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# NATURAL FAMILY PLANNING

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The Science and Art of Breast-feeding

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The American Academy of Natural Family Planning

*Thomas W. Hilgers*

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*Patricia F. Cook, Catherine Durr, & John T. (Tim) Farrell*

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## Legal Issues in NFP

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Thomas J. Prebil

### Introduction

**T**HIS ARTICLE addresses several topics that have been identified by NFP teachers as areas of concern in their practice. The suggestions here are meant to be general guidelines, and it is absolutely imperative that the reader understands that laws vary from state to state, and that custom and practice may vary from one location to another within a given state. It is strongly suggested that any legal question or potential problem be discussed promptly with an attorney practicing in your community.

This reference to local laws is extremely important, probably the single most important fact of the many variables that will effect any given problem.

### Professional Approach

To avoid legal problems, the teacher needs to take the offensive, that is, to establish a common sense, affirmative, professional approach to the job. This attitude must be maintained continuously and consistently for every person instructed or counseled. An effective procedure must be developed to record instructions, questions, problems, answers, or any other vital fact that may influence any given case. The teacher must do everything possible to ensure that every person taught is thoroughly

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Thomas J. Prebil is an attorney, in private practice, in St. Louis, Missouri. He is a member of the Missouri Bar Association, the Bar of Metropolitan St. Louis, and the American Bar Association.

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informed and completely understands the instruction. As a result, the teacher will place him or herself in the most favorable position against any legal problem that could develop. Documentation of records will be an ally in this effort.

Three areas are discussed here: malpractice, consent forms, and ownership of records.

#### Malpractice

In the area of malpractice, our courts have recognized two basically new actions in the last 8 to 10 years. These are cases in which a person claims that the action of a practitioner of some profession was negligent, that is, the action unreasonably deviated from the accepted norm or standard of behavior for that profession in that community, and, as a result of the unreasonable conduct, the person sustained damage. The one who claims to have been harmed seeks, in court, a remedy for the injury in the form of money damages.

Specifically the two new actions which have developed recently are: wrongful life<sup>1</sup> and wrongful birth.<sup>2</sup> These actions are distinguished by who is recognized as the person harmed.

Wrongful life is a suit brought on behalf of the child against the alleged wrongdoer whose conduct is claimed to have caused this person to have been born. This is in contrast to wrongful birth, which is an action by the parents of a child whose virtual existence is alleged to have been the result of someone's negligence.

These cases have met with various degrees of success in jurisdictions in which they have been recognized. As of this time, it appears that no court has permitted a suit for wrongful life by a child who has been born healthy. Conversely, however, one state has permitted an action for wrongful life by a child who was born with defects.<sup>3</sup> Many states have approved actions by parents for wrongful birth of children.<sup>4</sup> There have been cases against a physician or some other professional (for example, a pharmacist) for alleged malpractice of their profession when parents have conceived after taking measures to avoid pregnancy. These situations include a doctor unsuccessfully performing a

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vasectomy<sup>5</sup> or tubal ligation,<sup>6</sup> or a pharmacist<sup>7</sup> who fails to give a woman birth control pills that have been prescribed.

In these cases, the damages sought by plaintiffs also vary from state to state, but have included lost wages for the mother who must now stay home to care for the baby,<sup>8</sup> the cost of rearing the child,<sup>9</sup> the cost of prenatal care as well as hospital charges for labor, delivery, and nursery,<sup>10</sup> and compensation for mental distress.<sup>11</sup> If the child is born with a defect, it requires little imagination to appreciate the type of additional expenses for which the plaintiff will seek compensation.

This brief discussion of malpractice is really background for the questions that are germane to this article. Specifically, an NFP teacher needs to know what can be done to prevent such actions from being filed against him or her, and, if that fails, what can be done about the lawsuit.

