

Protecting Your License in an Era of Diminishing Resources- It's Impact on YOU

David L. Thomas, MD JD
Professor & Chairman
Department of Surgery
& Division of Correctional Medicine
NSU-COM

Dianne Rehtine, MD
Assistant Professor NSU-COM
Grand Dame of Correctional Health Care



The GOOD NEWS- We Still
have a job!

The Question is- Will you still have
a License?

The LAW-1

- Correctional health care guaranteed by the Constitution- WHY
- During the late 1960's and 1970's the US Supreme Court began recognizing INDIVIDUAL Rights- The Earl Warren court had sought to define the protections of fundamental rights, so did the two Chief Justices after him; Warren Burger and William Rehnquist.

THE LAW-3A-Comparisons

- The court ruled against the school district saying that "students do not shed their constitutional rights at the school house gates. In doing so the court protected what has come to be known as "symbolic speech."
- **INDIVIDUAL RIGHTS EVEN AT THE EXPENSE OF SOCIETY**

Estelle v. Gamble

- Texas- Estelle- In charge of Texas Department of Corrections
- Gamble- complained of poor healthcare
- U.S. Supreme Court ruled in FAVOR of TEXAS- Gamble, the inmate lost, but the Court took this opportunity to spell out what prison inmates were entitled

Estelle v. Gamble- 2

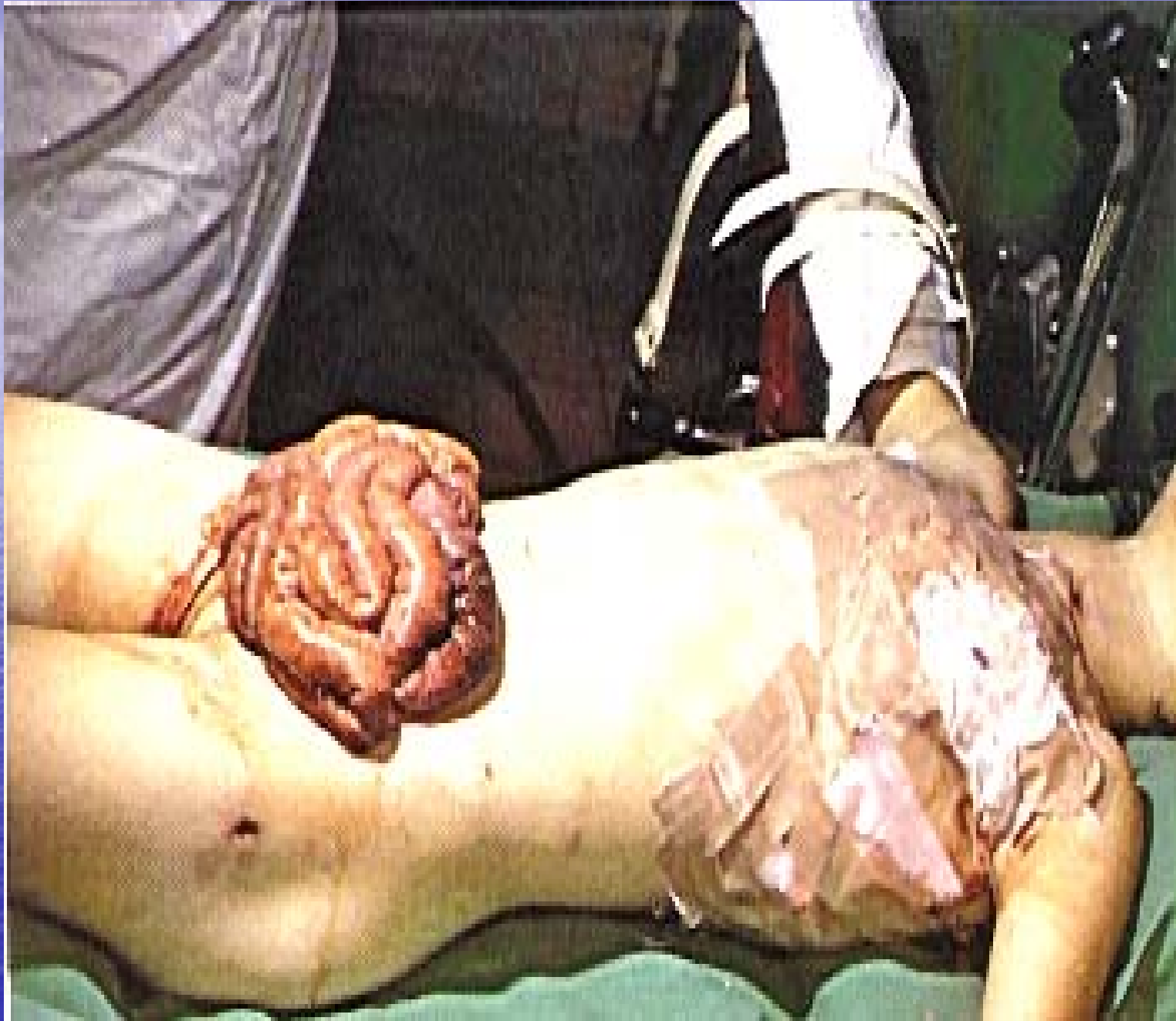
- Right to Access to Health Care
 - No artificial barriers- e.g. Osterback- I/M in confinement could not access mental health care without the Regional Director approving
 - Madrid v Gomez (ND Cal 1995) 889 F Supp 1146
 - Dealt with Conditions of Confinement- Placing people with a mental illness- or those at risk for mental illness- in confinement would lead to an exacerbation of their illness- violated the Constitution

