient a duty recognized by law, that the physician breached that duty, that the alleged breach resulted in injury to the patient, and that the patient sustained legally recognized damages as a result. In a lawsuit brought on the basis of claimed medical negligence, a patient claims that a physician, in the course of rendering treatment, failed to meet the applicable standard of care.

*Informed consent*: Another theory is informed consent. A physician must obtain full, knowing, and voluntary informed consent from her patient for any nonemergency surgical procedure. A patient's lack of consent claim is premised on the allegation that the physician failed to reveal a significant risk, which caused harm to the plaintiff, and that, had the potential risk been disclosed, a reasonable person would not have consented to the treatment or procedure. Informed consent requires more from a physician than simply

having the patient sign a form. The physician performing the procedure for which consent is required must ensure that the patient is aware of the benefits of the proposed treatment, the material risks of the treatment, alternative options to the proposed treatment, and possible consequences of declining the treatment. This information must be communicated to a patient so that she clearly understands it.

*Contractual liability of doctor to patient*: Physicians and patients can enter into express written contracts regarding the care provided. These contracts can include various treatment plans, the likelihood of success, and even the physician's promise to cure. Traditionally, courts have respected a physician's freedom to contract as he or she chooses. However, once a contract is formed, a plaintiff may have a cause of action for breach of contract if the outcome of the treatment is not what was promised.

## Minimizing risk

Opportunities exist to decrease the chances of being sued. One major area involves documentation, as the patient's records will serve as the basis of the litigation. Accordingly, physicians should ensure notations are legible so that lawyers, jurors, and others participating in the patient's care do not misunderstand the records. This has been made easier by the recent implementation of electronic health records. Records should also be comprehensive and kept contemporaneously with treatment to maintain accuracy and to avoid the appearance of impropriety. Subsequent entries must be clearly identified and dated. Never change records after a patient commences a suit against you. Remember that everything you write can come out during the investigation phase of the lawsuit.

Another opportunity to decrease your chances of being sued is to keep informed about recent developments in your field. Make a point to read pertinent literature, attend seminars, and do whatever is necessary to stay aware of, and to incorporate into your practice, current methods of treatment and diagnosis.

Physicians should also be cognizant of contractual liability. When discussing treatment, never guarantee results. Additionally, once a physician-patient relationship is established, you cannot withdraw from the relationship without providing adequate notice to the patient in time to obtain alternative care. Terminating the relationship without such is called abandonment, and can result in professional discipline and civil liability.

Finally, physicians should be aware of how relationships with the patient, institutions, and health care providers can affect liability. Communication is key to fostering a good doctor-patient relationship, and studies support that the quality of the doctor-patient relationship is a primary factor in determining whether a patient will sue her physician.[2] You should also understand how your relationship with your workplace affects your potential liability. For example, your workplace may be vicariously liable for negligence found on your part, and therefore, deemed ultimately responsible for any verdict or settlement amount. Conversely, you could be found vicariously liable for the actions of health care providers with whom you work. In the surgery context, the basis for this type of liability is that the surgeon is in a position of highest authority and has ultimate control over everything that occurs during the course of surgery. Therefore, you should understand the consequences of your relationships with the patients, facilities, and providers with which you work.[5]

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## Conclusion

Before a lawsuit, and as a regular part of your practice, it is important that you thoroughly and legibly document all aspects of care provided, stay current with medical advances, and take the time to create a relationship with your patients involving quality communication. It is impossible for us to provide you with enough information to adequately prepare you for the day on which you may be sued. We nevertheless hope that following the aforementioned suggestions will be of some help. ■

## References

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