

Health Law: Quality & Liability

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Medical Malpractice -
Other Variations



Economic SOC Variations



This is a variation
ONLY when already
using **national
standard**



Still a **national**
standard re
knowledge &
judgment

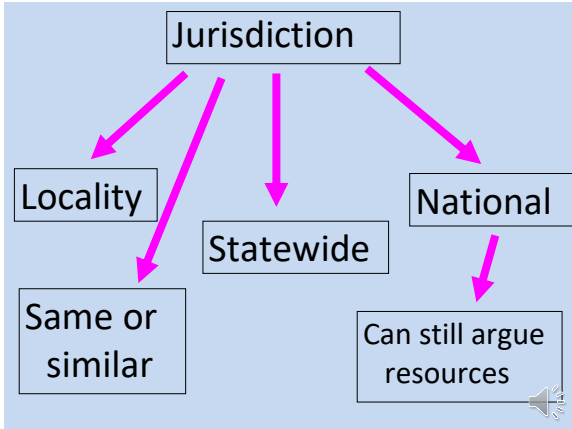


But DEF can argue
variation /
adjustment for
resource reasons



But physician only
must use **resources**
as are reasonably
available





Specialization SOC variations

Standard of care adjustment for medical credentials

American Board
of Medical Specialties
Higher standards. Better care.®

Board Certification goes beyond
basic medical licensure

3-6 years of training
Examination

- Dermatology
- Emergency Medicine
- Surgery
- Orthopedic surgery
- Pediatrics
- Anesthesiology

Board certified
always held to
national
standard

Even in

Idaho (strict locality)
 Minnesota (same or similar jurisdictions)
 Virginia (statewide)



Federation of
STATE
MEDICAL
BOARDS

U.S. Medical Regulatory Trends and Actions

2012 Physician Licensure Statistics

Total Number of Licensed Physicians in the United States	878,194
Board Certified vs. Non-Board-Certified	
Yes	671,755
No	206,439



Standard of care variations by school of thought



Photographer: Iain MacKenzie © Chris



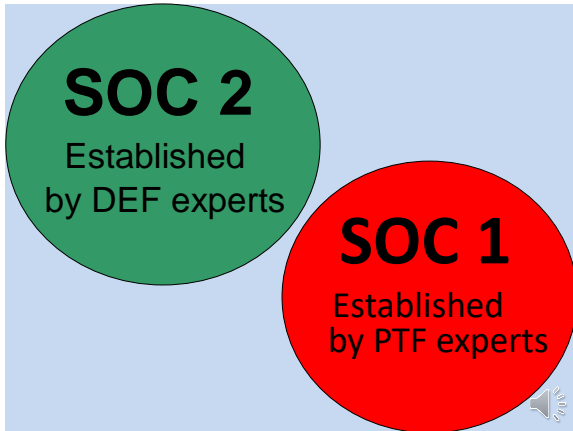
Standard of care

established
 through PTF
 experts

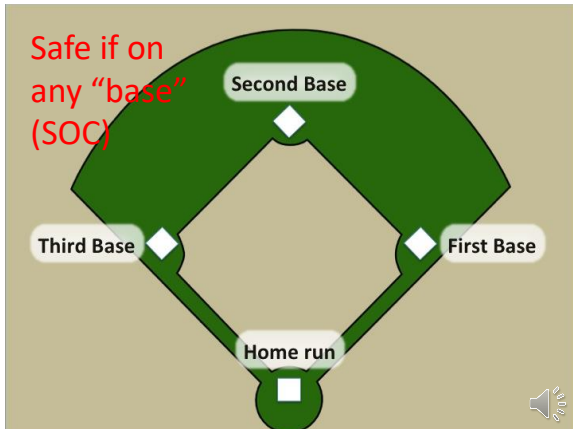


DEF can
 establish
 a 2nd SOC





Sufficient that
DEF conduct
complies with
either one



Compliance with
SOT **as good as**
compliance with
SOC established
by PTF

Jury does **not**
determine
which SOC is
"better"

Jury instruction:

Sufficient that DEF
 complied with **either**
 school of thought if has
 “respected advocates
 and followers”



DEF has **burden** to
 establish SOT

How does she do
 that?



Not enough that
 you and your
 SGU roommate
 do it that way



All physicians

Minority, but
 Non-insignificant

**BOTH**

Reputable and
 respected

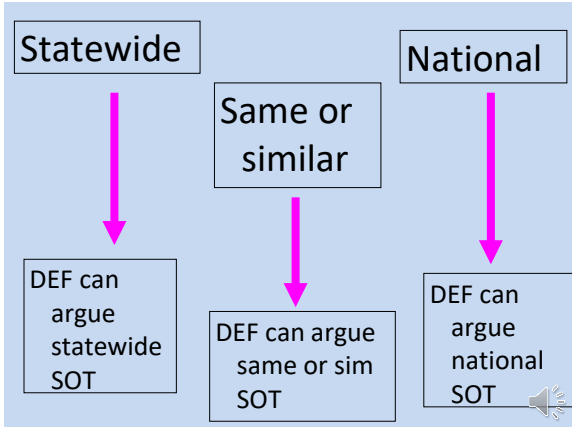
AND

Considerable
 number



SOT can be used in
any jurisdiction -- no
 matter how SOC is
 established





DEF must establish SOT in the **same way**
 PTF establishes SOC
 (e.g. geographical)

A small speaker icon is in the bottom right corner.