Estelle v. Gamble- 3

- Right to a Professional Medical Opinion-
 - Does NOT have to be a doctor as long as a doctor is willing to be the ultimate responsible person,
 - BUT see later cases
- Right to the care that is Ordered
 - Prison Officials Cannot withhold medical care except in extreme emergencies once it has been ordered

Still Have a JOB- but will You Still Have a License?

- Subtle Compromises – insidious but continuous
 - Asked to do more with less
- The ability to protect you patient and yourself is eroded through attrition- it is Never Obvious
- For Instance:



Protecting your License and your integrity

- No Security administrator nor budget conscious health care administration would ever ask you to handle that patient on your own without immediate hospitalization
- Likewise

Doing more with less

- This patient would immediately be sent out for care
- But when you get into the subtle things-
doing more with less
 - Patient loads- 1 or 2 extra patients a day
 - Restrictive formularies
 - Fewer support staff
- At what point have you breached your responsibility to your patient?

Patient Responsibility

- At what point do you breach your obligation to your patient?
- Is this a revocable or an irrevocable breach
- Can you prevent it and still maintain your job?
- Can you prevent it and still maintain your conscience?
- WHAT CAN YOU DO?

How can you BEST Protect yourself?

- Licensed Personnel vs. Unlicensed Personnel
- Inside vs. Outside Threats (Agency vs. Inmate)
- Licensed Personnel- Outside Threats
 - Lawsuits
 - Malpractice- State
 - Denial of Legal rights- Federal & State
 - Licensure Actions
 - 1983 action
- Unlicensed Personnel- Outside Threats
 - Only lawsuits – usually denial of rights
 - 1983 Actions

How can you BEST Protect yourself?

- LICENSED PERSONNEL
 - Do what you are supposed to
 - Lose the Attitude
- Adopt a personal standard of conduct
 - Consistent with your personal ethics
 - Consistent with your professional ethics
 - Consistent with agency ethics



BURNOUT

ATTITUDES ARE CONTAGIOUS. MINE MIGHT KILL YOU.

How can you BEST Protect yourself?- 2

- Once you have your personal standard of conduct (Providing it is reasonable) - DO NOT DEVIATE FROM IT
- Gather standard of care “items” that reasonably support your personal standard of conduct to a reasonable degree (e.g. The difference between Geodon and Zyprexa is probably not worth falling on your sword over- but not having ANY late generation anti-psychotics available may be)

How can you BEST Protect yourself?-3

- A GOOD WAY IS ADHERENCE TO OUTSIDE OBJECTIVE STANDARDS
- Jail Commission- Model Jail Standards
- ACA- Voluntary- NATIONALLY RECOGNIZED- some Federal Courts even site ACA Accreditation and Standards
- NCCHC- NATIONALLY RECOGNIZED- and recognized by the judiciary

Judicial vs. Administrative Actions

- In Terms of Broad Generalities- there may be some specific courts somewhere that do this differently, but on the whole the judicial trend is:
- Judicial Actions- Lawsuits
- Administrative Actions- Licensure penalties
- Two different forms of actions requiring two different forms of approaches for protection

Standards for judicial actions

- The Standard a health care practitioner is held to in a correctional setting is a similarly situated health care practitioner in a **correctional setting**
- This is different than other standards of care issues where a physician or practitioner is held to the community level of care

Standards for Judicial Actions- 2

- Courts have evolved over the years to recognize that corrections is not the general community and this is recognized in Federal "Deliberate Indifference" cases and State Malpractice cases
- Cadre of "Correctional health care experts" rendering opinions about care that was given- not just other community doctors

Standards for Judicial Actions- 3

- To be Liable- You must have violated the standard of care that other CORRECTIONAL health care providers would have violated and caused an injury
- This may or may not be the same as the community standard of care
- Both sides had better get Correctional Health care experts to impress the court

Standards for Administrative Actions

- Licensure actions- Pretty much at the whim of the duly constituted licensing board
- No real standards and if there are any- it will be community standard of care
- Personal Experience in working with physicians and others who used to work with me (e.g. Jan- we took one- give you one;)

Board Actions

- One and two decades ago- commonly "Licensure restricted to correctional health care only:
- On the whole- less likely to permit someone to have limited license for "corrections only" unless there is a clear nexus (e.g.- the practitioner that can't keep his hands off his female patients- licensed to work in a male prison only)

How can you BEST Protect yourself?

