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*Please reply to
The Jefferson City Office*

February 13, 2003

Mr. Sam Giordano, RRT
Executive Director
AARC
11030 Ables Lane
Dallas, TX 75229-4593

Re: Opinion Letter: Concurrent Therapy

Dear Sam:

You have asked for my opinion on the legality of concurrent therapy. The purpose of this letter is to provide prospective guidance under the limited set of facts stated below. It is not intended to serve as definitive legal guidance in any particular set of circumstances, but instead, is offered as the legal analysis of a given set of hypothetical facts.

I hold the opinion that concurrent therapy (defined as one therapist treating two or more patients in different rooms at the same time) is conceptually flawed and inherently unwise. I believe that any organization that performs concurrent therapy undertakes an unacceptably large risk of litigation. My opinion is informed as stated below:

Facts

My opinion is based on the following facts:

- Some hospitals employ credentialed respiratory therapists and ask them to perform therapy on multiple patients at the same time.

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- At some point in time the therapist must leave a patient alone with their medication and equipment and move to another room to perform therapy.
- While the therapist is gone, no therapist is present to monitor the therapy or encourage the patient
- These hospitals bill the same amount for therapy performed concurrently as they do for individual treatments rendered one-on-one.
- A therapist cannot adequately treat and monitor more than two patients at a time, and only then when both patients are in the same room.

Different facts might produce a different opinion.

Legal Analysis

A therapist is held to a standard of a reasonably prudent therapist. As a therapist for thirteen years, and as one who has experienced patient adverse reactions to therapy, I hold the opinion that no reasonably prudent therapist would leave a patient alone while that patient is undergoing therapy. I believe that leaving the patient alone during this time is tantamount to abandonment of that patient.

Other professionals with more current experience as therapists hold the same view that I do, thus, it is more than possible for a plaintiff to obtain an opinion to a reasonable degree of scientific certainty that concurrent therapy is negligent.

Professional standards, particularly the white paper issued by the AARC, also hold that concurrent therapy is negligent. As a result, the opinions of any experts who take the plaintiffs view that his practice is negligent have support for their opinions and conclusions in the form of published standards. These published standards meet the now famous "*Daubert*" criteria for admission of expert testimony. No similar credible scientific work exists on the other side of the question. This makes the defense of a hospital engaging in this therapy much more difficult.

The practice may also run afoul of Little FTC laws in the several states. In Missouri we have Chapter 407, RSMo. (2001) and it provides that the act, use or employment of any deception (defined as having the capacity to mislead the average consumer) in trade (defined broadly to include the provision of services) is unlawful. I believe it is deceptive and has the capacity to mislead the average person to suggest that a therapist provided them with "therapy" when all he or she did was start or stop the treatment. Little FTC laws permit consumers aggrieved to employ class action tactics to remedy the problem. That means a hospital engaging in this conduct might see its practices form the basis for a very expensive lesson in risk management.

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Punitive Damages

In order to be liable for punitive damages a defendant must generally undertake a known risk and disregard that risk, thereby jeopardizing patient health and safety. In my opinion a hospital that has its therapists engage in concurrent therapy places profit above patient safety and knowingly accepts a risk to patient care that is too high. I believe that in the right situation, a hospital could be sued and might well lose on this issue.

Summary

For all these reasons I believe that Concurrent Therapy is a legal trap for the unwary hospital administrator. Given the wrong set of circumstances concurrent therapy could not only lead to a needless patient death, but could also lead to a huge verdict against a hospital engaging in this practice.

It would be my best legal opinion that hospitals should not undertake concurrent therapy.

You have my permission to post this letter on the AARC website and distribute it through whatever means you see fit. As has always been the case, and will always be the case all services rendered by this office to the AARC or on its behalf are *pro bono*, and this letter is provided at no charge.

Sincerely,

A handwritten signature in black ink, appearing to read "A L DeWitt". The signature is stylized and cursive.

Anthony L. DeWitt, JD, RRT, CRT
Attorney, F.A.A.R.C.