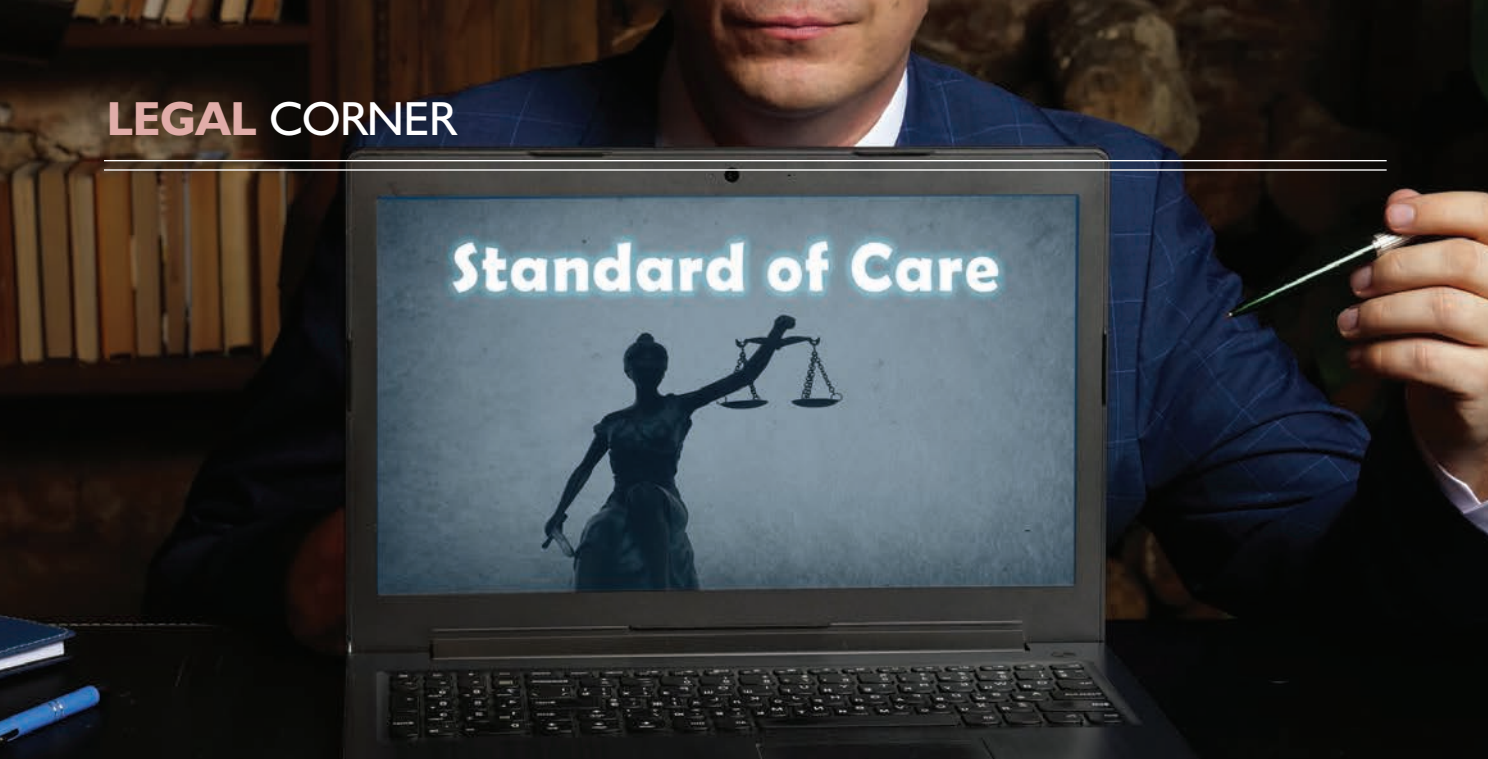

The Standard of Care and Podiatry

Here's a closer look at this legal term.

BY LAWRENCE F. KOBAK, DPM, JD

I was recently reviewing the Second Edition of the textbook, *Practical Chiropody,* by E.G.B. Runting. This was a book first published in 1926. It hopes that practitioners will find "guidance" within its pages, all 160 of them in this comprehensive textbook of its time.

On pages 14-15, it states, "If the patient does not complain of discomfort, and there is no evidence of something forming that is likely to be troublesome, there is great virtue in avoidance of chiropodial interference….The old proverb, 'Let sleeping dogs lie,' often holds good in chiropody, although it is the chiropodist's duty, if he sees something forming which is likely later to trouble the patient, to warn him and leave it to him to decide whether or not it should be disturbed."

Informed Consent

Let us substitute the word "chiropody" with "podiatry". You see a suspicious lesion on the foot; irregular edges, changes in coloration are noted. The 1926 "guidance" still applies as to how you would probably handle it. Advise the patient of the possible risks of the lesion, what it could be and how you can go about treating it or not. In the end, the decision on treating it and how to treat it is up to the patient. Currently, we are taught that prior to a treatment plan being put in place, the patient must be explained general considerations about the diagnosis and symptoms, alternative treatments, including no treatment, and reasonable risks of the treatment and condition. In effect, this has not changed in the last 100 years or so since E.G.B. Runting wrote his textbook. Never forget that the required informed consent is not a consent form. That signed form merely memorializes the informed consent process. Informed consent is an essential part of upholding the applicable standard of care. A written, signed consent form may or may not be required in your state. Your hospital probably requires a written informed consent prior to a procedure. Your practice group might require written consent for certain treatments. Documentation that the consent process has been ongoing is important.

What Is "Reasonable?"

