LEGAL CONSIDERATIONS FOR NOSOCOMIAL INFECTIONS

William C. Collier, Esq., CIH
McDonald Collier
795 Alamo Drive #103
Vacaville, CA 95688
(707) 446-4764
E-mail: kmcdbc@earthlink.net

May 11, 2004
AIHCE 2004
DISCLAIMER

- AIHA is granted a **limited use license only**, as described below, for use of the materials contained within this file. No other use is authorized and copyright infringement will be aggressively prosecuted. All materials prepared for delivery at AIHCE May 2004 are the intellectual property of McDonald Collier © 2004.

- AIHCE ONLY may use the attached copywritten materials for distribution to attendees of AIHCE, and for subsequent sale of the PDC proceedings only. No other copying, distribution or use of the content of these materials is authorized by the copyright holder. No other rights are granted to any other parties or AIHCE through delivery of this PDC or distribution of its proceedings.

- **Notice:** The following materials offer risk management information ONLY and **does not constitute legal advice**. Readers and attendees are STRONGLY encouraged to seek legal counsel in the review of contracts, or development of policies or operating procedures or other business activities where liability or compliance issues are of concern.
Toxic Mold Isn’t the Only Problem

- THANK GOD FOR MOLD
- Mold in hospital settings and the industrial hygienist
  - Contract Law
  - Tort Law
  - Medical Malpractice
  - Insurance law
TYPES OF CLAIMS

- PERSONAL INJURY

Plaintiffs are usually going to be suing the hospital, the contractors and anyone else they can blame the injury on. The types of injuries may range from skin infections, to invasive organisms, fever, respiratory problems, skin rashes, headaches, pneumonia and, of course, death.
POSSIBLE CLAIMS

- Defective design of containment
- Failure of containment
- Improper clearance
- Failure to meet the standard of care, most significantly - JCAHO
- Claims from Hospitals for all of the above
KEY ISSUES FOR INDUSTRIAL HYGIENISTS WORKING IN HOSPITALS

- Quality of Work – Standard of Care
- Business form, some forms limit liability
- Contracting – good contracting can help, but won’t save you
- Reports – disclaimers in reports helpful, but better in contract
- Insurance – a really good idea - and a lot of it

McDonald Collier
POSSIBLE QUESTIONS TO BE ANSWERED (irrespective)

- Has an exposure occurred?
- Is bacteria, viruses, or mold present and, if so, is it related to your work?
- What is the route of exposure and the possible dose (where applicable)?
- Who done it?
POTENTIAL DAMAGES

- Investigative Costs
- Abatement Measures
- Loss of Use
- Cost of Repair or Remediation
- Medical Expenses
- Property damage (Real and Personal)
- Emotional distress
- Loss of Property Value
- Wrongful Death
KEY ISSUES FOR PLAINTIFFS

- Proof of source of contamination;
- Class Actions, possible;
- Mitigation of Damages;
- Proof of Personal Injuries;
- Proof of other damages
KEY ISSUES FOR DEFENDANTS

- Causation; science is much better in this area than in the mold arena
- Statute of Limitations;
- Reliable Testing.
- In the case of nosocomial, to put the blame elsewhere – like on you!!!!!
CONTRACT ISSUES FOR INDUSTRIAL HYGIENISTS

- CONTRACTING RIGHT IS THE KEY TO SURVIVING THE WORST CASE SCENARIO
- PROBLEM – THE HOSPITALS WON’T SIGN YOUR PAPER
- TRY TO GET LIMITATIONS ON LIABILITY

McDonald Collier
CONTRACTS

- TERMS TO WATCH OUT FOR:
  INDEMNIFICATION
  RESPONSIBILITY FOR OF
  CONSEQUENTIAL DAMAGES
  LIQUIDATED DAMAGES
  IMPLIED WARRANTY
  GUARANTEES
  DISPUTES SETTLEMENT CONSTRAINTS

McDonald Collier
CONTRACT CLAUSES

- SCOPE OF SERVICES
- COMPENSATION
- TERMINATION OF CONTRACT
- PAYMENT TERMS & COLLECTION
- TAXES AND FEES
CONTRACT CLAUSES

- LIMITATION OF LIABILITY
- INDEMNIFICATION
- DOCUMENTS
- CHOICE OF LAW
- SEVERABILITY
- NONDISCLOSURE
CONTRACT CLAUSES

- DISPUTE RESOLUTION
- CHANGE ORDERS
- WAIVER OF BREACH OF CONTRACT
- TIME BAR
- LIMITS OF RELIANCE ON DATA COLLECTED
- THIRD PARTIES
CONTRACT COMMENTS

- STANDARD OF CARE

- ASSUMED EVEN IF NOT WRITTEN IN

- NEVER AGREE TO PERFORM YOUR WORK TO THE “HIGHEST” STANDARD OF CARE
Tort Law

Protected or Remedied Interests

- Bodily Integrity
- Dignitary Interests
- Locomotion
- Life itself

McDonald Collier
Tort Law: Liability

- GENERAL RULE: No Liability without Fault

- Bases for Tort Liability:
  - Wrongful Intent
  - Negligence
  - Strict or Absolute Liability (Exception)
  - Vicarious Liability

McDonald Collier
Tort: Focus on Negligence Actions

Definition:

Conduct which falls below a standard of care established by law for the protection of others against the unreasonable risk of harm.
Tort: Focus on Negligence Actions

- Four Required Elements:
  - Duty
  - Breach
  - Causation
  - Harm or Damages

- Each must be proved by Plaintiff by a “Preponderance of the Evidence”
Tort: Negligence - Duty

- Ask “to whom does D owe a duty?”
- General Rule: to all foreseeable victims (personally, or as a class) within the “zone of danger” created by D’s behavior
- The risk created by D. must be unreasonable and foreseeable
- Duty is antecedent to Negligence

McDonald Collier
Tort: Negligence - Breach

- Ask “how does D’s conduct compare with the degree of care that would be exercised by the Reasonably Prudent Person under the same or similar circumstance?”

- If D’s conduct has fallen below this standard, D has breached his Duty
Tort: Negligence - Harm

- Proof is Required in all Tort Actions except the Intentional Torts
- Generally, Economic loss is considered only if it accompanies some physical personal or property damage
- Emotional Harm/Fear of Disease Issues
FINAL DISCLAIMER

YOU WANT LEGAL ADVICE

GET YOUR OWN DARN ATTORNEY

McDonald Collier