Intradepartmental Consultation

What is the Pathologist’s Legal Liability?

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Intradepartmental consultations are part of most pathologists’ daily professional practice. They are encouraged, and in some situations are required by laboratory policy; and they serve as an excellent tool for both increasing diagnostic quality and reducing medical malpractice liability.1,2 Perhaps surprisingly, given their frequency, pathologists remain uncertain as to their medical malpractice liability for performing intradepartmental consultations.

The medical literature is silent on the issue; the legal literature addresses it, but only in the overall context of physician consultations. Nonetheless, a reasonable understanding of medical malpractice liability for pathology intradepartmental consultations can be developed. Traditionally, much of the legal literature regarding the application of liability to physicians performing consultations has involved whether or not a physician-patient relationship had been formed by the consultation. “In the traditional medical negligence case, the plaintiff must establish the existence of a physician-patient relationship.”3 Rather than from direct, face-to-face patient contact, which has traditionally been the method for establishing the relationship for treating physicians, pathologists’ physician-patient relationships develop predominantly from their contractual or quasi-contractual obligations to take care of their patients. The contractual basis of finding a physician-patient relationship exists is elemental in pathology, and is based on the contractual acceptance of the pathology work, the conduct of tests, the preparation of a report, and the acceptance of a fee for services rendered. With those features, courts have determined that “there could be no doubt that the diagnostic services were furnished on behalf of the patient.”4 As such, a pathologist-patient relationship arises, for example, through performance of an anatomic pathology diagnosis or provision of clinical laboratory value accuracy. Direct, face-to-face contact, for example with transfusion medicine procedures, is currently a less-contractual method of establishing a pathologist-patient relationship; however, as pathologists transform themselves and begin having more direct patient interactions, it is reasonable to expect those interactions will be sufficient to establish pathologist-patient relationships as well.

Although the issue of whether a specific consultation gives rise to a physician-patient relationship occasionally arises in medical malpractice litigation involving treating physicians, the issue is typically not one that arises in medical malpractice litigation involving pathologists’ direct diagnoses, because the physician-patient relationship between the patient and the pathologist is almost always assumed to be contractually or quasi-contractually present, and therefore is not considered an issue of fact that requires debate. With a pathology intradepartmental consultation, the issue of whether a physician-patient relationship exists, and therefore medical malpractice liability might attach, is less obvious.

A search of the legal literature (LexisNexis, http://www.lexisnexis.com/en-us/home.page; accessed May 31, 2013) does not reveal any medical malpractice lawsuit involving the attachment of liability due to a pathologist’s intradepartmental consultation; however, it must be remembered that cases reported in the legal literature comprise only a small percentage of medical malpractice lawsuits that are filed (and ultimately are dismissed or settled before trial). As such, it would be imprudent to ignore altogether the possibility of a medical malpractice lawsuit arising from, or in some way involving, a pathologist’s intradepartmental consultation.

Whether a physician consultation, including a pathology intradepartmental consultation, results in the establishment of a physician-patient relationship—and thereby the acquisition of a duty of care to the patient—may best be determined by whether the physician consultation, including the pathology intradepartmental consultation, is considered a “formal consultation” or an “informal consultation.”3 Formal consultations occur “when the primary . . . physician refers the patient or their records to the consultant for review and advice as to management of the instant illness resulting in a relationship between the consultant and the patient . . . [I]n formal consultations, the consultant establishes a relationship with the patient and has a duty to that patient, even if the consultant and patient have never met in a face-to-face interaction . . . [T]he primary . . . physician generally seeks specialty guidance to diagnose or manage the patient’s care and usually will follow the consultant’s advice . . . For treating physicians, . . . [I]n this category of ‘formal’ consultations, the patient is aware of, and consents to, the consultation and usually is billed for the service.”3 For...
pathologists, however, for whom patients are typically not aware of the pathologist who is responsible for the direct diagnosis, much less the pathologist performing the intradepartmental consultation, patient awareness and consent cannot be criteria. Therefore, in determining whether a formal consultation, and consequently, “a consensual physician-patient relationship exist[s] between the pathologist and the patient . . . the issue is not who contracted for the service, but whether the service was performed with the express or implied consent of the patient and rendered on behalf of the patient.” 3,5 Whether an intradepartmental consultation is “formal” is also informed by whether the intradepartmental consultation diagnosis “materially affected” the primary pathologist’s ultimate diagnosis, and whether the primary pathologist “relied on” the intradepartmental consultation diagnosis. 3 Perhaps of most significance in determining the pathology intradepartmental consultation’s status, formal consultations are those in which a physician “actually participated in the diagnosis of a patient’s condition.” 3,5

Informal consultations, on the other hand, occur where “the second physician only gave an informal opinion, had not been asked to see the patient, did not review tests, directly order laboratory or other studies and did not bill the patient . . . the consultation amounted to ‘nothing more than [an] answer [to] an inquiry from a colleague.’” 3,6