#### Avoiding Legal Problems

Taking the cynic's approach to this first question, the answer would be that nothing can be done to prevent another from filing suit. The right to sue belongs to the person who thinks he or she has been harmed. Furthermore, courts are open to everyone, and the merits of a lawsuit are not reviewed when a case is filed. The proliferation of lawsuits in the past two decades, which is common knowledge, seems to bear this out. Perhaps a more precise or pragmatic question is: What can be done to minimize the likelihood that someone will file a lawsuit against a teacher? How to minimize this propensity is the primary focus of this article. There is a direct correlation to the problem of minimizing the possibility of a lawsuit and the second question: What can be done if suit is filed? In one instance, the teacher strives to minimize the predisposition of a lawsuit being filed, and in the second, seeks to do everything possible to insure that the action will not be successful.

The NFP teacher has the advantage of working with a basically well-informed clientele. That is to say, when the person seeks instruction about natural family planning, he or she already has some information about other methods, both artificial and

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natural, and has made an actual choice to seek this instruction. This is significant for two reasons. First of all, the client has expressed a personal preference for the instruction and, secondly, the client has some appreciation of the method before the teacher even begins any instruction.

It is important to establish a good rapport with every client. The structure for follow-up sessions with a client, one to one with a teacher, is ideal to foster this rapport. Through follow-up, NFP instruction is personalized, and the teacher can answer the specific questions of each client and discuss every individual problem. This is contrary to the cold, impersonal, professional relationship that is criticized so often. By contrast, natural family planning is personal and should create a feeling of trust. The instruction should produce a confident, well-educated client who has developed a friendly, professional relationship with the teacher with whom she is well familiar. As a practical matter, this will go a long way to minimize the likelihood that this person would ever file a lawsuit.

The open communication between the teacher and client establishes a regular opportunity for the teacher to evaluate the client's perception and understanding of the material. Bear in mind that each client is an individual and will progress differently. The teacher must evaluate each client to determine the level of comprehension and adjust the instruction accordingly. The teacher cannot assume any knowledge on behalf of the client or take any facts for granted when instruction is initiated. The teacher must be prepared to explain all points thoroughly and deliberately until satisfied that they are understood by the client.

#### Accurate Record Keeping

This leads directly to the practice of making notations of what has been done. Handwritten, dated, and initialed notes are imperative to preserving a recollection of what transpired between teacher and client. It is important to take the time to make a notation that a fact has been explained; that questions have been solicited or answered; that the client has been requested to repeat an explanation to the teacher; that a prior instruction was re-



viewed; that a suggestion was made, for example, to seek medical opinion; or that the teacher followed up to determine if the suggestion was taken and, if not, why.

Some clients will be more difficult to deal with than others and will challenge the teacher. Teachers must use their instincts to recognize these individuals and adjust their approach accordingly. Accurate recording will be especially important for anyone suspected as a "problem." The teacher should take the time to explain any suggestion made to a client who falls in this category. The teacher should always state precisely and straightforwardly what he or she is trying to accomplish, why it is important to the client, and why it is important to the teacher. If teachers document everything they have done and why they have done it, they will actually be protecting themselves and insuring that they have provided thorough instruction in a professional manner.

If the teacher has taken time to develop a procedure of routine documentation, it becomes more difficult for anyone to seriously challenge the instruction. Admittedly, this does take time, but it could be the difference between success or failure.

Follow-up forms should be used both during and after each follow-up instruction. Phone calls should also be documented in the client's file. It is simply inadequate for teachers to rely on memory or unrecorded recollection. The client's file will be considered a business record, admissible in court, if it can be qualified as containing notations made in the ordinary course of business and if those notations are made at or near the time that the events took place. This will be a valuable tool to an attorney, if it becomes necessary for a teacher to employ one. However, if a teacher waits until a problem arises before constructing a record, it will be too late. A procedure must be implemented to provide for routine, accurate, and consistent documentation of the file.

#### Consent Form

The document that should be at the bottom of each file, that is, the first document, is the consent form. Although such forms are not used in all programs, their use is recommended. The text will vary from place to place, but certain criteria are basic and

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should be incorporated. This form should include statements that (1) NFP is being taught to the exclusion of all other methods, (2) participation is completely voluntary, (3) the method is not represented to be 100% effective, and (4) the client may discontinue participation at any time and that instruction may be requested at any time. The forms should be as simple and brief as possible and, therefore, will be less intimidating and more likely to be understood. The consent form should be presented and explained at the very first follow-up session. Time should be provided for the client to read the form or for the teacher to read it to the client. The teacher may want to ask questions to test the client's understanding. If this is done, the teacher must be sure to listen to the answer. The teacher may augment the explanation about the consent form, if necessary, to remedy any defects in the student's understanding. If this practice is followed, the teacher can be confident of getting off to a good start. It is suggested that clients sign and date two copies of the consent form. One, of course, is kept on file, and the other should be handed to the client with the suggestion that it be retained in her personal records.