- Licensed Personnel vs. Unlicensed Personnel
- Inside vs. Outside Threats (Agency vs. Inmate)
- Licensed Personnel- Outside Threats
 - Lawsuits
 - Malpractice- State
 - Denial of Legal rights- Federal & State
 - Licensure Actions
 - 1983 action
- Unlicensed Personnel- Outside Threats
 - Only lawsuits – usually denial of rights
 - 1983 Actions

Inside vs. Outside Threats

- Inside- From the Agency itself- You and the agency- Violated Civil Rights- in certain violation of Civil Rights actions considered to be a conflict of interest and will not defend you (In Florida- when I was there (don't know if it is still true) the Department would hire an outside law firm to represent the practitioner in a violation of Civil Rights Case)

Inside vs. Outside Threats- 2

- YOUR Agency Reports YOU to the Board
- Generally your actions were egregious
- Sometimes the agency will do this to protect themselves or head off a problem
- Remember- your employer is not your parent and is not always motivated by your best interests

Inside vs. **Outside** Threats- 3

- Generally Inmate initiated although other parties may have standing (e.g. ACLU; Certain state or Federal Agencies)
- Malpractice
- Deliberate Indifference (8th & 14th Amendments)
- Violation of Civil Rights (Other 1983 Actions)

How can you BEST Protect yourself?

- LICENSED PERSONNEL
 - Do what you are supposed to
 - Lose the Attitude
- Adopt a personal standard of conduct
 - Consistent with your personal ethics
 - Consistent with your professional ethics
 - Consistent with agency ethics

What are you Supposed to DO?

- Be aware of the standards of care- (Community, ACA, NCCHC, local) and practice your profession in accordance with those standards
- If you deviate from the standard- CLEARLY AND INTELLIGENTLY WRITE OUT IN THE MEDICAL RECORD WHY YOU DID SOMETHING

What are you Supposed to DO?- 2

- DO NOT EVER FORGET THE BASICS
 - Vital Signs- take them ALWAYS
 - SOAP notes or other clear notes in the chart
 - Ps- If you say you are going to follow up- then FOLLOW UP
- The esoteric is NOT what gets people into trouble- it is the basics
 - Personal experiences in lawsuits (Louisiana- No vitals, yet eventual kidney failure)

What are you Supposed to DO?- 3

- Document in the chart clearly and concisely- do not use the chart to editorialize (TSTSW) (Disagree with specialists order for post op care- will do this instead- This happens all the time in pain medications- JUST EXPRESS IT DIFFERENTLY- "Reviewed surgeon's recommendations noon this day. After evaluation of patient at 1500, feel appropriate therapy is...."

What Are You Supposed to DO?- 4

- **DO NOT FALSIFY THE RECORD UNDER ANY CIRCUMSTANCES EVER-**
(frequently not a problem in corrections- but it happens (had to fire good practitioners over this because in FL it is a violation of state law) (Malpractice-lawyer may already have the record before it is "improved"))

How can you BEST Protect yourself?

- LICENSED PERSONNEL
 - Do what you are supposed to
 - **Lose the Attitude**
- Adopt a personal standard of conduct
 - Consistent with your personal ethics
 - Consistent with your professional ethics
 - Consistent with agency ethics

Lose the Attitude

- Yes- you are smart if you treat the murdering child molester with the same professional attitude you treat any other patient
- Interact with your patients as human beings
- By Law- incarceration is the punishment
- More than half the suits and licensure actions- grow out of attitudes NOT results

Lose the Attitude- 2

- You have a great opportunity to avoid problems at essentially NO cost to you if you lose the attitude
- Personal experience- Phillips- change meds

Personal Standard of Conduct

- Consistent with
 - Your professional code of ethics
 - Your personal code of ethics
 - Your agency's code of conduct
- Do NOT deviate from this
- If you deviate from your professional code of conduct- licensure and malpractice actions

Personal Standard of Conduct- 2

- If you deviate from your personal code of ethics- miserable existence- cognitive dissonance constantly- inability to function
- If you deviate from your agencies code of conduct- termination, legal action, etc
- Your personal code of ethics- your professional code of ethics or your agency's code of conduct should all be in accord

Personal Code of Conduct- 3

- The **written** codes are generally always in accord- what generally happens is an **individual** (in my case the Secretary of the Department) attempts to oblige- or obliges- a violation of one of those three codes.
- If you accede- you are opening yourself up to all of the problems we have been talking about

Personal Code of Conduct- 4

- Most of the time- It can be resolved without breach of any of the codes
- If it cannot-
 - Breach code
 - Termination or resignation
- For me personally- there was a a great life after full time state employed correctional health care



RETIREMENT

BECAUSE YOU'VE GIVEN SO MUCH OF YOURSELF TO THE COMPANY THAT
YOU DON'T HAVE ANYTHING LEFT WE CAN USE.

www.despair.com

Protecting yourself and your license

- Generally- administrators are smart enough not to overtly oblige violations
- It is not that difficult to protect yourself and your license- It just requires a humanistic approach, quality care, honesty, and documentation of that care
- These are things we should all be doing anyhow.



PERSISTENCE

IT'S OVER, MAN. LET HER GO.