“Such curbside consultations generally involve a presentation of the patient’s history, recitation of the diagnostic test results obtained to date and discussion of potential avenues of treatment for this patient and others with similar symptom complexes. In these cases, the patient’s identity may be unknown to the specialist, the patient does not know about the consultation and the specialist colleague does not bill for his advice. Such informal consultations fail to result in the establishment of a relationship between the consultant and the patient.” 3,6

By these standards, intradepartmental pathology consultations meet the criteria of “formal” consultations, and should be considered events for which medical malpractice liability might attach to the consulting pathologist. Pathologists performing intradepartmental consultations are doing so because the pathologist responsible for direct diagnosis is seeking seeks guidance in diagnosing the patient’s disease or condition, and the pathologist is requesting the consultation with the intent of following the consulting pathologist’s opinion. And although the consulting pathologist does not bill the requesting pathologist or the patient directly for the intradepartmental consultation, it is arguable that there is in-kind payment, as the consulting pathologist is free to, and likely will, request intradepartmental consultations as well, with no expectation of having to pay the colleague performing the intradepartmental consultation. Further, and importantly, the intradepartmental consultation is not requested or performed out of curiosity, or merely to educate; it is “rendered on behalf of the patient,” is “relied on” by the requesting pathologist, and “materially affect[s]” the ultimate diagnosis. And finally, without question, the consulting pathologist “actually participate[s] in the diagnosis of a patient’s condition.”

In contrast to an informal consultation, the pathologist performing the intradepartmental consultation knows the identity of the patient, reviews the slides related to that patient’s disease or condition, and possibly performs additional staining or other testing on the specimen. Far from a curbside consultation, the intradepartmental consultation amounts to much more than merely “an answer to an inquiry from a colleague.” Intradepartmental consultations can reasonably be considered to meet the criteria of a formal consultation, for which medical malpractice liability might attach.

A pathology department consensus conference performing an intradepartmental consultation would consequently also meet the criteria for a formal consultation, and liability might attach to its opinions as well. Indeed, there are even more reasons a consultation to a consensus conference would be considered a formal consultation. The contractual issues and physician-patient relationship issues are essentially the same as with an individual consulting pathologist; however, pathology department conferences are a routine and sanctioned part of a department’s functioning, so more arguably a clearly professional activity than an intradepartmental consultation performed by an individual pathologist, for which a department does not typically establish a time of day, or a room, for its performance. Were a medical malpractice lawsuit to arise involving the participants of a department consensus conference, it is likely that liability would be joint and several, under the principle that “physicians treating a patient for the same illness may be jointly and severally liable for malpractice damages. Physicians have been held jointly and severally liable for malpractice in the absence of evidence separating the physician’s individual acts of negligence in causing the injury . . . .” 4,7

As whole slide imaging for primary diagnosis will undoubtedly result in the use of digital pathology for intradepartmental consultations, with physical proximity irrelevant, it is important to consider how telemedicine is making the definition of the physician-patient relationship more “fluid.” 3,4 It is predicted that with the advent of telemedicine, “the dividing line between [formal and informal] consultations will increasingly blur . . . most likely prompting more formal consultations and decreasing the likelihood of the casual, informal curbside consult.” 3,5 This will “increase the court’s likelihood of finding that the consultant had formed a relationship with the patient and did indeed have a duty to the patient.” 3 As such, it is reasonable to expect intradepartmental consultations using digital pathology, including those directed to a pathology department consensus conference, to possess the same medical malpractice liability risk as those performed more traditionally.

In summary, perhaps the reason pathologists have remained uncertain as to the amount of medical malpractice liability that attaches for intradepartmental consultations is that, from a practical perspective, liability has traditionally been extremely low. In fact, given the frequency of intradepartmental consultations, liability has been astonishingly low. Although its historical rarity (or indeed, absence) makes the potential for liability for intradepartmental consultations in the future unlikely, the principle of medical malpractice liability for formal consultations, for which intradepartmental consultations meet the criteria, suggests pathologists remain prudent in their performance of intradepartmental consultations, and maintain appropriate documentation as with any other case.

And there is no reason for angst. Medical malpractice liability for intradepartmental pathology consultations has existed whether pathologists clearly realized it or not, and there has been no onslaught of lawsuits; nor should one be expected. Indeed, that a potential avenue of medical
malpractice liability has been so underused as to appear nonexistent shows just how successful intradepartmental consultations are at improving diagnostic accuracy and, in turn, reducing medical malpractice risk. Intradepartmental consultations should continue to be liberally sought.

The principle that medical malpractice exists for intradepartmental consultations should not be a concern; these consultations fit the criteria for formal consultations and therefore potential liability should be expected. Nor is there reason to expect, or pursue, a legal carve out; this is very sound medical malpractice policy that pathologists should support.

It would be contrary to common medical practice to find that a pathologist whose everyday job is not merely to consult with other physicians, but to make independent examinations of tissue samples and render medical judgments thereon, cannot be held responsible for medical negligence merely because the patient from whom the sample was taken did not specifically consult with the pathologist or otherwise formally enter into a physician-patient relationship.4

References
6. Reynolds v Decatur Memorial Hospital, 660 NE2d 235 (Ill App 1996).