#### Ownership of Records and Charts

The file that is compiled in the course of the instruction becomes the property of the NFP program, much as a medical record is the property of the treating physician or the hospital. This is not to say that the clients are not entitled to a copy of the record. Clearly they are. But the original of the record should be retained by the teacher. Before a photocopy of the record is released to the client or to a person of their choice, the client should sign an appropriate authorization which specifically authorizes the release of the information. The release should be retained and become part of the file itself.

The notations made by the teacher on routine forms that are used would probably be considered part of the file and, therefore, released along with the other information contained in the record. However, any personal notations or memoranda of the teacher could be considered as separate from the record and

would not have to be released along with the information.

The original chart, itself, would be the property of the client. Since it is blank when it is issued and all of the entries and notations on it are made by the client, it is considered to be the client's property. However, at a very minimum, the teacher would be entitled to a photocopy of the chart for the file.

#### Conclusion

It is important to realize that what has been stated here is merely an overview, designed to present suggestions of how to avoid legal problems. A natural family planning teacher is in somewhat of a unique position. Clearly these teachers are not in the same category as the medical practitioners referred to in the cases above. Yet, the teachers are providing instruction and information upon which clients will rely, and the effects of which possibly could have serious medical or economic consequences. There have been no reported cases to date of an NFP teacher being sued for malpractice. As a practical matter, both the teacher/client relationship and the instruction, itself—which informs the clients how to recognize fertility but requires them to choose what will be done in regard to this fertility—make it unlikely that such an action will be taken. However, the possibility of a lawsuit does exist, and the better approach is one of caution.

#### Notes

- 1 First considered in 1963, this action was repeatedly rejected until the case of *Park v. Chessin*, 387 N.Y.S.2d 204 (1976), aff'd. 400 N.Y.S.2d 110 (1977) when it was finally recognized in the State of New York. This holding was subsequently overturned, however, in *Becker v. Schwartz*, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).
- 2 This action has been met with mixed success; while being denied in a minority of jurisdictions, e.g., *Reich the Medical Protectives Co. of Ft. Wayne, Indiana* 219 N.W.2d 242 (Wis., 1974), *Coleman v. Garrison*, 349 A.2d 8 (Del., 1975) and *Elliott v. Brown* 361 So.2d 546 (Ala., 1978), actions have been successful in a majority of situations, e.g., *Clegg v. Chase*, 319 N.Y.S.2d 966 (N.Y., 1977) *Troppe v. Scarf*, 187 N.W.2d 251 (Mi., 1971), *Bowman v. Dows*, 356 N.E.2d 496 (Oh., 1976), *Betancourt v. Gaylor*, 344 A.2d 336 (N.J., 1975), *Dumer v. St. Michael Hospital*, 233 N.W.2d 372 (Wis., 1975) and *Jacobs v. Theimer*, 519 S.W.2d 846 (Tx., 1975).
- 3 *Turpin v. Sortini*, 643 P.2d 954 (Cal., 1982).
- 4 For examples, see note #2, *supra*.
- 5 *Baldwin v. Sanders*, 223 S.E.2d 602 (So. Car., 1976) and *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).
- 6 *Custodio v. Bauer*, 251 Cal.2d 303 (1967).
- 7 *Troppe v. Scarf*, *supra*.

8 Troppe v  
9 Becker v  
10 Garwood  
11 Green v.



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- 8 Troppi v. Scarf, Id.
- 9 Becker v. Schwartz, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).
- 10 Garwood v. Locke, 522 S.W.2d 892 (Tex., 1977).
- 11 Green v. Sudakin, 265 N.W.2d 411 (Mi., 1978).

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