In 1860, the soon-to-be President Abraham Lincoln was involved in defending one of his several medical malpractice cases. The Illinois Supreme Court held that a physician was to use "a reasonable amount of skill and care." Most of the early cases involved the healing of fractured bones, often of the lower extremity. As practicing podiatrists, one must still ask, what does "a reasonable amount" mean?

Once upon a time, many physicians (but not all)found it was an effective treatment to bleed people. Former President Washington was bled by physicians; one proponent of bleeding a patient was one of the leading physicians of his time, Dr.

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Benjamin Rush. That is the same Rush who had an excellent medical school named after him. In 2021, would any podiatric physician "bleed" a patient to effect a cure? In the 1700s, it was not unusual to do so. In fact, many felt it was "reasonable", while many felt this treatment was not reasonable. Help!

It should be noted that the standard of care has been defined by the courts. By 1934, a New York Court took a shot at a definition (Garthe v Ruppert). They found that a business (could be a podiatric physician) practicing a certain way that eliminated hazards can be defined as the standard of care. Are you still finding this not overly helpful?

In the 1990s, practice guidelines started becoming used by various medical societies and governmental agencies to attempt to define what the standard of care was for various diseases. Many courts accept them, and many do not. In and of themselves, they are considered hearsay. Additionally, they are often very controversial, as seen in the relatively recent CDC Guidelines for Treatment of Chronic Pain.

Defining the Standard of Care

Prior to 1990, courts began to find that the standard of care involved "competent care". This soon changed to "minimally competent care" and "minimally sound medical judgment". Within another 10 years, courts were also finding physicians did not all have to use the same medical treatment to be considered within the standard of care.

Today, most states define the applicable standard of care as a reasonable degree of proficiency that one expects from an average physician or specialist. Applying this to podiatry, if you subspecialize in a particular area of podiatry, and you hold yourself out as being more knowledgeable in that area, the applicable standard of care would be the reasonable degree of proficiency that one expects from (for example)a podiatric wound care specialist, not a general podiatrist. A national, not a regional standard, is generally used today. A podiatrist in urban New York would generally be held to the same standard of care as a podiatrist in a rural area of Colorado. That means if treatment "X" is considered a reasonable treatment for a condition in New York, it would also be reasonable to be a treatment in Colorado.

The standard of care that applies is a podiatric standard, not an orthopedic or dermatologic standard of care. Occasionally, the standard of care might differ. In most states, the expert opinions in a podiatry malpractice case must be either that of a podiatrist or another specialist with actual expert knowledge about the podiatric standard of care. Such an expert might be an orthopedist who supervises or participates in a podiatric residency program.

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Multiple Treatments

We have previously touched on the fact that more than one treatment or technique may be within the applicable standard of care. To pick one area, anyone reading the podiatric literature would soon conclude that there are over a dozen treatments for verruca plantaris. To use one of the many evidence-based treatments or the other would not necessarily constitute podiatric malpractice—but it might.

Let us say that the patient has a true allergy to salicylates, yet you use a salicylic acid cream on the verruca anyway. The allergic reaction injures the patient. That is podiatric malpractice. The salicylates were not an accepted treatment under the specific circumstance for that patient.

Record-Keeping

That brings up the next topic, your medical record-keeping. By both Federal and most states' laws, your medical records must be complete and accurate. They should be completed within 24 hours of your participation with the patient's care. Of course, a dated and signed emendation to a chart note is acceptable and legal. However, when such an emendation is made after notice of an audit or malpractice action, it loses credibility. An emendation made a week after the note, as opposed to a year after the note, carries more credibility. Your hospital might have even more stringent requirements. An example of this would be a requirement to have your operative reports dictated, reviewed, and signed within a certain amount of time.

Evolving Acceptability

The biggest problem for the podiatric physician in determining the standard of care is that it is not a medical term; it is a legal term. Medicine and podiatry evolve. The first podiatrists doing metatarsal osteotomies were not, by definition, practicing within the standard of care of the time. That standard of care developed to encompass various osteotomies that withstood the test of time. Current accepted techniques of fixation were not always accepted. Materials for joint replacement have also evolved as to what is and what is not acceptable. One can make the argument that if one is practicing on the cutting-edge of podiatry, that practitioner, as part of the informed consent, has an obligation to explain the relatively new nature of the technique to the patient. This must be documented.

Let us explore the concept of an evolving standard of care more closely. If you are attempting relatively new surgical techniques, performed by few of your colleagues, are you practicing at or above the average podiatric practitioner or are you practicing outside the standard of care? Again, that is really a legal question not a podiatric question. The jury will decide that question. What do you, the podiatric practitioner, do? You can change your treatment reg-

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imens when the average podiatrist does; in other words, wait to change until the average podiatrist changes. On the other hand, you can educate yourself and be trained in improving techniques and be knowledgeable about new medication for the benefit of your patients. Do you have a reasonable/rational/sufficient basis to try something "new"? Is it really new, or is it just "improved"? Much, but not all these dilemmas can be dealt with by a thorough informed consent process. Remember, you cannot try to make your patient into a licensed podiatrist. Use plain English, use diagrams and models to explain. Explain to the patient why you think that a proposed treatment plan has the best chance of helping the condition under the circumstances.

In the end, upholding the illusive concept of standard of care means that you rendered treatment that the podiatric community feels is efficacious for the diagnosis. You must establish your working diagnosis through examination and taking a thorough history of your patient, and if needed, order various laboratory tests. This must be thoroughly documented. Your chart must state what you did, why you did it, and when you did it. Oftentimes, it must also state why you did something and why you did not do it. This will be the best way to show the world that you indeed practiced podiatry within that illusive standard of care. **PM**

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Dr. Kobak is Senior Counsel in Frier Levitt's Healthcare Department in the Uniondale, New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Health Care Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.