

# Ethics Consultation Liability: Real or Imagined?

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“If you do that, I’ll sue you.”

A threat that, at its core, challenges the professional to balance the patient’s best interests against institutional or self interests. This may be one of the true tests of professionalism?

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## Questions

- Ethics Consultants and Ethics Committees Are At Risk?
- If Ethics Consultants Are To Be Liable for Malpractice, What Are the Elements To Prove At Trial?
- What Defenses Might an Ethics Consultant Assert In When Allegations Arise (Malpractice; Violating Disabilities Laws; Declaratory Judgments and Injunctions)?

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## Ethics Consultants and Ethics Committees Are At Risk?

- Gilgunn case (Mass. Gen. Hospital, 1989): Ned Cassem, MD (Optimal Care Committee Chair and consultant)
- Gelsinger case (Univ. of Penn. Hospitals and Medical School, 1999) (an IRB case): Art Caplan, PhD (consultant)
- DRW case (Univ. of Wisconsin Hospitals and Medical School) (present): Norm Fost, MD, MPH (consultant)

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## If Ethics Consultants Are To Be Liable for Malpractice, What Are the Elements To Prove At Trial?

- Duty
- Breach or violation of duty
- Proximate (direct) causation
- Damages (monetary value of injuries)

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## What Defenses or Immunities Might an Ethics Consultant Assert To Counter a Malpractice Allegation?

- Consultants met their duty fully. They did “what reasonably prudent ethics consultants would do in like or similar circumstances” as established by expert witnesses who are asked about standard of care. (Recall some statutory limitations on medical expert witnesses testifying.)

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## What Defenses or Immunities Might an Ethics Consultant Assert To Counter a Malpractice Allegation?

- But it may be difficult showing that ethics consultants met their duty fully given the marked variability found in ethics committees? An alternative plaintiff strategy might be to show that the ethics consultant involved was simply “unqualified” (lacked the training, competencies, and skills) as established by others?

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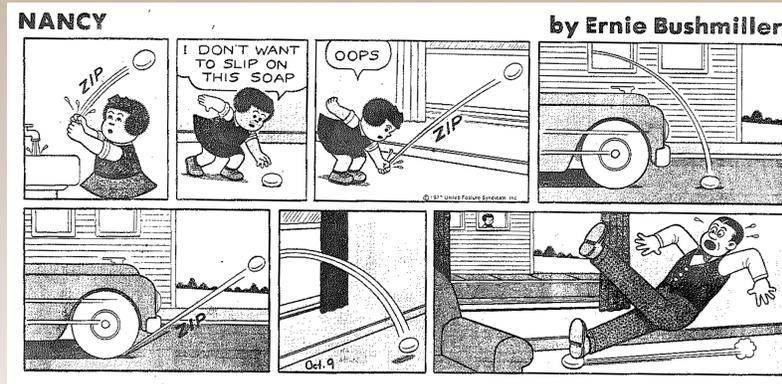
## What Defenses or Immunities Might an Ethics Consultant Assert In a Malpractice Trial?

- Consultants do not make decisions, they advise other decision makers. Any “duty” is advisory or educational. Actions that might result in injury to others is not “caused” by the ethics consultant. The ethics consultants’ advice is not the proximate cause of any alleged injury.

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## What is “proximate causation”?



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## What Defenses or Immunities Might an Ethics Consultant Assert In a Malpractice Trial?

- The ethics committee is a quality review committee of the medical staff and its deliberations and recommendations are “privileged”? Well, maybe; but probably not. Medical staff committee or no, not privileged if the communications have been disclosed otherwise. Any privilege would not extend to a consultant anyway, right? What about consultation sub-committees of the committee?

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## What Defenses or Immunities Might an Ethics Consultant Assert In a Malpractice Trial?

- Consultants responded because of a legal or quasi-legal requirement. Recall the Texas, New York, and Maryland statutes which mandate ethics committee roles in facilities. These statutes also carry very broad immunity clauses (e.g., Delaware). Recall the Sun Hudson case and the immunity clauses in surrogacy statutes.

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## Why do ethics committees and hospital counsel often have a love-hate relationship with each other?

- In many institutions, there is a good relationship between the two.
- Some ethics committee members and consultants would prefer that counsel be less involved; others urge that they be included. See White BD. Should an institution's risk manager/lawyer serve as HEC members? HEC Forum. 1991; 3(6):355-357.

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## Why do ethics committees and hospital counsel often have a love-hate relationship with each other?

- Is the issue an “ethical” or “legal” one? Probably both?
- Recall that ethics committee involvement is traditionally non-adversarial, with lawyers it is often adversarial (or it feels like it).
- Lawyers better understand the law and legal systems and approaches.

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## Why do ethics committees and hospital counsel often have a love-hate relationship with each other?

- Traditionally in America, contentious issues are resolved in the courts.
- Ethics committee members are clinicians (to be interpreted broadly here) and lawyers are not; they approach problems differently.
- Typically, clinicians are more at peace with some uncertainty; lawyers less so.

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## Why do ethics committees and hospital counsel often have a love-hate relationship with each other?

- Lawyers may see reducing institutional risk as one of their responsibilities. (Recall that all those associated with the institution, particularly employees, have the same fiduciary duty.) Ethics committee members may be charged with questioning authorities, motives, intentions, and actions in patients' best interests and challenging some rules.

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## Why do ethics committees and hospital counsel often have a love-hate relationship with each other?

- Ethics and law have different views about, and understandings and explanations of motives, intentions, and actions.
- One of the goals of ethics is to ponder (to consider and reflect after lengthy conversation); with law, it is to resolve the immediate problem and move on?

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## Other Liabilities To Consider?

- Defamation?
- Invasion of privacy?
- Intentional and negligent infliction of emotional distress?
- Outrageous conduct?
- Agency or vicarious liability?
- Statutory claims (e.g., NY FHCDA)?

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## Liability insurance?

- Covered in scope of practice or employment?
- Independent consultants need “errors and omissions” coverage?
- Should consultants be credentialed?
- Should consultants be certified?

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Of course, there's a fear or at least anxiety associated with being sued at all. Stress, time and treasure necessary to defend; possible damage to reputation and standing; future responses may change because of the experience?

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## Questions? Comments?

Permit me to acknowledge the  
kind review and the  
suggestions offered  
by Professor Thaddeus  
Mason Pope.  
<http://medicalfutility.blogspot.com>

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