

With permission: ACOG Today Volume 44, Issue 9, October 2000, page 8.

LIABILITY LOWDOWN: TRIBAL COURTS

Aware that many ACOG Fellows and Junior Fellows provide medical care to Native Americans, ACOG's Professional Liability Committee wants to make members aware of how they can minimize their exposure to a potential liability risk in such situations.

ACOG members help fill critical gaps in health services for Native Americans, often as volunteers. says Albert Strunk, JD, MD, vice president, Fellowship. We want them to continue to provide that care, and we want to reassure Fellows who volunteer for ACOG's short-term service program that they are protected.

Increased liability exposure can occur if a Native American tribal court asserts jurisdiction in a malpractice case against a physician who has provided care to a Native American. Plaintiffs' attorneys have sometimes sought such tribal jurisdiction, in part to circumvent state case precedents and statutes. For example, in tribal court, accepted medicine might be unrelated to prevailing allopathic or osteopathic standards; the plaintiff's medical expert might be a nonphysician; statutory caps on damages might not apply; or a professional liability insurance company might even refuse to provide a defense or defend only under certain conditions.

Indian Health Services employees protected from liability

Dr. Strunk points out that physicians employed by the Indian Health Service are protected by the Federal Tort Claims Act in several ways:

- _ Any suit must be filed in a federal district court
- _ The US must be named as a defendant in the employee's place
- _ Damages are subject to limitations and are the responsibility of the federal government

Fellows participating in ACOG's program are protected as temporary federal employees

Dr. Strunk emphasizes that Fellows providing care to Native Americans through ACOG's short-term service program are accorded the status of temporary federal employees and are thus protected by the Federal Tort Claims Act. They should be sure to obtain a copy of the federal contract executed by the facility where they are providing services, he notes. This should be done before they begin to render care, and they should permanently retain this documentation.

Dr. Strunk cautions, Fellows should keep in mind that *temporary* means *temporary!* The protection under the Federal Tort Claims Act does not continue after their *locum tenens* is over, and would not cover follow-up or other consultation after their temporary employment ends.

Non-IHS physicians should create personal services contract

For physicians who are not regular or temporary federal employees and who render care to Native Americans the safest course is to practice under a personal services contract. This is a specific type of contract, defined by federal law, which allows IHS facilities to contract with non-Service individuals to provide medical care to Native Americans who are IHS beneficiaries.

In general, Dr. Strunk points out, a physician rendering care under a personal services contract is considered to be a federal employee for purposes of the Federal Tort Claims Act and thus would have the benefit of the protections listed above.

Fellows or Junior Fellows who plan to provide medical services or consultations independent of ACOG's program should use the services of an attorney experienced in this particular area of physician contracting to assist them in developing a personal services contract. Special care must be taken in drafting such contracts to ensure, even though you may be required to maintain your own medical malpractice insurance, that you will receive Federal Tort Claims Act protection.

Protection needed even for consultation by phone or email from outside the reservation

Fellows or Junior Fellows who are not federal employees and do not have a personal services contract risk the potential of tribal court jurisdiction if the physician-patient contact took place on the reservation.

However, even giving a consultative opinion, however informal, with someone on the reservation by telephone or email, for example may be subject to tribal court jurisdiction if a lawsuit were to be filed. It makes no difference whether the consultation is with another physician, IHS or non-IHS, or even with the patient or a member of the patient's family.

Unless they have a personal services contract for such purposes or have the status of temporary federal IHS employee through ACOG's program, Fellows and Junior Fellows risk exposure if they provide consultations regarding Native Americans receiving services at IHS facilities or from IHS physicians on reservations, says Dr. Strunk, adding that they could render care in their office, off reservation, without coming under tribal court jurisdiction. In addition, at least so far, they are not subject to tribal court jurisdiction if they treat Native Americans at IHS facilities that are *not* located on pueblos or reservations.

The information in this article should not be construed as legal advice. As always, physicians should consult their personal attorney about legal requirements in their jurisdiction and for legal advice on a particular matter.