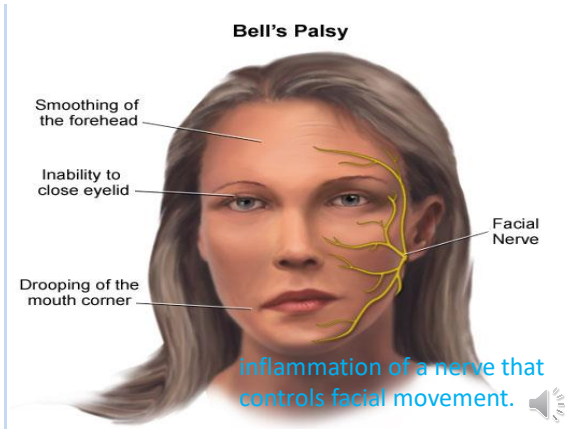
e.g. in Arizona
 (reputable & respected **in Arizona**)
 +
 (considerable number **in Arizona**)

A small speaker icon is in the bottom right corner.

Jandre
v.
WIPFCF

A small speaker icon is in the bottom right corner.



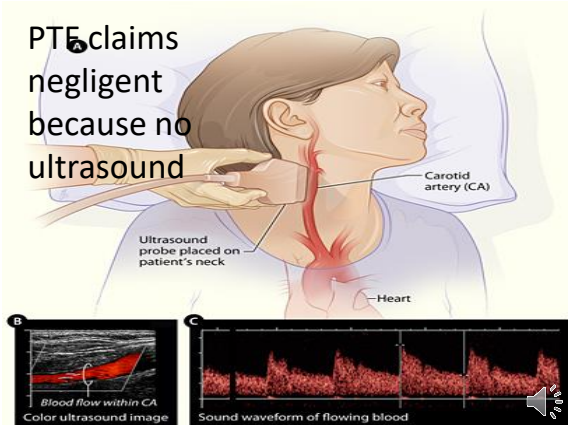


Wrong diagnosis



Not negligent to arrive at the wrong diagnosis.

DEF can do everything "right" and come up with the wrong answer.



PTF experts establish SOC:
RPP would use ultrasound

But **not** negligent to use stethoscope, if supported by “school of thought”

Recap

Malpractice duty

Do what the **reasonable physician** would do

Lay juries do not know what reasonable physician would do

Need **expert witnesses** to establish SOC

almost always



2 **OTHER** ways to set standard of care



Court / Judicial
CPG



**Judicial (court)
set standards
of care**



Rest. Torts 2d § 285(c)

The standard of conduct . . . may be established by judicial decision



PTF claims negligent to
not have a radio



The T.J. Hooper (2d Cir. 1932)



DEF argues
nobody uses
a radio

TUGBOATS of NEW YORK

An Illustrated History



Court: “In most cases
reasonable prudence is
in fact **common
prudence**, but strictly it
is never its measure.”



“A **whole calling** may
have unduly lagged in
the adoption of new
and available
devices.”



Extremely
rare in
med mal



Helling v. Carey



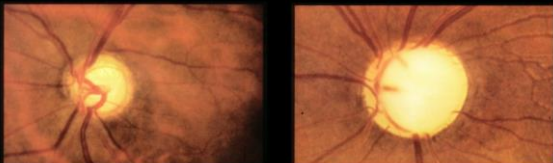
Infamous

Much criticized



Glaucoma...

...afflicts 3 million Americans...



...but half of them haven't been diagnosed because they haven't had an eye exam.



Expert witnesses

“SOC is **not** to test for glaucoma under age 40”



NORMALLY

“**compliance** with . . . standard of the profession . . . **insulates** from liability”



SCOW: “Who cares! They **should** test the under 40s.”



But Helling rare,
rare exception



With the medical
profession common
prudence “strictly is
the measure” of the
standard of care



Conformance to
their own rules,
protocols, practices
is a complete
defense for clinician



Court: “In most cases
reasonable prudence is
in fact **common**
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“A **whole calling** may
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devices.”



Extremely
rare in
med mal





Helling case
rare, rare
exception

**Standard of
care set
with CPGs**

CPG
Clinical
practice
guideline

Guideline based
on **systematic
review** of clinical
evidence.

Legislature
comply with
CPG = legal safe
harbor

But legal
experiments so
far limited &
unsuccessful

